Expert Analysis

INSURANCE LAW

'You Must Remember This': A Wave May Not Be 'Just a Wave'

This article is reprinted with permission from the October 8, 2021 edition of The New York Law Journal,© 2021, ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. ALMReprints.com -877-257-3382 - reprints@alm.com

An issue that frequently arises in the context of insurance coverage cases involves the definition and application of the phrase "use or operation"—a phrase that appears in several statutes pertaining to motor vehicles,[1] as well as in many insurance policies—most notably, the coverage sections of automobile liability insurance policies, and the exclusionary provisions of homeowners' policies.[2] The recent appellate decision in *Nationwide Mutual Ins. Co. v. Oster*, 193 A.D.3d 951 (2d Dept. April 21, 2021), has brought this issue into focus once again, this time appearing to expand the meaning and breadth of the phrase beyond all prior limitations.

By Jonathan A. Dachs

Background

Over the years, the courts have recognized that the phrase "use or operation" does not have a consistent or uniform meaning. As a result, seemingly inconsistent decisions and/or decisions with strong dissenting opinions have been the norm in cases involving this issue. As aptly stated by Justice Victor G. Grossman (in the lower court decision in *Nationwide Mutual Ins. Co. v. Oster*, 60 Misc.3d 1208[A] (Sup. Ct. Putnam Co. 2018)), "The 'plain language' and meaning of 'use' and 'operation' encompasses a broad range of activity. The tendency 'to know it when one sees it' (to paraphrase Justice Stewart in another context) yields a long line of decisions that reflect varied forms of human behavior, but provide little guidance where there are close questions of fact."

Thus, for example, in a case where a claimant injured his leg when walking past a twisted and jagged edge of a bumper of an uninsured, illegally parked vehicle, one court dismissed the uninsured motorist claim against the MVAIC on the ground that the injuries did not result from an accident involving the "use or operation" of a motor vehicle. *Wrenn v. Park*, 156 Misc.2d 358 (Sup. Ct. N.Y. Co. 1993); see also *Wooster v. Soriano*, 167 A.D.2d 233 (1st Dept. 1990) (accident did not occur out of the use or operation of a truck "since the unoccupied vehicle was merely parked on a public street and was not, at that time, being used or otherwise engaged in some ongoing activity"); *McConnell v. Fireman's Fund Am. Ins. Co.*, 49 A.D.2d 676 (4th Dept. 1975) (unoccupied locked vehicle parked on a public street in front of the owner's residence was "not being used" within the meaning of the No-Fault law). *On the other hand*, more recently, in a case where the claimant's injury was sustained when she was returning to work after taking a break in her employer's parking lot, as she walked into a piece of sheet metal extending approximately five feet beyond the tailgate of a coworker's parked pickup truck, the court held that the injury arose out of the "use" of the truck, thereby entitling her to make an SUM claim. In so doing, the court noted that "'use' of a vehicle encompasses more than just driving, and extends to other incidental activities." See also *Murtha v. Coons*, 233 A.D.2d 378 (2d Dept. 1996) ("The use of an automobile involves more than just its operation and includes all necessary incidental activities such as entering and exiting"). The court further held: "The use of an underinsured vehicle must be a proximate cause of the injuries for which coverage is sought" and that although the truck was not being operated at the time of the accident, it having been parked in the employer's lot when the coworker arrived at work, it was being used by the coworker to transport the sheet metal to the junkyard after work. *Liberty Mutual Fire Ins. Co. v. Malatino*, 75 A.D.3d 967 (3d Dept. 2010).

> It has been recognized widely that "[n]ot every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation.'"

'Standard' Definitions

It has been recognized widely that "[n]ot every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation.'" The accident must be connected in some way with the use of an automobile "*qua* automobile." See *Farm Family Cas. Ins. Co. v. Trapani*, 301 A.D.2d 740 (3d Dept. 2003); *New York Central Mutual Fire Ins. Co. v. Hayden*, 209 A.D.2d 927 (4th Dept. 1994); *Olin v. Moore*, 178 A.D.2d 517 (2d Dept. 1991).

In *Manhattan & Bronx Surface Transit Operating Auth. v. Gholson*, 71 A.D.2d 1004, 1005 (2d Dept. 1979), the Second Department expressly adopted a three-part test to determine an insurer's liability under a standard automobile policy: "(1.) The accident must have arisen out of the inherent nature of the automobile, as such; (2.) The accident must have arisen within the natural territorial limits of an automobile, and the accidental use, loading, or unloading must not have terminated; and (3.) The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury."

The *Gholson* standard appears slightly modified in *Eagle Ins. Co. v. Bults*, 269 A.D.2d 558, 558-59 (2d Dept. 2000), lv. to appeal denied 95 N.Y.2d 768 (2000), by the elimination of the territorial limits of the automobile criterion. There, the court stated: "Generally, the determination of whether an accident has resulted from the use or operation of a covered » Page 7

JONATHAN A. DACHS *is an attorney practicing in New York City. A frequent lecturer and writer on insurance law issues, he is the author of New York Uninsured and Underinsured Motorist Law & Practice (LexisNexis/Matthew Bender 2016-2021).*

Wave

« Continued from page 3

vehicle requires consideration of whether, inter alia, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself proximately caused the injury (see *U. S. Oil Ref. & Mktg Corp. v. Aetna Cas. & Sur. Co.*, 181 A.D.2d 768)."

In *Butts*, supra, where a horse was being unloaded from a van via a ramp when it jumped and threw the plaintiff to the ground, causing injury, the court upheld the motor vehicle insurer's disclaimer of coverage based upon the ground that the claim did not arise from the "ownership, maintenance or use" of a motor vehicle. While the court recognized that the act of "loading or unloading" is a "use," it concluded that the accident was not the result of some act or omission related to the use of the vehicle."

In *Zaccari v. Progressive Northwestern Ins. Co.*, 35 A.D.3d 597 (2d Dept. 2006), the court, after quoting the three-part test of *Gholson*, supra, added: "Although the [vehicle] itself need not be the proximate cause of the injury ... '[n]egligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury' [citations omitted]. To be a cause of the injury, the use of the motor vehicle must be 'closely related' to the injury [citation omitted.]. Also, the injury must result from the intrinsic nature of the motor vehicle, as such and the use of the automobile must do more than merely contribute to the condition which produced it [citation omitted]." In that case, where the plaintiff sustained back injuries in the course of attempting to rescue another motorist whose vehicle crashed and burst into flames, the court held that the plaintiff's injuries were not covered by the "use or operation" clause of the vehicle's policy because] the vehicle was stationary for some period of time before the plaintiff arrived on the scene, and it was not *the vehicle* that caused the plaintiff to injure his back.

However, seven years later, in *Kesick v. New York Central Mut. Fire Ins. Co.*, 106 A.D.3d 1219 (3d Dept. 2013), the court held that questions of fact existed as to whether an injury sustained by a State Trooper in attempting to lift an accident victim out of his car was caused by the "use or operation" of the offending car. Construing the language of the policy liberally, and resolving ambiguities in favor of the insured, the court concluded that the "use" of the offending (underinsured) vehicle was its operator's negligent operation of his vehicle, and the "accident" occurred when he collided with the victim's vehicle. The plaintiff in this case invoked the "Danger Invites Rescue" doctrine to establish the requisite causal connection between the motor vehicle accident and his injuries. The court further concluded that if the facts warranted the application of that doctrine, the plaintiff's injuries were not so remote in either time or space to the use of the offending vehicle as to preclude a finding of proximate cause as a matter of law. See also *Encompass Indemnity Co. v. Rich*, 131 A.D.3d 476 (2d Dept. 2015).

'Use' of a Motor Vehicle Found

In *Gering v. Merchants Mut. Ins. Co.*, 75 A.D.2d 321 (2d Dept. 1980), the court stated that "the 'use' of a vehicle encompasses more than driving a car [citations omitted]. It may include control of the vehicle while a flat tire is being repaired [citations omitted]; getting in and out of the car [citations omitted], unloading a vehicle [citation omitted]; examining the vehicle's gas gauge while filling up its tank [citation omitted]; and supervising a retarded child while being transported [citation omitted]." In that case, the court held that the attempted performance of an emergency repair on a vehicle by one of the passengers constituted a "use" of the vehicle since the repair was attempted so that the travelers could continue on their way home.

Consistent with the foregoing, "use" of a motor vehicle was found where the plaintiff was injured while loading equipment onto a truck (*Paul M. Maintenance v. Transcontinental Ins. Co.*, 300 A.D.2d 209 (1st Dept. 2002)); where a stalled vehicle was pushed by its owner to the shoulder of the road, against the snowbank, with its flashers on and doors locked, and left the scene to get help to move the disabled vehicle and the oncoming plaintiff struck that vehicle with his snowmobile (*Trentini v. Metropolitan Prop. & Cas. Ins. Co.*, 2 A.D.3d 957 (3d Dept. 2003)); where a driver lost control of her car and struck a utility pole, which caused sparks and hot pieces of wire to hit the plaintiff, who was standing in her garden along the roadway, and who fell while running away from the hazard (*Farm Family Cas. Ins. Co. v. Trapani*, 301 A.D.2d 740 (3d Dept. 2003)); and where the plaintiff tripped over a suitcase that was unloaded by a bus driver from a bus after its arrival at its destination (*Peter Pan Bus Lines v. Hanover Ins. Co.*, 157 A.D.3d 610 (1st Dept. 2018)).

'Use' of a Motor Vehicle Not Found

The "use" of a vehicle was found *not* to exist in two cases in which dogs reached out of parked cars and bit the plaintiffs as they walked by the vehicles, on the basis that the vehicles did not produce the injury, nor did the injuries arise out of the inherent nature of the vehicles; rather, the injuries were caused by the dogs and the vehicles were merely the locations of the injuries. See *Allstate Ins. Co. v. Reyes*, 109 A.D.3d 468 (2d Dept. 2013); *Allstate Insurance Co. v. Stalb*, 117 A.D.3d 625 (1st Dept. 2014).

"Use" of a motor vehicle was also rejected where a passenger leaned out of a moving car, placed his hands on a bicyclist's back and shoved him off the bicycle causing the cyclist to fall and be injured (*Morris v. Allstate Ins. Co.*, 261 A.D.2d 457 (2d Dept. 1999)); where a passenger threw a cup from an automobile and struck a pedestrian with it (*Ciminello v. Sullivan*, 2008 N.Y. Slip Op. 30911[U] (Sup. Ct. Suffolk Co. 2008), aff'd 65 A.D.3d 1002 (2d Dept. 2009)); where the plaintiff was injured while he was trying to help his four-year-old son off of a truck (*Empire Ins. Co. v. Schleissman*, 306 A.D.2d 512 (2d Dept. 2003)); and where a crate fell apart while loading and unloading, resulting in injury (*ABC v. Countrywide Ins. Co.*, 308 A.D.2d 309 (1st Dept. 2003)).

Waves, Gestures, Motions or Signals

One of the more interesting questions in this area is whether a wave, gesture, motion or signal by an operator of a motor vehicle may qualify as a "use" of the vehicle for insurance coverage purposes.

A long line of cases involving motorists (including, perhaps most commonly, bus drivers) who wave, gesture, motion or signal to other drivers or pedestrians that they may proceed, establishes that liability may be found if the motorist failed to exercise reasonable care and his or her conduct was a proximate cause of injuries to the plaintiff. A typical example of such a case is where the driver signals a pedestrian to cross the street and the pedestrian is hit by another vehicle. See e.g., *Levi v. Nardone*, 178 A.D.3d 692 (2d Dept. 2019); *Kiesman v. Philip*, 84 A.D.3d 1031 (2d Dept. 2011); *Yau v. New York City Transit Auth.*, 10 A.D.3d 654, 655 (2d Dept. 2004); *Thrane v. Haney*, 264 A.D.2d 926, 927 (3d Dept. 1999); *Valdez v. Bernard*, 123 A.D.2d 351 (2d Dept. 1986); *Riley v. Board of Ed. of Cent. School Dist. No. 1*, 15 A.D.2d 303 (3d Dept. 1962). Another common example is where the driver gestures to another driver that it is safe to turn or proceed, and the plaintiff is injured in a resulting collision. See *Dolce v. Cucolo*, 106 A.D.3d 1431, 1431-32 (3d Dept. 2013); *Ohlhausen v. City of New York*, 73 A.D.3d 89 (1st Dept. 2010); *Barber v. Merchant*, 180 A.D.2d 984 (3d Dept. 1992).

Which brings us to the *Oster* case ...

> This expansive decision will likely have significant effects on future litigation involving "use or operation of a motor vehicle," regardless of the context in which that phrase appears.

The 'Oster' Case

On Aug. 31, 2011, Lisette M. Oster (Lisette), her daughter, Gabrielle Oster (Gabrielle), and Andrew J. Abbene (Abbene), a family friend, drove from Putnam County to Cycle City on Route 17 in Sloatsburg, New York in two separate cars. Lisette and Abbene rode together in Abbene's 1995 BMW, which was insured by State Farm. Gabrielle followed them in a Honda vehicle owned by Lisette, which was insured by Allstate. Abbene remained at Cycle City while Lisette drove his BMW back to Putnam County. As Lisette and Gabrielle were leaving Cycle City, Abbene instructed them to proceed north on Route 17, make a U-turn onto Harriman Avenue, and travel back in the opposite direction to get onto the New York State Thruway.

Following Abbene's directions, Lisette turned left onto Harriman Avenue and then made a U-turn in a driveway to go back to Route 17 and the Thruway. After making the U-turn, Lisette stopped her vehicle at an angle on or near the shoulder where Harriman Avenue meets Route 17, to wait for her daughter to make the same turn. The engine was running but the car was not moving. Lisette had her foot on the brake, but did not recall if she had put the car in "park." When Lisette saw Gabrielle approaching the intersection, she waved to Gabrielle out the window of the BMW to signal her to turn, i.e., "to let her see that that's where we were turning around, to make sure ... that she saw where we were turning around." Gabrielle saw Lisette and turned left to go into Harriman Avenue, so she could follow her. As Gabrielle changed lanes to make the left turn, Douglas P. Daniele (Mr. Daniele), who was traveling behind Gabrielle on his motorcycle, struck her vehicle and was fatally injured.

In a Wrongful Death action commenced by the Executrix of Mr. Daniele's Estate against Gabrielle, Lisette and Abbene, the plaintiff alleged, inter alia, that Lisette, "while in the course of operating the aforesaid BMW vehicle owned by defendant Andrew J. Abbene, did signal, motion and/or wave to the defendant, Gabriel M. Oster, who was operating the aforesaid Honda vehicle owned by the defendant Lisette M. Oster, to make an illegal U- turn at the stated location" and that Lisette "was negligent, reckless and careless by giving a signal, motion and/or wave to the defendant Gabrielle M. Oster."

Lissette sought defense and indemnification from State Farm—the insurer for the BMW—and from Nationwide under a homeowners' policy it had issued to her. State Farm denied coverage on the ground that the accident "was not the result of the *ownership, maintenance or use* of the BMW from which Lisette waved to Gabrielle." Nationwide also denied coverage to Lisette (and Gabrielle) on the ground that its homeowners' policy specifically excluded coverage for claims arising out of the *use or operation of a motor vehicle* by an insured and that the subject accident occurred from the *use* of a motor vehicle.[3]

In the Wrongful Death action, the jury found that Lisette was negligent in the manner in which she waved to Gabrielle, and that Lisette's negligence was a substantial factor in causing the accident. The jury apportioned liability against all three defendants in that

action, as follows: Gabrielle: 73%; Lisette: 20%; Mr. Daniele: 7%.

Subsequently, and prior to the commencement of the damages trial, Nationwide commenced a Declaratory Judgment action seeking a judicial declaration that State Farm, rather than Nationwide, owed Lisette the duties of defense and identification under its policy. Lisette counter-claimed/cross-claimed against Nationwide and State Farm, claiming that they *both* wrongfully refused to fulfill their contractual obligations to her.

Supreme Court's Decision and Order

Upon motions and cross-motions for summary judgment, the Supreme Court determined that Lisette's wave to Gabrielle *did not* constitute "use or operation" of the Abbene BMW, and, thus, concluded and held that Nationwide was obligated to defend and indemnify Lisette in the underlying action, and State Farm was not so obliged. The court referenced and relied upon the fact that "the vehicle was parked, and Lisette waved to her daughter through its open window, similar to the parked car and open window through which the dog in *Reyes* reached out to bite the pedestrian," as well as the facts that: "The BMW was not performing a transportation function at the time of the accident;" "The accident did not take place within the BMW's natural territorial limits;" and "the BMW did not 'produce the injury.'" Summarizing his determination, Justice Grossman stated that "Lisette's 'wave' was an act independent of the 'use or operation' of the Abbene BMW. The fact that it was made from the driver's seat, with the engine running and other indicia of 'use and operation' is fortuitous, but it is neither convincing nor controlling .... There is no nexus between the wave and the actual operation of the automobile. Lisette's wave could just as easily have been made while standing outside the BMW or 50 feet away from it, without affecting 'use and operation.' The accident was not 'connected with the use of an automobile *qua* automobile' [citation omitted]. While it may be said that the travel plans for Lisette and Gabrielle contemplated continued travel, or use of the BMW (and the Honda)—so as to be part of a more broad use and operation (see, e.g., *Gering v. Merchants Mut. Ins.*, supra), Lissette's wave, which the jury found to be negligent, was not part of, or reasonably contemplated, within 'use and operation,' let alone negligent use and operation."

Appellate Division's Modification

On Nationwide's appeal (and Lisette's cross-appeal) from Justice Grossman's above-described Order, the Second Department unanimously (and somewhat surprisingly, in my view) held (in agreement with Nationwide) that Lisette's wave *did* constitute her "use" of the Abbene vehicle.

After noting that "[t]he 'use' of a vehicle encompasses more than just driving it (see *Hertz v. Government Employees Ins. Co.*, 250 A.D.2d 181, 187; *Gering v. Merchants Mut. Ins. Co.* [supra]," and that "[f]actors to be considered in determining whether an accident arose out of the use of a motor vehicle include whether the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produces the injury rather than merely contributes to cause the condition which produces the injury [citing *Encompass Indem. Co. v. Rich*, supra, and *Allstate Ins. Co. v. Reyes*, supra], the appellate court found: "Here, the Abbene vehicle was not merely the location of Lisette's negligent act, unrelated to her use of the vehicle [citations omitted]. Rather, Lisette's signal to Gabrielle was part of, and done to facilitate, her ongoing trip with Gabrielle. Lisette momentarily paused the vehicle near driving lanes, imminently intending to resume motion as soon as Gabrielle saw and reacted to her signal to turn. Under these circumstances, we conclude that Lisette's signal to Gabrielle constituted her 'use' of the Abbene vehicle [citing *Trentini v. Metropolitan Prop. and Cas. Ins. Co.*, supra, and *Gering v. Merchants Mut. Ins. Co.*, supra]." Thus, the court modified the Order appealed from and remitted the Declaratory Judgment action to the Supreme Court for the entry of judgment declaring that Nationwide was not obligated to defend or indemnify Lisette in the underlying Wrongful Death action and that State Farm is so obliged.

This expansive decision will likely have significant effects on future litigation involving "use or operation of a motor vehicle," regardless of the context in which that phrase appears. At the very least, we now know that a wave can be more than a wave—it can in appropriate circumstances constitute the "use" of a motor vehicle.

---

1. See, e.g., VTL §253 (pertaining to process of service amenability resulting from "use or operation" of a motor vehicle in this State by a non-resident); VTL §370 (pertaining to coverage for persons "legally operating" a vehicle in the business of the owner and with is permission); VTL §388 (pertaining to vicarious liability of an owner resulting from the "use or operation" of a motor vehicle); Ins. L. §3420 (f) (pertaining to uninsured motorist coverage for accidents arising out of the "ownership, maintenance or use" of a motor vehicle); Ins. L. §5102, et seq. (pertaining to No-Fault coverage for individuals injured through the "use or operation of a motor vehicle); INS. L. §5210, et seq. (pertaining to actions against the MVAIC for individuals injured through the "ownership, maintenance or use" of an uninsured motor vehicle).

2. For example, typically, a motor vehicle liability policy defines an "insured" to mean: "(1.) you and resident relatives for: (a.) the ownership, maintenance, or use of (1) your car... (3.) any other person for his or her use of: (a) your car... (4.) Any other person or organization vicariously liable for the use of a vehicle by an insured as defined in 1., 2., or 3. Above ... ."

Typically a homeowners' policy specifically excludes the use or operation of a motor vehicle from coverage, in language such as: "Coverage E—Personal Liability and Coverage F—Medical Payments do not apply to bodily injury or property damage ... (g.) arising out of the ownership, maintenance or use of; entrustment or the negligent supervision by an insured of; or statutorily imposed liability on an insured related to the use of ... (2) a motor vehicle ... owned by or operated by, or ... loaned to an insured."

3. Allstate provided a defense and indemnification to Lisette (and Gabrielle) in the Wrongful Death action under the Honda automobile policy, as the accident undeniably arose out of the use of the Honda.