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Insurance—Construction of the Clause "Arising Out of the Use of" in an Automobile Liability Insurance Policy—*National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966)

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INSURANCE—CONSTRUCTION OF THE CLAUSE "ARISING OUT OF THE USE OF" IN AN AUTOMOBILE LIABILITY INSURANCE POLICY—*National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W. 2d 821 (1966).

National Union Fire Insurance Company brought an action for declaratory judgment to determine whether they were legally obligated to defend their insured, Scott Campbell, under the terms of a comprehensive insurance policy. Scott Campbell was hunting with some companions, and while returning home in an automobile attempted to unload his rifle. In the process the rifle discharged causing serious injury to the driver. In the suit that followed, three insurance companies became involved,[1] as well as Scott Campbell, a minor, and his father. The primary issue at the trial was whether the injury arose out of the "use of the automobile" as defined in the automobile policy. The trial judge held that the injury did so arise. On appeal the Supreme Court of Nebraska reversed holding that some causal relationship must exist between the use of the automobile and the injury to the victim before the accident can "arise out of the use of the automobile." Since no such relationship existed, the automobile insurer was under no duty to defend.

This decision was the first in Nebraska construing the clause "arising out of the use of" an automobile. Although there has been general agreement as to the definition of this clause in other jurisdictions,[2] a problem arises in its application.[3] The purpose of this note will be to discuss the application of the particular facts of this case to the definition of the clause, to compare this decision to other decisions in the area, and to formulate some guide lines which will aid in future application of the clause.

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[1] National Union Fire insured the Campbells under a comprehensive personal liability policy. Allstate insured Joseph Bruecks, Sr., and his family, including persons using the automobile with his consent, under an automobile liability policy covering the car which his son was driving at the time of the shooting. St. Paul insured the Campbells on an automobile owned by them, which extended coverage for the use of non-owned automobiles.

[2] See Fidelity & Cas. Co. v. Lott, 273 F.2d 500 (5th Cir. 1960); Federated Mut. Implement & Hardware Ins. Co. v. Gupton, 241 F. Supp. 509 (E.D.S.C. 1965); Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (1961); Suburban Serv. Bus Co. v. National Mut. Cas. Co., 237 Mo. App. 1128, 183 S.W.2d 376 (1944); Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181 (1944).

[3] See Federated Mut. Implement & Hardware Ins. Co. v. Gupton, 241 F. Supp. 509, 511 (E.D.S.C. 1965); Annot., 89 A.L.R.2d 150, 153 (1963).

I. DEFINITION AND APPLICATION OF THE "ARISING OUT OF THE USE OF" CLAUSE

It has been generally held that insurance contracts will be construed liberally in favor of the insured, and when they are susceptible of two interpretations, the one that favors the insured will be preferred.[4] Accordingly, the clause "arising out of the use of" has been interpreted to mean causally connected with, not proximately caused by the automobile.[5] Furthermore, the words "arising out of" are of broader significance than the words "caused by," and are ordinarily understood to mean originating from, incident to, or having connection with the use of the vehicle.[6]

The problem of applying the "arising out of the use of" clause resolves itself into two parts: first, was Scott Campbell *using* the automobile within the terms of the policy, and second, did the injuries sustained by the plaintiff *arise out of that use*?

A person need not be the operator or driver of a vehicle to be using it within the meaning of the policy. A person is using the automobile if he is a passenger in the vehicle with the permission[7] of the named insured.[8] The court, in the instant case, found that

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[4] Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (1961); Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181 (1944); Soukop v. Employer's Liab. Assur. Corp., 341 Mo. 614, 108 S.W.2d 86 (1937).

[5] Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (1961).

[6] Red Ball Motor Freight v. Employers Mut. Liab. Ins. Co., 189 F.2d 374 (5th Cir. 1951); 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4317 (1962).

The Nebraska Supreme Court in the *National* decision cited Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181 (1944) which said "[t]he words 'arising out of the use' are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from, growing out of, or flowing from." National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 649, 139 N.W.2d 821, 826 (1966).

[7] Often there is a question raised as to what is permission within the meaning of the policy. For a discussion see Comment, 44 NEB. L. REV. 129 (1965).

[8] See Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N.W.2d 471 (1964); American Auto. Ins. Co. v. Taylor, 52 F. Supp. 601 (N.D. Ill. 1943) where the court citing Brown v. Kennedy, 38 Ohio L. Abs. 134, 138, 49 N.E.2d 417, 419, (Ohio Ct. App. 1942) said: "Certainly, it would be a narrower application of the term used, ignoring the general considerations mentioned, to require one using the car to use it in its entirety. The daughter of the insured was using the seat, which she occupied. She was using the sides and top to shelter her from the weather. She was using the wheels and tires, for upon them she was propelled through space. She was using the motor of the car, for by

Scott Campbell was riding as a passenger in the insured vehicle with the permission of the named insured, since the driver's mother, who was a named insured, directed the driver to pick up the youths.[9] However, extending liability coverage to a passenger as an insured does not necessarily mean that every negligent act committed by the passenger in which someone is injured "arises out of the use" of the automobile. There must be some causal connection between the injury and the use of the vehicle.[10] The difficulty therefore centers around the determination of whether the facts in each peculiar case are sufficient to sustain the required causal relationship.[11]

II. WHAT CONSTITUTES CAUSAL CONNECTION

The Nebraska Supreme Court *held* in the *National* case that the discharge of the gun during the use of the automobile was not within the coverage of the "arising out of the use" clause.[12] However, considering the public policy of liberal construction in favor of the insured and considering the fact that the insurance company has the power to limit any risk that they do not wish to cover, it would seem that the narrower application that the Nebraska Supreme Court placed upon the clause is unwarranted. There are decisions from other jurisdictions which the court cites with approval, but then attempts to distinguish, which afford a broader base upon which liability may be found. These cases illustrate several factors or tests used in construing the clause and each test will be discussed separately.

A. Facilitating the Use of the Vehicle

In *Schmidt v. Utilities Ins. Co.*,[13] plaintiff was injured when he

its power the vehicle in which she was riding was propelled along the road. Is all of this use to be ignored, simply because she did not hold the wheel—manipulate the gear shift, press the accelerator or brake pedal? Manifestly, this is restricting the full reasonable words, which the insured has written." *Id.* at 603. See also Hardware Mut. Cas. Co. v. Mitnick, 180 Md. 604, 26 A.2d 393 (1942); Comment, 44 Neb. L. Rev. 129, 138-39 (1965).

9 National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 647-48, 139 N.W. 2d 821, 824 (1966).

10 See 7 Appleman, Insurance Law and Practice § 4317 (1963); Annot., 89 A.L.R.2d 150, 153 (1963). *Cf.* Federal Ins. Co. v. Michigan Mut. Liab. Co., 277 F.2d 442 (3d Cir. 1960).

11 See Federated Mut. Implement & Hardware Ins. Co. v. Gupton, 241 F. Supp. 509, 511 (E.D.S.C. 1965).

12 National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N.W.2d 821 (1966).

13 353 Mo. 213, 182 S.W.2d 181 (1944).

tripped and fell over some wooden blocks located on the sidewalk. The driver of a truck had left the blocks on the sidewalk after he had used them as ramps for the purpose of backing the truck over the curb. The court held that the use of the blocks was necessary to facilitate the use of the truck; therefore the clause applied. In the *National* case, the transportation of the rifles facilitated the use of the vehicle since the vehicle was being used for the pleasure of the passengers by transporting them and their equipment home from a hunting trip. The transportation of the rifles was a necessary act in the fulfillment of the trip.

B. INCIDENT TO THE USE OF THE VEHICLE

In *Suburban Serv. Bus Co. v. National Mut. Cas. Co.*,[14] a child was injured as a result of being struck by some fluid from a fire extinguisher, which the bus driver discharged at the passengers to frighten them into refraining from using water guns on him. The court said that the injury arose out of the use of the bus since the bus driver's conduct was for the promotion of the safe operation of the bus and consequently incident to its use in transporting passengers. In the same manner, the unloading of the rifle in the *National* case was to prepare it for safe transportation in the vehicle and therefore any injury arising from this preparation was incident to the use of the vehicle.

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[14] 237 Mo. App. 1128, 183 S.W.2d 376 (1944). See Roche v. United States Fid. & Guar. Co., 247 App. Div. 335, 287 N.Y.S. 38 (2d Dep't 1936), *aff'd* 273 N.Y. 473, 6 N.E.2d 410 (1936) where an insured was walking toward a gas tank with a lighted cigarette in his mouth and a lighted match in his hand to examine the dial of a gauge on the vehicle. There was an explosion and the plaintiff was injured. The court said that the examination of the dial was incidental to the use of the vehicle; consequently the injury arose out of the use of the vehicle. See also Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co., 189 F.2d 374 (5th Cir. 1951) where an employee was negligent in failing to close a valve after refueling a truck. The failure to close the valve resulted in an overflow of gasoline which exploded after the truck had departed. The court said that the act of the driver was incident to the use of the truck, and therefore the injury arose out of the use of the truck. *But cf.* Esfeld Trucking, Inc. v. Metropolitan Ins. Co., 193 Kan. 7, 392 P.2d 107 (1964) where a truck had been unloaded at the job site and was being towed by a winch when the truck struck and injured a geologist. The court held that the injury did not arise out of the use of the truck because the injury was not a natural and reasonable incident or consequence of the use of the vehicle.

C. CONTEMPLATED BY THE PARTIES

In *American Fire & Cas. Co. v. Allstate Ins. Co.*,[15] an automobile was towing a jeep and was involved in a collision which resulted in injuries to the plaintiff. The court held that the manner in which the jeep was being used was not too unusual, and that it was clearly within the contemplation of the parties to the insurance contract. Accordingly, the injury arose out of the use of the automobile. The vehicle in *National* was being used as a means to convey boys and their rifles home from a hunting trip. This use is not unusual and could reasonably be considered within the contemplation of the parties.

D. "BUT FOR" CAUSATION

In *Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co.*,[16] a pickup truck pulling a horse trailer was involved in an accident. The court held that the accident arose out of the use of the horse trailer, since at the time of the accident the trailer was being used to transport a horse. The court said that "arising out of" means causally connected with, not proximately caused by, and but for causation—a cause and result relationship—is enough to satisfy this provision of the policy. Following this line of reasoning in *National*, "but for" the transportation of the rifle the accident and subsequent injury would not have occurred.

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[15] 214 F.2d 523 (4th Cir. 1954). *Cf.* Tucker v. State Farm Mut. Auto. Ins. Co., 154 So. 2d 226 (La. Ct. App. 1963) where an insured returned to her home and parked her automobile on an inclined driveway. Approximately an hour later she observed that the automobile, occupied by one of her minor children had begun to roll down the incline. In an attempt to stop the automobile the insured was struck and killed. The court held that the injury did *not* arise out of the use of the automobile because neither the insurer nor the insured intended to contract with respect to liability resulting from the use of the vehicle by a child; Commercial Union Ins. Co. v. Hall, 246 F. Supp. 64 (E.D.S.C. 1965) where an insured drove his car in front of an automobile being driven by the plaintiff, blocking his path. Insured then alighted from the car and subjected the plaintiff to a brutal assault. The court held that the injury did not arise out of the use of the vehicle since this was not the type of use reasonably contemplated by the insurer and the insured; Handley v. Oakley, 10 Wash.2d 396, 116 P.2d 833 (1941) where an ice cream truck parked near a baseball diamond for the purpose of distributing ice cream to children. A minor was struck by a foul ball while standing near the truck. The court held that the injury did not arise out of the use of the vehicle since this type of injury was not contemplated by the parties.

[16] 403 Pa. 603, 170 A.2d 571 (1961).

E. CONSEQUENCE OF THE USE

In *Dorsey v. Fidelity Union Cas. Co.*,[17] injury was inflicted on the insured while seated at the steering wheel of an automobile by the accidental discharge of a rifle from which a companion was removing shells for the purpose of loading the rifle into the automobile. The companion was standing outside the automobile. The court in construing the words "as a result of" held that the injury resulted from operating or riding in the car:

> [T]he parties had gone to the country for the purpose of hunting ducks, and intended to return to the city. The automobile was being used as a mode of conveyance, and Dorsey was the operator thereof. It was contemplated that the car would be used not only to convey the parties but their guns and ammunition. It was necessary that the guns be loaded into the car if they were to be transported to the city. Dorsey was in the car waiting for it to be loaded and for the purpose of driving it to the city as soon as the guns had been placed therein. The companion who fired the gun was not a stranger to the transaction, and he did not appear on the scene by accident. He and Dorsey were engaged in a common purpose with a common design, and were working in cooperation with each other. The transportation of the guns was a part of the common purpose. . . . Dorsey by riding in the car and operating it for the purpose for which it was being used, to wit, the hauling of the men and their guns, was thus brought into close proximity to the gun and exposed to the danger of being injured thereby while the guns were being prepared and loaded into the car. Such danger was necessarily incident to the use of the car for the purpose for which it was then being used, and the injury was one of the consequences of such use.[18]

It is submitted that the construction of the phrase "as a result of" is sufficiently similar to the construction of the phrase "arising out of the use of" to make the above mentioned language apply with equal vigor to the case at bar.[19]

F. USE OF AN APPURTENANCE

In *Fidelity & Cas. Co. v. Lott*,[20] the named insured, while

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17 52 S.W.2d 775 (Tex. Ct. Civ. App. 1932).

18 *Id.* at 776-77.

19 The verb "results" means "to proceed, spring or arise." Pacific Indem. Co. v. Arline, 213 S.W.2d 691 (Tex. Ct. Civ. App. 1948).

20 273 F.2d 500 (5th Cir. 1960). See Laviana v. Shelby Mut. Ins. Co., 224 F. Supp. 563 (D. Vt. 1963) where the defendant was unloading his gun outside of the car when the door swung shut causing the gun to discharge injuring the plaintiff. The court said that the injury arose out of the use of the car because a part of the car, namely the door, was instrumental in producing the accident. See also Bolton v. North River Ins. Co., 102 So. 2d 544 (La. Ct. App. 1958) where a passenger in the

resting his rifle across the top of his vehicle, shot at a deer. The bullet was deflected by the top of the vehicle and injured a passenger inside. The court held that the "automobile" was used as a gun-rest and therefore the accident arose out of the use of the "automobile." The court went on to say that the "automobile" did not have to be used as a "vehicle," but any injury would arise out of the use of the automobile if the automobile was being used in some way. In *Fidelity* the automobile was being used as a gun-rest. In the instant case the automobile was being used in its traditional method—as a mode of transportation. Accordingly, it would seem that the *National* case is even stronger than the *Fidelity* case because the automobile was being used as a "vehicle," a means of transporting the guns, and the ensuing injury arose out of this use.

G. Automobile as an Indispensable Agent

In *Wheeler v. London Guar. & Acc. Co.*,[21] the insured had transported two steel girders and by means of a block and tackle, with the automobile engine as motive power, loaded them into a garage. A boy stepped on one of the girders which caused it to roll over crushing his foot. The court pointed out that the automobile was an indispensable agent in the performance of the task and was directly connected with it. Therefore the injury arose out of the use of the automobile. In *National* it can also be said that the automobile was an indispensable agent, for without it the youths could not have gone hunting.

H. Essential Transaction in Connection With Use

In *Owens v. Ocean Acc. & Guar. Corp.*,[22] the plaintiff was in-

back seat of an automobile suddenly and without warning slammed the back door of the automobile on the plaintiff's left hand. The court held that the injury arose out of the use of the vehicle since an appurtenance of the vehicle produced the accident. *But cf.* McDonald v. Great Am. Ins. Co., 224 F. Supp. 369 (D.R.I. 1963) where a child threw a cherry bomb out of his father's moving vehicle and into the plaintiff's vehicle injuring a passenger. The court said that the injury did not arise out of the use of the vehicle because the injury was not caused by something physically attached to or immediately connected with the vehicle. It should be noted that this Rhode Island rule of limiting recovery only to injuries which are caused by the vehicle or something physically attached to the vehicle is restrictive and in the minority.

21 292 Pa. 156, 140 Atl. 855 (1928).

22 194 Ark. 817, 109 S.W.2d 928 (1937). See Federated Mut. Implement & Hardware Ins. Co. v. Gupton, 241 F. Supp. 509 (E.D.S.C. 1965) where a service station employee was delivering gas to a stalled automobile. As the employee poured the gas from a can into the tank, the woman driving the car started it up and drove backward pinning the employee

jured when she fell from an ambulance stretcher as she was being carried to the ambulance. Since the use of the stretcher was an essential transaction in connection with the use of the automobile as an ambulance, the injury arose out of the use of the automobile. Since in *National* the automobile was being used in its traditional manner—as a means of conveyance—this type of case is inapplicable.

I. INDEPENDENT ACTS

In *Norton v. Huisman*,[23] the plaintiff was injured while operating a sewer cleaning machine mounted on a truck. The court in holding that the injury did not arise out of the use of the truck stated that the injuries were the result of the independent operation of the sewer cleaning machine. It could be argued that the rifle in the *National* case like the sewer machine in the *Norton* case was an independent instrumentality. The truck was not necessary to the operation of the sewer cleaning machine and the car was not necessary to the operation of the rifle. However, in the *Norton* case the truck was not being used at the time of the accident. In *National* the car was not only being used at the time of the accident, but the use being made of the car was transporting the instrumentality which gave rise to the accident. Accordingly it cannot be said that firing of the rifle was a totally independent act, completely disconnected from the use of the vehicle.

J. LOADING AND UNLOADING

In *Allstate Ins. Co. v. Valdez*,[24] the insured was ejecting shells from his shotgun as a preparatory step to placing the shotgun in the trunk of the car. The shotgun accidentally discharged inflicting serious injuries to an occupant of the car. The court held that the accident arose out of the use of the vehicle since the shotgun discharged as the defendant attempted to load the vehicle. In *National*

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between the car and his employer's truck. Since the bringing of the gas was an essential transaction in connection with the use of the truck as a highway emergency vehicle, the injury arose out of the use of the truck.

[23] 17 Wis.2d 296, 116 N.W.2d 169 (1962). See Zurich Gen. Acc. & Liab. Ins. Co. v. American Mut. Liab. Ins. Co., 118 N.J. L. 317, 192 Atl. 387 (Sup. Ct. 1937) where plaintiff was injured when an employee of a milk company, while delivering milk, negligently used an ice pick. The court held that this was a totally independent act entirely disconnected with the use of the vehicle.

[24] 190 F. Supp. 893 (E.D. Mich. 1961). See Employers' Liab. Assur. Corp. v. Indemnity Ins. Co. of No. Am., 228 F. Supp. 896 (D. Md. 1964) where the court states that a policy which contains the language "loading and unloading" broadens the coverage afforded the insured.

the gun discharged after the car had been loaded; therefore it cannot be said that the injury arose out of the loading or unloading of the car. However, the distinction between unloading the rifle before entering the car and unloading the gun after entering the car provides little basis for the determination of insurance coverage.

III. CONCLUSION

The opinion in *National* recognizes that the concept of "arising out of the use of" comprises many things. First, that an automobile may be used by a person without it actually being driven by him. Second, that the automobile does not have to be the proximate cause of the injury, but some causal relation must exist between the injury and the use of the vehicle. Third, that the words "arising out of the use of" are broad, general and comprehensive. Fourth, that the clause should be given a liberal construction in favor of the insured. After recognizing and considering the many facets of the "arising out of the use of" clause, the Supreme Court of Nebraska decided to apply the clause narrowly. A narrow application of the clause in this case would seem unwarranted in the light of two important factors. First, the insurer, when composing the policy, has the opportunity to define the clause as broadly or as narrowly as he may desire. Since the insurer did not choose to restrict this clause, the broader application of other jurisdictions should have been adopted in accordance with the recognized principle of construing the clause in favor of the insured. Second, it is common knowledge that automobiles are frequently used to transport men and guns on hunting trips. By failing to exclude fire-arm accidents from the policy the insurer in effect acquiesced in the transportation of the guns in the vehicle, and accepted the risk of someone being injured.

It is difficult to escape the overriding policies of liberal construction and effectuating the intention of the parties. The primary purpose of a party in buying insurance is indemnification, and if at all possible, that purpose should be effectuated.

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