

ROAD RAGE, INSURANCE FRAUD AND OTHER “NON-ACCIDENTS”

In recent days, the newspapers have been replete with stories involving “unaccidental accidents,” to coin a phrase. On February 10th of this year, an article in the New York Post entitled “Gov: There auto be a law against road rage,” written by Frederic V. Dicker, reported on the proposal by Governor Pataki of a tough new law aimed at “road rage,” which is defined as “the unsafe operation of a motor vehicle in a hostile manner, without regard to the safety of other users of the highway,” including, but clearly not limited to, frequent or unsafe lane changes, failing to signal, tailgating, failing to yield right of way, and disregarding traffic controls. According to a recent Department of Motor Vehicles study of police accident reports, “aggressive driving” was a contributing factor in 59% of all collisions in which causes were attributed, and in 70% of fatal accidents in which causes were attributed.

In proposing his bill, which is characterized as “the toughest ‘road rage’ crackdown in the nation,” and which establishes three levels of increasingly severe punishment (from intentional harassment of another motorist, which would be a Class A misdemeanor punishable by up to one year in jail, to reckless operation of a car, the displaying of a deadly weapon from the vehicle, or hitting another vehicle with intent to harass, which would be a Class E felony punishable by up to four years in jail, to the most serious crime, involving driving that causes serious physical injury or death to another person, which would be a Class D felony punishable by up to seven years in jail), Governor Pataki was quoted as saying “This bill sends a clear message to those who choose to jeopardize the lives of others by turning New York’s roads and highways into danger zones. Too many collisions are not accidents.”

Just nine days later, the Post ran a series on insurance fraud, in which it discussed the growing problem of staged or fake accidents. In an article entitled “Insurance Fraud: Was that Auto Accident for Real?”, Evelyn Kanter noted that according to the National Insurance Crime Bureau (NICB), “phony claims” are a major factor in the skyrocketing number of bodily injury claims, and that fraudulent claims are often the result of deliberate auto accidents staged by vehicle accident rings, which may include not only the orchestrators of the “accident,” but also their doctors and/or lawyers. Ms. Kanter described several of the most common “staged vehicle collision” schemes currently being perpetrated, which include: (1) the “swoop and squat”, in which a suspect vehicle intentionally stops abruptly in front of an innocent vehicle, causing a rear-end collision; (2) the “drive down”, in which an unsuspecting driver is attempting to merge into traffic, the suspect driver yields and waves to the innocent driver to proceed with the merge, and as the innocent driver proceeds, the suspect driver intentionally smashes into him and denies waving him on; and (3) the “side swipe”, in which the perpetrators target an innocent driver in the turn lane of a busy intersection, who may be drifting into the outer lane, and then intentionally force a collision.

Just two months later, an article appeared in the New York Times reporting on the sentencing to eleven years in jail of two men in Los Angeles, California for a fatal staged crash. In that case, one of the defendants purposely slammed on his brakes so that a truck traveling behind him would hit his car. The truck did, in fact, hit the car, forcing a station wagon carrying a young couple and their 2-year-old daughter to stop behind it. A truck behind the family’s station wagon could not stop in time and crushed the wagon,

killing the entire family. In the sentencing hearing, the prosecutor was quoted as saying of the defendant, “This was how he made his living, staging these ‘accidents.’”

One question that arises from these tales is: Can the victims of a non-accidental collision recover uninsured or underinsured motorist benefits?

The statutes, regulations and prescribed endorsements governing uninsured motorist (“UM”), underinsured motorist (“UIM”) and supplementary uninsured motorist (“SUM”) coverage all expressly provide that such coverage is not operative unless damages are caused by an “accident.” As one eloquent judge (aptly named Thomas Dickens) put it twenty-eight years ago, “the Causa sine qua non (the indispensable condition) set forth in the statute for the right to arbitration, demands proof of an accident, as the basis of a claim thereunder, not proof of an assault.” *Kilbride v. MVAIC*, 62 Misc.2d 641 (Sup. Ct. N.Y. Co. 1970).

To be sure, the intent of the Legislature in enacting the uninsured and underinsured motorist statutes was to protect the victims of motor vehicle accidents. As noted by one court, “There is no provision in any of the statutes indicating a legislative intent to protect all victims of ‘motor vehicles,’ regardless of how the vehicle may have been used as an instrument of injury.” *McCarthy v. MVAIC*, 16 AD2d 35, 42 (4th Dept. 1962), affd. 12 NY2d 922 (1963). The term “accident” has been defined by the Court of Appeals as “an event of an unfortunate character that takes place without one’s foresight or expectation.” *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N.Am.*, 7 NY2d 22, 228 (1959) (definition taken from *Croshier v. Levitt*, 5 NY2d 259, 269 (1959)).

To the argument that an assault and/or battery by or with an automobile should be looked at from the standpoint of the victim, and not of the wrongdoer, and that from the

victim's standpoint it should be regarded as an "accident," the courts have responded by noting 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. See *McCarthy v. MVAIC*, supra.

The New York courts have consistently held that injuries caused by intentional acts are not cause by "accident" and are, therefore, beyond the scope of protection afforded by the uninsured/underinsured motorist endorsements. Interestingly, in the ancient case of *People v. Lee*, 1 Wheel. Cr. C. 364, the court noted the following two examples of an assault: (1) attempting to run a car against a prosecutor's wagon, even though one did not touch the other; and (2) striking violently with a club horse before a carriage in which a person was riding. Even more modern cases can be divided into those involving intentional personal assaults related in some way to the use of an automobile and those involving the use of the vehicle itself as the instrument of the assault.

In all-too-many cases these days, the occurrence of an intentional assault follows an otherwise innocent automobile accident. For example, one driver, angered by being struck by another, may choose to take out that anger on the scene, rather than waiting to obtain justice in the courts, by beating, or even shooting the other. In such cases, the courts have held that the innocent victim cannot recover benefits for injuries sustained as

a result of the post-accident assault under the uninsured motorist endorsement of his own policy. See e.g., Locascio v. Atlantic Mut. Ins. Co., 127 AD2d 246 (2d Dept. 1987) (no UM coverage to plaintiff who was severely injured when other driver shot him after the two drivers exited their vehicles).

Numerous cases also exist involving vehicular assaults. Perhaps not surprisingly, a substantial number of these cases involve police officers. For example, Kilbride v. MVAIC, supra, the plaintiff, a police officer, chased a stolen vehicle suspect into a cul-de-sac, and placed his patrol car in the entrance to block any escape. Finding himself trapped, the suspect reversed his gears, backed up at a high rate of speed and rammed his vehicle into the patrol car in which the plaintiff was still sitting, causing injuries. In Empire Mutual Ins. Co. v. Cona, 40 AD2d 963 (1st Dept. 1972), the claimant, a police officer, attempted to remove an unlicensed driver from a suspected stolen car, when the driver suddenly placed the car in motion, dragging the officer along with it. In Travelers Indemnity Company v. Morales, 188 AD2d 350 (1st Dept. 1992), the claimant, a police officer, was the victim of an intentional “ramming” of his car he had been chasing.

In MVAIC v. Jerman, 32 Misc.2d 946 (Sup. Ct. Nassau Co. 1962), rev'd. on other grounds, 18 AD2d 310 (2d Dept. 1963), the insured was injured when a jealous suitor, operating an uninsured vehicle, intentionally ran his car into the insured's vehicle, forcing it off the road and into a telephone pole, and then proceeded to back up and ram into it once again. In McCarthy v. MVAIC, supra, the plaintiff was driving her automobile with her sister as a passenger. Her sister had had a violent argument with her husband and the plaintiff was helping her escape from him, when the husband suddenly appeared in his

own car and deliberately drove into the plaintiff's automobile for the purpose of stopping it. In Valle v. Blackwell, 173 AD2d 390 (1st Dept. 1991), plaintiff, acting as a Good Samaritan, had interceded in an argument between the defendant and a woman. Thereafter, while the plaintiff and the woman were crossing the street, the defendant struck them with his van. In Aetna Casualty & Surety Co. v. Perry, 220 AD2d 497 (2d Dept. 1995), the claimant was suddenly hit in the rear by another vehicle while he was stopped at a red light. While he was still shaken by that event, an unidentified individual pointed a gun at him, told him to get out of the car, and drove away in the claimant's car. And, in Allstate Ins. Co. v. Bostick, 228 AD2d 628 (2d Dept. 1996), the claimant's decedent was killed when he was struck by a vehicle which had turned around, accelerated and struck him with enough force to crush his skull.

In all of these cases, the courts found that the injuries were the result of intentional assaults, and not accidents, and were, therefore, not covered under the uninsured motorist endorsements of the applicable policies.

Finally, we would like to call your attention to two interesting Court of Appeals decisions on related topics. In Michaels v. City of Buffalo, 85 NY2d 754 (1995), affg. 201 AD2d 117 (4th Dept. 1994), the Court held that stalling, mechanical failure and delay of an ambulance, in and of themselves, did not constitute an "accident" covered by the liability portions of a business automobile policy. Although the timing of the breakdown was unexpected, unforeseen and unfortunate to the patient, who ultimately died as result of the delay in treatment resultant therefrom, it did not involve any of the factors that typically distinguish accidents from other merely unexpected events, such as, trauma, violence, casualty, suddenness, or application of external force on the vehicle.

More recently, in *Manning v. Brown*, 91 NY2d 116 (1997), the Court held that a plaintiff's knowing participation in the unauthorized use of a motor vehicle – a crime commonly referred to as “joyriding,” precluded her recovery for injuries resulting from that conduct. In that case, the plaintiff and her friend, Amidon, high school students without drivers' licenses or learners' permits, entered a car belonging to two individuals referred to by Amidon as her grandparents (although they were not relatives) in order to check the car for loose change. While in the car, Amidon discovered a set of car keys, started the car and drive it away. Shortly thereafter, plaintiff and Amidon switched places, with plaintiff driving. Amidon asked her to be careful because the car was stolen. They subsequently again switched places, with Amidon driving, when an accident took place. Amidon pleaded guilty to the theft of the vehicle; plaintiff also pleaded guilty to charges related to the theft, but later withdrew her plea and was apparently never prosecuted.

In an action brought by plaintiff against Amidon and the owners of the vehicle, the defendants moved for summary judgment dismissing the complaint on the ground that plaintiff was a willing participant in a serious violation of the law [citing *Barker v. Kallash*, 63 NY2d 19], and that the public policy of this State dictates that one may not profit from one's own wrongdoing. Because there was no question that plaintiff's injuries were the direct result of her participation in the crime of unauthorized use of a vehicle in the third degree (Penal Law §165.05), which the Court deemed a serious offense because unauthorized use or “joyriding” “is usually accompanied by reckless or excessively fast driving, posing a threat to innocent third parties” and “puts the public at grave risk,” the Court affirmed the summary dismissal of plaintiff's case.