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INSURANCE-RECOVERY-INSURER'S LIABILITY ON STATUTORY AUTOMOBILE LIABILITY POLICY FOR ASSAULT BY AGENT OF INSURED

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INSURANCE—RECOVERY—INSURER'S LIABILITY ON STATUTORY AUTOMOBILE LIABILITY POLICY FOR ASSAULT BY AGENT OF INSURED—The negligence of a taxicab driver in backing his cab into plaintiff's automobile caused the bumpers of the two cars to lock. When plaintiff stepped out to inspect the situation, he was, without provocation, brutally beaten by the cab driver. Plaintiff recovered a judgment of $3,000 against the driver and the cab owner, and sought to garnishee the defendant, an insurance company which had issued to the cab owner a policy of automobile liability insurance. In 1946, when the assault occurred, the Illinois Motor Vehicle Law[1] required the owner of a vehicle for the carriage of passengers for hire to maintain an indemnity bond, or an insurance policy insuring against "liability for any injury to or death of any person resulting from the *negligence* of such owner or his agent, in the *operation* of such motor vehicle."[2] The policy issued by defendant recited that it was issued pursuant to the Motor Vehicle Law, and its coverage provisions were written in the terms of that statute. On appeal from an order of the trial court discharging the garnishee, *held,* reversed. This policy extended insurance protection against injuries resulting from the assault by the agent of the insured. *Hawthorne v. Frost,* 348 Ill. App. 279, 108 N.E. (2d) 816 (1952).

[1] Ill. Rev. Stat. (1951) c. 95½.

[2] Ill. Rev. Stat. (1951) c. 95½, ¶59, §42a(2), amended in respects here immaterial by an act approved June 19, 1951, Ill. Laws (1951) p. 356.

This is the latest of a number of cases considering the liability of an insurer on a public liability insurance policy for injuries resulting from an intentionally wrongful act (invariably an assault) by the insured or his agent.[3] The principal case differs from previous cases dealing with this problem[4] in that the crucial terms in the policy here in question ("negligence" and "operation") are considerably less inclusive than those heretofore considered. Thus in finding that the assault by the cab driver was an act of negligence in the operation of the cab it appears that the Illinois Appellate Court has gone farther in giving a broad construction to the statute and corresponding terms of the insurance policy than has any other court in this type of situation. In supporting its definition of "negligence" as including an assault, the court relied on a group of cases holding that an injury received from an assault or other intentionally wrongful act is within the protection of a provision covering injuries received as the result of an "accident"[5] and on the United States Supreme Court decision in *Jameson v. Encarnacion*[6] holding that an assault is "negligence" within the meaning of the Federal Employers' Liability Act.[7] But the term "accident" is clearly broader than "negligence";[8] and any interpretation based, as was the *Jameson* decision, on the particular purpose and policy of the Federal Employers' Liability Act is not necessarily to be followed in construing a state compulsory automobile liability insurance statute. Likewise, in determining that the assault occurred "in the operation of" the cab, little reliance could be placed on cases finding liability for an assault where the coverage provisions included the phraseology "ownership, operation, or use."[9] Without regard to differences in the circumstances surrounding the assaults which might well be sufficient to distinguish these cases

[3] A provision giving protection against results of intentional wrongs committed by agents of the insured does not contravene public policy where entered into pursuant to a state financial responsibility act [Hartford Accident and Indemnity Co. v. Wolbarst, 95 N.H. 40, 57 A. (2d) 151 (1948); Wheeler v. O'Connell, 297 Mass. 549, 9 N.E. (2d) 544 (1937), 111 A.L.R. 1038 at 1043 (1937)]. Cf. New Amsterdam Casualty Co. v. Jones, (6th Cir. 1943) 135 F. (2d) 191, where the injured person was allowed recovery under an ordinary public liability policy even though the intentional wrong (assault) had been committed by the insured himself. For a comprehensive discussion of this whole problem see McNeely, "Illegality as a Factor in Insurance," 41 COL. L. REV. 26 (1941).

[4] See cases cited in notes 5 and 9 infra.

[5] Albrecht Co. v. Fidelity and Casualty Co., 289 Ill. App. 508, 7 N.E. (2d) 626 (1937) (assault by insured's superintendent); Hartford Accident and Indemnity Co. v. Wolbarst, note 3 supra (injuries to occupant of car intentionally collided with by insured); New Amsterdam Casualty Co. v. Jones, note 3 supra (assault by insured); Georgia Casualty Co. v. Alden Mills, 156 Miss. 853, 127 S. 555 (1930) (assault by two of insured's foremen). *Contra:* Commonwealth Casualty Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928) (assault by cab driver employee of insured).

[6] 281 U.S. 635, 50 S.Ct. 440 (1930).

[7] 53 Stat. L. 1404, §1 (1939), 45 U.S.C. (1946) §51.

[8] Rothman v. Metropolitan Casualty Ins. Co., 134 Ohio St. 241, 16 N.E. (2d) 417 (1938); 7 APPLEMAN, INSURANCE LAW AND PRACTICE §4312 (1942).

[9] Green Bus Lines v. Ocean Accident and Guaranty Corp., 287 N.Y. 309, 39 N.E. (2d) 251 (1942), 162 A.L.R. 241 at 244 (1946) (assault by one bus passenger on another); American Casualty Co. v. Southern Stages, 70 Ga. App. 22, 27 S.E. (2d) 227 (1943) (assault committed by bus driver in ejecting passenger); Huntington Cab Co. v. American Fidelity and Casualty Co., (4th Cir. 1946) 155 F. (2d) 117 (assault by cab driver on passenger). For a case refusing to find liability even under a broadly worded

from the principal case, the terms "ownership" and "use" are broader than "operation."[10] Of course, the court could have by-passed these difficulties by finding liability on the theory that plaintiff's injuries resulted from the negligence of the driver in backing into plaintiff's car. Although it has been held in some jurisdictions that a plaintiff's injuries need not be the proximate result, in the normal tort sense, of conduct covered by the policy,[11] other courts take a contrary view.[12] If one keeps in mind the real basis of the decision in the principal case—the desirability of giving broad scope to statutory provisions intended to protect the public against financially irresponsible vehicle owners[13] —and recognizes the tendency of courts to consider, consciously or unconsciously, questions of policy and equity in proximate cause cases,[14] it is difficult to criticize the court for adopting a rather liberal viewpoint in determining whether the causal chain between the driver's negligence and the plaintiff's injuries had been broken. Whether the decision is better placed on the one theory or the other is not, perhaps, of vital importance; the significance of the case lies in its indication of the extent to which a court will go in permitting recovery where statutory liability insurance intended for the public's protection is involved. Unfortunately the narrow wording of the statute makes it impossible for the court to reach a socially desirable result without severely straining the usual legal concepts of negligence or causation.

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policy ("ownership, maintenance or use"), see National Mutual Casualty Co. v. Clark, 193 Miss. 27, 7 S. (2d) 800 (1942) (assault by cab driver on passenger failing to give sufficient tip).

[10] 7 APPLEMAN, INSURANCE LAW AND PRACTICE §§4313, 4314, 4316 (1942).

[11] Merchants Co. v. Hartford Accident and Indemnity Co., 187 Miss. 301, 188 S. 571 (1939), suggestion of error overruled 187 Miss. 309, 192 S. 566 (1940); Panhandle Steel Products Co. v. Fidelity Union Casualty Co., (Tex. Civ. App. 1929) 23 S.W. (2d) 799.

[12] Steir v. London Guarantee and Accident Co. of London, England, 227 App. Div. 37, 237 N.Y.S. 40 (1929), affd. 254 N.Y. 576, 173 N.E. 873 (1930); Handley v. Oakley, 10 Wash. (2d) 396, 116 P. (2d) 833 (1941).

[13] DeLuxe Motor Cab Co. v. Dever, 252 Ill. App. 156 (1929).

[14] PROSSER, TORTS 312 (1941); GREEN, RATIONALE OF PROXIMATE CAUSE, c. 7 (1927).