defendants' objection and agree to correct by filing an amended complaint. We have discussed before what allegations are necessary to state a cause of action for the breach of an implied warranty of habitability. On these two points, therefore, the defendants' motion for more specific pleading will be granted. We do not think, however, that the Kings must plead the source of the water and the specific defects in workmanship or the acts of negligence.

ORDER OF COURT

NOW, June 28, 1977, the preliminary objections are granted and denied in accordance with the foregoing opinion and the plaintiffs are given twenty (20) days from this date in which to file an amended complaint.

The case is transferred to the law side of the Court for further proceedings.

AMERICAN STATES INSURANCE COMPANY v. BOROUGH OF GREENCASTLE, et al., C. P. Franklin County Branch, Civil Action - Law, No. 125 November Term, 1976

Insurance Policy - Ambiguity - "Occurrence"

1. An insurance policy which defines an occurrence as an accident is ambiguous insofar as the term "occurrence" in its usual and ordinary sense is broader than the term "accident".

2. If an insurance policy is reasonably susceptible to two interpretations, it is to be considered in favor of the insured in order not to defeat, without plain necessity, the claim of indemnity which it was the insured's object to obtain.

3. The term "accident" in a policy of insurance includes negligent acts, unless the actor had knowledge that damage was likely to occur or intended that it should.

Denis M. DiLoreto, Esq. and
Edward I. Steckel, Esq., Attorneys for Respondent,
Donald E. Barnhart, Jr.

James W. Evans, Esq., Attorney for Petitioner

Rudolf M. Wertime, Esq. and
George F. Douglas, Esq., Attorneys for Respondent,
Borough of Greencastle

OPINION AND ORDER

EPPINGER, P.J., June 29, 1977:

American States Insurance Company (Insurance Company), in this declaratory judgment proceeding, asked that it be exonerated from possible liability in an action in which Donald E. Barnhart, Jr. (Barnhart), has sued the Borough of Greencastle (Borough) and three of its police officers. Barnhart was involved in an episode in a hotel, the police were called, they declined to enter the hotel and stop it, and ultimately Barnhart was shot and seriously injured.

The Insurance Company insures the Borough and under the terms of the policy, it is obligated ". . . to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damages to which this insurance applied, caused by an occurrence . . . " The company has the right and duty to defend any suit against the Borough seeking damages which are covered by the policy. This action was brought preliminarily to the trial of the action brought by Barnhart against the Borough to determine the Insurance Company's obligation to defend the policy. The policy itself defines occurrence as an *accident*, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (Emphasis ours.)

The Insurance Company's position is that this was not an occurrence because it was not an accident, apparently arguing that accident has a limited meaning which includes only those events which occur and could not be reasonably expected, so that where the police were notified that there was a gun in play, it could reasonably be expected that someone would be shot.

DEFINITION OF ACCIDENT

While occurrence is defined in the policy, accident is not. In *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 192 A.2d 682

(1963), the lower court's conclusion that an accidental fire included fires of both negligent and non-negligent origin were upheld. In that case the court cited *North American Life and Accident Insurance Co. v. Burroughs*, 69 Pa. 43, (1871), which held that an accident was "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency."

In *Brenneman v. St. Paul Fire and Marine Insurance Co.*, 411 Pa. 409, 192 A.2d 745 (1963), an accident was defined as merely an unanticipated event; something which occurs not as the result of natural routine but as the culmination of forces working without design, coordination, or plan. And, in *Western Commercial Travelers' Association v. Smith*, 85 F. 401 (8th Cir., 1898), the Court concluded that accidental means not the natural or probable consequences of the means which produced it.

In *Lancaster Area Refuse Authority v. Transamerica Insurance Co.*, 437 Pa. 492, 263 A.2d 368 (1970), our Supreme Court, in reversing the Superior Court, held that negligently inflicted harm might be caused by an accident. In the dissenting opinion in the Superior Court in *Lancaster Area*, 214 Pa. Super. 60, 251 A.2d 739 (1960), Judge Hoffman said:

> "Accident" is a word of broad scope and includes many unfortunate occurrences not anticipated in the ordinary course of affairs. The willful act is not embraced by the work, but the negligently caused happening is understood to be an "accident".

However, in *M. Schnoll & Son, Inc. v. Standard Accident Insurance Co.*, 190 Pa. Super. 360, 154 A.2d 341 (1959), the insurance company was found not to be liable under a comprehensive liability policy for damages resulting from the insured's negligent painting because the negligence did not constitute an accident. The Court said:

> "If an occurrence is the ordinary and expected result of the performance of an operation, then it cannot be an accident. To constitute an accident, the occurrence must be "an unusual or unexpected result attending the operation or performance of a usual or necessary act or event": *Hey v. Guarantors' Liability Indemnity Co.*, 191 Pa. 220, 37 A. 402."

"The end of law is not to abolish or to restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of law, where there is no law, there is no freedom." — John Locke, Second Treatise of Government, sec. 57

In that case the dripping paint which caused the damage was considered an unexpected occurrence. See also *Casper v. American Guarantee and Liability Insurance Co.*, 408 Pa. 426, 184 A.2d 247 (1962).

On the basis of these authorities, we conclude that negligent acts are accidents, unless the actor had knowledge that damage was likely to occur or intended that it should. In *Schnoll* and *Casper*, where the insured *knew* some damage was likely, and that it was likely to occur in a particular fashion, then the negligence was not an accident. However, mere knowledge that some injury might be likely, as in the case of *Moffat v. Metropolitan Casualty Insurance Co. of New York*, 238 F. Supp. 165 (M.D. Pa. 1964), is not sufficient to bring the case within this exception. It follows that even if the Court adopted the narrow definition of occurrence which we understand to be urged by the insurance company, it could be found that by the refusal of the police officers to act in not going into the hotel, constituted an accident. The question becomes whether the officers knew or should have known or intended that Barnhart would be shot by their failure to quell the fight in which a gun might be involved. Here the officers are alleged to be negligent by not acting in something other than a routine situation. Inferring the requisite knowledge that an injury was likely to occur is uncertain because predicting the results of a fight in which one of the participants is possibly wielding a gun is more difficult, for instance, than predicting that paint which the painter knew would be dripping could cause damage. Under the facts as alleged, we hold that the shooting could be an accident.

WHAT IS AN OCCURRENCE

In *Freedman v. The Ohio Casualty Co.*, York Leg. Rec. , case number 76-82050, decided November 29, 1976, a policy of insurance defined occurrence as in the policy in the present case. There the Court recognized that there might be an occurrence even when there is reckless conduct and referred to the case of *Grand River Lime Co. v. The Ohio Casualty Insurance Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (C.A. 3rd District 1972).

The Grand River Lime Co. case was a declaratory judgment proceeding and the Court rejected the insurance company's argument that the term occurrence must be read in

conjunction with the term accident by finding that ". . . occurrence is much broader than the term accident." The court added that while the activity which produced the alleged damage may be fully intended, and the residual effects fully known, the damage itself may be completely unexpected and unintended. In that case the activity was the allegedly negligent emission of pollutants that might have caused damage to the citizens in the nearby community.

In reaching its conclusion, the Ohio Court cited *Aerial Agricultural Service v. Till*, 207 F. Supp. 50 (N.D. Miss. 1962), in which the insurance company claimed it was not required to pay damages where the plaintiff unevenly distributed rice seed in the course of an aerial seeding. The court rejected the insurance company's argument that the plaintiffs' negligence precluded recovery under the policy which required damage to be caused by an occurrence.

Occurrence in that policy was defined as an accident, including a series of related occurrences, or a condition created by the insured which accidentally causes injury or destruction provided that such condition, injury or destruction is not caused by accident.[1]

In *Aerial* the court, saying that "occurrence" in its usual and ordinary sense was a broader term than accident, concluded that the definition of occurrence was ambiguous and that the contract had to be construed against the insurer and in favor of the insured. Pennsylvania follows this rule of construction. *Papadell v. Harleysville Mutual Casualty Co.*, 411 Pa. 214, 191 A.2d 274 (1963); *Sykes v. Nationwide Mutual Insurance Co.*, 413 Pa. 640, 198 A.2d 844 (1964). There is also a well-established rule that if an insurance policy is reasonably susceptible of two interpretations, it is to be construed in favor of the insured in order not to defeat, without plain necessity, the claim of indemnity which it was the insured's object to obtain: *Frick v. United Firemen's Insurance Co.*, 218 Pa. 407, 67 A. 743 (1907).

In *Lombard v. Sewerage & Water Board of New Orleans*, 284 So.2d 905 (1973), the court said that an occurrence meant either an accident or a continuous or repeated exposure to conditions which results during the policy period in injury which is accidentally caused. In *Otterman v. Union Mutual*

1. An example of insurance policy circumlocution, if there was one.

Fire Insurance Co., 130 Vt. 636, 298 A.2d (1972), where the policy defined occurrence as in this policy, a man fired a gun into a darkened building and a policeman was shot. The court found that the man did not intend to shoot the policeman and did not know that the policeman would be struck by the bullet and concluded that this was an "occurrence" because the injury was neither expected nor intended.

Believing that the policy does not present a clear and unambiguous statement that the episode here is not covered, we hold that the insurance company may be liable in this policy because the complaint alleges what could be found to be an occurrence. At this stage, it is impossible for the Court to conclude that the insurance company is exonerated from such liability.

ORDER OF COURT

NOW, June 29, 1977, the Petition for Declaratory Judgment is denied. Costs to be paid by American States Insurance Company.

Editor's Note—
This case has been appealed to the Pennsylvania Superior Court, having been docketed in the Harrisburg District of said Court on July 22, 1977, to No. 418, March Term, 1977.

HOOVER v. HOOVER, C. P. Franklin County Branch, No. 147 November Term, 1975

Divorce - Indignities - Sexual Relations - Post Separation Evidence

1. In Pennsylvania, refusal to have sexual intercourse is not sufficient grounds for divorce and does not constitute indignities.

2. Post Separation Evidence of the conduct of the parties is relevant for the purpose of shedding light upon their behavior prior to the separation.

Kenneth E. Hankins, Jr., Esq., Counsel for the Plaintiff

Stephen E. Patterson, Esq., Counsel for the Defendant

OPINION AND ORDER

KELLER, J., April 26, 1977:

This action in divorce was commenced by the filing of a complaint on November 12, 1975, and the same was served personally on the defendant on the same date by Deputy Sheriff Hawthorne. On November 19, 1975, the defendant executed a power of attorney appointing Stephen E. Patterson, Esq. to represent her and the same was filed on the same date. Counsel for the defendant on November 19, 1975, filed a praecipe for a rule on the plaintiff to file a Bill of Particulars, and the said rule was issued and served upon counsel for the plaintiff by counsel for the defendant. On November 21, 1975, defendant's petition for counsel fees and expenses was presented and an order entered on the same date directing that a rule issue upon the respondent to show cause why he should not be required to pay counsel fees and expenses, and staying the proceedings. The rule was issued by the Prothonotary and served by counsel for the defendant upon counsel for the plaintiff. The plaintiff's Bill of Particulars was filed on December 16, 1975. The plaintiff also filed an answer to the petition for counsel fees and expenses on the same date. On January 23, 1976, an order was entered on stipulation of counsel lifting the stay of proceedings.

On January 23, 1976, the plaintiff's counsel moved for the appointment of a Master and Thomas B. Steiger, Esq., was appointed Master by order of court dated January 29, 1976. The Master gave notice to counsel for the plaintiff and counsel for the defendant that a hearing on the matter would be held on March 12, 1976, at 1:00 o'clock P.M. in the hearing room of the Franklin County Court House. Counsel for the plaintiff accepted service of the Master's notice on February 12, 1976, and counsel for the defendant accepted service of the notice on February 16, 1976. The hearing of March 12, 1976, was continued by the Master until March 26, 1976, at 1:30 o'clock p.m. Testimony was taken in the contested divorce action on March 26, 1976 and April 9, 1976. Counsel for the parties submitted briefs on behalf of their respective clients. The testimony taken at the two hearings by an official court reporter was transcribed and filed on June 18, 1976. The Master gave notice to counsel for the parties that he would file his Master's Report on February 8, 1977, and receipt of the notice was acknowledged by each counsel on January 27,