

***Recent Developments Affecting Automobile  
Liability Insurance Coverage - 2007***

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**I. CASES AFFECTING DEFINITION OF ACCIDENT –  
ARISING FROM OWNERSHIP OPERATION  
MAINTENANCE OR USE**

**Background**

The availability of automobile insurance to compensate for an injury - - whether for a first party claim for uninsured/underinsured coverage or for a third party claim to a tortfeasor's bodily injury coverage - - depends in the first instance upon establishment of a nexus between the insured vehicle and the accident in question. The Massachusetts (Personal) Automobile Insurance Policy only covers "accidents and losses which result from the ownership, maintenance or use of autos." An accident is defined as "an unexpected, unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an auto." Therefore, there must be a sufficient relationship between the use of a motor vehicle and the injuries claimed in order for coverage to apply. Recent cases concerning the parameters of automobile coverage make clear that the insurer's obligations depend not only on the nature of the

injury-producing event but also upon the relationship between the insured and the event.

The Supreme Judicial Court observed in *Rischitelli v.*

*Safety Insurance Company*, 423 Mass. 703 (1996):

“Our cases have not defined circumstances in which an injury is one arising out of the use of an automobile. The expression ‘arising out of’ indicates a wider range of causation than the concept of proximate causation in tort law . . . However, the expression does not refer to all circumstances in which the injury would not have occurred ‘but for the involvement of a motor vehicle.’”

*Id.* at 704. Questions whether injuries or claims arise out of the operation, maintenance or use of an automobile necessarily involve an exercise in comparative line drawing, which requires some understanding of prior cases. Even with such an understanding, “The distinctions drawn in this area are not always obvious.” Justice Kass has noted that facts more than black letter law dominate “arising out of” analysis; “efforts to describe the reach of ‘arising out of’ are only marginally helpful in deciphering the problem at hand. The question is less one of reach than it is of fit.”

*Id.*

In *Ruggerio Ambulance Service, Inc., v. National Grange Insurance Company*, 430 Mass. 794 (2000), the Administrator of the Estate of a decedent brought a wrongful death action against Ruggerio Ambulance Service Inc. The decedent called for emergency services from his home complaining of chest pains. En

route to the decedent's home, the ambulance was involved in an auto accident. A second ambulance was then dispatched. By the time the second ambulance arrived, the decedent had stopped breathing and died on his way to the hospital. The Supreme Judicial Court, citing *Rischitelli v. Safety Insurance Co.*, 423 Mass. 703, 704 (1996), reiterated that "the expression 'arising out of' indicates a wider range of causation than the concept of proximate causation in tort law . . . . However, the expression does not refer to all circumstances in which the injury would not have occurred 'but for' the involvement of a motor vehicle." The court went on to state, "For an injury to 'arise out of' an accident, there must be a sufficiently close relationship between the injury and the accident." *Id.* at 798. The Court therefore held that because the decedent was neither involved in nor present for the ambulance accident the operation of the ambulance cannot have been the cause of the decedent's death. *Id.* at 798.

In *White v. American Casualty Co.*, 53 Mass. App. Ct. 66 (2001), the definition of accident was considered in the context of a PIP dispute. The plaintiff, planning to pick up an acquaintance for a ride, stopped in front of the acquaintance's house and sounded the horn. Immediately thereafter, a rottweiler jumped through an open window into the stationary vehicle and bit the plaintiff on the hand. The Superior Court entered summary

judgment in favor of the insurer, denying PIP coverage. The Appeals Court reversed.

Reiterating, that there is no bright line test indicating when an injury may be said to arise out of the use of an automobile, the Court observed that the insured was clearly using the auto just before the occurrence.

In this case, the plaintiff was engaged in picking up a passenger when the accident occurred. When he stopped in the driveway, remained in the driver's seat with the engine running, and sounded his horn, he was using a common method of signaling the arrival of a vehicle to passengers. Indeed, a horn is installed in an automobile both to alert other drivers to potential hazards and to signal the presence of the vehicle to others, be they operators, passengers or pedestrians. Like stopping the bus to pick up and discharge passengers ... , and like loading and unloading delivery trucks ... , discussed above, the plaintiff's act of pulling his vehicle into the driveway and sounding his horn to alert his intended passenger constituted a use of the automobile within the meaning of the policy.

*White v. American Casualty Co.*, 53 Mass. App. Ct. at 69.

Finally, the *White* Court concluded that the evidence permitted an inference of a causal relationship between the sounding of the horn and the dog's attack.

In this case, the rottweiler's attack on the plaintiff does not implicate the issues raised in *Rischitelli* relating to intentional criminal conduct by a human actor. Here, the issue raised is whether the attack by the rottweiler, coming as it did within seconds of a horn blast from a car that had just pulled into the driveway, was incited by the arrival of the automobile and the sounding of its horn. If so, the attack and resulting injuries can be said to have arisen out of the "use" of the automobile which set the dog in motion.

*White v. American Casualty Co.*, 53 Mass. App. Ct. at 72.

### **Road Rage and Other Batteries**

In *Rischitelli v. Safety Insurance Co.*, 423 Mass. 703 (1996), the Supreme Judicial Court addressed whether or not there was uninsured motorist coverage for injuries sustained as a result of an attack by an unidentified driver following a two car accident. The plaintiff sustained injuries when, following an accident between the vehicle he was driving and another vehicle, the operator of the other vehicle physically attacked and battered the plaintiff. Following the attack, the other driver left the scene without identifying himself. Safety denied an uninsured motorist claim, contending that the plaintiff's injuries did not arise out of the use of an automobile since they were not as a result of conduct that was either necessary or integral to the use of an automobile or in any associated with or peculiar to the automobile. The Court, after reciting the policy language and the language of Chapter 175, Section 113L, concluded that the "focus is on the vehicle and not on the operator-insured". . . and that "[t]he battery on the plaintiff was sufficiently independent of the motor vehicle accident that the losses that the plaintiff sustained arose from the intentional wrongdoing of the other driver and not from the use of an automobile." *Id.* at 707.

In *Sabatinelli v. Travelers Insurance Company*, 369 Mass. 674 (1976), the Supreme Judicial Court ruled that the definition of

accident did not include coverage for injuries sustained when the insured, who was seated in his automobile with the motor running, intentionally shot a pedestrian.

A counterpoint exists in *Assetta v. Safety Insurance Company*, 43 Mass. App. Ct. 317 (1997), in which the issue before the Appeals Court was whether an injury sustained as a result of an object being thrown from an auto arose from the use of the vehicle. More specifically, the plaintiff pedestrian was injured when she was struck in the face by a beer bottle that was tossed out a moving vehicle's window. The pedestrian brought an uninsured motorist claim (based on a hit and run accident). Safety, relying on the same argument that was successful in *Rischitelli*, supra, contended that there was no coverage because plaintiff's injury did not result from conduct necessary or integral to the use of the auto nor was the bottle associated with or peculiar to the motor vehicle. The Court reiterated the need for a casual connection between the injury and the use of the vehicle for coverage to apply, but in this instance, the court found such a connection. The Court concluded that since the bottle was thrown out the window while the car was accelerating it is "reasonable to assume that [the motor vehicle's] movement affected both the trajectory of the bottle and the force with which it struck [the plaintiff's] face. In these circumstances,

the judge was warranted in concluding that the plaintiffs' injuries arose from the use of the underinsured vehicle."

In *Roe v. Lawn*, 418 Mass. 66 (1994), the Supreme Judicial Court dealt with the issue of whether or not a sexual assault by a driver upon a passenger occurring within a livery vehicle owned and operated by a taxi company and used for school transport should be deemed to have arisen out of the "ownership, maintenance or use" of the automobile. The plaintiff brought an action against Braintree Town Taxi on a number of theories - - vicarious liability a theory of negligent hiring/entrustment, and most importantly, for the purposes of insurance coverage, for Braintree Town Taxi's breach of its non-delegable duty as a carrier to provide for the safety of its passengers. Braintree Town Taxi brought a third party action against Aetna Casualty and Surety Co. contesting Aetna's refusal to defend and indemnify against Mary Roe's claims. The Supreme Judicial Court concluded that "the school bus was used in the service of a common carrier of passengers and, therefore, carried an implied promise of safe passage. . . It was this promise of safe passage which led to the plaintiff's becoming a regular passenger on the bus." On the basis of this duty the Court concluded that the assault arose out of the use of the school bus.

### **Loading and Unloading as Use of a Vehicle**

Another issue coming up in the “arising out of” involves the loading and unloading of vehicles. In *Travelers Insurance Company v. Aetna Life and Casualty Company*, 410 Mass. 1002 (1991), the Supreme Judicial Court interpreted the “loading or unloading” clause of the combination policy. This case arose when the employees of a transportation company were carrying a wheelchair bound passenger downstairs to a “chair van.” Before reaching the van, one of the employees lost his footing, causing the wheelchair and its occupant to tumble down the porch stairs. A dispute arose between Travelers, which issued the pertinent auto insurance policy, and Aetna, which had provided a general business liability policy, as to which company was liable for the resulting damage. The Supreme Judicial Court affirmed a Superior Court ruling that the accident and injuries arose out of the “loading” of the van. The court noted that it had adopted the “complete operation” approach to interpreting loading and unloading cases. Under this approach, the motor vehicle insurance will cover acts or omissions of insureds while engaged directly in the loading or unloading process, or when they should be thus engaged, or while they are doing something reasonably connected with the process. The loading operation is complete when the insured has finished all work in which he was participating or was

expected to participate. See *Id.*, at 3004, *F.W. Woolworth Company v. Lumberman's Mutual Casualty Company*, 355 Mass. 211 (1969).

The most difficult cases in the context of loading and unloading are those distinguishing preparatory acts from the commencement of loading, compare *Travelers Insurance Company v. American Hardware Mutual Insurance Company*, 349 Mass. 768, (forklift accident during preparation) with *Improved Machinery, Inc. v. Merchants Mutual Insurance Company*, 349 Mass. 461 (forklift accident during loading process), and in determining at what point the loading or unloading process has concluded. See *F. W. Woolworth Company, v. Lumberman's Mutual Casualty Company*, 355 Mass. 211, (1969).

It is important to keep in mind, moreover, that automobile insurance coverage may extend to accidents remote in time to the loading or unloading process so long as acts or omissions during the loading or unloading process caused the injury-producing event. See e.g., *Lapointe v. Shelby Mutual Insurance Co.*, 361 Mass. 558, 281 N.E.2d 253 (1972) (propane gas explosion four hours after delivery within loading / unloading clause where improperly installed propane tank was delivered to wrong location).

In *Metropolitan Property and Casualty Ins. Co. v. Santos*, 55 Mass. App. Ct. 789 (2002), the Appeals Court applied traditional loading and unloading analysis in determining that an injury arose from the use of a motor vehicle within the terms of the Massachusetts personal auto policy. In *Santos*, the plaintiff was standing next to a pickup truck while the vehicle owner was loading a catch of fish onto the truck with a hydraulic lift. The plaintiff was accidentally struck in the mouth by a pile of three 100 lb. fish totes carried by the lift. Metropolitan denied coverage, contending that the injury did not arise from the use of a vehicle and therefore was not caused by an accident within the definitions of the policy.

The Court rejected the argument that use included loading and unloading only in the presence of specific loading-unloading policy language and affirmed a trial court decision in favor of coverage.

"The expression 'arising out of' indicates a wider range of causation than the concept of proximate causation in tort law.... However, the expression does not refer to all circumstances in which the injury would not have occurred 'but for' the involvement of a motor vehicle." We require a "reasonably apparent" causal connection between a vehicle's use and the injury for an accident to have occurred under the policy.

\* \* \*

Given the wide range of causation encompassed by the concept of an "arising- out-of" injury, we conclude that the causal connection between the injury and the use of the

automobile, being "reasonably apparent," is sufficient, and that Slavin is covered by the compulsory bodily injury to others section of the insurance policy. We also do not consider the use of the pick-up, as described above, to be "too casual" or "too remote."

*Metropolitan Property and Casualty Ins. Co. v. Santos*, 55 Mass. App. Ct. 789, 796-798.

*Tae v. Tae*

Illustrative of the reality that the determination of "arising out of" questions is a process more visceral than analytical is the Appeals Court's recent decision in *Tae v. Tae*, 57 Mass. App. Ct. 297 (2003).

The two plaintiffs were the minor children of the deceased defendant. The plaintiffs' mother took them to their grandmother's home, following an argument between the plaintiffs' mother and the defendant. At 3:00 A.M., the defendant drove an automobile borrowed from a friend to the grandmother's home. The defendant removed the plug on the automobile's gas tank and drained the gasoline from the tank into a bucket. He carried the gasoline into the dwelling, poured it over his body and set himself on fire. The resulting fire ignited a gas stove causing an explosion and massive fire. The defendant died and the plaintiff children were severely burned. At issue was the availability of bodily injury coverage of the defendant's own vehicle and that of the vehicle he had borrowed. The plaintiffs argued that the defendant's use of the

vehicle's fuel tank to transport the gasoline to the scene of the fire and the use of the fuel to start the fire constituted sufficient relationship with the vehicle to trigger coverage.

The Appeals Court, however, disagreed, reasoning that these circumstances were not sufficiently related to the operation of a vehicle to constitute "use" for purposes of coverage. 57 Mass. App. Ct. at 299-300. Moreover, the Court ruled, that even if vehicle were deemed to be in use, the defendants act of self-immolation was independent of such use rendering the circumstances analogous to the shooting from a stationary vehicle in the *Sabitinelli* case discussed above.

In this case, the defendant left the vehicle, went upstairs, and there immolated himself. Although the "expression 'arising out of' indicates a wider range of causation than the concept of proximate causation in tort law ... [i]n the last analysis, the court must make a judgment call." *Rischitelli v. Safety Ins. Co.*, 423 Mass. at 704, 706, 671 N.E.2d 1243. We deem the plaintiffs' injuries as insufficiently dependent on the defendant's use of the automobile to be covered by the automobile insurance policy.

57 Mass. App. Ct. at 300-01.

**Phoenix Ins. Co. v. Churchwell**

In *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612 (2003) the Appeals Court focused on the motor vehicle exclusion in a homeowners' policy, and ruled that an allegation of

a parent's negligent supervision of child -- by failing to put child passenger in safety seat -- arose from use of the vehicle.

## **II. RECENT DEVELOPMENTS AFFECTING LITIGATION OF INSURANCE COVERAGE**

The Supreme Judicial Court has established in *Preferred Mutual Insurance Company v. Gamache*, 426 Mass. 93 (1997), *Rubenstein v. Royal Insurance Company*, 429 Mass. 355 (1999), and *Hanover Insurance Company v. Golden*, 436 Mass. 584 (2002), a rule allowing policyholders to recover their attorneys fees for successfully litigating an insurer's duty to provide a defense under an insurance policy.

In *Rubenstein* 429 Mass. 355 (1999) the Court had resolved a controversy concerning an insurer's duty to defend in the context of environmental coverage dispute. The Supreme Judicial Court held that the insured was entitled to an award of reasonable attorney fees and expenses incurred in successfully establishing the insurer's duty to defend under a comprehensive general liability policy. This case applied the rule first established in *Preferred Mutual Insurance Company v. Gamache*, 426 Mass. 93 (1997), which held that an insured under a homeowner's policy was entitled to receive its attorneys fees and expenses incurred in successfully defending a declaratory judgment action initiated by the insurer. Under *Rubenstein*, an insured who establishes that the

insured violated its duty to defend may recover attorney fees and costs regardless of who instituted the coverage litigation, regardless of whether the policy in question is a homeowner's policy or commercial liability policy, and whether or not the insurer's refusal is deemed unfair or unreasonable.

In *Hanover Insurance Company v. Golden*, 436 Mass. 584 (2002), applied the rule to an auto insurer that had defended the underlying case under reservation of rights, and thus had not defaulted on defense or otherwise breached the insurance contract. Upholding a decision of the Appeals Court, (51 Mass. App. Ct. 465), the SJC held “that, if an action for declaratory relief concerning an insurer's duty to defend under a liability insurance policy is resolved in favor of the insured, then the insured is entitled to recover attorney's fees without regard to whether the insurer committed a breach of the terms of the policy.”

In *Safety Insurance Company v. Day*, 65 Mass. App. Ct. 15 (2005), the Appeals Court applied the rule of *Gamache* and *Rubenstein* beyond the insurer's obligation to defend and held that an insured who prevailed in a declaratory judgment action seeking indemnity coverage is entitled to attorneys fees from the unsuccessful insurer. The *Day* precedent was short lived.

In *Wilkinson v. Citation Insurance Company*, 447 Mass. 663 (2006) the Supreme Judicial Court rejected the *Day* court's

analysis and ruled that the *Gamache* exception to the American rule concerning payment of attorneys fees is limited to cases focusing on the duty to defend and will not apply to cases focusing solely on insurer duty to indemnify.

The *Wilkinson* case arose out of dispute whether a “business purpose” limitation in homeowner’s policy applied to limit coverage for certain personal property destroyed by a fire. The insurer refused to provide coverage in excess of the business property limit. First the Superior Court and ultimately the Supreme Judicial Court ruled in favor of the policyholder. The Superior Court awarded attorney fees. On appeal, the Supreme Judicial Court decided that the *Gamache* rule applies only to litigation of the duty to defend, and will not be extended to cases concerning indemnity coverage. The Court posited that requiring the prevailing policyholder to bear his own attorney fees represented the normal consequence of the American rule. In this regard, the Court observed that insurance policies are not materially from other contracts to which the same rule applies and that expansion of the *Gamache* exception beyond the duty to defend would require a reexamination of the American Rule which the Court was unwilling to undertake.

### III. CASES AFFECTING HOMEOWNERS OR GENERAL LIABILITY COVERAGE FOR AUTO ACCIDENTS

Homeowners' coverage and general liability coverage are subject to certain exclusions (intentional acts, etc.), including the so-called motor vehicle exclusion. In its most common form, the exclusion states that personal liability coverage does not apply to bodily injury:

arising out of: (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; (2) the entrustment by an insured of a motor vehicle .. to any person; ...

Part (1) of the above-quoted motor vehicle/conveyance exclusion has two parts, both of which the insurer must prove in order for the exclusion to apply. First, the injury or damage must have arisen out of the ownership, maintenance, use or loading or unloading of a motor vehicle or motorized land conveyance. Second, the motor vehicle in question must have been "owned, operated by or rented or loaned to" an insured. See *American National Property and Casualty Co., v. Gray*, 803 S.W.2d 693 (1990); *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (interpreting the application of an identical exclusion in another context; the clause "owned or operated" modifies "motor vehicle," thus confirming that the

exclusion consists of two parts which must be established in order to deny coverage).

"The word 'use' is clearly broader than the word 'occupy.' The ordinary meaning of 'use' includes the 'legal enjoyment of property that consists of its employment, occupation, exercise or practice.'" *Gordon v. Safety Ins. Co.*, 417 Mass. 687, 690, 632 N.E.2d 1187 (1994) quoting, Webster's New Third Int'l Dictionary 2523 (1961). In the *Gordon* case, the Court ruled that a person who had requested and was receiving a ride to a friend's home in a stolen vehicle, was more than just occupying the vehicle in question; he was also "using" it for his own purposes in the sense of the definitions of the auto policy.

Accordingly, there clearly exists the potential for liability to arise from "use" of a vehicle without the vehicle being "owned, operated by or rented or loaned to" the insured. The exclusionary clause should be inapplicable in such cases where the negligent user is not the owner or the operator of the vehicle and the vehicle was not rented or loaned to him. For example, the language of the exclusion does not encompass a passenger in a motor vehicle unless the passenger is also the owner, lessee, or bailee of the vehicle. See *American Nat'l Property and Cas.Co., v. Gray*, 803 S.W.2d 693 (Tenn. App. 1990) (a passenger's homeowners' insurer was required to provide coverage because the exclusionary clause

did not apply where the vehicle involved was not owned, operated, rented, or loaned to the insured passenger). Even if an insurer were to argue some other meaning, such an interpretation could not be considered clear and unambiguous as required for such an exclusion. See *Royal Globe Ins. Co. v. Schultz*, 385 Mass. 1013, 434 N.E.2d 213, (1982); *Hakim v. Massachusetts Insurer's Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161 (1997).

In *Hingham Mut. Fire Ins. Co. v. Niagara Fire Ins. Co.*, 46 Mass. App. Ct. 500 (1999), the Appeals Court considered a dispute between an auto insurer and a homeowners' insurer as to defense obligations in a case in which a passenger caused or contributed to an accident by grabbing the steering wheel. The Court ruled that the auto insurer had a duty to defend the passenger in its insured's vehicle where the underlying complaint alleged that the passenger had grabbed the steering wheel of the car in response to a perceived emergency. Such allegations were sufficient to support the conclusion the driver impliedly consented to the passenger's use of the vehicle as required for auto coverage to apply. The Court ruled that the passenger's homeowners' insurer shared the duty to defend because an exclusion for accidents arising out of the "operation" of a motor vehicle is ambiguous. "Operation" could be construed narrowly to include exercise of control over all the parts of the car that allow it to move, or it could be interpreted broadly

to include any voluntary act that affects the movement of the vehicle. Resolving this ambiguity against the insurer, the Appeals Court construed the policy in favor of providing coverage and ordered the homeowners' insurer to contribute to the defense of the case. Thus it appears that when a tortfeasor contributes to an accident while using but not operating (or owning) a vehicle, he or she may have coverage available from *both* an auto insurance policy *and* a homeowners' or general liability policy.

In a case of passenger interference, like *Hingham Mutual*, or other circumstances in which an alleged tortfeasor is a user but not an owner or operator of the vehicle, there may be coverage from the occupied vehicle, from the optional bodily injury coverage of the passenger's household vehicles (assuming the passenger is neither from the same household nor a regular user of the accident vehicle), and from the passenger's homeowners' policy.

When evaluating the applicability of the motor vehicle exclusion, it is extremely important to determine whether the homeowners' policy or general liability policy contains standard severability of interests language -- providing that the insurance applies separately to each insured as if he/she had a separate policy. If there is such a severability clause, the motor vehicle exclusion will not exclude coverage for an insured who is neither

owner nor operator of the accident vehicle, even where the injury is produced by motor-vehicle-related negligence on the part of another insured to whom the exclusion would apply. *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986) (in presence of severability clause, parent's coverage for alleged negligent supervision not excluded even though injuries arose from motor vehicle accident in which minor child was owner/operator of vehicle); see also *Merrimack Mut. Fire Ins. Co. v. Sampson*, 28 Mass. App. Ct. 353, 550 N.E.2d 901 (1990) (negligent supervision claim brought against insured but unlike in *Marnell* exclusion found applicable because named insured was owner of vehicle); cf. *Roe v. Lawn*, 34 Mass. App. Ct. 726, 727 n 5 (1993) (with severability clause, operator of taxi company not excluded from coverage under automobile policy for intentional sexual assault by driver) *aff'd on other grounds* 418 Mass. 66 (1994)

There continues to be some confusion as to whether coverage would extend where the alleged negligent supervision actually related to supervision of the use of a vehicle.

In *Shamban v. Worcester Insurance Co.*, 47 Mass. App. Ct. 10 (1999), a case involving an off-road vehicle, the Appeals Court confirmed that, in the presence of severability language, negligent supervision claims against *non-owner* parents may be covered by homeowners' insurance, even if the failure of supervision relates to

the use of a vehicle. Applying the plain language of the exclusion, the Court based its coverage determination on the fact that the subject insured neither owned nor operated the vehicle, and not on whether the negligence alleged was vehicle-related. Furthermore the court noted that allowance of coverage was further supported by language in the exception to the exclusion pertaining to off road vehicles not owned by the named insured.

In *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612 (2003) the Appeals Court ruled that the motor vehicle exclusion of homeowners' insurance policy barred coverage to a parent who allegedly negligently supervised her child by failing to put the child passenger in safety seat because the liability for the injury to the child arose from use of vehicle. In addition, the parent's ownership of subject vehicle brought the parent into exclusion and distinguished the case from *Marnell* and *Shamban*.

*Aetna Cas. & Surety Co. v. Home Ins. Co.*, 44 Mass. App. Ct. 218 (1998) provides a puzzling counterpoint, seemingly irreconcilable with the later decisions of *Hingham Mutual* and *Shamban*. The Court denied defense coverage under a homeowners' policy to the parents of driver/tortfeasor for a negligent supervision claim, reasoning that homeowners' insurance should protect only from risks associated with the home. The vehicle involved was owned by a business owned by the parents.

In ruling that there was no coverage under the homeowner's policy, the Court distinguished the negligent supervision claim in this case from that asserted in *Marnell* in which coverage was found. The Court emphasized that in *Marnell*, unlike in this case, the complaint contained specific allegations that the negligent failure of the parents to supervise and to prevent their son from drinking and driving took place in the home. Yet, unlike in *Marnell* the Court in *Aetna* ignored entirely the language of the policy, which the Court conceded did not exclude coverage.

There is no limitation that homeowner's policies protect only from risks associated with the home, written in the personal liability coverage of homeowners' policies. This part of the decision should be viewed at best, as a potential back up argument for an insurer which cannot prevail based on the policy language. This case by itself should not be interpreted as necessarily representing a trend adverse to coverage due to the absence of any policy related reasoning on this point, the fact that the issue was treated dismissively at the end of an opinion which focuses extensively on large liability coverage, and the fact that the decision is irreconcilable with the Court's subsequent rulings in *Shamban* and *Hingham Mutual*.

An equally anomalous decision, inexplicable on the language of the subject insurance policy, was the Supreme Judicial

Court's decision in *Society for Christian Activities, Inc. v. Markel Ins. Co.*, 440 Mass. 1006 (2003). A church camp and a camp employee brought a declaratory action against camp's commercial general liability insurer to recover the settlement amount paid to a camper who was injured in accident involving an automobile owned and operated by camp. The policy included a severability-of-interests clause and contained a motor vehicle exclusion (limited to vehicles owned or operated by insured). The claim against the camp employee was based on supervision as the employee neither owned nor operated the vehicle involved in the accident. Despite exclusion language which, consistent with *Marnell and Shamban*, would not exclude coverage to an individual insured that neither owned nor operated the accident vehicle, the Court found the policy inapplicable. Because the employer-camp and its auto insurer had paid a settlement, including claims against the employee, the Court decided that the Camp's efforts to receive payment from the general liability insurer were precluded by the motor vehicle exclusion. The decision lacked reference to any governing contract language or case-law, and appeared to be driven by the Court's concern that the Camp itself would receiving the benefit of the CGL policy even though coverage for the Camp itself was clearly excluded. It is unclear whether the decision would be different if there had been

no settlement and the sought-after coverage was for the actual benefit of the defendant-employee.

#### **IV. CASES AFFECTING OPTIONAL BODILY INJURY COVERAGE**

When a driver causes an accident while operating an auto from outside of his or her household, the optional bodily injury coverage from one or more household auto policies may be available to provide coverage secondary to that of the auto involved in the accident so long as the accident vehicle is not owned or regularly used by the driver or a household member.

##### **Status as “Household Member”**

In *John Hancock Property and Casualty Insurance Company v. Scannell*, 64 Mass. App. Ct. 906 (2005) the Appeals Court ruled that an adult child who lived with his mother was not a household member of his father who lived elsewhere, and thus was not entitled to benefits under an auto insurance policy issued to his father. The parents were separated and lived apart, and the father did not retain financial or other responsibility for the family home where the claimant resided. Citing *v. Metropolitan Prop. & Cas. Ins. Co. v. Morel*, 60 Mass. App. Ct. 379, 382 (2004), the Court acknowledged that it is possible to have more than one residence or household, but on the facts of the case which included a absence of responsibility for the household or its members, the separated

father would not be deemed a household member of the accident victim.

*Scannell* was a case in which the claimant was seeking uninsured motorist coverage and the insurer was seeking repayment of PIP and medical payments proceeds. However it is equally applicable to “household member” status, for purposes of optional bodily injury coverage.

In *Metropolitan Prop. & Cas. Ins. Co. v. Morel*, 60 Mass. App. Ct. 379, 382 (2004), the Court ruled that a policyholder’s son was a family member residing in insured’s “household,” and was entitled to coverage under insured’s excess liability policy with respect to an automobile accident, even though insured lived apart from the family home occupied by wife and sons. After the parents’ separation, the policyholder was frequently present and continued to receive mail at family address, the policyholder was co-owner of family home and continued to purchase insurance for family’s benefit. The excess policy was designed to augment the coverage of underlying homeowner’s policy issued for the family home as well as the underlying automobile policy. Although *Morel* did not involve an auto policy, the *Scannell* Court described the decision as “instructive” in the auto insurance context.

In *Straker v. Commerce Insurance Company*, 61 Mass. App. Ct. 1118, an unreported decision pursuant to Appeal Court

Rule 1:28, the Court affirmed a grant of summary judgment in favor of an insurer on the issue of “household member” status.

In *Straker*, the plaintiff was seeking to stack Part 5 Bodily Injury Coverage to satisfy a judgment. The tortfeasor was itinerant, 28-years-old, emancipated adult who used his mother’s address to receive mail. The evidence did not indicate that the tortfeasor was actually living with his mother at the time of the accident. The Court refused to order optional bodily injury coverage under the mother’s policy reasoning that use of an address as a mail drop is not sufficient to establish household member status.

In a footnote, the *Strake* Court expressed uncertainty whether optional bodily coverage would be available to household members not listed as operators on a policy, but assumed that it was available in absence of any dispute among the parties. In any event, the Court noted the failure to list an operator may be a relevant consideration in determining household status.

#### **“Regular Use”**

In *Safety Insurance Company v. Day* 65 Mass. App. Ct. 15 (2005), the Appeals Court provided an in depth discussion of the factors for evaluating “regular” use. The criteria or guidelines are so general that the evaluation of regularity of use will usually be extremely uncertain and fact intensive.

- Regular use does not apply to occasional or incidental use but does apply to habitual use of other cars. In addition, use includes not only operation, but use as a passenger and having the car generally available for use.
- On assessing whether use is incidental or habitual an important inquiry is whether there is a consistent pattern of use or availability of the other vehicle so that the user relies on the likelihood that he or she will be permitted to use that vehicle.
- There is a “minimum level of frequency” prerequisite to application of the regular use exclusion (but the minimum is not quantified).
- Factors concerning regularity of use include use of the vehicle to commute to work, lack of exclusive use of the vehicle for any significant period, and lack of unrestricted use of it, but no single or group of factors are automatically determinative.
- Similarly the fact the driver has no insured vehicle of her own is not a determinative factor. The key is not whether a driver owns a insured vehicle, but whether an insurer -- the driver’s own or that of a household member -- has agreed to indemnify the driver with respect driving the vehicle belonging to someone else.

In *Day*, the Court concluded that a consistent pattern of making periodic use of a housemate’s vehicle constitutes regular use which barred stacking the insured’s optional bodily injury coverage where the use consisted of using the vehicle for two or three trips out of town per month, using the vehicle as a passenger twice per month, and periodically using the vehicle locally.

## **Duty to Cooperate**

*In MetLife Auto & Home v. Cunningham*, 59 Mass. App. Ct. 583 (2003), the Appeals Court ruled that an insurer had a right to disclaim defense and indemnity coverage for breach of homeowners policy's cooperation clause when its insured refused to provide a statement to the insurer, asserting his Fifth Amendment privilege against self-incrimination. Cunningham was a defendant in a wrongful death action arising from a stabbing in an altercation. There were no criminal charges pending against him, but there was nothing to legally preclude a homicide charge if supporting evidence was developed. Cunningham came to an examination under oath and testified to basic coverage facts (identity, residence, relationship to policyholder), but refused to testify concerning the events surrounding the altercation giving rise to the claim. Even though the policy in question did not specify a right to examination under oath, the Court ruled that Cunningham's claim of privilege breached his duty to cooperate with the insurer. The *Cunningham* precedent almost certainly applies to the availability of optional bodily injury coverage under auto policies. Consequently, the decision should be a concern to claimants and policyholders alike in auto cases involving allegations of impaired operation or other criminal conduct.

## **V. NO COVERAGE FOR OPERATION OF A VEHICLE WITHOUT THE OWNER'S PERMISSION**

It is well established that an insurer's obligations under the auto policy exist only when the person who is driving the vehicle does so with the consent of the policyholder. This is equally applicable to compulsory or optional coverage. In *Picard v. Thomas*, 60 Mass. App. Ct. 362 (2004) the policyholder had authorized his daughter to use the vehicle but did not provide permission to allow anyone else to drive the car except in an emergency. The daughter allowed a friend to drive and the car was in an accident. The Court ruled that the driver, who had permission to drive the car from the daughter but not the vehicle owner, was not covered by the vehicle's liability insurance. The Court relied upon the specific limitations of the daughter's dominion over the car. "This case is distinguishable from those cases that in which the insurer has been liable to defend and indemnify a third party because the child who gave permission to the third party had unfettered permission to operate the car. See *Drescher v. Travelers Insurance Company*, 359 Mass. 458, 461 (1971)."