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Insurance: Interpretation of "Riding or Driving" and Similar Words in Automobile Accident Insurance Policies

Philip W. Grossman Jr.

only for the purpose of contradicting him. *Western Union Telegraph Co.* v. *Ammann,* 296 Fed. 453 (C.C.A. 3rd 1924).

In Michigan, a witness may express an opinion upon certain matter, even though that opinion is derived solely from study. The expert witness is not required to have actual experience with the subject matter in question before he may give his opinion upon the subject. By careful study, diligent attention to lectures, and intelligent reasoning, the expert may form a worthy opinion and one which may be expressed to the jury. *People* v. *Thacker,* 108 Mich. 652, 66 N.W. 562 (1896).

Wisconsin disagrees with the latter rule, and holds that the opinion of the expert must be formed from experience in addition to his study. Since the book itself cannot be read in evidence, extracts from it cannot be permitted from the lips and memory of the expert. "The testimony of such medical witnesses is at best merely hearsay—what medical books and teachers taught or told them, repeated from memory." *Soquet* v. *State,* 72 Wis. 659, 40 N.W. 391 (1888); *Zoldoske* v. *State,* 82 Wis. 580, 52 N.W. 778 (1892).

The American Law Institute makes the following statement on this subject: "A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject." The American Law Institute, Code of Evidence, Tentative Draft No. 2, Rule 629.

SYDNEY R. MERTZ.

Insurance—Interpretation of "Riding or Driving" and Similar Words in Automobile Accident Insurance Policies.—While the insured was driving a motor truck the tire on an inner wheel of the dual rear wheels became deflated so as to prevent further use of the truck, on the intended trip, until repairs could be made. Insured took the truck to its garage and began to make repairs by removing the outer wheel so as to be able to remove the disabled inner wheel and flat tire, and while so engaged he was killed by an explosion of the tire on the outer wheel. The accident insurance policy provided indemnity for loss of life resulting from " . . . the wrecking or disablement of any automobile or truck . . . in which the insured is riding or driving . . . " The Insurer demurred to the beneficiary's complaint for recovery on this policy on the ground that the facts alleged were insufficient to constitute a cause of action. On appeal from an order overruling the demurrer the Supreme Court reversed the order, *holding* that while the deflated inner wheel was a "disabling" of the truck within the meaning of the policy, and while the acts necessary to repair it in order to continue the trip could be considered necessarily incidental to the operation of the truck, the plain and unambiguous language of this policy, not using the phrase "operating a vehicle," provides coverage only where the party is injured while actually "driving or riding in the vehicle" at the time of the disablement by which his injury is effected. *Miller* v. *Washington National Insurance Co.,* 237 Wis. 475, 297 N.W. 359 (1941).

A majority of the courts have held that insurance provisions, such as those quoted from the policy in the principal case, are not as broad in scope as a policy covering injuries sustained while "operating" a motor vehicle. An insured party was held not to have been "driving or riding in" his car when he was injured by an explosion of the tire after he had stepped out of the car at a

filling station and applied an air hose to the tire. *Eynon* v. *Continental Life Insurance Co. of Mo.,* 252 Mich. 279, 233 N.W. 228 (1930). Where a driver struck a pole causing a wire to fall across his car and, after stepping out of the car for a few minutes, was electrocuted when he re-entered the automobile, the court, in considering the coverage provisions of the policy, said: "The language of the policy is not ambiguous; calls for no construction; and must therefore be considered in its plain and easily understood sense. The insured was not riding in the automobile when he was electrocuted." *Wertman* v. *Michigan Mutual Liability Co.,* 267 Mich. 508, 255 N.W. 418 (1934). Similarly, recovery was not allowed on the insurance policy where the insured was killed by carbon monoxide gas and found dead on the running board of an automobile which he had to move within a garage in order to make room to bring in his own car. *Field* v. *Southern Surety Co. of N. Y.,* 211 Iowa 1239, 235 N.W. 571 (1931). In holding that "driving" means to "urge forward under guidance," it was decided that the policy of insurance would not cover death by carbon monoxide where the insured died while seated in a stationary automobile in a closed garage. *Mould* v. *Travelers' Mutual Casualty Co.,* 219 Iowa 16, 257 N.W. 349 (1934).

However, it has been held that the fact that a car stops by reason of an obstacle does not mean that one ceases to ride in it; thus, recovery was allowed where the insured was found dead from carbon monoxide gas in an automobile stalled in a mud-hole with the engine running. *Miller* v. *Inter-Ocean Casualty Co.,* 110 W.Va. 494, 158 S.E. 706, 76 A.L.R. 1308 (1931); also, *Johnson* v. *Federal Life Insurance Co.,* 60 N.D. 397, 234 N.W. 661 (1931). And recovery was allowed on a policy which indemnified the insured against injury by accident involving an automobile "in which the insured is riding or driving, or by being accidentally thrown from such an automobile." The injured had stopped at a service station to have the car greased and, when the car had been partly lifted on the grease rack, he was injured by alighting from the car, losing his hold on the door and falling to the pavement. The court held that, in view of the policy's label, "Travel Accident Policy," the car "in which the insured was riding" need not be in motion at the time of the injury, and that the insured was "thrown from" the car within the terms of the policy. *Federal Life Insurance Co.* v. *McAleer,* 17 P. (2d) 681 (Okla. 1932).

The Wisconsin Court looked at the descriptive words on the outside of the policy, to determine the extent of coverage, when an insured died from injuries resulting from his being struck by a passing truck as he stood on the running board of his automobile wiping sleet from the windshield. The truck did not actually strike insured's automobile. The policy provided coverage if the injuries were sustained by the wrecking of any automobile in which the insured was riding as driver or passenger, "or by being struck, knocked down or run over while standing or walking in or on an open public street or highway by any automotive vehicle." On the back of the policy in large heavy type was a statement by the Wisconsin Division of American Automobile Association which said, "This policy is particularly designed to cover travel accidents . . . and within the limits of your policy agrees to pay you for injuries in consequence of your being struck, run down or run over by an automobile on the public streets or highway." The court allowed recovery in an action on this policy holding, with the well established rule, that any ambiguities are construed in favor of the insured; and since the Automobile Association had construed the policy in the words quoted, with the defendant's knowledge, it was said that although the insured was not "riding in" the car when injured, he could be

deemed to have been "on the open public highway" within the meaning of the policy, even though standing on the running board and not on the pavement. *Merritt* v. *Great Northern Life Insurance Co. of Milwaukee,* 236 Wis. 1, 294 N.W. 26 (1940).

An injury sustained while jumping from an automobile which is out of control is received while "riding in" the automobile. *Wright* v. *Aetna Insurance Co.,* 10 F. (2) 281, 46 O.L.R. 225 (1926). So is an injury sustained by being run over after falling from the running board of a car on which the insured is riding. *Stewart* v. *North American Accident Insurance Co.,* 33 S.W. (2d) 1005 (Mo. 1931).

Where insured was indemnified against injuries occurring from the wrecking of an automobile "within which" the insured was driving, no recovery was allowed when he was injured while riding on the running board of the car, the court holding "within" to be the antithesis of "without." *Reynolds* v. *National Casualty Co.,* 231 Mo. App. 453, 101 S.W. (2d) 515 (1937). Also, a policy covering injuries received "while actually riding in" an automobile was held to exclude a situation where insured was injured while riding on running board of automobile. *New Amsterdam Casualty Co.* v. *Rust,* 164 Tenn. 22, 46 S.W. (2d) 70 (1932).

On the other hand, an opposite result has been reached by a majority of the courts where the policy insures the holder against injuries sustained while "operating" an automobile rather than while "driving." For example, the plaintiff recovered on his policy insuring him against injuries sustained while "operating, riding in, demonstrating, adjusting, or cranking an automobile" where, after driving his car over some timber in the road, he got out of the car and broke his ankle while assisting a wrecker to push the car back preparatory to continuing the journey. The Supreme Court approved the opinion of the trial court which was that "the operation of an automobile necessarily implies doing all that is necessary to be done to successfully move the same from place to place . . . and when the plaintiff became stalled during his journey, any act of the plaintiff in or about his automobile, necessarily required or necessarily incidental to the continuance of the automobile journey, would in the opinion of this court come within the scope of 'operating' the automobile." *Merkelein* v. *Indemnity Insurance Co. of North America,* 214 Wis. 23, 252 N.W. 280 (1934).

Also, a person injured by tools while using them for the purpose of repairing a punctured tire while on the highway was held to have been injured within the coverage of the provision "while operating, driving in or on" an automobile, the court stating that the word "operating" includes such stops as the driver would ordinarily make under the circumstances. *Union Indemnity Co.* v. *Storm,* 86 Ind. App. 562, 158 N.E. 904 (1927). A person who took the driver's seat of an automobile preparatory to starting the car during a duck hunting trip and who was accidentally shot by his companion who was taking a gun apart at the side of the car, was held to be covered by a provision in the policy insuring him against injuries "resulting from operating, driving (or) riding in" an automobile. *Dorsey* v. *Fidelity Union Casualty Co.,* 52 S.W. (2d) 775 (Texas Civ. App. 1932). The word "operating" was held to include the act of alighting from an automobile where the insured sprained his ankle when he stepped onto a brick in alighting from his automobile. Since it is necessary to enter and alight as part of the operation of a car, the court said, these actions become necessary incidentals of operation which are included in that term. *Southern Surety Co.* v. *Davidson,* 280 S.W. 336 (Tex. Civ. App. 1926).

However, a recent holding in New York reached a different result under a differently worded insurance policy. In that case the party was injured while

alighting from an automobile which he had parked, but he was not allowed to recover from the insurer where the policy insured him against loss resulting from injuries sustained while "operating (driving) or riding in an automobile," since the word "driving" qualified the word "operating" and connoted some action referable to physical control of the automobile in motion or connected therewith. *D'Allessandro* v. *Merchants' Mutual Casualty Co.,* N.Y.S. (2d) 200 (1941). Words in a policy of insurance limiting coverage to injuries received while insured was "in" or "on" the vehicle precluded recovery where insured was killed while cranking the automobile when it lurched forward. *Turner* v. *Fidelity and Casualty Co. of N. Y.,* 274 Mo. 260, 202 S.W. 1078 (1918).

The decision in the principal case is not inconsistent, then, with the majority view under either type of policy, for the court said, ". . . if the policy had insured . . . against loss as the result of injury sustained while "operating" a motor vehicle, then the injury sustained . . . while engaged in removing the tire might be deemed within the coverage afforded by the policy." *Miller* v. *Washington National Insurance Co.,* supra.

PHILIP W. GROSSMAN, JR.

Suretyship—Effect on Surety Contract of Application of Funds Derived from Assured Contract to Other than Secured Debt.—Defendant contractor agreed to construct a highway for the state of Nebraska, and defendant surety company guaranteed faithful performance and assured payment to all materialmen. Plaintiff, a materialman, furnished all necessary cement. The contractor was indebted to the materialman upon a prior contract. Certain funds derived from the state contract were paid to the materialman by the contractor, with direction to apply these funds to the prior debt. The materialman knew the source of the funds and applied them as directed. The contractor having failed to pay the materialman $26,181, the latter sued both contractor and surety. The lower court held for the materialman against the surety. *Held,* reversed. The execution of the bond created an implied understanding that the money received from the government on the work was to be applied only to the debts arising therefrom, until they were satisfied. "A creditor, with knowledge of the source of the money, cannot apply it to a debt other than that secured by the bond, so long as the bond remains unsatisfied." *Ash Grove Lime & Portland Cement Co.* v. *Moran Construction Co.,* 296 N.W. 761 (Neb. 1941).

Generally when a creditor holds more than one claim against his debtor, the latter, on making a payment, may direct on which debt it shall be credited, and it is the duty of the creditor so to apply it. Where the debtor fails to direct how a payment is to be applied, the creditor may ordinarily make the application as he sees fit. *Wheeler* v. *American Investment Co.,* 167 Okla. 558, 31 P. (2d) 117 (1934); *Sipes* v. *John et al.,* 177 Okla. 299, 58 P. (2d) 854 (1936); *Carson et al.* v. *Cook County Liquor Co.,* 37 Okla. 12, 130 Pac. 303 (1913); *City of Lincoln* v. *Lincoln St. R. Co.,* 67 Neb. 469, 93 N.W. 766 (1903); *Johnston et al.* v. *Northwestern Live Stock Ins. Co.,* 107 Wis. 337, 83 N.W. 641 (1900). And where the funds are not derived from the contract which is assured there is little question that the creditor can apply payments to any debt in the absence of a direction by the debtor. *City of Marshfield ex rel McGeorge Gravel Co.* v. *United States Fidelity and Guaranty Co. et al.,* 128 Ore. 547, 274 Pac. 503 (1929).

Where the funds are derived from the contract which is assured, Utah has held that a direction by the debtor is controlling in the absence of knowledge on the part of the creditor. *Salt Lake City* v. *O'Connor et al.,* 68 Utah 233, 249