

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

DOCKET NO.: DAR-06023

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HANOVER INSURANCE COMPANY  
Appellant

v.

KARIM TALHOUNI, GLENN SCOTT AND  
CORNELIA PILLARD  
Appellees

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ON APPEAL FROM JUDGMENT OF THE  
MIDDLESEX SUPERIOR COURT

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BRIEF OF APPELLEES  
GLENN SCOTT AND CORNELIA PILLARD

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### STATEMENT OF THE CASE

Appellees are in accord with Appellant Hanover's statement of the case, but wish to clarify the Superior Court's disposition of issues raised on appeal.

Hanover's motion for summary judgment was denied on April 7, 1989, by the Honorable J. Harold Flannery. [App. 17]. The Court found that the intentional act exclusion "must be construed against the insurer" and "embodies a specific intent standard." [App. 19]. The Court rejected Hanover's contention that public policy bars coverage in cases involving an insured's intoxication or criminal conduct, finding that there is a public interest in the compensation of the victim through insurance. [App. 19-20]. In response to Hanover's contention that indemnification would reward the insured for criminal conduct, the Court noted that a "policy requiring such an insured to exhaust his own resources before any payment by an insurer, or one providing for recoupment by an insurer, could presumably be written, but that is not the policy here." [App. 20 n.2].

On April 8, 1991, the trial judge, the Honorable Patrick F. Brady, found that Hanover was obligated to indemnify Talhouni. [App. 90]. The Court's factual findings credit the testimony of several witnesses, including appellees Scott and Pillard, who witnessed Talhouni during and after the assault, and described him as appearing "like a wild man out of control," and "oblivious" to reality. [App. 92].

The Court found that Talhouni was "under the influence of LSD at the time" of the assault, "in an LSD-induced psychotic state," "hallucinating and delusional," "completely out of touch with reality" and "did not know he was assaulting another human being." [App. 94]. Based upon Talhouni's prior drug usage and knowledge, as well as expert testimony that LSD may cause rare psychotic episodes, the Court found that Talhouni "did not 'expect or intend' that he would be affected by the drug in a way that he would assault or hurt another human being." [App. 94].

The Court concluded that Hanover bore the burden of showing that Talhouni's conduct was volitional, and that he intended to cause injury. [App. 95]. No inference of intent could be based upon intoxication or criminal conduct. [App. 96-100]. The Court concluded that the McHoul test for criminal responsibility was "not suitable to a case of this nature," where the critical issue was "whether the insured's intoxication or impairment at the time ... was such that he was incapable of forming a specific intent to cause bodily harm, or incapable of being substantially certain that

such harm would occur." [App. 98 n.4].

Lastly, the Court rejected Hanover's public policy argument and stated: "As a matter of public policy, a criminal defendant may not invoke voluntary intoxication as a defense to a general intent crime. The policy concerns are different, however, in an insurance recovery case, namely, that the victims be compensated."

#### **SUMMARY OF ARGUMENT**

I. The intentional act exclusion must be construed against Hanover. Talhouni's conduct must be evaluated by a subjective standard. (pp. 13-16). If Hanover wanted to provide for an objective standard, or exclude coverage for injuries caused by intoxication or criminal conduct, it could have done so. (pp. 14-16). In 1984 the New Hampshire Supreme Court evaluated the identical exclusion, held that it required a subjective evaluation of intent and the admission of evidence of intoxication, and advised Hanover to change the exclusion if it wished to exclude such evidence. (pp. 14-15). Intent to cause injury may not be inferred from Talhouni's conduct or criminal convictions since he did not intend to attack anyone. (pp. 16-21).

II. Evidence of LSD intoxication is admissible on the issue of Talhouni's intent. (pp. 21-30). An insurer may not rely upon "public policy" to create an exclusion broader than the one in the policy. (pp. 25-30). Exclusion of coverage where an insured's intoxication led to injury would have no deterrent effect. (pp. 25-27). Public policy concerns which prevent a criminal defendant from invoking intoxication as a complete defense are not applicable. The overriding public policy in an insurance case is that the victim be compensated. (pp. 25-30).

III. Evaluation of intent is not restricted to the **McHoul** test because criminal responsibility is not an issue. (pp. 30-34). **McHoul** may not be used to bar evidence of intoxication where the exclusion provides for evaluation of the insured's intent. (pp. 30-37). Since evidence of intoxication is admissible in evaluating the specific intent of a criminal defendant, such evidence is admissible in evaluating the intent of an insured, where victim compensation is in the public interest. (pp. 34-36). Even if **McHoul** applies, coverage should not be excluded. (pp. 36-37).

IV. The expert opinions of Dr. Stephen Mirin were supported fully by facts in evidence. (pp. 37-48). Uncontroverted evidence supported his opinion that Talhouni was suffering from LSD-induced psychosis. (pp. 37-42). The burden of establishing that Dr.

Mirin's opinions were based on inadmissible hearsay was Hanover's. (pp. 42-46). Hanover failed to establish that Dr. Mirin relied upon any information not in evidence. (pp. 42-46). Even if Dr. Mirin's testimony concerning why Talhouni was psychotic was excluded, overwhelming evidence established that Talhouni did not intend to cause injury. (pp. 46-48).

#### **STATEMENT OF FACTS**

On March 16, 1985, Glenn Scott was attacked in her apartment by a stranger, Karim Talhouni. Scott's roommate, Cornelia Pillard, witnessed the assault.

On March 13, 1991, a jury awarded Scott \$65,000 in a tort action, **Scott, et al. v. Talhouni**, Middlesex Sup. Ct. No. 86-4890. Following this verdict, a jury waived declaratory judgment trial was conducted on the issue of whether Hanover was obligated to indemnify Talhouni. Scott, Pillard and Talhouni contended that Talhouni was acting under the influence of LSD, did not intend to cause injury and that the intentional act exclusion of Hanover's Homeowners policy did not apply.

The uncontroverted testimony of Scott, Pillard and Talhouni amply supported the Court's finding that Talhouni "was in an LSD-induced psychotic state," "hallucinating and delusional and did not know he was assaulting another human being." [App. 94]. Two additional witnesses who observed Talhouni after the attack, Police Officer Bruce Cromwell, and Carol Gargiulo, a family friend, also testified that Talhouni lacked any comprehension of reality.

Talhouni "looked wild" when Pillard first saw him running up the stairs to her apartment like a truck. [Tr. 1-9, 11]. Talhouni did not meet her gaze; "his eyes looked like marbles,"; he "was sort of going automatic." [Tr. 1-10].

Pillard hid in her bedroom. She emerged and saw Talhouni kneeling over Scott, who was lying in bed. [Tr. 1-4-5]. Talhouni's pants were pulled down and he was holding his penis. [Tr. 1-5]. Talhouni put his hands around Scott's throat and threw her head back and forth. [Tr. 1-6]. Talhouni was making "inhuman noises" and "growling." [Tr. 1-11-12]. Pillard stated, "I don't think he was uttering words at all ... he was making sounds." [Tr. 1-6, 11]. Talhouni appeared "crazed." [Tr. 1-11]. When Pillard and a neighbor screamed at Talhouni, he "didn't respond at all" and did not acknowledge their presence. [Tr. 1-12].

Scott similarly testified that Talhouni appeared deranged. Scott was asleep in bed when Talhouni entered her room. She woke to find Talhouni kneeling over her. He urinated on her. [Tr. 2-4]. He pinched

her breasts, choked her and threw her head around. [Tr. 2-5, 6]. Most of what Talhouni said was incomprehensible. [Tr. 2-7-8]. When Pillard and a neighbor entered the room, screaming at Talhouni and threatening him with a frying pan, he did not notice them. [Tr. 2-8, 10]. Nor did he appear to comprehend their warnings that police were on the way. [Tr. 2-10].

Rather, after attacking Scott, Talhouni laid down on top of her, motionless and speechless. [Tr. 2-10, 11].

Then, for no apparent reason, Talhouni got up, ran down the stairs and crashed through the glass front door. [Tr. 2-11, 118].

Talhouni was next seen by Sergeant Bruce Cromwell of the Cambridge Police. Upon his arrival, Sergeant Cromwell saw Talhouni lying on the ground thrashing about and cutting himself in shards of glass in front of the house: "It appeared to me to be like a fish out of water ... how it flips. It was just like that." [Tr. 2-115-116]. Cromwell attempted to speak with Talhouni, but he did not respond. [Tr. 2-116].

When Cromwell tried to assist Talhouni out of the glass, he "thrashed all the more." [Tr. 2-118]. Pillard saw Talhouni struggling with the police, "acting like a wild beast." [Tr. 1-13]. Talhouni did not appear to comprehend the presence of police. [Tr. 2-118]. He had to be forcibly restrained and dragged out of the glass. [Tr. 2-118]. Cromwell observed that Talhouni did not appear to have any understanding of what was going on around him. [Tr. 2-118].

Talhouni was transported by ambulance to Cambridge City Hospital. [App. 76]. Talhouni's mother was notified and she was driven to the hospital by a family friend, Carol Gargiulo. [Tr. 112-113]. Ms. Gargiulo's son was a close friend of Talhouni, and she had spent a great deal of time with Talhouni over a period of approximately seven years. [Tr. 2-102]. She never knew Talhouni to do anything violent. [Tr. 2-102].

Ms. Gargiulo saw Talhouni in the emergency room. Talhouni "was clearly out of it ... [his] eyes were wild, and he was swinging his head around, staring at the ceiling ... he wasn't there." [Tr. 2-113]. She attempted to speak with him but he did not respond and did not appear to know who she was. Nor did he appear to know where he was. [Tr. 2-114]. Ms. Gargiulo watched Talhouni's mother attempt to talk to him, but Talhouni did not recognize her. [Tr. 2-114].

Talhouni's own testimony further established that he did not intend to injure Scott. Talhouni recalled that hours prior to the incident he ingested "at least one" and perhaps as many as four "hits" of LSD. [Tr. 2-

130, 146-147]. The LSD was in a form Talhouni was familiar with, "blotter paper," consisting of LSD dissolved into a small piece of paper. [Tr. 2-134-136].

Talhouni did not know how he got into Scott's house. [Tr. 2-124]. He recalled being in a strange room with a demon. [Tr. 2-125]. Talhouni could not recall anything further about the assault. [Tr. 2-125, 127, 141-142]. He did recall his testimony at depositions in 1987 and 1990. At Talhouni's 1987 deposition he similarly testified that while he remembered a demon he did not recall an assault. [Tr. 2-142-144]. At his 1990 deposition Talhouni described a struggle with a demon. [Tr. 2-125-131]. It is Talhouni's 1990 deposition testimony upon which Hanover exclusively relies in its description of Talhouni's purported trial testimony. [Appellant's Brief p. 4]. In fact, Talhouni's trial testimony was that he could not recall the assault described in his 1990 deposition, and that he believed his 1990 testimony was influenced by what he had heard concerning the assault during the intervening years. [Tr. 2-141-144]. He stated that he believed his 1987 deposition testimony, consistent with his trial testimony, was closer to the truth. [Tr. 2-141-142].

Talhouni had taken LSD on approximately ten prior occasions. [Tr. 2-135]. He never had a bad experience and never acted violently. [Tr. 2-138]. While he knew LSD could cause paranoia and delusions, he had never heard of anyone on LSD hurting someone else. [Tr. 2-138-139]. Talhouni testified that he did not expect or intend to cause injury to anyone. [Tr. 2-152-154].

In addition to the uncontradicted testimony of Talhouni and the witnesses who saw Talhouni during and after the assault, the finding that Talhouni did not intend to injure Scott was supported by the testimony of Steven M. Mirin, M.D. Dr. Mirin is the Director of McLean Hospital, a Board Certified Diplomate in Psychiatry, who has specialized in the areas of substance abuse and psychopharmacology since 1968. [Tr. 2-14-16]. He has extensive clinical experience with LSD users, has conducted research on LSD and is the author of numerous publications concerning LSD. [Tr. 2-12-19; **See**, Dr. Mirin's Curriculum Vitae, App. 47-74].

Dr. Mirin testified that to a reasonable degree of medical certainty Talhouni did not know he was assaulting a human being. [Tr. 2-93-94]. He opined that Talhouni was psychotic as a result of LSD ingestion and "didn't know what he was doing at the time he was doing it." [Tr. 2-43, 92-93].

Dr. Mirin testified that LSD is "capable of

producing psychotic states," but that this is a "rare occurrence" which could not reasonably be expected. [Tr. 2-19, 24]. Dr. Mirin characterized such psychosis as involving "delusional beliefs," "hallucinations," and the loss of a sense of reality. [Tr. 2-20-21]. Such psychosis could generate a delusional belief that a hallucinatory demon posed a threat and prompt a nonvolitional attack upon the imagined demon and an inability to control one's impulses. [Tr. 2-20-23].

In evaluating Talhouni's conduct, Dr. Mirin reviewed the depositions of Scott, Pillard and Talhouni. [Tr. 2-25-26]. The substance of their testimony was repeated at trial. Dr. Mirin also reviewed the Cambridge City Hospital medical record which was admitted into evidence. [App. 75-81].

Dr. Mirin reviewed additional documents not admitted into evidence: a transcript of testimony of Sheldon Zigelbaum, M.D. at Talhouni's criminal trial, a medical report prepared by Dr. Zigelbaum, the deposition of Talhouni's mother, a letter from Dr. Theoharides, an expert retained by Hanover, and the notes of a psychologist, Dr. Alan Kaplan, who treated Talhouni. [Tr. 2-26]. Hanover falsely asserts that Dr. Mirin "relied" on all of these documents in formulating his "opinions." [Appellant's Brief, p. 7]. In fact, Dr. Mirin testified simply that he "reviewed" these documents. [Tr. 2-25-26]. Dr. Mirin mentioned reliance upon Dr. Zigelbaum's testimony and report only with regard to his opinion that LSD was the most likely drug ingested by Talhouni. [Tr. 2-90]. Dr. Mirin also mentioned relying upon the deposition of Talhouni's mother, but no testimony was elicited concerning the particular statements relied upon. [Tr. 2-28]. Nor was there testimony suggesting reliance upon any information not otherwise admitted into evidence.

When asked to identify the materials relied upon as the basis for his opinions, Dr. Mirin identified the depositions of Talhouni, Scott and Pillard, as well as the Cambridge City Hospital medical record, all of which were admitted into evidence in substance or in whole. [Tr. 2-28]. When asked to detail the specific facts of significance, Dr. Mirin provided the following list of uncontroverted facts, all of which were admitted into evidence:

- a) Glenn Scott's testimony concerning the bizarre attack by a stranger who burst into her room, urinated on her, grabbed and choked her, but made no attempt to sexually assault her. [Tr. 2-34-35; See, Scott Testimony, Tr. 2-4-6];

- b) Scott and Pillard's testimony concerning Talhouni's failure to notice the screams and threats of Pillard and a neighbor, Talhouni's animal-like noises and incoherent mumbling, Talhouni's sudden and inexplicable cessation of the attack and his crashing through the glass door to the house. [Tr. 2-34-36; See, Scott and Pillard Testimony, Tr. 1-11-13, 2-7-8, 10-11];
- c) Pillard's testimony that Talhouni appeared furious and wild and was thrashing about in broken glass apparently oblivious to his circumstances. [Tr. 2-25-36; See, Pillard Testimony, Tr. 1-13];
- d) Talhouni's testimony that he took LSD in the early afternoon, which would be consistent with the duration of action of LSD. [Tr. 2-37-38; See, Talhouni Testimony, 2-134, 136, 146-147];
- e) The Cambridge City Hospital's report that upon Talhouni's admission at 5:30 p.m. he was incoherent, unable to appreciate where he was or who the people around him were, that eventually Talhouni informed staff that he had taken LSD, and that the Hospital's diagnosis was hallucinogen abuse. [Tr. 2-38, 48-59, 55-59; See, Cambridge City Hospital Medical Record, App. 75-81].

#### ARGUMENT

#### **I. TALHOUNI'S UNINTENTIONAL AND LSD-INDUCED ASSAULT IS NOT EXCLUDED FROM COVERAGE UNDER THE HANOVER POLICY**

A. The Intentional act Exclusion Must be Strictly Construed Against Hanover, and Hanover Bears the Burden of Proving its Application.

Exclusions from insurance coverage are to be strictly construed against the insurer. Quincy Mutual v. Abernathy, 393 Mass. 81, 83 (1984); Vappi & Co. v. Aetna Cas. & Sur. Co., 348 Mass. 477, 431 (1965). Any ambiguity in the intentional act exclusion must be resolved against Hanover. Abernathy, 393 Mass. at 83; Worcester Ins. Co. v. Fells Acre Day School, Inc., 408 Mass. 393, 414 (1990); Liberty Mutual Ins. Co. v. Tabor, 407 Mass. 354, 362 (1990).

There is no dispute that Talhouni is covered by the general terms of the Hanover policy. Consequently, it is Hanover's burden to show that the intentional act

exclusion applies. McGinnis v. Aetna Life & Cas. Co., 398 Mass. 37, 38 (1986); Markline v. Travelers Ins. Co., 384 Mass. 139 (1981); Burd v. Sussex Mutual Ins. Co., 267 A.2d 7, 15 (N.J. 1970); Couch on Insurance, ¶79.315 (2d rev. ed 1983 and Supp. 1990).

B. Talhouni's Conduct Must be Evaluated by a Specific Intent Standard.

The exclusion explicitly provides for a subjective evaluation of the intent of the insured, rather than the objective "reasonable man" standard urged by Hanover. The policy states that Hanover need not indemnify Talhouni for "bodily injury... expected or intended by the insured."<sup>1</sup> (emphasis in original) [App. 22]. To exclude Talhouni's conduct from coverage, Hanover must prove that he specifically intended to cause the resulting harm or was substantially certain that such harm would occur. Fells Acre, 408 Mass. at 399; Newton v. Krasnigor, 404 Mass. 682, 685 (1989); Abernathy, 393 Mass. at 84.

This Court may not create a coverage exclusion where Hanover itself failed to do so unambiguously. If Hanover wished to exclude from coverage all injuries caused by intoxication or by criminal conduct, it was in a position to do so. See, Transamerica Ins. Co. v. Norfolk & Dedham Mutual Fire Ins. Co., 361 Mass. 144, 147 (1972) ("if coverage... were not intended, the insurer could have readily so declared by the addition of an express exclusion in the policy to that effect."); United Services Auto Ass'n. v. Elitzky, 517 A.2d 982, 991 (Pa. Super. 1986) ("If the [insurance] industry feels that our decision is in error and in serious conflict with its interests, its task is a simple one. It can protect itself by rewriting its policies to clearly exclude those risks against which it does not want to insure."); MacKinnon, 471 A.2d at 1169; Aetna Cas. & Sur. Co. v. Dichtl, 398 N.E.2d 582, 588 (Ill. App. 1980); State Farm Fire & Cas. Co. v. Morgan, 368 S.E.2d 509, 510 (Ga. 1988).

In MacKinnon v. Hanover Ins. Co., 471 A.2d at 1167, this identical Hanover exclusion was found to

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<sup>1</sup> The Hanover exclusion is narrower than the exclusions at issue in Abernathy and Fells Acre, which excluded injury expected or intended "from the standpoint of the insured." The exclusions in Abernathy and Fells Acre may imply a more objective intent, analogous to the intent of an actor "in the shoes of" the insured. MacKinnon v. Hanover Ins. Co., 471 A.2d 1166, 1167 (N.H. 1984).

refer to the "actual expectation or intention... in the mind of the insured at the time he took the action allegedly resulting in injury." The court sought "to give effect to the plain meaning" of Hanover's exclusion. Id. at 1169. The court advised Hanover that its decision did "not imply that the contract could not have been different," and did "not imply anything about the court's views on the substantive law of torts." Id. at 1169. Thus, in 1984, the Supreme Court of New Hampshire invited Hanover to change the exclusion language to provide for an objective standard. More than one year later, when Talhouni attacked Scott, the exclusion was unchanged.

In Dichtl, 398 N.E.2d at 588, the court rejected the insurer's contention that an exclusion for injury "expected or intended from the standpoint of the insured" required an objective evaluation of intent: The word 'reasonable' is not employed in the exclusion and we reject Aetna's plea that we read in a reasonableness standard. It was Aetna which drafted the policy and if it wanted an objective standard to apply, it could have drafted its policy accordingly.

In Morgan, 368 S.E.2d at 510, the court concluded that an exclusion for injury intended "by the insured" required a subjective analysis of intent: The words... express a plain and understandable meaning. We decline to overprint those words with limitations which they fail to express... If the company desires to broaden the exclusion, it may do so. But this task falls to the policy drafter and not to the courts.

C. Intent to Cause Injury may not be Inferred From Talhouni's Conduct.

In Abernathy, 393 Mass. at 87-88, this Court held that intent to cause injury could not be inferred where an insured intentionally threw a rock at a moving vehicle. Since Abernathy, the Court has carved a narrow exception to the rule that a finding of intent must be based solely upon the insured's state of mind.

In Newton v. Krasnigor, 404 Mass. at 685-687, the Court held that the conduct of an insured, who intentionally set fire to several piles of books in a school library, warranted the inference, as a matter of

law, that the insured intended to cause property damage. The Court concluded that where "reason mandates" that from the very nature of an intentional act, harm must have been intended, such an inference is appropriate. Id. at 686 n.7.

This same reasoning was applied in Fells Acre, where the tort plaintiffs contended that even though the tort defendants intentionally molested children, they did not intend this conduct to cause injury. 408 Mass. at 399. The Court concluded that injury was such an obvious and inherent consequence of child molestation that "intent to commit this act carries with it the intent to inflict injury." Id. at 400.

Hanover relies upon Krasnigor and Fells Acre to argue that, regardless of Talhouni's state of mind, the nature of his conduct requires an inference of intent to injure. Hanover's reliance is misplaced.

Intent to injure may only be inferred where the insured's intentional act posed an inherent likelihood of injury. Krasnigor, 404 Mass. at 687; Fells Acre, 408 Mass. at 393; Terrio v. McDonough, 16 Mass. App. 163, 169 (1983) ("it is self evident that if a person is pushed down a flight of stairs it is to be expected that person will be hurt"). Unlike Krasnigor, where a jury found that the insured intentionally set several fires, unlike Fells Acre, where the tort defendants were found to have committed intentional acts of sexual abuse, and unlike Terrio, where the insured intentionally pushed the victim, the Trial Court found that Talhouni "did not know that he was assaulting another human being." [App. 94].

In Long v. Coates, 806 P.2d 1256, 1257 (Wash. App. 1990), an insured drank "12 to 15 beers, 2 to 4 double rum and cokes, and 1 or 2 exotic cocktails called snowshoes" and then stabbed a police officer. Evaluating an intentional act exclusion identical to the exclusion in this case, the court found that the insured's intoxication negated his capacity to form an intent, and concluded that the exclusion did not apply. Id. at 1258. On appeal the insurer made the same argument advanced by Hanover: that intent may be inferred as a matter of law from the commission of a violent act. Like Hanover, the insurer relied exclusively upon cases in which "the insured admitted intending, or was found to have intended, the injurious act." Id. at 1260. The argument was rejected: Because intent to both commit the act and to cause some injury are required to bring this case within the exclusion, and because the court

found [the insured] lacked intent to commit the act, whether the intent to harm may be inferred from the act is irrelevant.

Id. at 1260.

Since Talhouni did not intend to attack a human being, intent to cause injury may not be inferred from his conduct. Nor may intent to injure be inferred from Talhouni's use of LSD unless he was "substantially certain" that the drug would prompt him to attack someone. See, Abernathy, 395 Mass. at 84; Krasnigor, 404 Mass. at 687; Fells Acre, 408 Mass. at 400-401. The Trial Court concluded that at the time Talhouni took LSD "he did not 'expect or intend' that he would be affected by the drug in a way that he would assault or hurt another human being." [App. 93-94]. This finding was supported by uncontroverted evidence: Talhouni had never heard of anyone on LSD becoming violent; Talhouni had taken LSD approximately ten times, experiencing only mild visual hallucinations, euphoria and increased energy; he had never experienced a "bad trip"; and Dr. Mirin's testimony that while LSD may induce psychosis, it does so rarely and unpredictably. [App. 93-94; Tr. 2-19-24, 135, 138].

D. Intent to Cause Injury may not be Inferred  
From Talhouni's Criminal Convictions.

Hanover contends that Talhouni's criminal convictions on charges of indecent assault and battery and assault require an inference of intent to injure.

Conviction for a "general intent" crime requires a defendant to intentionally or recklessly engage in proscribed conduct, whereas "specific intent" crimes require a defendant to intend a specific result above and beyond the mental state necessary to commit the actus reus of the crime. LAFAVE AND SCOTT, CRIMINAL LAW ?28, p. 202 (1972). The crimes of indecent assault and battery and assault are general intent crimes; they do not require proof of specific intent. See, Commonwealth v. Henson, 394 Mass. 584, 592 (1985); Commonwealth v. Peretti, 20 Mass. App. 36, 43-44 (1985). Neither crime requires intent to injure. See, Commonwealth v. Campbell, 352 Mass. 387, 397 (1967); Commonwealth v. Welch, 16 Mass. App. 271, 274 (1983).<sup>2</sup>

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<sup>2</sup> Even if Talhouni's criminal convictions required proof of specific intent, such a finding would have no collateral estoppel effect in this civil action. Mass.

Hanover interprets Fells Acre to hold that a criminal conviction for indecent assault warrants an inference of intent to injure. However, this Court's inference of intent to injure in Fells Acre was explicitly premised upon the finding that [n]owhere in the record is there a jot of evidence suggesting that the tort defendants were suffering from a mental disease or defect that would render them incapable of forming an intent to harm.

Fells Acre, 408 Mass. at 400-401.

Fells Acre does not hold that intent may be inferred from a criminal conviction. Fells Acre provides that where an insured intentionally commits an act such as sexual abuse of a child, which poses an inherent likelihood of injury, intent to injure may be inferred. Id. at 399-400. In this case, by contrast, uncontroverted evidence established that Talhouni, due to LSD-induced psychosis, could not and did not intend to assault a human being.

## II. EVIDENCE OF LSD INTOXICATION PROPERLY WAS ADMITTED TO PROVE TALHOUNI'S LACK OF INTENT

### A. The Majority View in Other Jurisdictions Provides That Intoxication may Negate the Capacity to Form Intent.

The "majority view" in other jurisdictions is that evidence of an insured's intoxication is admissible on the question of whether injury was "intended or expected by the insured." Long v. Coates, 806 P.2d 1256, 1259 (Wash. App. 1990); State Farm Fire & Cas. Co. v. Morgan, 364 S.E.2d 62, 64 (Ga. App. 1987), aff'd 368 S.E.2d 509 (Ga. 1988). Ten jurisdictions hold that evidence of intoxication is admissible and relevant on the issue of intentionality: Washington, Georgia, New Hampshire, Wyoming, Wisconsin,

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Property Ins. v. Norrington, 395 Mass. 751, 753-754 (1985); Aetna Cas. Ins. v. Niziolek, 395 Mass. 737, 742 (1985).

Illinois, Alabama, Arizona, Louisiana and New Jersey.<sup>3</sup>  
**State Farm v. Morgan** is typical of the majority position. The insured was an alcoholic who shot his son, daughter-in-law and then himself. His autopsy revealed a blood alcohol content of .25 per cent. The Georgia Supreme Court, interpreting an exclusion identical to that relied upon by Hanover, found evidence of intoxication admissible:

[t]he question of intent or expectation here uniquely fits the pattern of those issues of material fact which are not appropriate issues for summary judgment but are decided by the trier of fact.

**Morgan**, 368 S.E.2d at 510.

In **Burd v. Sussex Mutual Ins. Co.**, 267 A.2d at 9, the Supreme Court of New Jersey evaluated a policy excluding coverage for "bodily injury... caused intentionally by" the insured. The insured, while drunk, injured someone with a shotgun. The court held that evidence of intoxication was admissible and that intent could not be inferred from the insured's criminal conviction. **Id.** at 15.

In **McKinnon v. Hanover Ins. Co.**, 471 A.2d at 1167-1170, the court found that an identical Hanover exclusion required Hanover to establish that the insured subjectively intended to sexually abuse his stepdaughter, where the insured alleged that his conduct was the unintentional consequence of intoxication. Evidence of intoxication was held admissible. **Id.** at 1170.

In **Aetna Cas. & Sur. Co. v. Dichtl**, 398 N.E.2d at 586-589, the court found that a policy which excluded coverage for injury "expected or intended from the standpoint of the insured," required an evaluation of the insured's subjective intent. The insured asserted

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<sup>3</sup> **Long v. Coates**, *supra*; **Morgan**, *supra*; **MacKinnon**, 471 A.2d 1166 (N.H. 1984); **Morris v. Farmers Ins. Exchange**, 771 P.2d 1206 (Wyo. 1989); **N.N. by Donovan v. Moraine Mutual Ins. Co.**, 434 N.W.2d 845 (Wis. App. 1988), *rev'd on other grounds*, 450 N.W.2d 845 (Wis. 1990); **Aetna Cas. & Sur. Co. v. Dichtl**, 398 N.E.2d 582 (Ill. App. 1980); **Lawler Machine & Foundry Co. v. Pacific Indemnity Insurance Co.**, 383 So.2d 156 (Ala. 1980); **U.S.F. & G. Ins. Co. v. Brannan**, 589 P.2d 817 (Wash. App. 1979); **Parkinson v. Farmers Ins. Co.**, 594 P.2d 1039 (Ariz. App. 1979); **Nettles v. Evans**, 303 So.2d 306 (La. App. 1974); **Burd v. Sussex Mutual Ins. Co.**, 267 A.2d 7 (N.J. 1970).

that she had killed her husband as a consequence of consuming "various medications which made her irrational." Id. at 584. The court found evidence of the insured's drug use admissible. Id. at 589.

Contrary to Hanover's contention that "numerous" courts and the "weight of authority" provide that evidence of intoxication is inadmissible, Hanover cites only three jurisdictions in support of its position:

Minnesota, Missouri and Michigan.<sup>4</sup> Hanover's reliance upon even these cases is misplaced. In the Michigan case of Allstate Ins. Co. v. Hampton, an explicitly "objective" exclusion barred coverage for injuries "which may reasonably be expected to result from the intentional or criminal acts of an insured person." 433 N.W.2d at 334. Hampton supports the appellees' contention that if Hanover wanted to exclude coverage for harm stemming from criminal conduct or intoxication, regardless of the insured's subjective intent, it could have done so. The Missouri cases relied upon by Hanover both involved intentional act exclusions barring coverage for harm intended "from the standpoint of the insured." Hanover Ins. Co. v. Newcomer, 585 S.W.2d at 289; Travelers Ins. Co. v. Cole, 631 S.W.2d at 664.

In MacKinnon, 471 A.2d at 1167-1168, the Supreme Court of New Hampshire distinguished such "standpoint" language, which it characterized as possibly establishing an "objective normative" standard of intent, from language identical to the policy exclusion in this case. "A reference to intention or expectation 'by' the insured does not allow for such a [broad and objective] construction." Id. at 1167.

The majority of courts hold that such "standpoint" language requires admission of evidence of intoxication and evaluation of the subjective intent of the insured no different than an exclusion which refers to intent "by the insured." See, Morgan, 368 S.E.2d at 509; Dichtl, 398 N.E.2d at 582; Ala. Farm Bureau Mut. Cas. Ins. v. Dyer, 454 So. 2d 921, 924-925 (Ala. 1984).

In this case, where Hanover's intentional act exclusion provides for a subjective evaluation of Talhouni's intent, evidence of LSD-induced psychosis

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<sup>4</sup> American Family Mutual Insurance Co. v. Peterson, 405 N.W.2d 418 (Minn. 1987); Hanover Insurance Co. v. Newcomer, 585 S.W.2d 285 (Mo. App. 1979); Travelers Ins. Co. v. Cole, 631 S.W.2d 661, 664 (Mo. App. 1982); Allstate Insurance Co. v. Hampton, 433 N.W.2d 334 (Mich. App. 1988).

was admissible and relevant in determining whether the exclusion applies.

B. Public Policy Favors Compensation  
of the Victim and Restriction  
of the Coverage Exclusion.

The public policy considerations which favor the admission of evidence of Talhouni's LSD intoxication are well-founded in "the public interest that the victim be compensated" and the view that "the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack." **Burd**, 267 A.2d at 15.

Hanover's contention that the overriding public policy consideration is deterrence, analogous to the criminal law, has been rejected by several courts:

With respect to voluntary intoxication, the public policy considerations applicable to a criminal prosecution are not decisive as to liability insurance coverage. In criminal matters there is reason to deal cautiously with a plea of intoxication, and this to protect the innocent from attack by drunken men. . .

But other values are involved in the insurance controversy. The exclusion of intentional injury from coverage stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences. [citation omitted]. Pulling the other way is the public interest that the victim be compensated, and the victim's rights being derivative of the insured's, the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack.

And the insured, in his own right, is also entitled to the maximum protection consistent with the public purpose the exclusion is intended to serve.

**Burd**, 267 A.2d at 15; **See also, Morgan**, 364 S.E.2d at

64; Long v. Coates, 806 P.2d at 1259; MacKinnon, 471 A.2d at 1169; Morris, 771 P.2d at 1214.

A broadly interpreted intentional act exclusion, and the exclusion of evidence of intoxication, would have no deterrent effect:

While the exclusion in question reflects the assumption that coverage would weaken the deterrent fear of liability, it is not obvious that a refusal to consider relevant evidence of intoxication on the issue of actual intent would have any appreciable effect on the behavior of insured persons. Hence, we find no reason in public policy to narrow coverage by holding evidence of intoxication inadmissible in the absence of a policy provision to that effect.

MacKinnon, 471 A.2d at 1169.

In United Services Auto Ass'n. v. Elitzky, 517 A.2d 982 (Pa. Super. 1986), the insurer argued that public policy required an exclusion for injury "intended by the insured" to be read objectively. The court held that public policy could not be used to expand the exclusion:

A contrary conclusion would lead to the illogical holding that certain acts are not excluded from coverage under an "intended harm" clause but are nonetheless excluded because of public policy. The law is complex enough without the addition of such highly technical and ultimately pointless distinctions.

Id. at 989.

Massachusetts cases consistently have held that public policy favors compensation of the victim or the beneficiary of the insured. The view that "[e]xclusions from coverage are to be strictly construed" is well established. Abernathy, 393 Mass. at 83, quoting Vappi, 348 Mass. at 431. This narrow construction of policy exclusions has been applied repeatedly to uphold coverage when there has been an allegation of illegality on the part of the insured.

In Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass.

271 (1970), this Court held that an exclusion of liability incurred "by reason of any statute" did not exclude coverage where the plaintiff in the underlying tort action alleged that the insured sold liquor to an intoxicated person in violation of G.L. c. 138, §69. The insurer in that case, as here, argued that "public policy precludes a person, whose tortious acts also violated a criminal statute, from receiving the benefits of an insurance agreement covering those acts." Id. at 278. The argument was rejected: The defendant's contention was rejected in

Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 5, where we said that "[i]f the maxim, that no man shall profit from his own wrong, be applied literally, then the slightest negligence . . . would bar recovery. Such a result would be recognized generally as impractical and unjust." We hold that public policy would not be advanced by depriving the plaintiff here of the benefits of the policy.

Id. at 278.

In Commerce Ins. Co. v. Koch, 25 Mass. App. Ct. 383, 386 (1988), the Appeals Court held that injury caused by an unregistered and uninsured driver who had been drinking vodka was not excluded:

If Commerce is suggesting that the fact that [the insured] was violating motor vehicle law at the time of the accident . . . should serve as a defense to suit on Commerce's policy, the answer is given in McMahon v. Pearlman, 242 Mass. 367, 371 (1922), quoting Judge Cardozo's remark in Messersmith v. American Fid. Co., 232 N.Y. 161, 163 (1921): "To restrict such insurance to cases where there has been no violation of criminal law or ordinance would . . . reduce indemnity to a shadow."

Id. at 386.

The illegal conduct of an insured, bringing about his own death, is not a bar to a beneficiary's recovery under a life insurance policy. In Davis v. Boston Mutual Life Ins. Co., 370 Mass. 602, 603-604 (1976),

the insured "was shot and killed by a police officer...[while] committing two grave and serious felonies...his death was caused by and resulted from his own criminal conduct." Id. at 603-604. This Court, again finding that "[t]he public policy issue cannot be resolved by literal application of the maxim that no man shall profit from his own wrong," awarded the plaintiff judgment on the policy. Id. at 605-608.

Consideration of Talhouni's LSD intoxication is further warranted by the fact that public policy is no bar to the admission of such evidence where a criminal defendant's specific intent is an issue. See, Commonwealth v. Henson, 394 Mass. 554, 593 (1985).

This Court recently held that consideration of a criminal defendant's voluntary intoxication is appropriate in determining whether the objective "third prong of malice" exists:

...the Commonwealth must establish the guilty **knowledge** of the defendant beyond a reasonable doubt, and evidence of intoxication should be considered by a jury. Evidence of intoxication certainly bears on the defendant's ability to possess the requisite knowledge of the circumstances in which he acted.

Commonwealth v. Sama, 411 Mass. 293, 298 (1991)  
(emphasis in original).

If "credible evidence of debilitating intoxication bearing on [a defendant's] ability to possess meaningful knowledge of the circumstances at the time of the victim's death" is admissible in the defense of an alleged murderer, id. at 298-299, then such evidence is surely admissible when "the public interest that the victim be compensated" is implicated. Burd, 267 A.2d at 15.

### III. EVALUATION OF TALHOUNI'S STATE OF MIND IS NOT RESTRICTED TO THE McHOUL TEST

A. McHoul has no Application Where  
Talhouni did not Intend to  
Commit an Assault and Criminal  
Responsibility is not an Issue.

In Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967), this Court adopted the American Law Institute's Model Penal Code definition of legal insanity: a lack of substantial capacity to appreciate the criminality of one's conduct or to conform one's conduct to the law

as a result of mental disease or defect. Relying upon Fells Acre and Baker v. Commercial Union, 382 Mass. 347 (1981), Hanover contends that the McHoul test must be applied in evaluating Talhouni's state of mind. However, the evaluation of Talhouni's state of mind should not be restricted to McHoul.

In Fells Acre and Baker, the insureds were found to have intended physical acts which caused injury: the Amiraults intentionally molested children; Mrs. Baker intentionally set her house on fire. Fells Acre, 408 Mass. at 399-401; Baker, 382 Mass. at 350-352. No evidence was offered suggesting that these insureds did not know what they were doing. Under these circumstances, application of McHoul was appropriate to determine whether these insureds were responsible for their conduct.

In Baker, this Court stated that it held no view as to whether McHoul should apply in evaluating an insured's state of mind. McHoul was applied in Baker because it was the standard accepted by both parties at trial, where there was no question that Baker intended to burn down her house, and the issue was whether she was responsible for her conduct. Baker, 382 Mass. at 349-350. Since there was no evidence that Baker did not appreciate that she was burning down her house, application of the McHoul test narrowed the intentional act exclusion to the benefit of the insured. Baker would have lost coverage under a strict specific intent standard. Pursuant to McHoul, the exclusion was avoided even though she acted intentionally. Id. at 349.

Similarly, in Fells Acre, this Court referenced the McHoul standard where there was no evidence that the insureds lacked specific intent to molest children.

The Court's comment that there was not "a jot of evidence suggesting that the tort defendants were suffering from a mental disease or defect" did not articulate a standard to be applied in all insurance disputes. See, Fells Acre, 408 Mass. at 401. Rather, this comment reflected the facts of the case, in which a psychiatrist proffered testimony on nothing more than the general issue of the motivations of child abusers as a group. Id. at 400. No evidence was offered that the insureds were intoxicated and lacked intent to molest the children. The Court's failure to discuss the issue of intoxication may not be read as an adoption of McHoul. Fells Acre does not reject the specific intent standard established in Abernathy and Krasnigor. Rather, like Baker, Fells Acre holds that even where an insured acts with intent, the exclusion

may be avoided if a lack of criminal responsibility is established. **Fells Acre**, 408 Mass. at 401.

In this case, where Talhouni lacked intent to assault a human being, and intent cannot be inferred from his use of LSD, there is no need to examine the issue of criminal responsibility to avoid the exclusion. **See, Fells Acre**, 408 Mass. at 339-401; **Baker**, 383 Mass. at 350-351; **Abernathy**, 383 Mass. at 86-87; Memorandum and Order, J. Flannery, [App. 19-20]; Memorandum of Decision, J. Brady, [App. 98-100].

Hanover's argument for strict application of the **McHoul** test "confuses [the] principles of civil liability and criminal responsibility." Memorandum and Order, J. Flannery, [App. 19]. "The concept of criminal responsibility is separate from and does not depend upon, one's actual capacity to intend or expect any effect specifically or in general." **Id.**

In **Nettles v. Evans**, 303 So.2d 306 (La. App. 1974), and **Morgan**, 364 S.E.2d 62 (Ga. App. 1987), **aff'd**, 368 S.E.2d 509 (Ga. 1988), the courts rejected insurers' similar efforts to collapse these concepts and preclude the admission of evidence of intoxication to negate intent.

In **Nettles**, the insured attacked a woman after ingesting diet pills and alcohol. An expert testified that this combination of drugs and alcohol could cause hallucinations. **Id.** at 307-308. Based upon a criminal statute providing that "voluntary intoxication does not constitute a defense to a crime requiring general intent," the trial court barred evidence of intoxication and held that the insured's acts were intentional. The Louisiana Appeals Court reversed, finding that intent in an intoxicated person could not be inferred from the criminal statute. **Id.** at 309.

In **Morgan**, an intoxicated insured shot his son and daughter-in-law, and then killed himself. 364 S.E.2d at 63. The court rejected the insurer's contention that a criminal statute providing that voluntary intoxication was no excuse for a crime was controlling: ... the criminal statute does not and cannot

establish that intent exists in fact in an intoxicated person; for reasons of public policy it merely precludes assertion of a defense to a criminal charge based on lack of intent resulting from intoxication.

In contrast, in civil cases... the concern is whether intent is or was present in fact, in order to determine the applicability of a

policy exclusion.

Id. at 63-64.

B. Since Evidence of Intoxication is Admissible in Evaluating a Criminal Defendant's Specific Intent, Such Evidence Must be Considered in Evaluating an Insured's State of Mind in a Civil Matter.

The admission of evidence of intoxication is warranted by this Court's finding that such evidence may be introduced by a criminal defendant where his state of mind is in issue. While evidence of intoxication may not exonerate a defendant of all criminal responsibility, such evidence may be introduced where specific intent is an element of the crime. See, Commonwealth v. Doucette, 391 Mass. 443, 455 (1984) (whether defendant had capacity to premeditate); Commonwealth v. Perry, 385 Mass. 639, 649 (1982) (whether defendant committed murder with extreme atrocity or cruelty); Commonwealth v. Grey, 399 Mass. 469, 470-471 (1987) (whether defendant possessed malice aforethought as evidenced by a specific intent to kill or cause grievous harm); Commonwealth v. Henson, 394 Mass. at 593 (whether defendant acted with specific intent).

Evidence of intoxication is admissible on the issue of malice as it relates to a defendant's knowledge of the circumstances in which he acted at the time of the victim's death. Commonwealth v. Sama, 411 Mass. at 293. "Proof of malice under this theory does not rely on evidence of the defendant's specific intent." Id. at 296 n.1. Sama suggests that evidence of intoxication is admissible not only in cases involving specific intent crimes, but in all cases where knowledge is an element of the crime.

Thus, where the defendant's state of mind is an element of the crime, evidence of intoxication is not restricted by McHoul. The McHoul test is limited to the determination of criminal responsibility. There is no rational basis for considering evidence of intoxication in evaluating the state of mind of a criminal defendant, and barring such evidence where the intent of an insured is at issue. Indeed, there are stronger reasons for admitting evidence of intoxication in civil disputes over insurance, where there is a public interest that the victim be compensated, than to show incapacity to form specific intent in criminal cases. Burd, 276 A.2d at 15.

C. Even if McHoul Applies, Evidence of Talhouni's LSD-Induced Psychosis Should not be Excluded.

If McHoul is used to evaluate Talhouni's intent, he would be deemed not responsible for his conduct so long as evidence of his LSD-induced psychosis is not excluded. Uncontroverted evidence established that Talhouni could neither appreciate the criminality of his conduct nor conform his conduct to the law. Since the rationale for exclusion of evidence of intoxication in criminal matters is not germane to this insurance dispute, application of McHoul would not warrant the exclusion of such evidence.

Even if McHoul were applied precisely as in a criminal case, evidence of Talhouni's psychosis should not be excluded. Psychosis is not a normal consequence of LSD use, and Talhouni did not anticipate that he would become psychotic. [Memorandum of Decision, J. Brady, App. 93-94]. While Talhouni may not have suffered from a latent disease, he did suffer from a unique susceptibility. Dr. Mirin testified that only "certain individuals" will become psychotic from LSD use. [Tr. 2-19-20]. Thus, the LSD triggered a mental disorder, psychosis, distinct from LSD's typical consequences. [Tr. 2-19-24]. Accordingly, the reasoning of Commonwealth v. Brennan, 399 Mass. 358, 361-363 (1987), militates in favor of the admission of evidence of Talhouni's psychosis.

**IV. THE EXPERT OPINIONS OF DR. STEPHEN MIRIN HAD PROPER FOUNDATION**

A. Dr. Mirin's Opinions Were Supported Fully by Facts in Evidence.

Dr. Stephen Mirin testified that to a reasonable degree of medical certainty Talhouni did not know he was assaulting a human being, was psychotic as a result of LSD ingestion and "didn't know what he was doing at the time he was doing it." [Tr. 2-43, 92-94].

Hanover asserts that Dr. Mirin's opinions were based on facts not admitted into evidence. This argument distorts the record and ignores Dr. Mirin's testimony regarding the specific facts he relied upon.

Dr. Mirin testified that in evaluating this case he "reviewed" a number of documents including the depositions of Scott, Pillard, Talhouni and Talhouni's mother, the Cambridge City Hospital medical record, a medical report by Sheldon Zigelbaum, M.D., as well as Dr. Zigelbaum's testimony at Talhouni's criminal trial,

a letter prepared by a medical expert retained by Hanover, Dr. Theoharides, and the office notes of a therapist who treated Talhouni, Dr. Kaplan. [Tr. 2-26].

An expert's exposure to hearsay does not imply reliance thereon in the formulation of opinions. **Commonwealth v. Harris**, 1 Mass. App. 265, **aff'd**, 364 Mass. 236 (1973); LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, 112 (5th ed. 1981). Dr. Mirin never testified, as Hanover asserts, that he relied upon all of these materials in reaching his opinions. [Appellant's Brief, p. 31]. Rather, Dr. Mirin testified that he used these materials, and "whatever weight ... [he] chose to give them." [Tr. 2-68]. Hanover's counsel never asked Dr. Mirin how much weight, if any, he gave to each document, or what information he relied upon.

On direct examination, Dr. Mirin identified the uncontroverted facts taken from these materials upon which he relied, all of which were offered into evidence:

- a) Glenn Scott's testimony concerning the bizarre attack by a stranger who burst into her room, urinated on her, grabbed and choked her, but made no attempt to sexually assault her. [Tr. 2-34-36; **See**, Scott Testimony, Tr. 2-4-6];
- b) Scott and Pillard's testimony concerning Talhouni's failure to notice the screams and threats of Pillard and a neighbor, Talhouni's animal-like noises and incoherent mumbling, Talhouni's sudden and inexplicable cessation of the attack and his crashing through the glass door to the house. [Tr. 2-34-36; **See**, Scott and Pillard Testimony, Tr. 1-11-13, 2-7-8, 10-11];
- c) Pillard's testimony that Talhouni appeared furious and wild and was thrashing about in broken glass apparently oblivious to his circumstances. [Tr. 2-25-36; **See**, Pillard Testimony, Tr. 1-13];
- d) Talhouni's testimony that he took LSD in the early afternoon, at approximately twelve o'clock to one o'clock, which would be consistent with the duration of action of LSD. [Tr. 2-37-38; **See**, Talhouni Testimony, 2-134, 136, 146-147];
- e) The Cambridge City Hospital's report that upon Talhouni's admission at 5:30 p.m. he was incoherent, unable to appreciate where he was or who the people around him were, that eventually

Talhouni informed staff that he had taken LSD, and that the Hospital's diagnosis was hallucinogen abuse. [Tr. 2-38, 48-59, 55-59; See, Cambridge City Hospital Medical Record, App. 75-81].

None of these facts were contested. The descriptions of Talhouni presented by Pillard, Scott, Officer Cromwell and Carol Gargiulo were not challenged. Nor did Hanover offer any explanation for Talhouni's conduct other than LSD ingestion. No evidence of any kind, factual or opinion, was offered to rebut Talhouni's assertion that he ingested LSD. Independent of any documents reviewed by Dr. Mirin which may have constituted hearsay, the facts identified by Dr. Mirin, all of which were admitted into evidence, amply supported his opinions.

Hanover's contention that Dr. Mirin's opinions were speculative is similarly baseless. Hanover argues that because Talhouni did not purchase the LSD himself, but relied upon a friend to do so, Talhouni's testimony that he took LSD should not have been considered by Dr. Mirin. [Appellant's Brief, pp. 37-38]. But such "reliance" is part of every drug transaction. If Talhouni had purchased the LSD himself he would have relied upon the seller's representation that the substance was LSD. Hanover's argument would disallow expert testimony concerning drug use in every case other than where the user personally manufactured the drug and all of its components.

Nor can it seriously be argued that the Cambridge City Hospital's failure to test for the presence of LSD renders Dr. Mirin's opinions speculative. Hanover's argument would exclude expert testimony whenever an expert fails to rely upon a determinative test.<sup>5</sup> Dr. Mirin's opinion would have been further supported by a toxic screen revealing LSD. The Hospital's failure to perform such a test goes to the weight of Dr. Mirin's

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<sup>5</sup> Hanover's assertion the Dr. Mirin "admitted" that the findings of Talhouni's physical examination were inconsistent with LSD intoxication is grossly disingenuous. Dr. Mirin was questioned concerning the medical record's failure to note the presence of dilated pupils, high blood pressure or high temperature. Dr. Mirin repeatedly pointed out that these findings normally would be present only in the "early stages of drug intoxication," "within one or two hours" of ingestion. [Tr. 2-85-87]. Talhouni was admitted to the Hospital at 5:20 p.m., approximately five hours after he took the LSD. [App. 76].

opinion, not to admissibility.

The evidence that Talhouni ingested LSD was substantial and uncontroverted. Talhouni had taken LSD before and experienced mild hallucinations; he recalled taking LSD on March 16, 1985 between noon and one o'clock; he knew what LSD looked like, and knew where to purchase it. [Tr. 2-134-138]. He testified to experiencing hallucinations at the time of the assault, when he visualized a threatening demon. [Tr. 2-125]. At the Hospital he admitted taking LSD prior to the assault. [App. 76]. The Hospital's medical record describes Talhouni as "incoherent," "sometimes quiet, sometimes aggressively wild," and notes a "resolving hallucinogen intoxication." [App. 76-78]. Talhouni's behavior was described by four witnesses who observed him during and after the assault, and who uniformly described him as not comprehending reality.

Dr. Mirin concluded that as a result of LSD-induced psychosis, "Talhouni didn't know what he was doing at the time he was doing it." [Tr. 2-43]. This opinion concerning whether Talhouni "knew what [he] was doing" was admissible on the issue of intent, and was supported fully by uncontroverted facts in evidence.

**See, Baker**, 382 Mass. at 349.

B. Hanover Failed to Establish That Dr. Mirin Relied Upon Facts not in Evidence Which Were not Independently Admissible and a Proper Basis for Expert Opinion.

Excluding the depositions of Scott, Pillard and Talhouni, Dr. Mirin identified three documents not in evidence which he relied upon: the medical report and criminal trial testimony of Dr. Zigelbaum, and the deposition of Talhouni's mother. [Tr. 2-67, 90].

Dr. Mirin's conclusion that LSD was the most likely drug ingested by Talhouni was based in part upon his reading of a medical report prepared by Dr. Zigelbaum as well as Dr. Zigelbaum's testimony at Talhouni's criminal trial. [Tr. 2-90]. Dr. Zigelbaum, a psychiatrist, provided treatment to Talhouni following the attack upon Scott. [Tr. 2-131-132].

Hanover relies upon **Grant v. Lewis/Boyle, Inc.**, 408 Mass. 269 (1990) and **Adoption of Seth**, 29 Mass. App. 343 (1990), in arguing that an expert medical opinion may not be based upon the records of another physician. The reliance is misplaced. These cases hold that an expert may not introduce the out-of-court diagnosis of other physicians in the absence of a specific exception to the hearsay rule. **Grant**, 408 Mass. at 274; **Adoption of Seth**, 29 Mass. App. at 351-

352.

Dr. Mirin did not introduce or even mention any opinion of Dr. Zigelbaum. Hanover's counsel never asked Dr. Mirin to identify the portions of Dr. Zigelbaum's records or testimony relied upon. Inquiry regarding the basis of expert testimony is left to cross-examination and the burden of establishing that Dr. Mirin's opinion was based upon inadmissible hearsay was Hanover's. **Department of Youth Services v. A Juvenile**, 398 Mass. at 516; LIACOS, **supra**, at 115-116 ("the effect of omission of relevant facts upon the expert's opinion may be tested on cross-examination").

Hanover did not attempt to meet this burden. There was no suggestion that Dr. Mirin relied upon facts contained in Dr. Zigelbaum's report or trial testimony which were not otherwise admitted into evidence through witness testimony or through the Hospital records.

Dr. Mirin's reliance upon Dr. Zigelbaum's report and testimony was appropriate. An expert may "base an opinion on facts not in evidence if the facts ... are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." **Department of Youth Services**, 398 Mass. at 531. It is "proper for ... [a physician] to testify that he relied on the reports of other physicians in reaching his opinion." **Grant**, 408 Mass. at 274. Indeed, expert opinion may be based "solely on a review of medical records" where so acknowledged. **McNamara v. Honeyman**, 406 Mass. 43, 55 (1989). Even when an "expert's opinion is based in part on inadmissible hearsay, that fact goes to the weight of his testimony, not to its admissibility." **General Electric v. Board of Assessors of Lynn**, 393 Mass. 591, 601 (1984).

Obviously, Dr. Zigelbaum could have appeared as a witness and testified to the substance of his medical report and criminal trial testimony. Even in the absence of his appearance, his medical report was admissible. Medical reports fall under a statutory exception to the hearsay rule, G.L. c. 233, §79G, which provides for their introduction, including opinions regarding causation. Excluding opinions contained therein, the report also constitutes a business record under G.L. c. 233, §78. **Brockton Hospital v. Cooper**, 345 Mass. 616, 617 (1963); LIACOS, **supra**, at 331-332.

Dr. Zigelbaum's trial testimony constituted a medical report given under oath and subject to cross-examination, and should be subject to the same hearsay exclusion as the written report. Dr. Zigelbaum's criminal trial testimony involved the same issue of concern in the declaratory judgment trial: Talhouni's

state of mind. The Commonwealth had a similar motive as Hanover in challenging Talhouni's claim of LSD intoxication and lack of intent. Accordingly, Dr. Zigelbaum's trial testimony also falls under the reported testimony exception. To the extent that Dr. Zigelbaum's testimony reported Talhouni's statements, such statements would be excluded from the hearsay rule as party admissions. See, Proposed Mass. R. Evid. 801(d)(2); LIACOS, supra, at 275-276.

Moreover, there is simply no evidence that Dr. Mirin relied upon any facts reported in Dr. Zigelbaum's criminal trial testimony or in his medical report which were not put into evidence through Talhouni's testimony, through the Cambridge City Hospital medical records or through other witnesses.

Dr. Mirin's reliance upon the deposition of Talhouni's mother, Barbara, was similarly undefined. Dr. Mirin stated that he relied upon information in her deposition. [Tr. 2-67]. Hanover's counsel never asked Dr. Mirin to identify this information. Nor did Hanover's counsel establish that any facts so relied upon were not otherwise admitted into evidence. To the extent that the significance of Barbara Talhouni's deposition to Dr. Mirin was based upon her observations of her son on the day of the incident, the substance of such testimony was put into evidence through other witnesses and through the Hospital record.

Barbara Talhouni was taken to the Hospital by her friend, Carol Gargiulo. [Tr. 2-113]. Ms. Gargiulo observed Ms. Talhouni attempt to speak with her son, who did not recognize her. [Tr. 2-113]. Both Ms. Gargiulo and the medical records described Talhouni as unresponsive while Ms. Talhouni was present. [Tr. 2-113-114; App. 75-80]. There is no evidence that Dr. Mirin relied upon any facts from Barbara Talhouni's deposition apart from these.

Nor is there any question that Dr. Mirin's reliance upon Ms. Talhouni's deposition was appropriate. Ms. Talhouni could have testified regarding her observations of her son in the Hospital, just as Ms. Gargiulo testified.

C. Any Reliance by Dr. Mirin Upon Inadmissible Hearsay was Inconsequential.

Even if Dr. Zigelbaum's report and criminal trial testimony and Barbara Talhouni's deposition constituted inadmissible hearsay, Dr. Mirin's reliance on these materials was inconsequential.

Dr. Mirin testified that he relied on Dr. Zigelbaum's statements only with respect to whether LSD was the most likely drug ingested by Talhouni. [Tr. 2-

90]. This opinion was tangential to Dr. Mirin's conclusion that Talhouni did not know what he was doing.

Dr. Mirin testified that a number of drugs are capable of inducing psychosis. [Tr. 2-37-41]. Dr. Mirin described the differences between these drugs with respect to potency and duration of action, and concluded that LSD was the most likely drug ingested by Talhouni. [Tr. 2-41]. When asked to further detail the basis for his opinion, Dr. Mirin noted Talhouni's bizarre behavior, the duration of the behavior and Talhouni's description of the effects of the drug. [Tr. 2-41]. Subsequently, Dr. Mirin added that Dr. Zigelbaum's report and testimony were also considered in reaching this opinion. [Tr. 2-90].

Dr. Zigelbaum's report and testimony were not essential to Dr. Mirin's opinion. Rather, Dr. Mirin's opinion that Talhouni ingested LSD rested upon ample evidence wholly aside from Dr. Zigelbaum's statements. [Tr. 2-41]. Moreover, the critical issue at trial was whether Talhouni knew what he was doing, and not which particular drug prompted his psychosis. There is no evidence that Dr. Mirin relied upon Dr. Zigelbaum's report or testimony concerning anything other than his conclusion that LSD was the most likely drug involved.

Nor is there any evidence that information from Barbara Talhouni's deposition, not admitted into evidence through other witnesses or through the Hospital record, was essential to Dr. Mirin's opinions.

The only reference to Barbara Talhouni throughout the trial concerned her presence at the Hospital, [Tr. 2-113-114], and it can be inferred that the testimony of Carol Gargiulo on this subject, and the Hospital record itself, replicated the deposition testimony of Ms. Talhouni which was of interest to Dr. Mirin.

The Trial Court's decision states that Dr. Mirin's testimony was "of considerable assistance to the court in understanding the effects of LSD." [App. 94]. However, even if Dr. Mirin's testimony concerning why Talhouni was psychotic was excluded altogether, the evidence at trial on the issue of whether Talhouni intended to cause injury was overwhelming and uncontroverted. The factual findings of the Trial Court made in paragraphs 2-6 of its Memorandum of Decision are based solely upon the testimony of Scott, Pillard, Talhouni and Officer Cromwell. [App. 91-93]. These findings alone fully support the Court's conclusion that Talhouni "was unaware of what he was doing," "completely out of touch with reality," and did not intend or expect to cause injury. [App. 2-94]. Not

a single fact or opinion was offered into evidence by Hanover suggesting otherwise.

**CONCLUSION**

For all of the foregoing reasons, the Judgment of the Superior Court that Hanover is obligated to indemnify Talhouni for his conduct on March 16, 1985 should be affirmed.

Dated: June 17, 1992

Appellees Scott and Pillard  
By their Attorneys,

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