



Legal Beat

By MICHAEL SEAN QUINN

Dogs, Guns and Automobiles

Whoever thinks that automobile insurance is simple, settled or dull better think again. Let's start with some fundamentals. The words "auto accident," of course, together constitute an undefined phrase which is central to vehicle liability insurance. Now let's go to the next step. Not every accident involving an auto is an "auto accident". So much for *simple*.

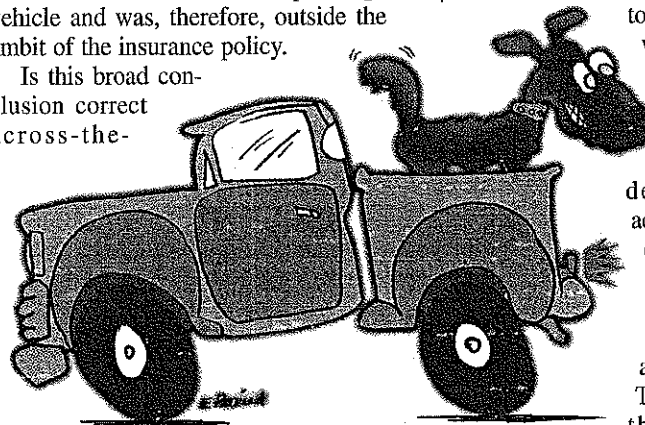
Not long ago, the Supreme Judicial Court of Maine confronted this problem. Michael went to visit his parents after work. He had his dog with him—let's call him Zeke—which he had tied to the truck. While Michael visited his mother, Zeke jumped onto the flatbed of his truck. In the meanwhile, Jacob, a neighborhood boy, went for a swim in the pool at Michael's parents' home. Thereafter, he got on the bed of the truck to pet Zeke. He remained there for five or ten minutes playing with the dog. Eventually Zeke bit Jacob's face.

The issue was whether Michael's homeowners carrier or his auto carrier covered the loss. Jacob's damages were \$55,000, and everyone agreed that the settlement was reasonable. The auto carrier paid, and sought

recovery from the HO carrier. So much for *settled*.

Maine's high court concluded that an auto accident could only be caused by the "use" of an insured vehicle. (The term "use" is central to auto insurance policies.) But, implied the court, the vehicle must be used as a vehicle. Michael was not using his truck as a vehicle. He was using it as a hitching post. Consequently, Michael's "use" of his vehicle was divorced from operating the vehicle and was, therefore, outside the ambit of the insurance policy.

Is this broad conclusion correct across-the-



board? Dog and boy were on the flatbed of the truck. The accident happened on or in the truck. It is not unusual for trucks to transport dogs. It is not unusual to tie dogs up on the flatbeds of trucks. What if Michael drove his truck down a street and the dog leaped out to bite a pedestrian? What if Michael drove his truck down a road; the dog leaped out of the truck and into another car; and there bit off the nose of the driver? Surely, these two incidents would be covered. What if the noseless driver then hit a hydrant and flooded the neighborhood? Wouldn't Michael's auto carrier have to pay? What about payment for the nose job?

Texas has recently faced similar puzzles. In 1995, the Amarillo Court of Appeals dealt with a car-dog scenario. Isaiah accompanied Emma on her rounds. The first stop was the canine grooming salon. So far so good. The second stop was to be at the vet's. On the way, however, Emma's dog bit Isaiah. Neither the HO nor the auto carrier wanted to defend. There were declaratory judgment actions all around. The trial court said the HO carrier had no duty to defend but the auto carrier did.

The auto carrier appealed both holdings. The court of appeals said that only Emma had standing to appeal the trial court's declaration that the HO carrier had no duty to defend. Hence, that part of the appeal by the auto carrier was thrown out, and Emma was left without homeowner's coverage.

In addition, the appellate court reversed the trial court as to the auto carrier. Dog-bites-man torts are not "auto accidents" within the meaning of the liability policy, even if the bite takes place on the back seat of a moving vehicle. The phrase "auto accident" refers to collisions or near collisions between vehicles and other vehicles, objects or persons. Hence, Emma had no insurance at all. Driver-hits-pedestrian: covered. Driver-hits-dog: covered. Dog-bites-either-driver-or passenger: not covered. Auto accidents are not accidents in (even moving) autos. Auto accidents are car wrecks.

Can this decision possibly be right? What if Emma swerved sharply to miss a jack rabbit, crossed the road and frightened the dog? Would not a resultant dog bite be a direct consequence of the operation of the vehicle? Besides, aren't vehicles foreseeably used to convey dogs? Perhaps Emma

continued on page 30

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Legal Beat

continued from page 16

was too focused on the freeway to keep track of what's going on in the car. Isn't this the negligent use of a vehicle? The Amarillo Court of Appeals implies that none of these considerations is relevant.

In its defense, Emma did not appeal the court's judgment that the HO carrier needed to respond. That appeal really should have been filed. In the Maine case, the insured had assigned to the appellant carrier any rights he might have against the appellee carrier, so there was no problem. So far as the Texas case is concerned, Emma's problem might have been caused by her lawyer, not her insurers.

A similar issue came up in *Mid Century Insurance v. Lindsey* decided in 1997 by the Texarkana Court of Appeals. It considered whether the accidental discharge of a rifle in a car was covered.

The insured was seated in one truck, which was parked next to an empty truck, near a lake in the country. A young boy returned to the empty truck. He was fishing with his father, who owned the truck. The boy had chilled and returned for coveralls. The truck was locked, so the boy tried to crawl in through a sliding back window. While flailing about, he brushed against a loaded shotgun on a gun rack over the rear window. The gun discharged and wounded Lindsey in the next truck. Lindsey's damages exceeded the policy limits of the truck owner, so he proceeded against his own carrier for underinsured motorist coverage. So much for *dull*.

The trial court found coverage, and the court of appeals affirmed. It found that there was an accident within the meaning of the UM/UIM provisions of the policy and that the accident did arise out of the use of a underinsured motor vehicle.

The UM/UIM language of the policy provided coverage for bodily injury caused by an accident. The question before the court concerned the meaning of the term "accident" in the context of UM/UIM coverage. The insurer argued that it means "auto accident" or "motor vehicle accident," and then suggested that such accidents are essentially collisions. The court of appeals rejected this view. The phrase "auto accident" and the phrase "motor vehicle accident" appear elsewhere in auto insurance policies, but they do not occur in the UM/UIM coverage sections. Hence, the coverage under the UM/UIM component of the policy may be somewhat broader than in the liability section. The term "accident" is *not* restricted to collisions. "An accident, when viewed from the standpoint of the victim, is an un-

pected happening [occurring] without [his] intent or design," said the court.

At the same time, the only accidents insured under the UM/UIM provisions of the policy are those where the liability of the owner or operator arises out of the "ownership, maintenance or use" of the uninsured motor vehicle. The issue here is *use*. Was the boy using the truck when he caused the firearm to discharge?

There is something misconceived in suggesting that UM/UIM is broader than liability coverage.

The court of appeals reviewed a number of different tests for *use* and a number of different contexts in which the discharge of firearms has been said to constitute the use of a motor vehicle. These include loading and unloading, the use of the car as a gun rest, accidental discharges caused by the movement of the car, and accidental discharges of a firearm while being removed from a gun rack. The *Lindsey* court thought the case before it most analogous to the last component of this taxonomy, and it observed that the majority of cases had found that the removal of a gun from a gun rack in a motor vehicle constituted a use of the motor vehicle.

Insurance issues such as this one are—of course—contract issues. Consequently, the controlling deep-question is whether gun rack-related firearm discharges were within the contemplation of the parties to the insurance contract. The court of appeals observed that most of the cases considering the issue have held that they were. "It especially can be assumed to be within the contemplation of the parties that a pickup truck in Texas might be used to carry a gun." The court also regarded it as important that the boy was trying to get into the truck when he caused the firearm to discharge. Surely, entering a vehicle is a use of the vehicle.

The *Lindsey* court distinguished its holding from other superficially similar cases. Most significantly, it was not something which simply happened inside the truck with no relevance to the fact that it was a motor vehicle. Thus, said the court,

it was not like being bitten by a dog inside a car. (Emma's case was not a UIM case, of course. Then again, the court didn't think this distinction material, apparently.)

Notably, the court also distinguished the 1997 holding of the Texas Supreme Court in *National Union v. Merchants Fast Motor Lanes*. There the court held that an auto carrier had no duty to defend a lawsuit when the petition's allegations merely alleged that the driver of a vehicle negligently discharged a firearm resulting in injuries. Such bare-bones allegations are insufficient to allege a "use" of the automobile, said the court. *Lindsey*, of course, involved detailed facts which indicated that the discharge occurred in the course of the boy's entry into the vehicle.

What if the boy was trying to get into the truck but couldn't open the sliding back window. Suppose the man from the nearby vehicle went over to help him, and there was a dog in the truck, which bit the man. Auto coverage? The case of *Emma v. Isaiah* from Amarillo would appear to say *No*. But surely this answer is wrong. What about the case of *Jacob v. Michael*. If Zeke had been in the cab of the truck, and if Jacob had opened the door to pet the dog, and the dog had then bit him, would that be covered? Using the reasoning in *Lindsay*, the answer would be *Yes*. If that is covered, why isn't petting a dog in the back of the truck covered?

The courts have pulled this noose too tight. Obviously, the Oklahoma City bombing is not covered by any auto policy, even if the bomb was transported and ignited in an insured vehicle. This conclusion follows immediately from the fortuity requirement inherent in most insurance policies. Similarly, there is no coverage for a drive-by shooting. Nevertheless, if a driver negligently handles a firearm in the course of driving, perhaps there should be coverage. After all, if it is somehow wrapped up with driving a car, why not? Isn't that a form of negligently using a car?

There is something misconceived in suggesting that UM/UIM is broader than liability coverage. The essential purpose of UM/UIM coverage is to provide a victim with first-party insurance when someone is too poor, too stupid or too cheap to buy appropriate liability insurance. Thus, UM/UIM coverage is a mirror opposite of liability coverage. The idea that the former should be broader than the latter is inconsistent with the latter's essential purpose. ■

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