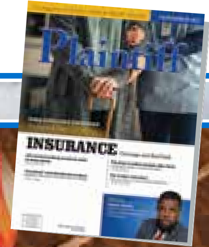


# "Accidents" and intentional conduct

## Must an "accident" result from an unintentional act? Does negligence equate to "accident?" Strategies for dealing with "no accident, hence no coverage"

By Jeffrey I. Ehrlich

Consider the following scenarios and ask yourself whether they describe a situation that should be covered by liability insurance:

*Scenario* 1: At a pool party at his home, the policyholder picks up his friend and throws him into the pool as a joke, intending to "get him wet." Unfortunately, the policyholder doesn't use enough force on the throw and his friend lands on the pool steps, breaking his clavicle. The injured friend sues the policyholder.

*Scenario* 2*:* A landowner hires the policyholder to drill a well on his property. The vibrations from the drilling travel through the ground and reach a neighbor's property, cracking the walls of the neighbor's house. The neighbor sues the policyholder.

*Scenario* 3: A landowner hires a contractor to grade and clear land behind her home, which she mistakenly believes belongs to her, but which actually belongs to her neighbor. The neighbor sues the policyholder.

In each scenario, the policyholder acted intentionally. And in each, that intentional act produced a result that the policyholder did not expect or intend. In each case the insurer denied coverage, claiming there had been no "accident" because the insured acted intentionally. How would you resolve those cases?

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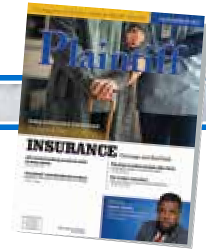



Here is how the Courts of Appeal resolved them. In scenario 1, the court held that there was an "accident." (*State Farm Fire & Casualty Co. v. Superior Court* (*Wright*) (2008) 164 Cal.App.4th 317, 329 (*Wright*). In scenario 2, the court held that there was an "accident." (*Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 328.) And in scenario 3, the court held that there was no "accident" and therefore no coverage. (*Ghukasian v. Aegis Security Ins. Co.* (2022) 78 Cal.App.5th 270, 277.)

If you are confused, that is understandable. The issue of what qualifies as an "accident" for the purposes of liability coverage in California has long been the subject of an intractable split of authority. While I had thought that the split had been resolved by the Supreme Court in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216, the *Ghukasian* court saw it differently.

Here we will trace the nature of the split of authority and endeavor to equip you with the arguments you will need to convince the courts you appear before to follow the line of authority that produces coverage.

### What is an "accident"?

Let us start first with the definition of "accident." This was unclear until the Supreme Court decided *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308. In *Delgado*, the Court explained, "In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. . . . This common law construction of the term 'accident' becomes part of the policy and precludes any assertion that the term is ambiguous." (*Id.*, cleaned up, citations omitted.)

California courts had used this definition of "accident" before *Delgado*, but they also used different definitions. *Delgado* settled on a single definition, which tells us that an "accident" is (a) a happening or consequence; (b) from a known or unknown cause, which (c) is unexpected, unforeseen, or undesigned by the policyholder.

Notice that this definition does not require that the happening or consequence be the result of an unintentional act. Rather, it simply requires that the happening or consequence be something that the policyholder did not intend or expect to occur. If courts simply applied this definition in the cases before them, much of the confusion about whether there has been an "accident" would evaporate, because the definition inherently allows an "accident" to be the unintended consequence of an intentional act. But not all courts see it that way.

### The split of authority

In *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* (1959) 51 Cal.2d 558, 563, the Court relied on the same definition of "accident" that it ultimately adopted in *Delgado*, and held that there was an "accident" in a case against the manufacturer and seller of defective doors that were installed in houses.

In *Hogan v. Midland National Ins.* Co. (1970) 3 Cal.3d 553, the manufacturer of a defective saw was sued by the lumber mill that purchased it, seeking to recover its losses for lumber that was not cut to specification because of the saw's problems. The mill experienced problems with the saw immediately after it was purchased. When its customers began to reject lumber that had been cut too narrowly, the mill attempted to compensate by deliberately cutting the wood wider than specified.

The Supreme Court held that the saw manufacturer's liability policy provided coverage for the lumber that had been inadvertently cut too narrow. In reaching this conclusion, the Court rejected the insurer's argument that there had been no *accident* because the mill continued to use the saw even after it experienced problems with its performance. (*Id*. at p. 559.) The Court held that the lumber that had been inadvertently cut too narrowly qualified as an "accident" under the *Geddes* definition of that term. (*Id*. at pp. 559-560.)

But the Court also held that, once the mill deliberately cut the lumber too wide, there was no "accident" because the boards had been cut that way "by design." (*Id*. at p. 560.) As the Court explained, "Whatever the motivation, there is no question that these boards were deliberately cut wider than necessary; the conduct being calculated and deliberate, no accident occurred within the *Geddes I* definition." (*Ibid*.)

Several post-*Geddes* decisions held that an "accident" included the unexpected consequences of the policyholder's deliberate acts. (See, e.g., *Meyer,* 233 Cal.App.2d at p. 326 [unexpected damage to neighbor's property caused by vibrations incident to drilling operations was an *accident*, even though the drilling itself was intentional]; *Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 96-97 [damage from construction defects in condominium units sold by developer was accidental because developer was unaware of defects when units were sold].)

### *Wright:* the high-water mark

*Wright* was the high-water mark for this view. The insurer in *Wright* pointed to a substantial body of caselaw that held that, where the insured's conduct is deliberate or volitional, the incident is not an "accident" for the purposes of insurance law, even if the outcome of that act is unexpected. (See, e.g., *Royal Globe Ins. Co. v. Whitaker (1986)* 181 Cal.App.3d 532, 537 ["An intentional act is not an 'accident' within the plain meaning of the word."]; *Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1045-1046 ["[C]ourts have consistently defined the term ['accident'] to require unintentional acts or conduct. The plain meaning of the word 'accident' is an event occurring unexpectedly or by chance."]; *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 599 ["[W]hether the insured intended the harm that resulted from his conduct is not determinative.

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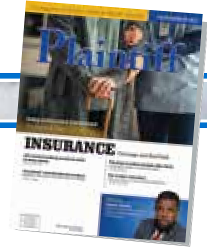

The question is whether an accident gave rise to [the victim's] injuries."].)

But the *Wright* court noted that there was a countervailing line of authority on this point, which held that the unexpected or unintended consequences of the policyholder's deliberate act can be an "accident." (*Id*. at pp. 325-326, citing cases.) Ultimately, the court adopted this view, relying on this analogy:

> During a pick-up baseball game, a batter hits the ball with the intention of sending it into deep right field for a home run. But, because of the batter's stance and the angle of contact with the ball, the batter sends the baseball in a trajectory that breaks a window in foul territory. The batter deliberately hit the ball and intended that it move far and fast. It cannot be said that this batter intended to cause the property damage, i.e., to hit a foul ball and break the window. This was an accident because one aspect in the causal series of events – too much force at an inadvertent angle leading to the broken window – was unintended by the batter, and as such was fortuitous.

(*Id*. at p. 328.)

In the *Wright* court's view, the case before it resembled this situation and therefore qualified as an "accident" under the *Geddes* definition, explaining: "The act directly responsible for Wright's injury, throwing too softly so as to miss the water, was an *unforeseen or undesigned happening or consequence and was thus fortuitous*." (*Id*. at p. 329, emphasis in original.) In my experience, no insurer or court has ever pointed to any flaw in this analysis of why an accident can include the unintended consequences of the policyholder's intentional act. Nevertheless, the response to *Wright* in the Courts of Appeal was decidedly negative.

In *Fire Ins. Exchange v. Superior Court* (*Bourguignon*) (2010) 181 Cal.App.4th 388, 392-393 (*Fire Exchange*), the court stated:

> Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. [Citations omitted.] The insured's subjective intent is irrelevant. [Fn 1.] Indeed, it is well established in California that the term "accident" refers to the nature of the act giving rise to liability; not to the insured's intent to cause harm.

In the referenced footnote, the court added that the *Wright* decision "seems to stand in variance to this rule." (*Ibid*.) As the court stated elsewhere in its opinion, "Any suggestion . . . that the harm occasioned by intentional conduct may constitute an accident when the person engaged in the conduct is unaware of its wrongful character is contrary to the holdings of our state courts." (*Id*., 181 Cal.App.4th at p. 395.)

The *Fire Exchange* majority applied this view and held that there was no *accident* and hence no coverage where the policyholders had constructed a building that encroached on their neighbor's property. In the court's view:

> [T]he Bourguignons intended to build the house where they built it. Accepting their contention that they believed they owned the five and one-half foot strip of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so.

(*Id*., at p. 396.)

The criticism of *Wright* was even stronger in *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 579. The *Frake* court expressly rejected the plaintiff's contention that, under the definition of *accident* adopted in *Delgado*, an "accident" could include "the unintended consequences of the insured's intentional acts." (*Id*., 197 Cal.App.4th at p. 583.) The court stated, "In sum, *Delgado contains no language indicating that the California Supreme Court intended to overrule prior case law holding that* "the term 'accident' does not apply to an act's consequences, but instead applies to the act itself." (*Ibid*.)

With respect to *Wright* and its logic, the *Frake* court stated, "[T]o the extent *Wright ruled that the term* 'accident' applies to deliberate acts that directly cause unintended harm, such a holding is contradictory to well-established California law." (*Id*. at p. 585.)

The court took the same approach in *Albert v. Mid-Century Ins. Co.* (2015) 236 Cal.App.4th 1281, 1290-1292, holding that there was no accident where the policyholder hired a contractor to prune trees located on his neighbor's property. Citing *Frake*, the court stated, "The term 'accident' refers to the nature of the insured's conduct, and not to its unintended consequences. (*Id*., 236 Cal.App.4th at p. 1291.) Citing *Fire Exchange*, the court added, "When an insured intends the acts resulting in the injury or damage, it is not an accident 'merely because the insured did not intend to cause injury. The insured's subjective intent is irrelevant.'" (*Id*., 236 Cal.App.4th at p. 1291.)

### ***Liberty Surplus* – the split appears resolved**

In *Liberty Surplus Insurance Corporation v. Ledesma and Meyer Construction Company, Inc.* (9th Cir. 2016) 834 F.3d 998, the Ninth Circuit asked the California Supreme Court to decide whether there was an "occurrence" under a liability policy when the injured third party sued an employer for negligently hiring, retaining, and supervising an employee who committed an intentional tort against her. In asking for the Supreme Court's guidance, the Ninth Circuit observed that California law was "unsettled" on the issue whether "deliberate conduct constitutes an 'accident' under a liability policy." (*Id*. at p. 1002.)

The Supreme Court answered the certified question in *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216 (*Liberty Surplus*). In answering the question, the Supreme Court seemed to make two points unmistakably clear:

First, it appeared to end the debate about whether liability policies that promise coverage for "accidents" cover

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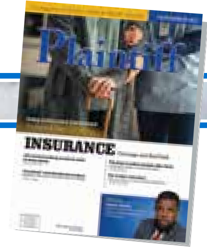

only a subset of negligent conduct by the policyholder. It explained,

> [T]he term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence [Citations omitted.] Accordingly, a policy providing a defense and indemnification for bodily injury caused by 'an accident' promises coverage for liability resulting from the *insured's* negligent acts."

(*Id*., 5 Cal.5th at pp. 221-222, cleaned up.)

### Negligence does not equal "accident"

This statement was significant because, until *Liberty Surplus*, many appellate courts had justified their limited view of what qualified as an "accident" by explaining that "negligence" and "accidents" were neither synonyms nor coterminous, and that a policyholder's negligence was not necessarily within the scope of coverage for "accidents." (See, e.g., *American Internat. Bank v. Fidelity & Deposit Co. of Maryland* (1996) 49 Cal.App.4th 1558, 1572-1573, [referring to "misapprehension that all claims for negligence must at least potentially come within the policy and therefore give rise to a duty to defend. That is not so.... 'Negligent' and 'accidental' *are not synonymous....*"]; *Quan*, 67 Cal.App.4th 583, 596 [same]; *Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1233-1234 [same].)

Although the *Liberty Surplus* decision did not cite or expressly overrule these cases on this point, the Court's statement that liability policies that provide coverage for "accidents" "promise coverage for liability resulting from the insured's negligent acts" would seem to have had that effect. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1059 [later decision overrules earlier decisions that conflict with it, regardless of whether the earlier decisions are mentioned or commented on].)

Second, Liberty Surplus expressly held that an accident can include the unintended consequences of the policyholder's deliberate conduct. Specifically, the Court held that even though the employer in Liberty Surplus acted intentionally when it hired the employee-tortfeasor, and likewise acted intentionally when it retained and supervised him, the unexpected consequences of that negligent (albeit intentional) conduct qualified as an accident. (*Id*., 5 Cal.5th at p. 226.) In sum, Liberty Surplus seemed to reaffirm that it meant what it said when it adopted a definition of "accident" that includes unexpected "consequences."

This, of course, does not mean that all unexpected consequences of intentional conduct will qualify as an accident. Hogan shows that the consequences that the policyholder expects to result from its conduct – such as deliberately cutting boards wider than specified – do not qualify as an accident. (Id., 3 Cal.3d at p. 560.) And Delgado shows that the consequences of "acts done with intent to cause injury" are likewise not the product of an *accident* as a matter of law. (*Id*., 47 Cal.4th at pp. 311-312.) Finally, some conduct is deemed inherently harmful, and so cannot qualify as an accident, regardless of the policyholder's subjective intent. (See, e.g., *J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1021 [sexual abuse of a child is inherently uninsurable because it is inherently harmful]; *Price v. Occidental Life Ins. Co.* (1915) 169 Cal. 800, 803 [no accident where policyholder engages in deliberate conduct from which harm would "naturally be expected" and that harm occurs].)

### *Ghukasian* – the split reemerges

*Ghukasian* presented facts that were almost identical to the facts in *Albert* and *Fire Exchange*. In all three cases, the insureds were mistaken about the location of their property boundary with a neighbor and ended up trespassing and damaging the neighbor's property.

Interestingly, even before *Liberty Surplus*, California courts had held that, when an insured's acts result from being "misinformed as to the objective facts," the result is an "accident." (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 888.) *Lyons* even provided a hypothetical scenario to illustrate the point: a shopkeeper who mistakenly locks an employee in the store at closing time because he forgot that the employee was still inside the store. (*Ibid*.)

But notwithstanding *Lyons* and *Liberty Surplus*, the *Ghukasian* court followed *Albert* and *Fire Exchange*, holding that, because the insured intended to have the land at issue graded, her mistake about the location of the boundary was irrelevant. (*Id*., 78 Cal.App.5th at p. 277.) In the view of the *Ghukasian* court, "Ghukasian's intentional conduct (leveling land and cutting trees) was the immediate cause of the injury; there was no additional, independent act that produced the damage." (*Ibid*.) The court distinguished *Liberty Surplus* on this basis, and further noted, "Liberty Surplus contains no language indicating it intended to overrule prior caselaw holding intentional acts are not 'accidents' merely because the insured did not intend to cause injury." (*Ibid*.)

### Strategies for coverage

If you are handling a case where the policyholder acted intentionally and caused unintended damage, and the insurer declines coverage on the ground that there was no "accident," what should you do? Here are some suggestions.

First, point out that the Supreme Court has twice stated what appears to be a legal rule that liability policies that promise coverage for "accidents" will necessarily cover liability resulting from the policyholder's negligence, because the term "accidents" is broader than and subsumes the term "negligence."

The Court not only said this in *Liberty Surplus*, 5 Cal.5th at pp 221-222, it also said it in *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 765 (*Robert S.*): "Because the term 'accident' is more comprehensive than the term 'negligence' and thus includes negligence [citation omitted.], Safeco's homeowners policy promised coverage for liability resulting from

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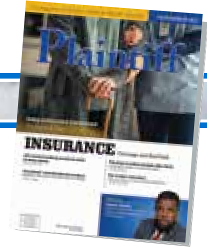

the insured's negligent acts." (*Id*., 26 Cal.4th at p. 765.)

The *Liberty Surplus* opinion reemphasized this rule in its concluding paragraph, stating that "unless the policy contained an applicable exclusion, employers could properly expect liability coverage for claims based on negligent hiring, retention, and supervision of their employees, "*just as they do for other claims of negligence*." (*Id*., 5 Cal.5th at p. 230, emphasis added.) The *Ghukasian* court ignored this language in *Liberty Surplus*.

Second, point out that it makes no sense to try to distinguish between negligence claims that arise from an intentional act by the policyholder and those that do not. This is because "negligence" in California is a breach of the duty imposed by Civil Code section 1714, subdivision (a), which requires everyone to exercise "ordinary care or skill in the management of his or her property or person." (See *Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 771 [explaining duty of care imposed by § 1714].)

The "management" by a policyholder of his or her property or person will *always* require some kind of intentional conduct, particularly when it results in the type of harm that results in a lawsuit being filed against the policyholder.

Third, focus on the actual definition of "accident" that the Supreme Court adopted in *Delgado*, and explain how the conduct at issue in your case fits within it. Just as insurers and courts universally ignore the "baseball" example in *Wright* when they find that there is no coverage when the insured acts intentionally, they also tend to overlook the actual language of the definition of "accident" in *Delgado*.

Fourth, rely on the "baseball" example in *Wright*, and relate it to your case. Likewise, you can show that in *Geddes*, *Hogan*, and *Liberty Surplus* – all Supreme Court cases – it could be said that the policyholder's conduct was "intentional," yet an "accident" was found in each case. In *Geddes*, the insured intentionally manufactured and sold the doors at issue but was not aware that they were defective; in *Hogan*, the insured deliberately cut lumber using a saw that had continuously had problems but was not aware that the boards were too thin; and in *Liberty Surplus*, the insured intentionally hired, retained, and supervised the employee who committed the intentional tort.

These cases, as well as the favorable Court of Appeal cases like *Wright*, show that the unintended consequences of the policyholders' deliberate acts can produce an insurable "accident." Hopefully, the Courts of Appeal will soon reach the same conclusion.

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