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INSURANCE LAW

*W. Shelby McKenzie**

AUTOMOBILE LIABILITY INSURANCE—USE

Carter v. City Parish Government[1] is the fourth in a series of supreme court decisions which suggests a process for deciding the often difficult question of whether liability arises out of the "use" of an automobile.[2] *Carter* involved the death by drowning of a ten-year old girl. A severe storm resulted in the flooding of an expressway underpass. Highway officials established barricades at all entrances in order to prevent access to the flooded underpass. When last seen, the deceased was in the vehicle driven by her uncle. By circumstantial evidence, it was concluded that the uncle, who was intoxicated, drove around the entrance barricades and proceeded along the expressway until his vehicle encountered the flood waters of the underpass. The girl's body was found 300 to 450 feet from the partially submerged vehicle in which she had been riding.

The parents of the deceased girl brought suit against State Farm Mutual Automobile Insurance Co. (State Farm) under two policies—the uncle's automobile liability insurance and their own uninsured motorist coverage. In order for coverage to exist under either policy, the plaintiffs had to show that the uncle's liability arose out of the use of his automobile. Without first determining the uncle's liability, both lower courts found that the death did not arise out of use of the automobile by utilizing tests developed in earlier decisions.[3] The supreme court criticized this approach, stating that proper analysis required the courts to consider, in order, two separate questions: "(1) Was the conduct of the insured of which the plaintiff complains a legal cause of the injury? (2) Was it a use of the automobile?"[4] A court need not reach the use question unless the legal cause question could be answered affirmatively, and coverage would exist only if both these questions could be answered affirmatively.

The supreme court declared further that it was incumbent upon the

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1. 423 So. 2d 1080 (La. 1982).

2. Automobile liability policies protect against the specific risk of liability "arising out of the ownership, maintenance or use" of vehicles. Policies frequently define "use" to include the loading and unloading of the vehicle. Conversely, many other liability policies, including homeowner's policies and comprehensive general liability policies, expressly exclude coverage for liability "arising out of the ownership, maintenance, use, loading and unloading of vehicles." In determining whether there is coverage under an automobile policy or in determining whether coverage is excluded under other policies, courts must decide whether an accident arose out of the "use" of a vehicle.

3. Carter v. City Parish Gov't, 409 So. 2d 345 (La. App. 1st Cir. 1981).

4. 423 So. 2d at 1087.

courts to apply the duty-risk analysis in answering the legal cause question. This approach to the legal cause issue would also force the courts to focus on two distinct questions: "(a) was the conduct complained of a cause in fact of the harm? (b) was the alleged tortfeasor under a duty to protect against the particular risk involved?"[5] The supreme court expressly criticized lower court decisions which have attempted to resolve the use issue without first making a duty-risk analysis to determine whether the conduct complained of was a legal cause of the injury.[6]

In *Carter*, the supreme court found that *but for* the uncle's conduct in ignoring the barricades and driving into the flood waters, the young girl probably would not have drowned. Thus, his conduct was a cause-in-fact of the harm. The court also concluded that the risk of drowning by a passenger of tender age is contemplated by the legal duties of a motorist to obey the warning of barricades and to drive in a reasonable and prudent manner under hazardous conditions.[7] Having determined that the legal cause of the accident was the uncle's breach of duties in operation of the vehicle, the court turned to the second question of the use analysis—was the conduct complained of a use of the automobile? Since negligent operation of the vehicle was the legal cause of the accident, the liability clearly arose out of use for which there was coverage under the policies.

As noted previously, *Carter* builds on three earlier supreme court decisions—*Fertitta v. Palmer*,[8] *LeJeune v. Allstate Insurance Co.*,[9] and

5. *Id.* at 1084.

6. The court specifically criticized the use of tests which rely heavily on proximate cause concepts as applied in Sherville v. National Union Fire Ins. Co., 387 So. 2d 1181 (La. App. 1st Cir. 1980); Tillman v. Canal Ins. Co., 305 So. 2d 602 (La. App. 1st Cir. 1974); Ramsey v. Continental Ins. Co., 286 So. 2d 371 (La. App. 2d Cir. 1973); United States Fidelity & Guar. Co. v. Burris, 240 So. 2d 408 (La. App. 2d Cir. 1970); Baudin v. Traders & Gen. Ins. Co., 201 So. 2d 379 (La. App. 3d Cir. 1967).

7. These duties, the court found, clearly protect a passenger against the risk of drowning in the vehicle or while escaping therefrom. Since the deceased was not found in the immediate vicinity of the vehicle, however, State Farm argued that the circumstantial evidence did not exclude the reasonable hypothesis that the child's drowning resulted from other risks which should not be included within the scope of the driver's duties. The court disagreed, finding the risk that the child unknowingly failed to select the best path to safety or that she was led in the wrong direction by her uncle as rescuer were within the scope of the duty. The only other hypothesis—that she knowingly and voluntarily chose to brave the other deeper waters—was rejected by the court as unreasonable, on the basis of the rebuttable presumption applied by the courts of appeal in other cases that a deceased exercised due care in conformity with the instinct for self-preservation. *See* Callahan v. Town of Bunkie, 287 So. 2d 629 (La. App. 3d Cir. 1973); Ebarb v. Southern Farm Casualty Ins. Co., 251 So. 2d 100 (La. App. 3d Cir.), *writ denied*, 259 La. 881, 253 So. 2d 215 (1971); Gant v. Aetna Casualty & Surety Co., 234 So. 2d 776 (La. App. 1st Cir.), *writ denied*, 256 La. 376, 236 So. 2d 503 (1970).

8. 252 La. 336, 211 So. 2d 282 (1968).

9. 365 So. 2d 471 (La. 1978).

Picou v. Ferraro.[10] A familiarity with these decisions and the principles they establish is necessary to place *Carter* in context.

In *Fertitta*, the issue was whether an accident arose out of the unloading of a neon sign from a truck. The sign had been handed to the employee who would install it, but the sign had never been placed in a stationary position after its removal from the truck. The insurance policy on the truck covered damages arising out of use of the truck, and the policy stated that use of the truck "includes the loading and unloading thereof."[11] Rejecting the artificial tests which have been developed for determining whether an accident arose out of the loading or unloading of a vehicle,[12] the supreme court approved the "common sense" approach utilized by the court of appeal. "This simply means that the court should decide whether, under a particular set of facts, the act causing the injury constituted part of the 'unloading' process as that term is commonly understood."[13] The common sense approach led both courts to conclude that the employee was in the process of installing the sign at the time the accident occurred, and the injury had no connection with the unloading of the truck.

LeJeune v. Allstate Insurance Co.[14] involved a collision between a hearse in a funeral procession on the inferior highway and a vehicle on the favored highway. The court concluded that the accident was caused in part by the negligence of the deputy sheriff who was assigned to escort the funeral procession and had failed to protect the intersection. The issue was whether his negligence arose out of the use of his vehicle.[15] The court found that the negligence did not arise out of use of the vehicle because the deputy's duty existed independently of his use of an automobile. Although he could have used his police car to discharge his law enforcement duty, it was not any use of his vehicle itself that led to liability. The liability arose out of the deputy's failure to warn, with the vehicle or otherwise.[16]

In *Picou v. Ferrara*,[17] it was argued that coverage was not excluded under a comprehensive general liability policy for allegations of negligent entrustment of a vehicle to a corporate employee. The plaintiff's motor-

10. 412 So. 2d 1297 (La. 1982).
11. 252 La. at 341, 211 So. 2d at 284.
12. *See* Spurlock v. Boyce-Harvey Mach. Co., 90 So. 2d 417 (La. App. 1st Cir. 1956).
13. 252 La. at 343, 211 So. 2d at 285.
14. 365 So. 2d 471 (La. 1978).
15. The court was faced with the determination whether there was coverage under the sheriff's Law Enforcement Officer's Professional Liability policy which expressly excluded "bodily injury arising out of the ownership, operation, or use, loading or unloading, of land motor vehicles." *Id.* at 478.
16. The court also held that there was no coverage under the automobile liability policy insuring the deputy's vehicle, since the accident did not arise out of its use.
17. 412 So. 2d 1297 (La. 1982).

cycle was struck by an automobile owned and operated by an employee of the defendant corporation. The allegations against the corporation included both vicarious liability for the negligent operation of the auto by its employee and the corporation's independent negligence in hiring an incompetent driver. The corporation filed a third-party demand against its general liability insurer, whose policy expressly excluded coverage for damages arising out of the use of automobiles. On cross-motions for summary judgment, both lower courts held that while the claim asserting the vicarious liability of the corporation fell within the policy's coverage exclusion, the claim based upon negligent entrustment did not. The lower courts thought that the corporation's duty to permit only those persons competent to operate an automobile to do so existed independently of any duties or liabilities with respect to actual use of the automobile; thus, they held that the suit based on negligent entrustment did not arise out of use and that the coverage exclusion did not apply. The supreme court reversed, holding that the policy's coverage exclusion extended to both of these claims. The court focused on the *theory* of liability in determining the applicability of the policy exclusion. The court felt that the issue of coverage, *i.e.*, whether the harm arose out of the use of an automobile, could be decided by answering a single question: Was use of the automobile an essential element in the theory of liability? The court found that use of the automobile was essential to both theories of liability—the employer's responsibility for its employee's acts and the negligent choice of the driver.[18]

From this quartet of supreme court decisions—*Fertitta, LeJeune, Picou* and *Carter*—the following process for resolving the use issue can be gleaned: Through the duty-risk analysis, it must be determined whether the insured's conduct of which the plaintiff complains is a legal cause of the accident. If the conduct complained of is a legal cause of the harm, it must then be determined whether that harm arose out of the use of a vehicle. In order for the harm to arise out of use, the automobile must be essential to the theory of liability; the specific duty breached by the insured must flow from use of the automobile. If the specific duty breached

18. It distinguished *LeJeune* under which the theory of liability was breach of law enforcement duties independent from the use of the automobile. It also distinguished Frazier v. State Farm Mut. Auto. Ins. Co., 347 So. 2d 1275 (La. App. 1st Cir. 1977), which involved a claim under a homeowner's policy for negligent supervision of a young child who was in the care of the insureds at the time she was struck by an automobile. The court noted that the automobile in *Frazier* "was an essential fact of the accident, but only incidental to the *theory* of liability under the homeowner's policy." *Id.* at 1300. See also Hill v. Liberty Mut. Ins. Co., 357 So. 2d 61 (La. App. 4th Cir. 1978); Hurston v. Dufour, 292 So. 2d 733 (La. App. 1st Cir. 1974), in which the courts rejected the contention that the vicarious liability of a parent for the negligent operation of a vehicle did not arise out of the use of the vehicle. The courts held that coverage for such liability was excluded in the homeowner's policy.

by the insured existed independently of the automobile, then liability does not arise out of use even though the duty could have been performed by use of an automobile. In the final analysis, common sense must be utilized in making the determination whether use of the automobile is an essential ingredient of the duty breached by the insured.

The Louisiana Supreme Court has wisely rejected the utilization of an artificial formula to resolve use issues. As long as the courts resist the temptation to play word games in hard cases, the process suggested by the four supreme court decisions, with a heavy dose of common sense, offers a sound approach to the resolution of this often difficult issue.[19]

Uninsured Motorist Coverage

Workers' Compensation

The Louisiana Workers' Compensation Act reserves the right of injured workers to recover damages from third persons and further provides that any person obligated to pay compensation may maintain

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19. Other cases which have involved the issue of whether an accident arose out of the "ownership, maintenance, use, loading or unloading of vehicles" include: (1) Firearms and firecrackers: Tobin v. Williams, 396 So. 2d 562 (La. App. 3d Cir. 1981); Bruno v. Hartford Accident & Indem. Co., 337 So. 2d 241 (La. App. 3d Cir. 1976); Ramsey v. Continental Ins. Co., 286 So. 2d 371 (La. App. 2d Cir. 1973); Cagle v. Playland Amusement, 202 So. 2d 396 (La. App. 4th Cir.), *writ denied*, 251 La. 403, 204 So. 2d 578 (1967); Speziale v. Kohnke, 194 So. 2d 485 (La. App. 4th Cir.), *writ denied*, 250 La. 469, 196 So. 2d 534 (1967). (2) Non-operator use: Garvey v. Great Atl. & Pac. Tea Co., 125 So. 2d 634 (La. App. 4th Cir. 1961); Bolton v. North River Ins. Co., 102 So. 2d 544 (La. App. 1st Cir. 1958), *cert. denied*. (3) Law enforcement: Curry v. Iberville Parish Sheriff's Office, 405 So. 2d 1387 (La. App. 1st Cir. 1981), *writ denied*, 410 So. 2d 1130 (La. 1982). (4) Loading and unloading: Pullen v. Employer's Liab. Assurance Corp., 230 La. 867, 89 So. 2d 373 (1956); Copes v. Copeland Bldg. Supply, 415 So. 2d 264 (La. App. 2d Cir. 1982); Young v. E & L Lumber Co., 392 So. 2d 136 (La. App. 1st Cir. 1980); Lee v. Liberty Mut. Ins. Co., 387 So. 2d 621 (La. App. 4th Cir. 1980); Sherville v. National Union Fire Ins. Co., 387 So. 2d 1181 (La. App. 1st Cir. 1980); Mauterer v. Associated Indem. Corp., 332 So. 2d 570 (La. App. 4th Cir. 1976); Barrois v. Service Drayage Co., 250 So. 2d 135 (La. App. 4th Cir.), *writ denied*, 259 La. 805, 253 So. 2d 66 (1971); Mays v. Aetna Casualty & Surety Co., 242 So. 2d 264 (La. App. 2d Cir. 1970); United States Fidelity & Guar. Co. v. Burris, 240 So. 2d 408 (La. App. 2d Cir. 1970); Bardwell v. England Transp. Co., 169 So. 2d 537 (La. App. 4th Cir. 1964); Spurlock v. Boyce-Harvey Mach. Co., 90 So. 2d 417 (La. App. 1st Cir. 1956). (5) Spills: Tillman v. Canal Ins. Co., 305 So. 2d 602 (La. App. 1st Cir. 1974), *writ denied*, 307 So. 2d 630 (La. 1975). (6) Children: Frazier v. State Farm Mut. Auto. Ins. Co., 347 So. 2d 1275 (La. App. 1st Cir. 1977); Tucker v. State Farm Mut. Auto. Ins. Co., 154 So. 2d 226 (La. App. 2d Cir. 1963); Baudin v. Trader's & Gen. Ins. Co., 201 So. 2d 379 (La. App. 3d Cir. 1967). (7) Towing or pulling: Johns v. State Farm Fire & Casualty Co., 349 So. 2d 481 (La. App. 3d Cir. 1977); Howard v. Ponthieux, 326 So. 2d 911 (La. App. 3d Cir. 1976); Vogt v. Hotard, 144 So. 2d 714 (La. App. 4th Cir. 1962), *cert. denied*. (8) Maintenance: Chase v. Dunbar, 185 So. 2d 563 (La. App. 1st Cir. 1966); Wall v. Windmann, 142 So. 2d 537 (La. App. 4th Cir. 1962).

a suit against such third person for recovery of any amount which he has paid or has become obligated to pay as compensation to an employee.[20] Overruling the rationale of decisions from four appellate circuits,[21] the Louisiana Supreme Court in *Johnson v. Fireman's Fund Insurance Co.*,[22] held that a workers' compensation insurer can maintain an action against certain insurers providing uninsured motorist (UM) coverage for the employee to recover the amount of compensation benefits paid to the employee. The court reasoned that the UM insurer is a third person legally liable to pay damages to an injured employee because it is obligated by law and by the issuance of its policy to repair the same damage as the tortfeasor. Such conclusion, the majority asserted, was consistent with the legislative aims of the workmen's compensation statute to prevent double recovery (from both the UM insurer and the compensation insurer) by the injured employee and to place the ultimate burden on the tortfeasor.[23] The court did impose one limitation upon a compensation insurer's right to recover from uninsured motorist insurers. The compensation insurer cannot recover out of UM coverage paid for by an employee. The court concluded that such recovery would dilute the employee's compensation benefits in violation of the compensation act's prohibition against the direct or indirect imposition of the cost of compensation upon the employee.[24]

Since the issue was raised in *Johnson* on an exception of no cause of action, the policy was not in evidence. Therefore, the court did not consider the exclusion contained in most UM policies which expressly precludes the coverage from inuring directly or indirectly to the benefit of any workers' compensation insurer. The UM statute neither mandates nor expressly prohibits this exclusion.[25] Since UM coverage is mandatory and since the *Johnson* decision holds that the UM insurer is a third party against whom the compensation carrier is entitled to exercise its statutory subrogation right, the court will probably hold that the policy exclusion is not enforceable on the ground that the subrogated compensation carrier succeeds to the insured's statutory right to UM coverage.[26]

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20. *See* LA. R.S. 23:1101-:1103 (1964 & Supp. 1983).

21. Johnson v. Fireman's Fund Ins. Co., 411 So. 2d 538 (La. App. 1st Cir. 1982); Lute v. City of Lake Charles, 394 So. 2d 736 (La. App. 3d Cir. 1981); Bannon v. Edrington, 392 So. 2d 186 (La. App. 4th Cir. 1980); Gentry v. Pugh, 362 So. 2d 1154 (La. App. 2d Cir.), *writ denied*, 363 So. 2d 922 (La. 1978); *see* McKenzie, *Louisiana Uninsured Motorist Coverage—After Twenty Years*, 43 LA. L. REV. 691, 714 (1983).

22. 425 So. 2d 224, 227-28 (La. 1983).

23. The statutorily specified uninsured motorists coverage is provided for the protection of injured persons; it guarantees the injured person's recovery of damages as though the tortfeasor had been insured.

24. *See* 425 So. 2d at 228-29; LA. R.S. 23:1163 (1964).

25. LA. R.S. 22:1406(D) (1978 & Supp. 1983).

26. Also, policies providing UM coverage generally contain reduction clauses which

Of the two policies under consideration in *Johnson*, one was issued to the employer and one to the employee. The compensation carrier was not permitted to subrogate against the UM coverage purchased by the employee. Presumably, this restriction would not be applicable to subrogation under policies purchased by anyone other than the employee. For example, if the employee is insured as a relative under another's policy or has coverage because he is occupying another's insured automobile, then the compensation carrier would be subrogated to the employee's rights under such coverage even though the coverage was not provided by the employer.

The courts will be called upon to resolve an interesting "stacking" dilemma. Louisiana Revised Statutes 22:1406(D)(1)(c) provides that the occupant of an automobile not owned by him may recover under the UM coverage available on the occupied automobile and under one additional policy. The additional coverage available to such occupant may include a policy purchased by him and policies purchased by others. It would be to the employee/occupant's advantage to choose his own policy and to the compensation carrier's advantage to choose other coverage against which it could exercise its subrogation rights.[27] Is the compensation carrier subrogated to the employee/occupant's right of selection?

The 1983 amendments to the Louisiana Workers' Compensation Act greatly strengthened the subrogation rights of the employer and compensation insurer by imposing penalties upon the employee and third party who enter into settlements without the approval of the employer or his insurer.[28] It now will be necessary for the UM insured and UM insurer to obtain settlement approval from the compensation insurer or employer when those parties' may be subrogated to the UM coverage.

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provide that the sums received as workers' compensation benefits will be credited against the limits of liability under UM coverage. Generally, these reduction clauses have been held to be unenforceable. Landry v. State Farm Mut. Auto. Ins. Co., 320 So. 2d 254 (La. App. 3d Cir. 1975); Williams v. Buckelew, 246 So. 2d 58 (La. App. 2d Cir. 1970). These reduction clauses are discussed in McKenzie, *supra* note 18, at 716; Johnson, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Workers' Compensation*, 40 LA. L. REV. 742 (1980).

27. For example, suppose the employee who owned his own car resided with his parents who also own an automobile and the employee was injured while operating his employer's vehicle. Under LA. R.S. 22:1406 (D)(1)(c), the coverage on the employer's vehicle would be primary, and under *Johnson* the compensation carrier would be subrogated to the employee's rights under the employer's policy. The UM coverage under both the policy issued to the employee and to the parents would be available as excess coverage, but under the statute the injured person is limited to one policy. The right of selection is critical because under *Johnson* the compensation carrier would be subrogated only to the rights against the parent's coverage.

28. LA. R.S. 23:1102 (1964), *as amended by* 1983 La. Acts, 1st Extra. Session, No. 1, § 1.

Legal Interest

A conflict in the circuits has been resolved by the third circuit's reversal of position in *Stroud v. Liberty Mutual Insurance Co.*[29] In *Hebert v. Ordoyne*,[30] the first circuit concluded that legal interest on a UM claim ran from date of judicial demand as in tort actions. The third circuit disagreed in *Guidroz v. Tauzin*,[31] holding that a UM claim was an action in contract and that interest ran from the date the debt became due, which was held to be the date of judgment. Finding that *Johnson v. Fireman's Fund Insurance Co.*[32] constituted a shift in legal theory, the third circuit in *Stroud* overruled its decision in *Guidroz* and awarded interest from date of judicial demand.

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29. 429 So. 2d 492 (La. App. 3d Cir. 1983).
30. 388 So. 2d 407 (La. App. 1st Cir. 1980).
31. 413 So. 2d 682 (La. App. 3d Cir. 1982).
32. 425 So. 2d 224 (La. 1982).