INSURANCE LAW

Definition of 'Accident' Undergoes Significant Change

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The courts of this state have long been vexed with the question of what constitutes an "accident." As recognized by the Court of Appeals more than 50 years ago, "No all-inclusive definition of 'accident' is possible, nor any formulation of a test applicable in every case, for the word has been employed in a number of senses and given varying meanings depending on the relevant context."[1] The recent decision by the Court of Appeals in *State Farm Mut. Auto. Ins. Co. v. Langan*,[2] in the context of uninsured/underinsured motorist insurance, has, quite unexpectedly, overturned the commonly accepted view on how the term "accident" is to be interpreted in that particular area of the law. After briefly placing it in historical and philosophical context, we will analyze this important recent decision below.

Historical Context

In 1918, in *Lewis v. Ocean Accident & Guarantee Corp., Ltd. of London, England*,[3] the Court of Appeals held that the estate of an individual who died from a brain inflammation produced from a germ that came from an infected pimple on his lip, which was punctured by some instrument, was entitled to benefits under a policy that insured against "loss or disability, resulting directly, independently, and exclusively of all other causes, from bodily injuries effected solely through accidental means."

Writing in his unique style, Judge Benjamin Cardozo, who concluded that the death was caused by an "accident," stated, as follows: "To the scientist who traces the origin of disease, there may seem to be no accident in all this. Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident [citation omitted]. But our point of view in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man [citations omitted]. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexplained, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by the courts [citations omitted]."[4]

> The 'Langan' decision in the context of uninsured/underinsured motorist insurance, has overturned the commonly accepted view on how the term 'accident' is to be interpreted.

In *Miller v. Continental Ins. Co.*,[5] the Court (Fuchsberg, J.) observed that "[i]n construing whether or not a certain result is accidental, it is customary to look at the causalty [sic] from the point of view of the insured, to see whether or not, from his point of view, it was unexpected, unusual and unforeseen [citations omitted]."[6]

In *Agoado Realty Corp. v. United Int'l Ins. Co.*,[7] the Court of Appeals was asked to determine, inter alia, whether the intentional assault (murder) of a tenant by an unknown assailant was an "accident" and, thus, a covered "occurrence" within the meaning of a landlord's liability insurance policy. The Court (Wesley, J.) concluded that the murder constituted an accident for purposes of determining the defendant insurer's obligations to the landlord insured because the pleadings in the underlying action demonstrated that the incident was "unexpected, unusual and unforeseeable from the *insured's standpoint* [emphasis in original]."

Similarly, in *RJC Realty Holdings Corp. v. Republic Franklin Ins. Co.*,[8] the Court of Appeals (Smith, J.) held, inter alia, that an alleged sexual assault by a masseur employed by the insured beauty/health spa was an "accident" within the meaning of the spa's policy. Although the alleged assault was obviously not an accident from the masseur's point of view, his expectation and intention in committing the assault would not be attributed to his employer, the insured spa, as to which it was not expected or intended and was, therefore, to be deemed an accident.

Auto Coverage Context

In the context of automobile liability coverage, generally, a different approach initially prevailed. In *Michaels v. City of Buffalo*,[9] for example, the Court of Appeals (Levine, J.) held that the mechanical failure of defendant's ambulance and consequent delay in transporting the decedent to the hospital, which allegedly caused or contributed to his death, was not an accident within the meaning of that term as used in a business auto policy held by the defendant, and, therefore, no coverage under that policy applied. In so concluding, the Court noted that "The term 'accident' as used in automobile insurance policies refers to an event involving some trauma, violence or casualty, or application of external force in which the auto is involved."

Significantly, the Court recognized that "to the decedent the timing of the breakdown was indeed unexpected, unforeseen and unfortunate." However, the Court noted, "the determination whether it was an accident should not be made by reference to the injured victim. 'Because an injury is always fortuitous to a non-consenting victim, if its accidental character were to be judged in relation to such a victim, virtually all » Page 7

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instances of compensable injury would also be accomplished by determining coverage in relation to occurrence rather than injury alone. Thus, the general rule for applying 'accident'...causation coverage looks to the insured defendant to determine whether the causal event was fortuitous or not [citation omitted]."

Uninsured/Underinsured

In the specific context of uninsured/underinsured motorist coverage, great emphasis was, from the beginning, placed upon the necessity of finding that an "accident" took place, as the legislative intent behind the uninsured and underinsured motorist statutes was clearly to protect victims of motor vehicle accidents. The express terms of the applicable statutes and endorsements refer specifically to "accidents," and indeed, at least one court has termed proof of an accident as the sine qua non of an uninsured motorist claim.[10]

Cases involving this issue may be divided into three categories: those involving intentional collisions in the furtherance of an insurance fraud scheme[11]; those involving intentional personal assaults related in some way to the prior use of an automobile[12]; and those involving vehicular assaults, i.e., the use of the vehicle itself as the instrument of the assault (intentional ramming, etc.).[13] In all three categories the courts consistently held that injuries caused by an intentional act were not caused by "accident" and were, therefore, beyond the scope of the protection afforded by the UM/SUM endorsements. And this was consistently held to be so regardless of the fact that the person making claim for such benefits was the innocent victim of, rather than an active participant in, the fraud and/or the assault.[14]

In *Progressive County Mut. Ins. Co. v. McNeil*,[15] Justice Zelda Jonas of the Supreme Court, Nassau County, presciently recognized and commented upon the unfairness of her decision, which she felt bound by precedent to make, disqualifying the claimants from UM benefits because the striking of their vehicle by perpetrators of an insurance fraud was an "intentional collision," stating that "Legislative action is necessary in order to remedy this glaring void where innocent victims of intentional collisions are left without recourse for compensation for their injuries by the insurance industry."

In *McCarthy v. MVAIC*,[16] a case involving an assault and battery committed by means of the use of an automobile, the claimant seeking UM benefits from the MVAIC (prior to the transference in 1965 of the duty to provide statutory UM coverage to private insurers), after the offending vehicle's insurer denied liability because there was no "accident," argued that "an assault and battery by automobile should be looked at from the standpoint of the victim and not of the wrongdoer and that, from that standpoint, it should be regarded as an accident and should be covered by the standard automobile liability insurance policy."

That argument was expressly rejected by the Fourth Department, which noted that the purpose of the uninsured motorist statutes is to give the same protection to a person injured by an uninsured motorist as he or she would have had if injured in an accident caused by an automobile covered by a standard liability insurance policy; the determination of the scope of coverage of a standard policy is, therefore, controlling in determining the scope of UM coverage; and since it is clear that, consistent with the public policy of the state, there is and can be no coverage for an insured against his own criminal acts in a standard liability insurance policy, there can be no such expansion of coverage under the UM policy. Notably, the Appellate Division in *McCarthy*, supra, added that "this argument should be addressed to the Legislature and not to the courts since... the standard policy is explicit in excluding coverage for assault and battery."

Legislative Efforts

Although nothing whatsoever was done on the legislative front for many years despite judicial suggestions to do so, as we reported in a recent article in this space,[17] in July 2010, as part of the "Automobile Insurance Fraud Prevention Act of 2010," amendments were proposed to section 3420 (and 5202) of the Insurance Law, pursuant to which new subdivisions were to be added that specifically defined the term "covered person" to include "any person injured as a result of a staged, planned or intentional accident, provided that such person is not a perpetrator of or a knowing participant in the staging or planning of the accident." That bill was, however, never signed into law.

It is against this backdrop that the important new decision in *Langan* must be viewed.

'State Farm v. Langan'

In *Langan*, the claimant's decedent was struck and killed by a motor vehicle driven by an individual named Popadich, who pleaded guilty to murder in the second degree, after admitting that he intentionally caused the death by striking the decedent with his automobile.[18] The Second Department upheld the decedent's insurer's disclaimer of uninsured motorist benefits on the ground that the death was the result of an intentional act, and not an accident.

Few can argue that the result of the 'Langan' decision, which rights an obvious inequity in the system, is the correct and fair result, more consistent with the purposes of uninsured/underinsured motorist law than prior precedents.

After noting that "in New York, the mandatory coverage afforded under an uninsured motorist endorsement is meant to be coextensive with, and, therefore, no greater than, the standard coverage that would ordinarily be available to the uninsured motorist had he or she been insured," the court observed that "no standard automobile liability policy would have provided coverage to Popadich for the injury he intentionally inflicted on [the decedent]," and, thus, concluded that "it follows then, that because no coverage would have been provided under a standard automobile liability policy issued to Popadich, State Farm is not obligated to provide benefits under the uninsured motorist endorsement of its policy [citing *McCarthy v. MVAIC*, supra]."[19]

In a wise and interesting concurring/dissenting opinion, Justice William Mastro noted that "the overwhelming national trend" was to permit uninsured motorist coverage in situations such as this by interpreting the term "accident" from the perspective of the injured party rather than the tortfeasor, an approach based upon "the strong public policy considerations favoring an avenue of redress when they enter into private insurance contracts and pay premiums for first party benefits to compensate them for injuries suffered at the hands of motorists who have no available liability insurance coverage...."

He further recognized that in *Michaels v. City of Buffalo*, supra, the Court of Appeals elected to interpret the term "accident" from the perspective of the tortfeasor-insured rather than from the viewpoint of the injured party, in the distinct context of automobile liability coverage, but he noted that "in the present case involving, inter alia, a claim for uninsured motorist benefits, the injured party was in fact the 'insured,' since he purchased the uninsured motorist coverage as part of his own liability policy.

"Moreover, §60-1.1(f) of New York's Insurance Department Regulations (see 11 NYCRR §60-1.1[f]), which is applicable to every owner's policy of liability insurance issued in this state [citations omitted], expressly requires the inclusion of '[a] provision that assault and battery shall be deemed an accident unless committed by or at the direction of *the insured*' [emphasis added]. Thus, viewing the party claiming uninsured motorist benefits as the 'insured,' it is clear that the intentional acts committed by Popadich were not 'by or at the direction of the insured,' and the incident therefore should be a covered 'accident' with respect to the injured policy holder."

Although nowhere stated in Justice Mastro's opinion, implicit therein was the notion that there is something inherently wrong with a system that compensates the innocent victim of a negligent uninsured defendant, but not the innocent victim of a criminal uninsured defendant. Accordingly, Justice Mastro respectfully suggested that "the time may have come for a reexamination of the governing principles in this area by our State's highest court."

Court of Appeals Decision

Upon a subsequent grant of leave by the Appellate Division in *Langan*, the Court of Appeals did, in fact, reexamine and reconsider the governing principles in this area. In an opinion written by Chief Judge Jonathan Lippman (over two dissents), the majority observed that "Although we

have noted that the perspective of the injured victim should not be used to determine whether an accident has occurred '[b]ecause an injury is always fortuitous to a non-consenting victim'" [citing *Michaels*, supra], here the victim was also the insured. In this case, it was clear that "viewed from the insured's perspective, the occurrence was an unexpected or unintended event—and, therefore, an 'accident'—even though Popadich admittedly intended to strike the decedent with the vehicle." Thus, the Court concluded that "Consistent with the reasonable expectation of the insured under the policy and the stated purpose of the UM endorsement (to provide coverage against damage caused by uninsured motorists), the intentional assault of an innocent insured is an accident within the meaning of his or her own policy. The occurrence at issue was clearly an accident from *the insured's point of view* [emphasis added]," and, thus, the claimant was entitled to benefits under the UM endorsement.

In so holding, the Court distinguished its prior decision in *McCarthy*, supra, on the basis that the claim in *McCarthy*, was against MVAIC, a state fund, whereas in *Langan*, the claim involved a UM endorsement that was part of the insured's own policy, for which he paid premiums, as well as on the basis that since the insured was the victim in this case and not the tortfeasor, "the public policy against providing coverage for an insured's criminal acts is not implicated."

Finally, the Court noted that the result of its decision, albeit a significant change in the law of New York, was in keeping with the national trend toward allowing innocent insureds to recover uninsured motorist benefits under their own policies when they have been injured through the intentional conduct of another.[20]

Although it is unclear why the Court of Appeals suddenly felt that the issue of UM/SUM coverage for innocent victims of intentional acts was more appropriately decided by the Court, rather than through legislation, few can argue that the result of the *Langan* decision, which rights an obvious inequity in the system, is the correct and fair result, more consistent with the purposes of uninsured/underinsured motorist law than prior precedents.

1. See *Croshier v. Levitt*, 5 NY2d 259, 262 (1959).
2. 16 NY3d 249 (March 29, 2011).
3. 224 NY 18 (1918).
4. See also, *Croshier v. Levitt*, 5 NY2d at 269 (dissenting opinion of Judge Dye) ("While it is true accident is nowhere precisely defined, it does not follow that it is a term without meaning. It is a word in common everyday usage and is generally understood to mean an event of an unfortunate character that takes place without one's foresight or expectation, an undesigned sudden event, a mishap, a mischance, or calamity of [sic] catastrophe, a happening not in the usual course; fortuitously, unforeseen and without cause (Webster's Standard Dictionary, Oxford, Funk & Wagnall's). It is a term of general import to be tested as to meaning by common speech and understanding [citations omitted] and...'is to be determined not by any legal definition, but by the common-sense viewpoint of the average man' [citations omitted].") see also, *Miller v. Continental Ins. Co.*, 40 NY2d 675 (1976) ("[T]he multifaceted term 'accident' is not given a narrow, technical definition by the law. It is construed, rather, in accordance with its understanding by the average man [citations omitted], who, of course, relates it to the factual context in which it is used [citations omitted]."
5. 40 NY2d 675 (1976).
6. 40 NY2d at 677.
7. 95 NY2d 141 (2000).
8. 2 NY3d 158 (2004).
9. 85 NY2d 754 (1995).
10. See *Kilbride v. MVAIC*, 62 Misc.3d 641 (Sup. Ct. N.Y. Co. 1970).
11. See e.g., *Metro Medical Diagnostics, P.C. v Eagle Ins. Co.*, 293 AD2d 751 (2d Dept. 2002); *Eagle Ins. Co. v. Davis*, 22 AD3d 846 (2d Dept. 2005); *State Farm Mut. Ins. Co. v. Laguerre*, 305 AD2d 490 (2d Dept. 2003); *GEICO v. Robbins*, 15 AD3d 484 (2d Dept. 2005).
12. See e.g., *Progressive Northwestern Ins. Co. v. Van Dina*, 282 AD2d 680 (2d Dept. 2001); *Aetna Cas. & Sur. Co. v. Perry*, 220 AD2d 497 (2d Dept. 1995); *Locascio v. Atlantic Mut. Ins. Co.*, 127 AD2d 746 (2d Dept. 1987).
13. See e.g., *Travelers Indemnity Co. v. Richards-Campbell*, 73 AD3d 1076 (2d Dept. 2010); *American Manufacturers Mut. Ins. Co. v. Burke*, 63 AD3d 732 (2d Dept. 2009); *Metlife Auto & Home v. Kalendarev*, 54 AD3d 830 (2d Dept. 2008); *Westchester Medical Center v. Travelers Prop. Cas. Ins. Co.*, 309 AD2d 927 (2d Dept. 2003); *Allstate Ins. Co. v. Bostick*, 228 AD2d 628 (2d Dept. 1996); *Travelers Indemnity Co. v. Morales*, 188 AD2d 350 (1st Dept. 1992); *Empire Mut. Ins. Co. v. Cona*, 40 AD2d 963 (1st Dept. 1972); *Kilbride v. MVAIC*, supra.
14. See *Emanvilova v. Pallotta*, 49 AD3d 413 (1st Dept. 2008); *Travelers Indemn. Co. v. Cruz*, 40 AD3d 362 (1st Dept. 2007); *National Grange Mut. Ins. Co. v. Vitebskaya*, 1 Misc3d 774 (Sup. Ct. Kings Co. 2003).
15. 4 Misc.3d 1022(A) (Sup. Ct. Nassau Co., 2004).
16. 16 AD2d 33 (4th Dept. 1962), affd. 12 NY2d 922 (1963).
17. See Dachs, N. and Dachs, J., "Proposed Amendments to the No-Fault Law - 'Take 2,'" NYLJ July 13, 2010, p. 3, col. 1.
18. Indeed, in *Commercial Ins. Co. of New York, New Jersey v. Popadich*, 68 AD3d 401 (1st Dept. 2009), in which the First Department affirmed the Order of the Supreme Court, New York County, which had granted summary judgment to defendant Popadich's insurer for a declaration that it owed no duty to defend or indemnify Popadich in the personal injury actions commenced against him based upon exclusions for "intentional or criminal acts" and acts intended by him, the court noted that Popadich had intentionally run down 27 pedestrians with his automobile on the streets of Manhattan.
19. *State Farm Mutual Auto Ins. Co. v. Langan*, 55 AD3d 281 (2d Dept. 2008), modified 16 NY3d 249 (2011).
20. See e.g., *American Family Mut. Ins. Co. v. Peterson*, 679 NW2d 571 (Iowa 2004); *Shaw v. City of Jersey City*, 174 N.J. 567, 811 A2d 404 (2002); *Wendell v. State Farm Mut. Auto Ins. Co.*, 293 Mont. 140, 974 P.2d 62 (1999).