

THE FIRST QUESTION TO ASK? - WHAT CONSTITUTES AN “ACCIDENT?”

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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.” See, Sixth & Seventh Edition Massachusetts Automobile Insurance Policy. Therefore, there must be a sufficient casual connection 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.

A. When Does The Incident Arise Out Of The Operation, Maintenance Or Use Of An Automobile?

As succinctly stated by the Supreme Judicial Court in *Rischitelli v. Safety Insurance Company*, 423 Mass. 703 (1996), “[o]ur 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.

In *Rischitelli v. Safety Insurance Company*, 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 got out of his vehicle and physically attacked and battered the plaintiff. Following the attack, the other driver left the scene without identifying himself. Safety contended 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, quoting 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. See also, *Sabatinelli v. Travelers Insurance Company*, 369 Mass. 674 (1976) (no auto coverage for injuries sustained when insured, who was seated in his automobile with motor running, intentionally shot pedestrian).

Similarly, in an unreported decision in *Robbins v. Aetna Casualty and Surety Company*, Docket No, 91-P-1155, the Appeals Court decided in a summary disposition pursuant to Appeals Court Rule 1:28, and without argument, that the Massachusetts motor vehicle policy did not provide uninsured motorist coverage for injuries sustained

by the plaintiff in a traffic-related fight. The altercation began when the operator of one vehicle stopped his vehicle across two lanes of traffic, thereby barricading and preventing the escape of the vehicle occupied by the plaintiff. There followed an altercation at the close of which the plaintiff was injured when the door of the vehicle he was occupying was closed on his ankle. The blocking car left the scene without identifying information. Consequently, the plaintiff sought damages under the uninsured motorist clause of the Aetna policy he was occupying at the time of the accident.

The plaintiff contended that his injury arose from the unidentified operator's use of the blocking vehicle as a barricade to facilitate the assault that led to the plaintiff's injury. The Appeals Court rejected the plaintiff's argument and affirmed a Superior Court judgment in favor of the insurer without directly addressing the question of the manner of use of a vehicle leading to the assault and stating simply that there was no casual relationship between the use of the motor vehicle and the accident.

Another issue coming up in the "arising out of" context was addressed in *Travelers Insurance Company v. Aetna Life and Casualty Company*, 410 Mass. 1002 (1991), wherein 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 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 when 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 Company*, 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).

Another boundary confronted in “arising out of” cases involves accidents occurring in the vicinity of the vehicle. In *Rosebrooks v. National General Insurance Company*, 13 Mass. App. Ct. 1049 (1982), plaintiff brought suit for the recovery of personal injury protection benefits as a result of her slip on ice as she was about to enter an automobile. The plaintiff claimed that at the time of the fall she had reached the rear of the vehicle, put her right hands on it and began walking around the vehicle to enter the driver’s side rear door. As she walked around the rear of the vehicle she slipped and fell on ice. The Superior Court denied coverage, and the Appeals Court agreed, on the grounds that this “was not an auto accident (a) because it had no causal relationship to any operation of the vehicle in the immediate past (in neither another automobile nor the insured vehicle was directly involved), and (b) because entering the automobile had not begun.” *Rosebrooks*, 13 Mass. App. Ct. 1049, 1050 (1982); See, *Travelers Ins. Co. v. Safeguard Ins. Co.*, 346 Mass. 622, 624 (1964) (no auto coverage for party injured when operator’s hand is shut in door by delivery boy as operator waiting to enter vehicle).

There have been several decisions, including Supreme Judicial Court and the Appeals Court decisions, involving the applicability of automobile insurance policies to instances of assault and battery.

In *Roe v. Lawn*, 418 Mass. 66 (1994), the Supreme Judicial court dealt with the issue of whether or not a sexual assault occurring within a vehicle owned and operated by a common carrier on a passenger carrier and committed by employee of that carrier on a passenger should be deemed to have arisen out of the “ownership, maintenance or use” of the automobile. The plaintiff brought an actions 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 Superior Court, relying on First Circuit precedent, *Aetna Casualty and Surety Co. v. United States Fidelity and Guaranty Co.*, 806 F.2d 302 (1996), ruled in favor and plaintiff appealed. On appeal, 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, reversed the Superior Court and remanded the matter for further proceedings consistent with the opinion.

In *Assetta v. Safety Insurance Company*, 43 Mass. App. Ct. 317 (1997), the issue before the court was whether an injury sustained as a result of an object being thrown, from an auto arises 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 Safety policy provided that "[Safety] would pay damages for bodily injury to people injured or killed as a result of certain accidents caused by someone who does not have enough insurance." The term accident was defined as "an unexpected, unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an automobile." *Id.* at 318.

Safety, relying on the same position 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 causal connection between the injury and the use of the vehicle for coverage to apply. In this instance, the court found that 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.” Compare with *Marzano v. Elaqua*, 7 Mass. L. Rptr. 644 (1997) (Injuries sustained when pedestrian threw an object through vehicle’s window were not covered since the injuries were not caused by “uninsured or hit and run autos”).

In *Batts v. The Travelers Insurance Company*, the Plaintiff’s Estate sought uninsured or underinsured motorist benefits as a result of the injuries that led to the plaintiff’s ultimate death. On March 24, 1993, the deceased had parked her car outside her home and left its engine running. As she approached her vehicle an unidentified individual pushed her up against a fence, entered her car and drove away. The applicable provisions of the policy stated as follows:

Sometimes an owner or operator of an auto legally responsible for an accident is uninsured. Some accidents involve unidentified hit-and-run autos. Under this Part, we will pay damage for bodily injury to people injured or killed in certain accidents caused by uninsured or hit-and-run autos. The Superior Court concluded that “it is clear that the plaintiff may not recover under these particular provisions only if the injuries to the deceased were caused by another auto.

Sometimes an owner or operator of an auto legally responsible for an accident is underinsured. Under this Part, we will pay damages for bodily injury to people injured and killed as a result of certain accidents caused by someone who does not have enough insurance.

A Superior Court concluded “it is clear that the plaintiff may recover under these provisions only if the injuries to the deceased were caused by another auto. Since it is undisputed that the injuries to the deceased were not caused by another auto, but by an assailant, the defendant is entitled to summary judgment. . .”. *Id.*

The Supreme Judicial Court’s most recent decision focusing on the “arising out of” language in an automobile policy was in *Ruggerio Ambulance Service, Inc., v. National Grange Insurance Company*, 430 Mass. 794 (2000). In *Ruggerio*, 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 Appeals Court, citing *Rischitelli v. Safety Insurance Co.*, 423 Mass. 703, 704 (1996), stated 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 accident cannot have been the cause of the decedent’s death. *Id.* at 798.

In *Ricardo v. Trust Ins. Co.*, C.A., No. 96-01751 (Bristol Superior Court, May 5, 1997) the plaintiff was operating her motor vehicle on Route 140 in New Bedford. As

she approached an intersection, the plaintiff slowed her vehicle down. When she came to a stop, she noticed that a person in a car opposite to her appeared to have a weapon. The plaintiff heard a pop sound and felt a pain on the left side of her head. The plaintiff learned later that she had been shot in the head with a pellet from an airgun. The shooter and the vehicle in which he or she was riding were never identified. The plaintiff sought uninsured motorist benefits under her auto policy.

The applicable provisions relating to uninsured motorist benefits in the auto policy issued to the plaintiff defined accident as “an unexpected or unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an auto.” The policy went on to provide that “[b]ecause this is an auto policy, it only covers accidents or losses which result from the ownership, maintenance or use of autos.” The Superior Court held that the plaintiff’s injuries were caused by the wrongdoing of the shooter and not from the use of an automobile and therefore, held that the plaintiff was not entitled to uninsured motorist benefits. The Appeals Court affirmed the Superior Court’s decision pursuant to Rule 1:28 in a one paragraph Memorandum and Order.

In *White v. American Casualty Co.*, 53 Mass. App. Ct. 66 (2001) the issue was whether an incident arose out of the operation, maintenance or use of an auto in the context of Personal Injury Protection benefits. The plaintiff stopped in front of an acquaintance house and sounded the horn. A Rotweiler dog then jumped into the non-moving vehicle through an open window and bit the plaintiff on the hand. The Superior Court entered summary judgment in favor of the insurer. The Appeals Court held that the insured was using the car at the time of the bite and that a factual issue existed as to

the causal connection between the horn blast and the bite thereby precluding summary judgment.

The case of *Foley v. Nationwide Mutual Insurance Co.*, 13 Mass.L.Rptr. 220 (2000), involved consolidated actions for declaratory judgment arising out of a motor vehicle incident in which the Plaintiff, David Foley, suffered personal injuries as a result of the conduct of the defendant, Robert Flannery. The Plaintiff, David Foley, a Newbury Police Officer, pursued Robert Flannery who fled the scene of a motor vehicle accident. Officer Foley was able to catch up to Mr. Flannery after Mr. Flannery's vehicle ran off the road. Mr. Foley was injured when he entered Flannery's motor vehicle to remove the keys from the ignition and, at the same time, Flannery entered his vehicle in an apparent attempt to flee the scene. The Court concluded that the accident arose out of Flannery's use and operation of the vehicle. The court stated as follows: "[t]here was a direct and immediate connection between the vehicle, the conduct of the plaintiff Foley in reaching inside to remove the keys, and the simultaneous conduct of the defendant Flannery in trying to get past the plaintiff and into the vehicle as he sought to escape from the scene. The critical events took place within the passenger compartment of defendant Flannery's vehicle. Here, as in *Assetta v. Safety Insurance Co.*, 43 Mass. App. Ct. 317, 319 (1997), the defendant Flannery's vehicle was directly involved in causing injury to the plaintiff's shoulder." 2000 WL 1923516, 10.

In conclusion, there is no bright line test indicating when an injury arises out of the use of a motor vehicle for the purpose of automobile coverage. Whether or not an injury is related to an automobile's use must be decided on a case by case basis and requires "a judgment call as to where along a continuum of causation fall the facts of

each case.” *Ruggerio Ambulance Serv., Inc. v. National Grange Mut. Ins. Co.*, 430 Mass.
794, 797 (2000).