InDret

Intentional Harm and Insurance

Fernando Gómez
Facultad de Derecho
Universitat Pompeu Fabra

Begoña Arquillo
Facultad de Derecho
Universitat Pompeu Fabra

Barcelona, June 2000

www.indret.com

Summary

Abstract

"Actual malice is not insurable". This proposition is assumed by all the old regulations on insurance contracts and is incorporated within article 19 of the 'Ley de Contrato de Seguro' (Spanish law of insurance contracts). However, its application within the area of civil liability insurance has proved highly problematic for both legislators and the Spanish courts, as is demonstrated by the last ten years of Supreme Court case law analyzed in the second part of this article. Generally speaking, this case law is in favor of the insurance company being obliged to pay compensation to the injured party, granting them a right of return against the fraudulent policy holder, the company not being permitted to use the fact that actual malice is not covered against the victim.

The analytic part of the present article provides economic grounds for prohibiting the insurance of actual malice and considers the two available options (exclusion of cover and right of return) under which it could be implemented for both voluntary and compulsory insurance. The analysis suggests that for the former, exclusion of cover is generally the best solution, even for potential injured parties. With compulsory insurance the right of return is more socially desirable. These theoretical results enable the doubts and positions within Spanish case law to be assessed with a more detailed knowledge of their consequences.

The conclusions reached are applicable not only to cases of damage caused maliciously, but also to those in which damage results from a notable increase in risk due to voluntary conduct on the part of the guilty party (drunkenness, for example).

• *Legal regulation*

Dealing with **actual malice of the insured** poses a problem for Spanish legal texts. On the one hand, it is clear that insuring actual malice is prohibited. Article 19 of the 'Ley de Contrato de Seguro' (BOE no. 250, 17 October) includes the following guideline: "[the] *insurer will be obliged to pay compensation except when the damage is considered to have been caused by bad faith on the part of the insured*".

However, article 76 of the law, concerning civil liability insurance, seems to oblige the insurer to pay in cases of damage caused by actual malice, merely acknowledging the right to take action for recovery against the insured:

> *"The injured party or his heirs will be able to take direct action against the insured in order to demand that compensation be paid, without prejudice to the insurer's right to take action for recovery against the insured in the event that it was actual malice on his part that caused damage or harm to the third party".*

In the area of compulsory motor insurance, article 7.a of the 'Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor' (law on civil liability and motor vehicle insurance) (Additional Provision no. 8 of law 30/1995, 8 November, of 'Ordenación y Supervisión de los Seguros Privados' (planning and supervision of private insurance), BOE no. 268, 9 November) also establishes that:

> *"The insurer, once compensation has been paid, can take action for recovery:*
>
> *a) against the driver, the owner of the vehicle responsible and the insured if the damage caused was due to actual malice on the part of either of these, or to the driver being under the influence of alcohol, drugs or psychotropic substances".*

Moreover, when it is considered that damages were caused maliciously the binding system for legal assessment of personal injury by means of baremos (schedules) cannot be applied (section 1º 1 of the appendix to the law).

Legal regulation is not very different in cases of damage that, although not malicious, result from a voluntary behavior which significantly increases risk, such as **drunkenness of the insured**, despite the fact that article 76 of the 'Ley de Contrato de Seguro' makes no reference to this. Article 7.a of the 'Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor', referred to above, provides the insurer with the same right to take action for recovery.

• *Analysis of key questions*

1. Why prohibit the insurance of actual malice in civil liability insurance?

A general principle universally accepted in the insurance world is that **actual malice on the part of the insured is not insurable**. The concept was first used in the area of **damage insurance** (for example, that of fire) where it is more necessary. Its role here is both obvious and positive: to reduce the insured's incentives for insuring the property for more than its worth and then destroying it and pocketing the compensation that the company has to pay; or destroying it and claiming upon realizing that the property's real value is less than the sum assured. It thus acts as a deterrent against willfully-caused moral hazards (such as those mentioned) or those of adverse selection: if malicious losses were covered by insurance policies then premiums would rise enormously and this would eject better risks (i.e. those less susceptible to producing malicious damages) from the market.

In **civil liability insurance**, the basis for not insuring damages maliciously caused to third parties is similar although differs in some of the finer points. By definition, in this branch of insurance, it is not the insured who is going to claim compensation, but the victim of the injurious act who, sooner or later, receives the amount paid by the insurance company. Therefore, there is no direct incentive for taking out insurance and then causing loss in order to claim. It is true that there are hypothetical situations of moral hazard; for example, in the case of someone who plans to cause damage to another taking out insurance on such a tort in order to avoid paying compensation, or who intentionally causes damage knowing that his insurer will be the one to pay compensation. While both situations are imaginable, they are unlikely to occur in reality (at least, it seems to us, in those areas most prone to producing personal injuries and with respect to those people who tend to take out civil liability insurance: those who commit petty crime, even if only sporadically, rarely take out such insurance). The reason for this lies in the fact that, even when his civil liability could be insured, the person who maliciously causes damage faces the threat of punishment provided for under criminal law which does not depend upon his behavior with respect to the insurance.

> On the other hand, in the case of fire insurance, the person who sets fire to his own property in order to claim compensation also faces sanction (and the likelihood of it being applied is greater because insurance companies take a special interest in detecting such acts), but the purpose of this is precisely to deter people from fraudulent conduct in insurance contracts: deliberately setting fire to one's own property in order to defraud third parties is punishable, under article 357 of the criminal code, with a prison sentence of between one and four years.

Thus, although there are problems of moral hazard resulting from the insurability of actual malice in civil liability insurance (see, among others, BAIRD, 1994, 153-158), these are not as serious as in the more traditional area of damages insurance. In the area of civil liability insurance, **the basis for prohibiting the insurance of actual malice is more to do with avoiding adverse selection.**

Providing cover for malicious losses is expensive for insurance companies and a policy which offered such cover would have a much higher premium than one which didn't (REJDA, 1992, 24; CLARKE, 1997, 5). However, from the insured's point of view, neither is the former more advantageous (it doesn't reduce his risk, which is what an insurance contract is meant to do, unless he is already, or potentially, a criminal) than the latter: the insured

can avoid the damages at zero cost simply by not causing them voluntarily, something which – hypothetically – is within his power to do. Therefore, the insured prefers a cheaper policy, but one which enables him to transfer the same proportion of risk to the insurance company. Excluding actual malice from being insured under civil liability insurance is thus a solution which benefits both the company and the insured himself.

The above implies that the *ex post* differentiation of malicious conduct from imprudent or careless conduct, even if these are of a serious nature, can be both precise and free from significant errors. If there is a reasonable probability of negligent behavior being confused *ex post* with malicious conduct, then there will be an added risk for the potential responsible party who accepts a policy which excludes actual malice from its cover. Although this is an empirical question, our impression is that the level of accuracy achieved in differentiating the two is not in fact less – and, in many cases (those in which there is a criminal process that invests both time and resources in clarifying the subjective accusation of the tortious outcome against the agent), is probably greater – than in the majority of ordinary cases of loss or damages which are covered by insurance.

2. Exclusion of cover versus right of return

Once the disadvantages of insuring intentional damage within the area of civil liability insurance have been established, it is necessary to develop a **mechanism for implementing this prohibition on insuring actual malice.** Two options are here considered:

- The simplest and most immediate option would be exonerating the insurance company from any obligation to pay compensation. The victim would thus only be able to direct his claim for compensation against the fraudulent policy holder who caused the tort. Technically, this would be an **exclusion from cover applicable against the injured third party**

- A different and consistent solution is that which obliges the insurer to pay the necessary compensation to the victim, but which allows the former to then recover the amount paid from the fraudulent insured party. Thus, the insurance company has a **right of return** against the insured which allows it to recover monies paid out as a result of intentional damages on the insured's part.

In order to develop a preference for one or other of the options it is necessary to analyze their potential effects on the conduct and welfare of the parties involved. There are, naturally, three parties involved, for in addition to the insurer and the insured, one must consider the victim of the malicious damage. Undoubtedly, the latter prefers *ex post* the option of the right of return - as this guarantees compensation for the injuries suffered - over the exclusion of cover, which involves a risk (of greater or lesser degree depending on the insured's solvency) of not receiving compensation. As will be seen, however, the right of return solution can, under certain circumstances, increase *ex ante* the risk for potential victims of not being fully compensated for damages suffered.

The effects of both legal options will be analyzed by distinguishing **two different dimensions**. Firstly, **if the insurance is voluntary or compulsory** and secondly, **if the insured is solvent enough** to face the maximum malicious damage that he may cause or whether, on the contrary, his level of solvency is insufficient to fully compensate the victim.

a. Voluntary insurance

a.a) The insured is completely solvent

Exclusion of cover and right of return are **equivalent** in this case. The insured and potential causer's incentive for avoiding damages is the same in both cases and, moreover, is at its optimum from society's point of view in that it is the insured's own assets which are used to make reparation for any damages caused (provided that damages are calculated in terms of full compensation and that this rule is applied without significant errors). The premium charged by the insurance company for a policy with exclusion of cover would be the same as that for one with a right of return given that the compensation which the company expects to pay in both cases is the same and is equal to zero.

There are two caveats, however. Firstly, that the above is based on the assumption that the insurance company will demand repayment from the insured of the sum which was paid to the victim. If the company does not take action against the insured there are two consequences: the potential causer's incentives for avoiding damages will be less than the optimum and the cost, for the company, of right of return policies would rise, thus leading to higher premiums for the insured.

Secondly, the transaction costs of either option have not been taken into account. If one or the other has an advantage in this respect, then the two are not equivalent in terms of overall efficiency.

a.b) Insolvency or limited solvency of the insured

The incentive to avoid malicious damage is the same under no cover and right of return because in both cases the insured expects to pay the total amount of his assets, in one case to the victim and in the other to the insurance company. This incentive will not be enough (criminal sanctions aside), in that the expected payment is less than the true social cost of the conduct

The price of the policy, however, will be higher with right of return than with exclusion of cover: in the second option the compensation which the insurance company expects to pay for malicious damages is zero while with right of return compensation is, by definition, positive in that, due to his limited solvency, not all the amount paid to the victim can be recovered. Therefore, **there is a reduced incentive for taking out insurance,** that is to say there will be fewer potential causers of damage who take out insurance: policies governed by the right of return offer the insured the same in terms of the translation of risk, but at a higher price.

> Actually, what the right of return with limited solvency does is partially convert civil liability insurance into accident insurance for potential victims, but it is paid for by the causer. In other words, it creates favorable financial conditions for potential causers which are used in favor of potential victims and means that the amount of civil liability insurance which they, the latter, claim is necessarily less than the optimum. What happens is that potential causers won't buy all the insurance that would be optimum (technically speaking, the second most optimum, because limited solvency prevents the optimum from being reached in the insurance requested) and which, in theory, they would like to take out and, as a consequence, they will incur a greater risk than would be socially desirable.

But the right of return has a beneficial side in that it can reduce the risk for potential victims: if the causer of malicious damage is insured then victims will be fully compensated and do not incur any risk. However, **this effect of reduced risk does not work for all victims**, but only for those who suffer malicious damage. Victims of accidental damages (i.e. non-malicious) will see the risk they incur rise as there are less insured causers and therefore a higher probability of not receiving full compensation (it should be remembered that the causer is not sufficiently solvent to pay all the damages).

Put another way, the right of return increases the risk incurred by potential causers (as there are a greater number of them who act without having insurance cover for their civil liability, nor even accidental injury) and by victims of non-malicious damages, but reduces the risk for potential victims to the extent that they may suffer malicious damage caused by someone whose responsibility is insured.

The preference for right of return over exclusion of cover depends upon the increased risk for causers and victims of accidental damage being less than the reduction in risk for victims of not being fully compensated after suffering malicious damage by an insured causer.

Moreover, if the injury which results from the causer's activity is not uniform but variable, then the appeal of the right of return as opposed to exclusion of cover is further reduced because the response of the potential purchaser of insurance who is faced with higher premiums will not merely be failure to take out insurance, but that he will also take out less cover, such that he may not be sufficiently covered to face all the damages suffered by the victim.

On the basis of the above it can be deduced that, except when the ratio of malicious damages to the total number of damages resulting from a certain activity is significant, it is extremely difficult within a system of voluntary insurance, with potential causers who aren't solvent enough to face all damages, for the right of return to be superior, in terms of social welfare, to the exclusion of cover for malicious damages.

b. Compulsory insurance

b.a) The insured is completely solvent

The analysis here is the same as in the case of voluntary insurance. Both mechanisms (exclusion of cover and right of return) are **equivalent** from the point of view of incentive not to act maliciously as well as that of policy price. It should be remembered, however, that the two caveats mentioned in that case are equally valid in this one.

b.b) Insolvency or limited solvency of the insured

Conceptually speaking, the analysis is similar to that for voluntary insurance[1]. The difference lies in the fact that **the potential causer has lost the power to decide both if he takes out insurance or not and what level of cover will be chosen.**

The causer's incentives after taking out insurance will be the same under no cover as under the return system and, once again, will be less than the social optimum due to the insured's limited solvency (as before, leaving aside the deterrent effect of criminal sanction).

The compensation which the insurance company expects to pay per policy will be higher with right of return in that it will have to pay the victim **c** (the agreed cover) whilst only **min (c,s)** can be recovered from the fraudulent causer i.e. that paid to the victim, but limited by the insured's degree of solvency, such that if this is less than the amount covered only the maximum amount which corresponds to the said degree of solvency is recovered.

Thus, premiums with right of return will be higher than those with limited cover for the same reasons as have already been set forth with respect to voluntary insurance. However, in the case of compulsory insurance, and contrary to what happens under a system of voluntary insurance, the insured can neither refuse to take out insurance nor opt for reduced cover.

Therefore, potential causers assume neither greater nor lesser risk with the right of return compared with that which they would incur with exclusion of cover for damages caused maliciously, nor can they reduce the insurance they wish to take out as this is fixed according to legal regulations. The only difference is that they will pay more for their policies. If there is no reduction in either the number of insured potential causers or in the amount of cover that each of these possesses, then neither is there an increased risk for victims of non-malicious damages, who will always be compensated for all damages suffered.

[1] If the cover which is legally demanded is not determined in the most appropriate way this may lead to a lack of incentive to take care on the part of the insured; however, this is a problem in the design of the compulsory insurance system, not of the choice between exclusion of cover for malicious damage versus right of return: if insurance cover, **c,** is required, equal to the damage, **D**, **(c=D)**, and it is not possible for the insurance company to control *ex ante* the degree of care taken by the insured, the incentive will be lower than when what is required is simply that $\mathbf{c \geq D - s}$ (where **s** is the insured's level of solvency). See POLBORN, 1998, 143.

For potential victims, on the other hand, the risk of suffering malicious damage without being able to receive compensation is eliminated under the right of return system in that, whatever the case, the insurance company will pay compensation. This makes right of return the preferred option in these circumstances.

• *Case law from the Supreme Court*

1. Damages caused by actual malice of the insured

Between January 1989 and February 2000 there were only 8 occasions on which the Supreme Court addressed the problem of damages caused maliciously by the insured. From the cases analyzed the following **case law guideline** can be inferred: insuring assets against the negative consequences of actual malice is prohibited, but, as is clearly stated in art. 76 of the 'Ley de Contrato de Seguro', **the insurer is obliged to pay compensation if the person claiming it is the injured third party given that the actual malice of the insured cannot be used against the victim, this being without prejudice to the insurer's subsequent right of return against the insured,** (see also MORILLAS, 1993, 12-21; PERÁN, 1998, 130-131; TAPIA, 1999, 1044-1048; SÁNCHEZ, 1999, 1257). The argument holds even when actual malice is excluded from cover by a voluntary insurance policy.

This case law arose in the Second Chamber of the Supreme Court, with **STS, 2nd, 12.11.1994,** (Ar. 8917), relating to voluntary civil liability insurance, in the case of an ambulance driver who had intentionally run over a motorcycle, causing serious injuries to its driver. The Supreme Court ruled, contrary to the insurer's argument, that the defense of actual malice on the part of the insured could not be used against the injured party. The same ruling was delivered in **STS, 2nd, 21.11.1994,** (Ar. 9213), in the case of a man with paranoid schizophrenia who ran over a woman who died a few days later.

> Only one exception to this guideline, in the early 1990's, can be found. The case in question was settled by **STS, 1st, 8.7.1992,** (Ar. 6782)**,** and concerned a man who tried to kill another man with his car, but only succeeded in causing him serious injuries: the Supreme Court considered that this was an act which fell outside the area of insurance cover.

However, recent case law has raised doubts in the area of **compulsory civil liability insurance**, specifically that of motor vehicles, in cases where damages have resulted from the vehicle being used as an instrument of homicide. The best case is that of **STS, 2nd, 29.5.1997,** (Ar. 3637) [the most controversial of recent years and one which has been widely discussed (most recently by BATALLER, 1999, 779-790)].

> Juan B.E. had long ago fallen out with Manuel L.J. In the early hours of 18.7.1992, Juan drove his vehicle into the path of Manuel and his friend Esteban A.P., fatally running over the former and injuring the second. The Córdoba 'SAP' (provincial court ruling) 22.9.1995 found Juan guilty on two counts of murder, one actual and one attempted, and ordered him to pay civil liability compensation. However, it absolved the company which had insured the vehicle, adducing that

actual malice was not insurable. The 'Ministerio Fiscal' (Attorney General's office) and the private prosecution appealed against the decision.

The Supreme Court finally ruled against the insurer: despite the fact that malicious conducts cannot be insured, it said, the company should pay the compensation, within the limits determined by the compulsory insurance in question, given its purpose of protecting injured third parties. Moreover, compensating the victim does not depend on whether or not there has been a previous ruling declaring the action which has caused the injury to be malicious.

However, there was a dissenting opinion with respect to this sentence, undersigned by the magistrates Francisco Soto Nieto and José Luis Manzanares Samaniego. The basis of their argument was that art. 1 of the 'Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor' refers to damages caused "*during vehicular traffic*" i.e. with the purpose of transit or a journey from one place to another, but does not include cases in which the vehicle is used with murderous intent, as if it were a weapon (there are also authors who clearly opt for this solution: MADRIGAL, 1997, 2). It is also alleged that the right of return only refers to those payments made prior to the action being verified as actual malice. Despite all this, these arguments have had little effect on subsequent case law.

On the other hand, **the majority position has been consolidated with respect to both compulsory and voluntary civil liability insurance** as can be seen in the most recent rulings: **STS, 1st, 24.10.1997,** (Ar. 7768), that concerns the case of a robber who tried to steal a bag and was grabbed by two men, one of whom was then run over by the robber's accomplice who came to the robber's aid; **STS, 2nd, 11.2.1998,** (Ar. 1046), that found against the insurer in a case where the insured killed another person with a shotgun; **STS, 2nd, 28.4.1998**, (Ar. 3821), a similar case: a man killed a drug addict who had threatened him by running over him twice; finally, **STS, 2nd, 4.12.1998,** (Ar. 10325)**,** which obliged a hotel's insurance company to pay because one of the hotel's employees stabbed and seriously wounded another employee.

2. Damages caused by drunkenness of the insured

a. Voluntary insurance

Case law has generally stated that **the defense of drunkenness cannot be used against an injured third party**, even if it is included in a cover exclusion clause, and that the insurer can only take **action for recovery**.

In justifying this, the Supreme Court basically uses two arguments:

i) Clauses which are based upon an especially heightened risk from the insured's behavior cannot be used against third parties.

ii) It makes no sense for art. 76 of the 'Ley de Contrato de Seguro' to grant direct action in favor of the injured party in the case of actual malice and not in the case of the insured's conduct being influenced by the consumption of alcohol, especially as

both behaviors may overlap (ORTEGA, 1998, 2284-2297). An illustrative example may be found in **STS, 2nd, 15.10.1990** (Ar. 8069).

However, the Supreme Court does not always automatically find that this defense cannot be used:

- It sometimes argues that the exclusion of cover due to drunkenness may not be applied either because it had no direct relationship with the injurious act or because it was not a determining factor in causing it.

> As is stated in **STS, 2nd, 15.10.1991,** (Ar. 7263): "[it is taken to be] proven that the cause of the negligence was the vehicle's high speed and the fact that the driver was distracted by the conversation being maintained with the passenger and not the small amount of alcohol that he had previously consumed" (FJ 2); and also in **STS, 1st, 29.11.1991,** (Ar. 8576): "the objective defense that features in the policy cannot be used by the insurer against the injured third party as this exclusion agreement had no direct relationship with, nor was it the determining factor of, the injurious event, such as would be required for the risks covered by the voluntary insurance to be excluded" (FJ 2).

- In other cases, the Supreme Court argues that the inapplicability of the defense is a result of the clause not being correctly incorporated into the insurance contract (FORCADA, 1987, 934-935; BAILLO, 2000, 318-319). This, however, confuses cover exclusion clauses with those which limit the rights of the insured in that it states that the former have not been incorporated into the contract because they lack the formal requisites of the latter (i.e. that they clearly stand out in the documentation and are specifically accepted in writing: art. 3 of the 'Ley de Contrato de Seguro').

> This is the argument used in the following rulings: **STS, 2nd, 16.11.1989** (Ar. 8657); **STS, 2nd, 5.12.1989,** (Ar. 4932); **STS, 2nd, 8.3.1990,** (Ar. 2424); **STS, 2nd, 15.3.1991**, (Ar. 2163); **STS, 2nd, 24.4.1991,** (Ar. 2936); **STS, 1st, 29.4.1991**, (Ar. 3067); **STS, 1st, 10.6.1991,** (Ar. 4582); **STS, 2nd, 25.10.1991,** (Ar. 7390); **STS, 2nd, 28.10.1991,** (Ar. 7405); **STS, 2nd, 30.12.1991,** (Ar. 9702); **STS, 2nd, 8.6.1992,** (Ar. 5040); **STS, 2nd, 23.1.1993,** (Ar. 493).
>
> Despite this, a notable exception can be found in **STS, 2nd, 4.4.1990** (Ar. 3055): the Court states that by virtue of a clause in the voluntary insurance policy that was known and accepted by the insured, the insurer is not obliged to cover risks resulting from drunkenness.

The recent **STS, 2nd, 23.2.2000,** (Ar. 1145), also veers from the case law guidelines which have been followed until now, demonstrating that the question is far from settled. In this case, a drunk driver ran over and killed a cyclist. The 'Audiencia Provincial de Navarra' (provincial court) ordered the driver, jointly with his insurance company, to pay 9,000,000 pesetas to each of the dead man's children and 650,000 pesetas to his heirs.

In its appeal the company had basically contended that its civil liabilities should be limited to compulsory insurance and not include voluntary insurance as there was a cover exclusion clause in case of drunkenness (if, in a judicial ruling, it was proven that this factor contributed to the accident or if the level of alcohol in the blood was greater than 0.8 g/1000 cm^3) that was not required to be specifically accepted in writing. The Supreme Court also considered that **this clause may be used against the injured party** and allowed

the appeal. Therefore, it decided to fix the amount of compensation at the limit of the compulsory insurance according to the 'Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor'.

b. Compulsory insurance

In compulsory motor insurance the question raises no doubts: the insurer **cannot use the issue of drunkenness against the victim,** but if the accident is caused by this he will have a **right of return** against the insured. This is confirmed by the **Ruling of the European Court of Justice 28.3.1996** (DOCE no. 180/10, 22 June) which stipulates that:

> "the compulsory insurance contract cannot provide in certain cases, and especially in the case of a vehicle driver's drunkenness, that the insurer is not obliged to pay compensation for personal and material injuries caused to third parties by the insured vehicle. However, the compulsory insurance contract can stipulate that, in such cases, the insurer has the right to take action for recovery against the insured".

• *Conclusions*

Prohibiting the insurance of actual malice in civil liability insurance is justified by the aim of avoiding adverse selection. In practice, however, this prohibition may be carried out by means of an exclusion of cover or a right of return for the company against the insured. In Spanish case law, the question of how to choose between the two is considered on the basis of literal arguments or prejudgments about the function of civil liability insurance and the liability in question. We favor an approach based on the effects of the different competing solutions.

From this perspective, when **the potential causer has sufficient resources** to face the greatest damage that may result from his conduct, the two norms are identical in terms of the causer's incentives and the assumption of risk by both parties. The preference for one or the other will thus depend upon the transaction costs that they may generate. In this area, it can be argued, *prima facie*, that **exclusion of cover is superior to right of return:** the former would generate only one process for obtaining compensation, that filed by the victim against the causer. The right of return would require two processes (and the costs associated with each): the victim would claim against the insurance company which itself would subsequently claim against the insured. The lower cost of exclusion of cover for malicious damages suggests that it is in the interest of both the insured and the insurer to agree on policies which include such a clause. And this is indeed what happens in the actual insurance market. However, further and more detailed empirical information is needed to corroborate this initial impression.

Although there may be individual cases, and even sectors, in which the complete solvency of potential causers of damage is not improbable, it is more plausible to assume that **the solvency of the potential causer will not cover all – including the most serious – injurious consequences of his activity**. Under these conditions of limited solvency the

effects of the two options are no longer equivalent and, moreover, will depend upon whether the civil liability insurance in question is voluntary or compulsory.

Although the theoretical outcome is not totally conclusive, there are sound reasons for believing that **exclusion of cover is to be recommended** in the area of **voluntary insurance**. On the other hand, in those areas governed by **compulsory insurance** the arguments against **the right of return** lose their effect and thus this option is to be preferred.

Theoretical analysis therefore confirms that which was maintained by the recent **STS, 2nd, 23.2.2000** (Ar. 1145), whereby the right of return is reserved for the area of compulsory insurance and the exclusion of cover is allowed in voluntary forms.

However, a final observation is necessary. The analysis presented here could be described as partial in that it presupposes (and, therefore, leaves outside its area of interest) the main deterrent against intentionally caused damages, namely, criminal sanction. In fact, the use of criminal law in these cases is due to the inability of the civil liability system alone (and its associated mechanisms, such as insurance) to achieve socially acceptable levels in the prevention of malicious conduct. For this very reason the underprevention which has been mentioned in cases where the potential causer of damages has limited solvency should be understood as being open to correction by the threat of criminal sanction.

- ***Table of rulings cited***

Supreme Court Rulings

Chamber and Date	Ar.	Judge Rapporteur	Parties
1st, 29.4.1991	3067	Jesús Marina Martínez-Pardo	María del Carmen A.G. v. the heirs of Rufino Abilio D.F., María Alegría G.F. and "G.A.G.S.A."
1st, 10.6.1991	4582	Joaquín Delgado García	Not stated v. the insurance company "La Catalana"
1st, 29.11.1991	8576	Gumersindo Burgos Pérez de Andrade	Antonio L. and Carmen T.G. v. Alfonso Luis M.M., Mª de los Llanos S.S., Isidro M.G., "Previsión Española, S.A." and "La Equitativa Fundación Rosillo S.A."
1st, 8.7.1992	6782	José Augusto de Vega Ruiz	"Transportes Collado" and Rafael M v. Antonio G.M. and "Mapfre"
1st, 24.10.1997	7768	Gregorio García Ancos	J.R. v. Miguel G.G., Antonio J.J. and Consorcio de Compensación de Seguros
2nd, 16.11.1989	8657	Fernando Díaz Palos	Not stated v. José Miguel D.E. and "La Unión y el Fénix Español"
2nd, 5.12.1989	4932	Eduardo Moner Muñoz	Widow of Constantino S.G., Isabel, María, Milagros, Guadalupe and José S.G. v. Agustín D.C. and Mutualidad Interprovincial de

			Seguros "Soliss"
2nd, 8.3.1990	2424	Enrique Ruiz Vadillo	Not stated v. José D.S. and "Unión des Assurances de Paris"
2nd, 4.4.1990	3055	Luis Vivas Marzal	José Manuel G.C. and the heirs of José Francisco P.P v. José M.L. and the insurance company "MUDESPA"
2nd, 15.10.1990	8060	Joaquín Delgado García	Not stated v. José Antonio F.F. and "Mutua Nacional del Automóvil"
2nd, 15.3.1991	2163	José Augusto de Vega Ruiz	Not stated v. Antonio D.S. and "Nueva Aseguradora S.A." (now "Le Mans Seguros España, S.A.")
2nd, 24.4.1991	2936	José Augusto de Vega Ruiz	José B.E. v. José Ramón P.M., Rafael L.F. and the insurance company "La Previsión Hispalense, S.A."
2nd, 15.10.1991	7263	Enrique Ruiz Vadillo	Not stated v. Adrián C.C. and "Mutua Extremeña de Seguros"
2nd, 25.10.1991	7390	Justo Carrero Ramos	Not stated v. Antonio S.B. and "Previsión Española S.A. de Seguros"
2nd, 28.10.1991	7405	Antonio Huerta y Álvarez de Lara	Aurora C.H. and the parents of the minor Carlos H.G. v. Manuel R.M. and the "Compañía Nacional del Automóvil"
2nd, 30.12.1991	9702	Enrique Bacigalupo Zapater	Not stated v. Pedro Luis G.LL. and "Atlántida S.A. de Seguros"
2nd, 8.6.1992	5040	Ramón Montero Fernández –Cid	Not stated v. José Armando B.M. and the insurance company "Dapa S.A."
2nd, 23.1.1993	493	Fernando Díaz Palos	Not stated v. Manuel F.G. and "Unión Levantina S.A."
2nd, 12.11.1994	8917	Justo Carrero Ramos	Not stated v. Evaristo E.M. and "Mapfre"
2nd, 21.11.1994	9213	Joaquín Delgado García	Not stated v. José F.D.
2nd, 29.5.1997	3637	Cándido Conde-Pumpido Tourón	Gracia A.P. and others v. Juan B.E. and the insurance company "La Estrella, S.A."
2nd, 11.2.1998	1046	Eduardo Moner Muñoz	Francisco A. and Fuensanta C. v. Silvestre B.B. and "La Vasco Navarra , S.A., Seguros y Reaseguros"
2nd, 28.4.1998	3821	Joaquín Martín Canivell	Juan Carlos R.G., José Javier R.G., Justo R.F. and Dolores C.A. v. Manuel U.A. and "Pelayo Mutua de Seguros"
2nd, 4.12.1998	10325	Cándido Conde-Pumpido Tourón	Rosa María F.C and "Asepeyo" v. Roberto V.V., "Days Cerdanyola S.A." and "AGF-Unión Fénix Seguros y Reaseguros"
2nd, 23.2.2000	1145	Joaquín Martín Canivell	Children and heirs of Félix L.N. v. Alberto Enrique L.I. and the insurance company "Lagun Aro, S.A. "

- ***References***

Jaime BAILLO MORALES-ARCE, *La acción directa en el seguro obligatorio de responsabilidad civil automovilística,* Colección Studia Albornotiana, núm. LXXIV, Publicaciones del Real Colegio de España, Bolonia, 2000.

Douglas G. BAIRD, Robert H. GERTNER y Randal C. PICKER, *Game Theory and the Law*, Harvard University Press, Cambridge, Massachusetts and London, 1994.

Juan BATALLER GRAU, Josefina BOQUERA MATARREDONA y Jesús OLAVARRÍA IGLESIA (Coord.), *El contrato de seguro en la jurisprudencia del Tribunal Supremo,* Tirant lo Blanch, Valencia, 1999.

Malcolm A. CLARKE, *The Law of Insurance Contracts,* 3rd ed., Insurance Law Library, London 1997.

Marcos FORCADA JORDI, "Cuestiones en torno al rechazo del siniestro por las aseguradoras en supuestos de alcoholemia", *Revista Jurídica La Ley,* 1987-II, pp. 928-935.

Matías MADRIGAL MARTÍNEZ-PEREDA, "Algunas consideraciones sobre el derecho de repetición de las compañías aseguradoras en el ámbito de la circulación", *Revista Jurídica La Ley*, núm. 4367, 1997, pp. 1-5.

María José MORILLAS JARILLO, "Dolo del asegurado y responsabilidad civil. El caso automovilístico en especial", *Derecho de los Negocios,* núm. 32, 1993, pp. 12-21.

Rodrigo ORTEGA MONTORO, "La acción directa y la oponibilidad de excepciones por el asegurador en los supuestos de alcoholemia", *Revista Jurídica La Ley,* núm. 4693, 1998-VI, pp. 2284-2287.

Mattias POLBORN, "Compulsory Insurance and the Judgement-Proof Problem", 18 *International Review of Law & Economics,* 1998, págs. 141-146.

Juan PERÁN ORTEGA, *La responsabilidad civil y su seguro,* Tecnos, Madrid, 1998.

George E. REJDA, *Principles of Risk Management and Insurance,* 4th ed., HarperCollins Publisher Inc., New York, 1992.

Fernando SÁNCHEZ CALERO (Dir.), Francisco Javier TIRADO SUÁREZ, José Carlos FERNÁNDEZ ROZAS y Alberto Javier TAPIA HERMIDA, *Ley de Contrato de Seguro. Comentarios a la Ley 50/1980, de 8 de octubre, y a sus modificaciones,* Aranzadi, Pamplona, 1999.

Alberto Javier TAPIA HERMIDA, "Aspectos polémicos del seguro de responsabilidad civil. Reflexiones sobre la jurisprudencia reciente", *Revista de Derecho Mercantil,* núm. 233, 1999, pp. 997-1050.