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Allstate Ins. Co. v. Troelstrup: Application of the Intentional Acts Exclusion under Homeowner's Insurance Policies to Acts of Child Molestation

ALLSTATE INS. CO. V. TROELSTRUP: APPLICATION OF THE
INTENTIONAL ACTS EXCLUSION UNDER
HOMEOWNER'S INSURANCE POLICIES TO
ACTS OF CHILD MOLESTATION

I. INTRODUCTION

In the United States, and in Colorado, the tragedy of sexual abuse becomes a reality for children. In 1989, a national study found two million reported incidents of child abuse of all types,¹ of which over 900,000 were confirmed.² Colorado recorded 7,224 confirmed reports of child abuse or neglect in 1989,³ classifying 1,969 as sexual abuse.⁴ Of these, 1,208 were incest and 761 third party sexual abuse.⁵

Colorado makes sexual abuse of a child a criminal offense.⁶ But

1. REPORT OF THE U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY (1990).

2. *Id.*

3. CONFIRMED REPORTS TO THE CENTRAL REGISTRY (sic), (unpublished report) (1990) (hereinafter REPORT).

4. Sexual abuse of children is defined as "the involvement of dependant, developmentally immature children in sexual activities that they do not fully comprehend and therefore to which they are unable to give informed consent and/or which violate the taboos of society." R. HELFER & R. KEMPE, THE BATTERED CHILD 286 (4th ed. 1987).

5. REPORT *supra* note 3. COLORADO CENTRAL REGISTRY, REPORTING OF CHILD ABUSE TO COLORADO CENTRAL REGISTRY FOR CHILD PROTECTION at 6 (1986). This report defines incest as "inappropriate sexual activity where the victim to perpetrator relationship was as natural parent, stepparent, adoptive parent, foster parent, [or] sibling (natural, adoptive or stepsibling)" and third party sexual abuse as "inappropriate sexual activity with a child where the perpetrator is unrelated to the victim."

6. See COLO. REV. STAT. § 18-3-405 (Supp. 1990) Sexual Assault on a Child.

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor commits the offense on a victim by means of such force, intimidation, or threat as specified in section 18-3-402 (1) (a), (1) (b), or (1) (c); or

(b) Repealed, L. 90, p. 1033, § 25, effective July 1, 1990.

(c) The actor commits the offense as a part of a pattern of sexual abuse. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years of the offense charged in the information or indictment. The offense charged in the offense or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in § 18-3-401 (2.5).

(3) If a defendant is convicted of a class 3 felony of sexual assault on a child pursuant to paragraph (a) or (c) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 16-11-309, C.R.S.

Sexual contact within the meaning of section 18-3-405 is defined as: the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

§ 18-3-401 (4) C.R.S. (1986).

prosecution and incarceration of the abuser does little to help the victim, who may suffer psychological effects from the molestation.⁷ Often such effects are long-term and require extensive medical assistance and psychological therapy.⁸ Abused children have sought compensation for these damages through civil suits,⁹ often recovering from an abuser's insurance policy. Recently, several jurisdictions have limited recovery under an intentional act exclusion provision of an abuser's homeowner's insurance policy. In *Allstate Insurance Company v. Troelstrup*,¹⁰ the Colorado Supreme Court joined this trend.

Section II of this Comment provides background of such suits and the trend towards limitation of recovery. Section III reviews pre-*Troelstrup* Colorado case law concerning the nature of intentional acts within the meaning of an intentional act exclusion clause of a homeowner's insurance policy. Section IV examines the *Troelstrup* decisions. Section V reviews the cases from other jurisdictions cited in support by the *Troelstrup* court. Finally, section VI discusses the implications of *Troelstrup* and reviews alternative sources of recovery for child sexual abuse victims.

II. BACKGROUND

Victims of child sexual abuse have sought recovery from their abusers for costs of past, present and future counseling, therapy and medical expenses.¹¹ They have also pursued damages for pain and suffering, emotional trauma, diminished childhood, hedonic damages (economic measurements of reduced enjoyment of life) and punitive damages,¹² often under differing theories of recovery.¹³ Such suits have produced impressive results. *Laurie M. v. Jeffery M.*¹⁴ granted an abused step-daughter \$100,000 in compensatory and \$100,000 in punitive damages.¹⁵ Thirteen alter boys who sued a Catholic priest for alleged sexual abuse settled for \$400,000 to \$600,000 per child.¹⁶ In *Wilson v. Tobias-*

See also COLO. REV. STAT. § 18-3-405.3 (1986) Sexual assault on a child by one in a position of trust.

7. See generally C. WALKER, *THE PHYSICALLY AND SEXUALLY ABUSED CHILD*, (1988); R. HELFER & R. KEMPE, *THE BATTERED CHILD*, (4th. ed. 1987); Comment, *Insurance Coverage for Child Sexual Abuse Under California Law*, 18 SW.U.L. REV. 171 (1988).

8. See Comment *supra* note 7 at 172; HELFER *supra* note 7 at 294.

9. Moss, *Fighting Child Abuse*, A.B.A.J. Oct. 1, 1987 at 36. See Comment, *Civil Remedies for Victims of Childhood Sexual Abuse*, 13 OHIO N.U.L. REV. 223 (1986) (identifying and suggesting reforms of obstacles barring suit by incest victims against their abusers and outlining theories of recovery).

10. 789 P.2d 415 (Colo. 1990).

11. For a lengthy discussion of the long term psychological effects of incest and resultant need for therapy, see *Jones v. Jones*, 242 N.J. Super. 195, 576 A.2d 316 (1990).

12. Pimpinelli, *Incest: The Secret Tort; Toward a Civil Cause of Action*, N.J.L.J. Jan. 17, 1991, at 12.

13. See Comment, *supra* note 9, (discussing tort theories including intentional infliction of emotional distress, assault and bodily harm).

14. 159 A.D.2d 52, 559 N.Y.S.2d 336 (1990).

15. See *id.* at 56, 559 N.Y.S.2d at 339, for a discussion of punitive damage awards in sexual abuse cases. The court reduced the amounts from the \$200,000 actual and \$275,000 punitive damages awarded by the trial court.

16. Moss, *supra* note 9.

sen,¹⁷ the plaintiff, sexually abused by a Boy Scout leader, was awarded \$4.2 million. Such verdicts only benefit the victim if a source exists to satisfy the judgment. Often the most likely source is the abuser's homeowner's insurance policy.

Most homeowner's policies contain an "intentional acts" exclusion provision, allowing the insurer to deny coverage for injury or harm that results from acts intended or expected by the insured.¹⁸ Abuse involves intentional behavior by the molester that, at first glance, appears to fall squarely within the exclusion. Plaintiffs have avoided these exclusions and obtained recovery by alleging that abusers, while intending the act of molestation, did not have the subjective intent to *injure*. Although suggesting that an act of sexual abuse is not intended to harm the victim seems ludicrous, evidence suggests that in some cases it may be true.¹⁹ Defendants have introduced expert testimony, often uncontroverted, supporting this distinction.²⁰ Insurers, however, have sought to deny coverage in these cases by arguing that courts should decline to make an act/harm distinction and instead find that molesters intended the resultant psychological injury.²¹ Finding such an intent to injure brings the acts within the intentional act exclusion provisions and allows insurers

17. On appeal the punitive damages were vacated; the actual damages were affirmed. 97 Or. Ct. App. 536, 777 P.2d 1379 (1989).

18. The policy in the *Troelstrup* case excluded coverage for "bodily injury or property damage intentionally caused by an insured person." *Troelstrup*, 789 P.2d at 417. See generally Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R.4th 957 (1990).

19. "Because the sexual victimization of children is so reprehensible, the offender is perceived to be some sort of depraved monster. [W]e have . . . not found this to be the case. His offense has been more the product of immaturity than malicious intent . . ." NATIONAL CONFERENCE ON SENTENCING ADVOCACY, *THE CHILD MOLESTER: CLINICAL OBSERVATIONS* (1989).

See also D. FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY & RESEARCH* 33-44 (1984). Child sexual abuse in many cases is motivated by emotional rather than sexual needs. Finkelhor summarizes theories about why a molester commits child sexual abuse into four research models. Some theorists believe that child sexual abusers have an arrested psychological development and thus have a need to relate to "other" children because of their low sense of self-esteem. Some evidence suggests that molesters actually have a sexual orientation for children. A third model holds that the abuser is unable to get his or her sexual and emotional needs met in an adult relationship. This model is often seen in cases of incest in dysfunctional families. The fourth factor is that some social conditioning, including role models set by the abuser's own childhood, may make molestation more acceptable because some social norms have been altered or never learned. See generally M. BRASSARD, *PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH*, 81-82 (1987); K. FALLER, *CHILD SEXUAL ABUSE*, 89-115 (1988).

20. [Accused molester] Troelstrup presented deposition testimony from several involved professionals, as well as from the investigating officer, all of whom, in essence, expressed the opinion that Troelstrup had no subjective intention to injure or harm the child. He also submitted a psychologist's affidavit in which the opinion was expressed that Troelstrup had formulated no conscious intent to harm the child.

Allstate Ins. Co. v. Troelstrup, 768 P.2d 731, 732 (Colo. Ct. App. 1988). See also *Foremost Ins. Co. v. Weetman*, 726 F. Supp. 618, 620 (W.D. Pa. 1989); *Twin City Fire Ins. Co. v. Doe*, 788 P.2d 121, 122 (Ariz. Ct. App. 1989); *Fire Ins. Exch. v. Abbott*, 204 Cal. App. 3d 1012, 1016-17, 251 Cal. Rptr. 620, 623-24 (1988).

21. See Grady & McKee, *INSURANCE COVERAGE FOR SEXUAL MOLESTATION OF A MINOR: There should be no coverage for or duty to defend cases involving admitted acts of sexual molestation by an insured*, 56 DEF. COUNS. J. 170 (1989). This article reviews the trend of

to deny any duty to defend the insured or satisfy a judgement assessed against the insured.

Since 1982, eighteen states have decided, generally in declaratory judgment actions brought by insurers, that the intent to injure will be inferred as a matter of law from the intent to commit the molestation, thus allowing insurers to deny liability under homeowner's insurance policies.²² In its decision in *Troelstrup*, the Colorado Supreme Court joined the jurisdictions accepting this view.

III. COLORADO CASE LAW ON THE MEANING OF AN INTENTIONAL ACT EXCLUSION OF A HOMEOWNER'S INSURANCE POLICY PRIOR TO *TROELSTRUP*

*Butler v. Behaeghe*²³ established the general approach in Colorado to defining intentional acts within the meaning of an intentional act exclusion in a homeowner's insurance policy. Behaeghe struck Butler in the head with a steel pipe, causing serious injury. Behaeghe claimed he intended to strike the plaintiff in the abdomen but not to injure him. After a favorable jury verdict, Butler sought recovery against the third-party defendant Safeco, the defendant's homeowner's insurance carrier. Safeco denied liability, claiming the defendant's actions were intentional within the meaning of the intentional acts exclusion.

Behaeghe, seeking to secure coverage, argued that for the exclusion to apply, Safeco must show not only that he intended to strike the plaintiff but also intended to cause the specific resulting injury.²⁴ The court of appeals held that, within the meaning of an intentional act exclusion, coverage is excluded if the insured acted with the intent to cause any bodily injury, even if the resultant injury differed in character or magnitude from that expected.²⁵ The court found that in general such an ex-

decisional law in the area and concludes by noting the trend "favors insurers. We applaud that trend." *Id.* at 178.

22. The first supreme court case to infer intent as a matter of law in a sexual assault on a minor was *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834 (Minn. 1982). *Hill* is widely cited as precedent, however, the *Hill* court did not create a new rule inferring intent in all situations. Instead the court found the defendant had received actual notice as to the harmful effects of his actions by prior warnings of the state health department and inferred intent. See, e.g., *Foremost Ins. Co. v. Weetman*, 726 F. Supp. 618 (W.D. Pa. 1989); *Allstate Ins. Co. v. Thomas*, 684 F. Supp. 1056 (W.D. Okla. 1988); *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815 (D. Alaska 1987); *Twin City Fire Ins. Co. v. Doe*, 163 Ariz. 388, 788 P.2d 121 (Ct. App. 1989); *CNA Ins. Co. v. McGinnis*, 282 Ark. 90, 666 S.W.2d 689 (1984); *J.C. Penny Cas. Ins. Co. v. M.K.*, 278 Cal. Rptr. 64, 804 P.2d 689 (1991); *Landis v. Allstate Ins. Co.*, 546 So.2d 1051 (Fla. 1989); *Roe v. State Farm Fire & Cas. Co.*, 259 Ga. 42, 376 S.E.2d 876 (1989); *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485 (Iowa 1988); *Harpy v. Nationwide Mut. Fire Ins. Co.*, 76 Md. App. 474, 545 A.2d 718 (1988); *Worcester Ins. v. Fells Acres Day School*, 408 Mass. 393, 558 N.E.2d 958 (1990); *Auto-Owners Ins. Co. v. Gardipey*, 173 Mich. App. 711, 434 N.W.2d 220 (1988); *Lehmann v. Metzger*, 355 N.W.2d 425 (Minn. 1984); *Mackinnon v. Hanover Ins. Co.*, 124 N.H. 456, 471 A.2d 1166 (1984); *Rodriguez v. Williams*, 107 Wash. 2d 381, 729 P.2d 627 (1986) (*en banc*); *N.N. v. Moraine Mut. Ins. Co.*, 153 Wis. 2d 84, 450 N.W.2d 445 (1990); *Horace Mann Ins. Co. v. LEEBER*, 376 S.E.2d 581 (W. Va. 1988).

23. 37 Colo. App. 282, 548 P.2d 934 (1976).

24. *Id.* at 286, 548 P.2d at 938.

25. *Id.* at 287-88, 548 P.2d at 938-39 (emphasis added).

clusion would apply unless the insured acted "without *any* intent or *any* expectation of causing *any* injury, however slight."²⁶

The Colorado Supreme Court extended the scope of an exclusionary provision in *Chacon v. American Family Mutual Insurance Company*.²⁷ In *Chacon*, an insured sought recovery from his own insurance company for damages he paid after his son vandalized a public school. The policy provided coverage for the named insured and other residents of the insured's household, and excluded coverage for acts intended by any insured.²⁸ The insurer denied coverage, arguing that this language excluded coverage to all those insured for property damage which was intended or expected by any individual insured.²⁹ The insured brought the instant suit for breach of contract. The supreme court affirmed a decision for the insurer.

Such an exclusion was held not to apply in *American Family Mutual Insurance Company v. Johnson*,³⁰ which involved a mistaken assault on an innocent party. Johnson, after a domestic dispute, kicked a person whom he thought was his wife but turned out to be Brown, an uninvolved third party; Brown was subsequently successful in a personal injury action. American, the plaintiff, from whom Johnson held a homeowner's insurance policy, brought a declaratory judgment action alleging that Johnson's actions were within the scope of the provision.³¹ The court held that an act intended to accomplish a certain result which accomplishes a result not expected or intended does not fall within an intentional acts exclusion.³² Since Johnson neither intended nor expected to kick Brown, the exclusion did not apply.³³ In *Mangus v. Western Casualty Surety Company*,³⁴ Miller was tried for assault to commit murder after shooting Mangus, and found not guilty by reason of insanity. In a subsequent settlement, Miller assigned all rights under his homeowner's policy to Mangus. Western Casualty brought a declaratory judgment action alleging that Miller's acts were intentional and it was thus not liable for coverage under the intentional acts exclusion clause.³⁵ The court held that as the insured was insane at the time of the assault, the insured's insanity, as a matter of law, precluded application of the exclusion.³⁶

Thus, prior to the *Troelstrup* decision, an intentional act exclusion in a homeowner's insurance policy had been held to apply where any in-

26. *Id.* (emphasis added).

27. 788 P.2d 748 (Colo. 1990).

28. *Id.* at 750. The policy defined the insured as "you and your relatives if residents of your household." The intentional act exclusion provided that coverage would not apply for injury "expected or intended by any insured."

29. *Id.*

30. 796 P.2d 43 (Colo. Ct. App. 1990).

31. *Id.* at 44. The provision excluded coverage for "bodily injury . . . which is expected or intended by any insured."

32. *Id.* at 45.

33. *Id.*

34. 41 Colo. App. 217, 585 P.2d 304 (1978).

35. *Id.* at 218, 585 P.2d at 305.

36. *Id.* at 219-20, 585 P.2d at 306.

sured intended or expected to cause property damage or injury. Coverage was not excluded where the insured simply had no intent to injure, injured the wrong person by mistake or was legally insane at the time of the act and could not form the requisite intent.

IV. THE TROELSTRUP SERIES OF DECISIONS

A. *Troelstrup v. District Court*³⁷

In December 1983, W.M.L., a minor, filed a suit by and through his mother in Denver district court against the defendant, Glenn Troelstrup, alleging sexual assault and seeking money damages for negligence and outrageous, willful and wanton conduct.³⁸ Troelstrup tendered his defense to Allstate, his homeowner's insurance carrier. Allstate accepted under reservation of rights and sought a declaratory judgment that Troelstrup's actions fell within the intentional act exclusion in his homeowner's policy.³⁹ The district court refused Troelstrup's request to delay the action and allowed the declaratory action to proceed before the underlying civil trial. Troelstrup sought review of the denial of his request to delay through a petition of prohibition and mandamus. The Colorado Supreme Court affirmed, additionally noting its belief that Allstate had a reasonable likelihood of success in the declaratory judgment action.⁴⁰ Justice Erickson, joined by Justice Neighbors, specially concurred in the result but stated that he believed the court had "unnecessarily" stated that Allstate had a reasonable likelihood of success.⁴¹ On remand, the district court entered summary judgment for Allstate.

37. 712 P.2d 1010 (Colo. 1986).

38. *Id.* at 1010. W.M.L. was a 12 year old patient at Fort Logan Mental Health Center, a state mental health facility. Troelstrup, age 53, was a volunteer member of the Mental Health Advisory Committee of the center. The alleged molestation occurred at the facility. W.M.L. alleged that Troelstrup had committed homosexual acts, committed the crime of sexual assault on a child, slept nude with W.M.L. and had photographed and developed nude and erotic photographs of W.M.L.

39. *Id.* at 1010. The homeowner's insurance policy had an exclusionary clause that provided: "We do not cover bodily injury or property damage intentionally caused by the insured person."

40. *Id.* at 1012-13. "Hence . . . the nature and character of the alleged facts giving rise to W.M.L.'s personal injury case establish a reasonable likelihood that the tortious conduct of Troelstrup is excluded from coverage under his homeowner's policy." The court went on to cite three other cases, *Allstate Ins. Co. v. Kim W.*, 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984); *Horace Mann Ins. Co. v. Independent School Dist.*, 355 N.W.2d 413 (Minn. 1984); *State Farm Fire & Cas. Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984). All three cases involved sexual assault, the first two on a minor and the last on a physically disabled adult. The court found that all three supported the idea that "an intentional injury exclusion clause may be invoked to negate the insurer's duty to defend where the nature and character of the act is such that the intent to inflict injury may be inferred as a matter of law."

41. *Troelstrup*, at 1014. "[In so deciding], the majority virtually decides the merits of Allstate's summary judgment claim, stating that Troelstrup's conduct is likely not covered by the Allstate policy. Such a factual determination is properly made by the trial court." (Erickson, J., concurring).

B. *Allstate Insurance Company v. Troelstrup*⁴²

The court of appeals reversed in *Allstate Insurance Company v. Troelstrup*. The court initially determined that the sole issue before it was whether, as a matter of law, Allstate would be excused from satisfying any judgment W.M.L. might obtain against Troelstrup.⁴³ The determination of that issue rested on whether Troelstrup had the subjective intent to harm W.M.L.⁴⁴

Allstate argued that Troelstrup's previous *nolo contendere* plea⁴⁵ and his deposition admissions in the civil suit were sufficient, as a matter of law, to bring his actions within the intentional act exclusion.⁴⁶ Troelstrup argued that, although he admitted the acts, he had provided uncontroverted deposition testimony from psychologists and the arresting officer expressing opinions that he had no subjective intent to harm W.M.L.⁴⁷ Troelstrup claimed this constituted a genuine controversy as to his intent to injure, raising a sufficient factual issue to preclude summary judgment.⁴⁸

The court of appeals found *Butler v. Behaeghe*⁴⁹ to be controlling precedent. The court also cited *Allstate Insurance Company v. Steinemer*⁵⁰ for the "majority rule" that an exclusion did not apply to a policyholder not intending that his act cause bodily injury, even given that harm was a reasonably foreseeable consequence of the act.⁵¹ The court held that Troelstrup's subjective intent to harm was thus integral to the application of the exclusion, and the determination of that intent was a factual issue to be decided by the trier of fact.⁵²

C. *Allstate Insurance Company v. Troelstrup*⁵³

The Colorado Supreme Court reversed in *Allstate Insurance Company v. Troelstrup*. After reviewing *Butler*, the court noted that other jurisdictions, while accepting this rule, had declined to apply it in cases of child

42. 768 P.2d 731 (Colo. Ct. App. 1988), *rev'd*, 789 P.2d 415 (Colo. 1990).

43. *Id.*

44. *Id.*

45. In a criminal trial held before the civil case was brought, Troelstrup pled *nolo contendere* to a charge of felony sexual assault upon a child under Colo. Rev. Stat. § 18-3-405 (1986) and received a three year prison sentence.

46. *Id.* at 732.

47. *Id.*

48. *Id.*

49. 37 Colo. App. 282, 548 P.2d 934 (1976). For a discussion of *Butler* see *supra* notes 23-26 and accompanying text.

50. 723 F.2d 873 (11th Cir. 1984).

51. 768 P.2d at 732. *Steinemer* involved an injury suffered when a minor injured his friend by shooting him with a BB gun. The Eleventh Circuit followed what it termed the "majority rule" which, within the meaning of an intentional act exclusion, separated an intent to do an act from the intent to injure or cause harm by doing the act.

"Under the majority rule . . . an 'intentional injury' exclusion will not apply if the insured intentionally does an act, *but* has no intent to commit harm, even if the act involves the foreseeable consequences of great harm or even amounts to gross or culpable negligence." *Id.* (quoting *Steinemer*, 723 F.2d at 875) (emphasis in *Allstate*).

52. *Allstate*, 768 P.2d at 732.

53. 789 P.2d 415 (Colo. 1990).

molestation.⁵⁴ The other courts expressed several theories in support of such holdings. Some used an objective test.⁵⁵ This test permitted an inference of intent, since a reasonable person would expect injury to result from molestation. This approach, however, had been criticized as being overly broad.⁵⁶ Moreover, most jurisdictions that had considered the issue had decided to infer an intent to injure as a matter of law.⁵⁷

The court found that jurisdictions which inferred intent as a matter of law had taken judicial notice that sexual assault on a child will inevitably produce some harm.⁵⁸ The court quoted from *Allstate Insurance Company v. Kim W.*,⁵⁹ declaring that injury is inherent in acts of child molestation.⁶⁰ It also noted that both the Colorado legislature⁶¹ and court of appeals⁶² had found harm present in cases of molestation. The court also found the criminal statutes concerning child abuse implicitly contained the idea that harm is present in and flows from the forbidden behavior.⁶³

In its decision, the court held that an intent to injure would be inferred as a matter of law from an intentional act of child molestation.⁶⁴ As a result, the subjective intent of the insured would not be relevant in the determination of whether an intentional injury exclusion precluded coverage.⁶⁵ The court rejected Troelstrup's claim that the rule should

54. *Id.* at 418.

55. Such a test "considers what a 'plain ordinary person would expect and intend to result [from the offender's sexual misconduct].'" *Id.* at 419 (quoting CNA Ins. Co. v. McGinnis, 282 Ark. 90, 94, 666 S.W.2d 689, 691 (1984)).

56. "[T]he policy specifically states that the insured must expect or intend harm [I]f an objective standard is used, virtually no intentional act would ever be covered." *Rodriguez v. Williams*, 107 Wash. 2d 381, 385, 729 P.2d 627, 630 (1986).

57. 789 P.2d at 419.

58. *Id.*

59. 160 Cal. App. 3d 326, 334, 206 Cal. Rptr. 609, 613 (1984).

60. [I]mplicit in the determination that children must be protected from such acts is a determination that at least some harm is inherent in and inevitably results from those acts "The harm may be manifested in many different mental, emotional and physical ways, leaving a child with possible lasting and debilitating fears."

Id. (quoting *People v. Austin*, 111 Cal. App. 3d 110, 114-115, 168 Cal. Rptr. 401, 407 (1980)).

61. The legislature has declared that "the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental and emotional injury to the child" (quoting COLO. REV. STAT. § 18-6-403 8B (1986)). This section refers to sexual exploitation of a child, a different offense than Troelstrup was charged with. The quoted language appears in section one of the statute and is a statement of legislative intent only. The court has held that social, developmental and emotional injury to the child is specifically *not* an element of this crime. *Id.* *People v. Enea*, 665 P.2d 1026 (Colo. 1983).

62. *Kim W.*, 160 Cal. App. 3d at 334, 206 Cal. Rptr. at 613. Child molestation "is indeed a heinous crime that causes devastating results whenever it is committed, particularly when the perpetrator is in a position of trust." (quoting *People v. Garcidealba*, 736 P.2d 1240, 1243 (Colo. Ct. App. 1986)).

63. *Id.*

64. *Id.* Troelstrup had admitted the intentional nature of the acts. Troelstrup had pled *nolo contendere* to the charge of sexual assault on a minor and the trial judge had determined that Troelstrup's actions were taken "to satisfy his own gratification." *Id.* at 417. The court cited as support the cases discussed *infra* in section V.

65. *Kim W.*, 160 Cal. App. 3d at 419, 206 Cal. Rptr. at 613. The court said this decision does not "completely reject the [insured's] subjective intent; rather [it] overrule[s] the

not preclude coverage for his actions as they were not "extreme," citing *Horace Mann Insurance Company v. Leeber*,⁶⁶ which found that the majority rule inferring intent was not limited to cases involving "violence," "penetration" or an abuse over a "lengthy period of time."⁶⁷

Troelstrup did not contend that the count of negligence in the complaint was relevant to the resolution of the issue.⁶⁸ The court mentioned in a footnote that a Michigan court of appeals case had denied coverage for a "negligent" molestation claim, calling it a "transparent attempt to trigger insurance coverage" by recharacterizing intentional child molestation as negligence.⁶⁹ Finally, Troelstrup's claims that Allstate had not zealously pursued his defense in the civil case during the pendency of the declaratory judgment were rejected, the court noting that because Allstate had accepted under reservation of rights, its only obligation was to prevent a default judgment or other prejudicial action.⁷⁰

V. DECISIONS OF OTHER JURISDICTIONS CITED AS SUPPORT IN *TROELSTRUP*

Troelstrup cited decisions from California, Iowa, Minnesota and Washington in support of the holding.⁷¹ *Fire Insurance Exchange v. Abbott*⁷² was a consolidated action involving two separate defendants accused of unrelated acts of sexual misconduct with a minor. Both defendants admitted their acts but denied subjective intent to injure.⁷³ The court decided the question of intent in light of a statute excluding coverage for "wilful" acts of an insured.⁷⁴ The statute is construed as a part of all policies written in California; Colorado has no analogous statutory language. *Abbott* adopted the holding of a previous California case⁷⁵ inferring intent to injure as a matter of law from an intentional act of molestation within the meaning of the "wilful" statute.⁷⁶ Unlike *Troelstrup*, *Abbott* did not involve an underlying criminal prosecution.⁷⁷

insured's actual intent in limited circumstances." (quoting *Rodriguez v. Williams*, 107 Wash. 2d 381, 385, 729 P.2d 627, 630 (1986)).

Of note is *Landis v. Allstate Ins. Co.*, 546 So. 2d 1051, 1053 (Fla. 1989). The *Landis* court excluded coverage based on the insured's intentional act of molestation itself, not reaching the question of specific intent. "[W]e believe that specific intent to commit harm is not required by the intentional acts exclusion. Rather, all intentional acts are properly excluded by the express language of the homeowner's policy."

66. 376 S.E.2d 581, 585-86 (W. Va. 1988).

67. *Troelstrup*, 789 P.2d at 420.

68. *Id.* at 418.

69. *Id.* at 418 n.7 (citing *Linebaugh v. Berdish*, 144 Mich. App. 750, 757, 376 N.W.2d 400, 406 (1985)).

70. *Id.* at 420.

71. *Troelstrup*, 789 P.2d at 419.

72. 204 Cal. App. 3d 1012, 251 Cal. Rptr. 620 (1988).

73. *Id.* at 1016, 251 Cal. Rptr. at 622.

74. "An insurer is not liable for a loss caused by the wilful act of the insured . . ." CAL. INS. CODE § 533 (West Ann. 1990).

75. *Allstate Ins. Co. v. Kim W.*, 160 Cal. App. 3d 326, 206 Cal. Rptr. 609 (1984).

76. In *J.C. Penny Cas. Ins. Co. v. M.K.*, 804 P.2d 689, 278 Cal. Rptr. 64 (1991), the California Supreme Court upheld the holdings in both these cases.

77. The result in *Abbott* was upheld in *J.C. Penny Cas. Ins. Co. v. M.K.*, 804 P.2d 689,

*Altena v. United Fire and Casualty Company*⁷⁸ involved an adult victim of sexual abuse by a relative. The *Altena* court, although noting that the victim was an adult potentially distinguished the case from others involving abuse of a minor, adopted the holding in *State Farm Fire and Casualty Company v. Williams*⁷⁹ which refused to make that distinction.⁸⁰ Thus, *Troelstrup's* reliance on *Altena* for support may indicate that Colorado would extend the rule to cases involving sexual assault on an adult, despite the court's express limitation of its holding to situations involving minors.⁸¹ *Altena*, like *Abbott*, did not involve an underlying criminal prosecution.

In *Lehman v. Metzger*,⁸² an uncle was alleged to have sexually abused his minor niece. It is not clear from the reported decision if Metzger admitted his acts. The *Lehman* court, in a perhaps overly broad holding, inferred intent to injure as a matter of law where the underlying claim was that the insured intentionally sexually assaulted a victim (not limited to an adult).⁸³ The court provided no analysis, merely citing previous state decisions.⁸⁴

In *Rodriguez v. Williams*,⁸⁵ after Williams was convicted of committing incest with his minor stepdaughter, the stepdaughter filed a civil suit.⁸⁶ In the declaratory judgment action brought by his insurer, Williams in deposition admitted the incest but denied the subjective intent to injure.⁸⁷ He introduced an affidavit from his psychologist in support.⁸⁸ The Washington Supreme Court rejected the reasonable person standard applied by the court of appeals, finding the exclusion must be interpreted from the insured's standpoint.⁸⁹ Nonetheless, the court concluded that in cases involving incest it would infer intent to injure as a matter of law and thus declined to allow coverage.⁹⁰

278 Cal. Rptr. 64 (1991). The California Supreme Court also decided the issue in light of section 533 of the California Insurance Code. Of note is that the court found the language of the statute sufficient to infer intent: "Because we agree . . . that child molestation is willful as a matter of law under section 553, we do not base our decision on the insured's admissions of wrongdoing. *Neither an admission nor a criminal conviction is necessary to give rise to the exclusion under section 533.*" *Id.* at 840 P.2d at 698 n.13, 278 Cal. Rptr. at 73 (emphasis added). Thus the California line of cases in this area, based on a state statute, provides questionable support for Colorado's common law decision.

78. 422 N.W.2d 485 (Iowa 1988).

79. 355 N.W.2d 421 (Minn. 1984).

80. *Altena*, at 422 N.W.2d at 489.

81. "We conclude that an intent to injure may be inferred as a matter of law where child molestation is involved." *Troelstrup*, 789 P.2d 415, 419 (emphasis added).

82. 355 N.W.2d 425 (Minn. 1984).

83. *Id.* (emphasis added).

84. *Id.* at 426.

85. 107 Wash. 2d 381, 729 P.2d 627 (1986).

86. *Id.* at 382, 729 P.2d at 628.

87. *Id.* The court did not address the effect of the criminal conviction in the instant case.

88. *Id.*

89. *Id.*

90. *Id.* at 388, 729 P.2d at 630. The court cited *Linebaugh v. Berdish*, 144 Mich. App. 750, 376 N.W.2d 400 (1985) and *State Farm Fire & Cas. Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984), both reaching similar results in sexual abuse cases.

VI. IMPLICATIONS OF *TROELSTRUP* FOR VICTIMS OF CHILD SEXUAL ABUSE

It is not yet clear what effect the *Troelstrup* decision will have in Colorado. No commentators have yet analyzed the implications in those jurisdictions which preceded Colorado in finding intent as a matter of law in abuse cases. One California justice has offered a cautionary dissent on the effects of a similar decision in that state. *J.C. Penney Casualty Insurance Company v. M.K.*,⁹¹ settling a split in California appellate courts,⁹² reached the same holding as the *Troelstrup* court. Writing in dissent, Justice Broussard identified two areas of concern with the majority opinion. Justice Broussard accused the majority of "practicing psychiatry without a license and doing a terrible job of it."⁹³ He pointed out that all the expert testimony in the case showed that the abuser had no subjective intent to harm the victim, even though the majority held the testimony "irrelevant" and quoted from other cases to the effect that such testimony "flies in the face of all reason, common sense and experience."⁹⁴ In strong language, Justice Broussard rebuked the majority for discarding the expert testimony.⁹⁵ He also noted that liability insurance serves a two-fold function in society. Such insurance provides not only funds for the wrongdoer to use to pay his debts but is a source of compensation, often the only source, for victims.⁹⁶

Of note is that *Troelstrup* does not give guidance to what result the court would have reached had the defendant denied the allegations in the civil suit. Of the cases cited as support, the alleged molesters in *Abbott*, *Altena* and *Rodriguez* admitted their actions. In *Lehman* the act was established at a trial on coverage with no reference to an admission. In a similar declaratory judgment action brought in Colorado by an insurer subsequent to *Troelstrup*, a plaintiff's lawyer has successfully avoided the application of the *Troelstrup* decision where the defendant in that case denied committing the alleged acts.⁹⁷

The court in *Troelstrup* found it unnecessary to address the effect of the *nolo contendere* plea, finding that the admissions in the deposition provided sufficient basis for its holding.⁹⁸ Even if it had reached that issue,

91. 52 Cal. 3d 1009, 804 P.2d 689, 278 Cal. Rptr. 64 (1991).

92. The difference centered on inferring intent to injure as a matter of law in child molestation cases within the meaning of § 533 of the California Insurance Code, applying a "wilful acts" exclusion to all policies in the state.

93. 804 P.2d at 701, 278 Cal. Rptr. at 76 (Broussard, J., dissenting).

94. *Id.* at 704, 278 Cal. Rptr. at 79.

95. There is nothing in our record to justify this shocking attack on the science of psychiatry. Neither the majority opinion nor the cited authorities provide any empirical evidence for such an attack, and the experience involved is that of child molesters and those who work with child molesters, not judges. In the absence of experience, judges should not undertake to practice psychiatry. *Id.*

96. "Often the wrongdoer's insurance is the only way the innocent victims of crime, including child molestation, may recover compensation for medical expenses, their disabilities and their injuries." *Id.* at 703, 278 Cal. Rptr. at 78.

97. Conversation with Tim Devereux, Esq. (Feb. 18, 1991).

98. *Troelstrup*, 789 P.2d 415, 417 n.6.

a *nolo contendere* plea has been held not relevant to prove intent.⁹⁹ Thus, if Troelstrup had denied the charges in the civil action, the court would have had nothing on which to base its newly created mandatory inference of intent. Additionally, the court has long held that a guilty verdict may be introduced only as prima facie evidence in a civil case.¹⁰⁰ Had Troelstrup been convicted in the criminal case and denied the charge in the civil suit, the verdict could have been introduced only as prima facie evidence. Trial courts are now apparently in the position of either upsetting precedent and inferring intent as a matter of law from the previously prima facie evidence of a conviction, or not granting summary judgment to an insurer and charging it with the duty to defend the suit. Of the cases cited as support in *Troelstrup*, only *Rodriguez v. Williams*¹⁰¹ involved a criminal prosecution. Williams was convicted of incest and subsequently admitted his acts in deposition in the declaratory judgment action.¹⁰² As in *Troelstrup*, the *Rodriguez* court accepted the deposition testimony, not considering (or even discussing) the criminal conviction.¹⁰³ Other states which have considered the use of criminal convictions in similar declaratory judgment actions have reached differing results.¹⁰⁴

Also unresolved is the potential extent of the decision's application. Given the plain language of the holding,¹⁰⁵ it is unclear if the decision covers any case in which child molestation is initially *alleged*, even if denied by the defendant. *Lehman v. Metzger*, cited as support, appears to exclude coverage where the *claim* alleges sexual assault.¹⁰⁶ If the doctrine does so extend, it is not obvious what occurs after an insurer is released from any obligation to defend in a pre-trial declaratory judgment action over the denials of the insured and a jury subsequently finds that indeed no molestation occurred, or that the claim itself was spurious. It is possible that an insured may then seek reimbursement for his costs. Also, as noted above, the *Troelstrup* holding is specifically limited to cases involving *child* molestation,¹⁰⁷ yet it cites *Altena*, involving an adult victim, for support. As the case does not define what it considers child molestation, nor limit any such definition by reference to the statute, it is possible that the age of the molester is not determinative.¹⁰⁸

99. See *People v. Goodwin*, 197 Colo. 47, 593 P.2d 326 (1979).

100. Approximately Fifty-Nine Gambling Devices v. People, 110 Colo. 82, 130 P.2d 920 (1942).

101. 107 Wash. 2d 381, 729 P.2d 627 (Wash. 1986).

102. *Id.* at 383, 729 P.2d at 628.

103. *Id.* at 388, 729 P.2d at 631.

104. See Annotation, *Criminal Conviction as Rendering Conduct for Insured Convicted Within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured*, 35 A.L.R.4th 1063 (1990). This annotation discusses the use of convictions on either a jury verdict or a guilty plea. There are no cases concerning use of a plea of *nolo contendere*.

105. "We conclude that an intent to injure may be inferred as a matter of law where child molestation is *involved*." *Troelstrup*, 789 P.2d 415, 419 (emphasis added).

106. 355 N.W.2d 425 (Minn. 1984), see also *supra* note 82 and accompanying text.

107. 789 P.2d at 419.

108. Colorado makes sexual assault on a child a crime only where "the victim is less than fifteen years of age and the actor is at least four years older than the victim." COLO.

Troelstrup may thus apply to alleged molesters who are themselves minors. The ruling could in theory apply to a molester less than ten years old, even though such a defendant can not be criminally charged.¹⁰⁹

Troelstrup should not affect a victim's initial ability to receive compensation, if needed, for therapy and medical expenses. Funds are usually available from the local county Victim's Assistance program.¹¹⁰ Recognizing the importance of such programs, a Presidential panel has recommended an increase in funding for state and local programs that assist minor victims of abuse, including sexual abuse.¹¹¹ If a criminal case is successfully prosecuted, the court may order restitution from the defendant in addition to other penalties.¹¹² There remains, however, the difference between an order for, and payment of, restitution.¹¹³

Troelstrup's effects will primarily be felt by the victim seeking recovery for long-term or late-discovered psychological injuries¹¹⁴ or for non-economic damages. Where will this compensation come from after *Troelstrup*? A victim may search for an alternate insurance policy providing coverage.¹¹⁵ A plaintiff may always seek recovery from a defend-

REV. STAT. § 18-3-405 (1986) (emphasis added). It is unclear if *Troelstrup* applies to a molester who can not be criminally charged.

Two decisions provide conflicting guidance in this matter. Compare *Illinois Farmers Ins. Co. v. Judith G.*, 379 N.W.2d 638 (Minn. Ct. App. 1986) (finding no coverage for a minor who was between the ages of 13 and 16 when he sexually assaulted two minors) with *Allstate Ins. Co. v. Jack S.*, 709 F. Supp. 963 (D. Nev. 1989) (refusing to infer intent and thus allowing coverage for a 14 year old alleged abuser).

109. A person under ten years old can not be found guilty of a criminal offense in Colorado. See COLO. REV. STAT. § 18-1-801 (1986).

110. Victim's Assistance offices are divisions of the District Attorney's offices in the Denver metro area. Compensation is usually subject to approval by a review board before disbursement.

Compensation varies in the Denver metro area: Adams County pays for a maximum of ten therapy sessions at a maximum of \$60 per session and will pay some medical expenses if the victim has no primary insurance. Arapahoe County has no set maximum dollar amount or number of visits. It seeks a treatment plan from a therapist and will generally follow the recommendations in that plan. Arapahoe also pays reasonable medical expenses.

Denver provides a maximum of \$2,500 for therapy plus will pay for hospitalization and miscellaneous medical expenses. Jefferson County will pay for one therapy session per week at a maximum of \$60 per session for a reasonable number of sessions. It will also pay medical expenses, with a total maximum therapy and medical expenditure of \$10,000 per victim.

111. PRESIDENT'S CHILD SAFETY PARTNERSHIP, FINAL REPORT 128-35 (1987). The panel urged states to reduce or eliminate factors which may prevent minors from receiving compensation from assistance programs offered by state and local governments, such as the victim's age, the nature of the crime and the victim's unique reactions. It also suggested that state and local governments develop "alternative funding mechanisms," such as surcharges on wedding licenses or birth certificates, asset forfeiture of individuals convicted of child exploitation and mandatory fines or penalties in addition to existing criminal sanctions, to generate revenue to fund such compensation programs.

112. Such restitution is usually ordered paid as reimbursement to a Victim's Assistance program if the victim has received such aid.

113. See *infra* note 117.

114. See Comment, *Civil Remedies for Victims of Childhood Sexual Abuse*, 13 OHIO N.U.L. REV. 223, 229 (1986).

115. See *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981) (holding that, under a professional liability policy covering liability for

ant's personal assets. In *Doe v. Uhler*,¹¹⁶ the plaintiff attached the defendant's real property to avoid possible liquidation intended to avoid a writ of execution. Obviously if the abuser is not of sufficient means to satisfy the order or is judgment proof, any victory will be hollow.¹¹⁷

One commentator suggests that incest victims may be able to recover under a claim of negligent infliction of emotional distress,¹¹⁸ a tort recognized in Colorado¹¹⁹ but not yet interpreted in this procedural setting. Although the underlying complaint in *Troelstrup* contained a count of negligence, the court did not address it as Troelstrup did not argue the issue. Nonetheless, given the court's approving reference to a Michigan case characterizing a negligence count as a "transparent attempt" to avoid the effect of inferring intent,¹²⁰ it seems reasonable to expect an insurer may prevail in a declaratory judgment action against such a count.¹²¹

A victim may also seek recovery by filing suit against others who may have been negligent in allowing the abuse to occur.¹²² The parent who did not commit the incest but knew or should have known that the incest was being committed and negligently failed to intervene may be reached through his or her homeowner's insurance policy. This approach may fail if the policy contains language similar to that in

injury resulting from "assault" or "undue familiarity," the insurance company had a duty to defend dentist who had allegedly sexually assaulted an adult female patient).

116. 220 N.J. Super. 522, 532 A.2d 1133 (1987).

117. "Particularly as to child molesters, the wrongdoers are likely to be incarcerated . . . and there is little likelihood that a judgment recovered against the wrongdoer can be collected out of the wrongdoer's earnings. The wrongdoer will ordinarily be faced with substantial legal expenses depleting whatever assets he may have had." *J.C. Penney*, 804 P.2d at 703, 278 Cal. Rptr. at 78 (Broussard, J., dissenting).

118. Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U.L. REV., 609, 627-28 (1983).

119. See *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978). In *Towns*, a minor brought suit against a plumbing company after he witnessed an explosion which injured his sister. He alleged the defendant had negligently exposed him to an unreasonable risk of bodily harm. In finding the plaintiff had stated a cause of action, the court adopted the RESTATEMENT (SECOND) OF TORTS, § 436(2) which provided: "If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another . . . the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability."

The court also cited with approval the definition of bodily harm from the RESTATEMENT (SECOND) OF TORTS § 436A comment C: "long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration . . ."

In subsequent cases, Colorado has limited third party claims of fear for another's safety where the third party was outside the "zone of danger." See *Hale v. Morris*, 725 P.2d 26 (Colo. Ct. App. 1986).

120. *Troelstrup*, 789 P.2d 418 n.7 (quoting *Linebaugh v. Berdish*, 144 Mich. App. 750, 757, 376 N.W.2d 400, 406 (1985)).

121. *But see* *State Farm v. Nycum*, ___ F.2d ___, 1991 WL 164632 (9th Cir. 1991), distinguishing *J.C. Penny* and finding coverage when the jury found liability on a general verdict which could have been premised on a finding of either intentional molestation or negligent touching. The court rejected an automatic application of the *J.C. Penny* doctrine in any case involving an allegation of molestation.

122. Parents of a three year old boy who was molested by an employee of a McDonald's restaurant sued the company alleging negligent hiring. The plaintiff sought \$3.7 million in damages. *Denver Post*, Mar. 1, 1991 sec. B, at 2 col. 1.

*Chacon*¹²³ as discussed in section III. As *Chacon* involved a married couple, it may be distinguishable if the abuser lives with but is not married to the parent and thus not a relative within the meaning of the policy.

VII. CONCLUSION

With its decision in *Troelstrup*, the Colorado Supreme Court, joining a developing national trend, has foreclosed a major avenue of compensation for victims of child molestation. Yet it is unclear if the *Troelstrup* court was responding to social needs or insurer pressures. As abhorrent as the reality of sexual abuse of a child is, there is no clear reason for this exception to the *Butler* rule. Reference to Colorado's criminal statutes is unpersuasive as the offense is sexual contact with a minor which can "reasonably be construed as being for the purposes of sexual arousal, gratification or abuse."¹²⁴ This incorporates the reasonable person review of the act specifically rejected in *Troelstrup* as overbroad. Additionally, as discussed above, a guilty verdict is admissible only as prima facie evidence.

Also troubling is the rejection of expert testimony as irrelevant. Where the determinative issue is the intent of the insured to cause harm, as set forth in *Butler*, it seems that expert evidence on this very point is crucial. Yet the court declared such testimony as irrelevant. Insurers argue that this trend represents sound public policy,¹²⁵ yet it seems to represent a fundamental shift in twentieth century tort law theory.¹²⁶ The argument that an abuser will be less likely to commit acts of abuse if he realizes that his homeowners insurer will not be available to defend him or satisfy a judgment is spurious.¹²⁷

123. *Chacon v. American Fam. Mut. Ins. Co.*, 788 P.2d 748 (Colo. 1990).

124. COLO. REV. STAT. § 18-3-405 (1986). See *supra* note 6 for the full text of the statute.

125. See Grady & McKee, *supra* note 21, at 177-78.

126. In the late nineteenth century, liability insurance was viewed strictly as a contract between the insured and the insurer. The insured was generally an employer, and an injured employee had no direct recourse against the insurer. This changed in the early part of the twentieth century. Insurance began to be regarded as a source of compensation for injured persons. This switch in viewpoints was driven by a larger change in the perceived purpose of tort law. Tort law had been a means to punish the blameworthy for their misdeeds, so that losses would "lie where they fell" unless the plaintiff could find a culpable defendant. Twentieth century tort theorists began to view tort law as an efficient way to spread the costs of injury throughout society. G. WHITE, *TORT LAW IN AMERICA*, 146-153 (1980). The trend adopted by *Troelstrup* is a swing backwards, focussing on the bad acts of the defendant and ignoring the compensation needs of the victim. See generally, R. RABIN, *PERSPECTIVES ON TORT LAW*, 1983; G. CALABRESI, *IDEAS, BELIEFS, ATTITUDES, AND THE LAW* (1985).

127. The availability of insurance coverage for child sexual abuse will affect the perpetrator's choice to commit the act only if financial responsibility is one of his concerns. Moreover, child sexual abuse is criminal conduct. A perpetrator covered by a homeowner's policy would not be more likely to sexually abuse a child because he had a homeowner's policy as he would still be subject to criminal liability. If financial responsibility is a concern, the perpetrator has knowledge that his action will harm the child. The very fact that a perpetrator knows he will become financially responsible for the injuries sustained . . . indicates that he is substan-

Rather than carving a wholesale exception to the *Butler* doctrine, the court could have created a rebuttable presumption, placing the burden on the alleged molester to show through credible evidence, including expert testimony, that he did not have the intent to injure. Or the court simply could have required insurers to specifically exempt coverage in the language of their policies. The fact that this unique situation required an exception to *Butler* dispels a "parade of horrors" argument of a twenty page policy of which eighteen pages are enumerated exceptions to coverage.

Ultimately, the boundaries and implications of this new area of tort law remain to be determined by the courts in Colorado and other jurisdictions which have chosen to follow this trend in the law.¹²⁸ The needs of the victims, however, have not changed. With this major avenue of recovery now blocked, needed and deserved compensation may become unavailable in many cases, thus increasing the suffering of the victims.

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tially certain that the child will be injured by his conduct [thus establishing the requisite intent to injure and triggering the policy exception].

Comment, *supra* note 7, at 175-76 (1988).

128. The California legislature recently passed a bill reversing the decision in *J.C. Penny*. See 1991 Ca. S.B. 1147. The bill provides that in a civil action for damages for injury resulting from an act of child molestation, the defendant's intent may not be implied absent an evidentiary hearing on the matter and an insurer is not exonerated unless the trier of fact specifically finds that the insured harbored a preconceived notion to intentionally harm. See also Debra J. Saunders, *California's Child Molesters' Relief Act*, WALL ST. J., Oct. 3, 1991, at A18.