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Insurance - Isolated Instance of Carrying for Hire Not "Public or Livery Conveyance" Within Policy Exclusion - Stanley v. American Motorists Ins. Co.

INSURANCE — ISOLATED INSTANCE OF CARRYING FOR HIRE NOT "PUBLIC OR LIVERY CONVEYANCE" WITHIN POLICY EXCLUSION

Stanley v. American Motorists Ins. Co.[1]

Appellee issued a policy of insurance to Pfeiffer, applying to a truck owned by him, which contained the following exclusion clause:

> "This policy does not apply (a) while the automobile is used as a public or livery conveyance, unless such use is specifically described in the policy and premium charged therefore."

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[1] 73 A. 2d 1 (Md., 1950).

Use as a public or livery conveyance was not described in the policy nor was a premium charged for such use. During the policy period a club to which the appellant belonged arranged a picnic. Tickets were sold to the members of the picnic group to pay for their transportation to the picnic grounds. The sum of eighteen dollars was collected and given to the insured's employee, Johnson, who was to drive the members to the picnic area. Johnson was not acting as the agent or servant of the insured on this occasion but he did have permission to use the truck. Neither the insured nor Johnson was in the business of carrying passengers for hire and this was the first instance of its kind. On the way to the picnic grounds an accident occurred which resulted in injury to appellant, a passenger on the insured's truck. As a result of this injury, a default judgment was obtained against the insured. The insurance carrier then instigated an action against the insured and the injured party asking for a declaratory judgment on the policy. The lower court held the use was within the exclusion clause and that the policy did not apply to this accident. The Court of Appeals reversed this ruling.

In both the Court of Appeals and the lower court the case resolved on the single question: does one such isolated use, as in this factual situation, constitute a use as a "livery or public conveyance"? That such a question came to the Court of Appeals after several decades of mass auto operation and literally millions of relatively serious accidents is explained by the change that occurred in automobile policies during the last war. Prior to our entry into the war the standard policy exclusion was to the effect that the policy would not apply while passengers were being carried for a consideration. With the war and its resultant shortages of rubber and gasoline, the car pool became a popular and necessary association of most working people. The insurance companies changed their policies and narrowed the exclusion so as to bar coverage while the automobile is used as a public or livery conveyance, but not prevent "sharing the ride".

It is suggested in the appellee's brief that the word "while" in the phrase "while the automobile is used as a public or livery conveyance" is significant and serves to refute the appellant's claim that the use must be repeated and have occurred on numerous occasions to be excluded. This emphasis on the word "while" ignores the meaning of the words "public or livery conveyance", for the automobile can not be used "as" a public or livery conveyance

unless, like such a conveyance, it is used or held out for use for hire on repeated occasions.

The appellee's contention rested on cases involving the older exclusion "While the vehicle is being used for the carrying of persons for a consideration or hire" or similar phrases. In those cases a single instance of such use was held to bring the use within the exclusion clause and to allow the insurer to avoid liability for accidents arising in the course of such use. However, the distinction between such clauses and the one in the instant case is immediately obvious as the meaning of the older exclusion does not rest on the words "public or livery conveyance". Hence the decisions cited by the insurer and the dicta therein must be considered in the light of the earlier broader exclusion and when so considered it is seen that none of these cases applies to the present problem.

Mittet v. Home Insurance Co.,[2] cited by the insurer, involved the exclusion "if the automobile described herein shall be used for carrying passengers for compensation, or rented or leased". Under this broad exclusion the court held for the insurer. Realizing the importance of the words "public or livery conveyance" the insurer in the instant case says the court referred to the use in the *Mittet* case as being used for livery purposes. A closer look at the case reveals that the word "livery" was used in a paragraph dealing only with the question of whether or not the insured had knowledge of the use, and which merely referred to the charge of the trial court, wherein the word "livery" was used. It was truly not an attempt to define the word, as such definition was not required.

Myers v. Ocean Accident & Guarantee Corp.[3] also involved the broader clause. In referring to this case the insurer quotes the court as saying:

> "Not only was this arrangement (to carry passengers for compensation) contrary to the literal word of the exclusion clause but *it also violated its purpose and its intent by an increase in the risk; that the insurer might become liable to pay a passenger for damages to them resulting from the negligent operation of the automobile.*"[4]

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[2] 207 N. W. 49 (S. D., 1926). The insured's son on a single occasion transported for a consideration a passenger from the insured's farm to a nearby town.

[3] 99 F. 2d 485 (4th Cir., 1938).

[4] Appellee's Brief, p. 13 (No. 145, Oct. Term, 1949).

In the case we are considering we do have an increase of risk but this also must be considered in the light of the different exclusion clauses. The policy in the *Myers* case was meant to exclude the increased risk of carrying passengers for a compensation while the policy in our case is so worded as to exclude only the increased risk incurred in using the car for purposes of a "public or livery conveyance". The distinction between the two exclusions continues to stand.

Broadway Auto Livery v. State Board of Public Roads[5] was used in an attempt to define livery service and the court was quoted:

> "The proprietor of a livery stable was not at common law a common carrier, for the reason that he did not hold himself out as being willing to carry passengers indiscriminately. There was an element of choice in the transaction both on the part of the proprietor and the person desiring transportation. . . . Transportation of this kind was usually a matter of prearrangement as to time, type of vehicle, destination, and charges."

The insurer puts his emphasis on the last sentence and states that it applies to the instant case. However, in the case cited the court was not dealing with a single instance but with a case where the defendant in effect ran a taxi business and had not complied with state regulations, the defense being that his vehicles were being used in "livery service" and were not taxis. The court there was concerned with the maximum use to which a vehicle could be used in "livery service" whereas we are concerned with the minimum use that will bring a vehicle within that classification. In the opinion in the *Broadway Auto Livery* case there is no implication that a single use for hire would constitute a vehicle a "livery conveyance".

In support of the decision in the instant case we find several adequate definitions of the words in question. *Elliot v. Behner*[6] a decision involving the same exclusion clause with which we are here concerned, contains the following syllabus statement:

> "The term 'public conveyance' means a vehicle used indiscriminately in conveying the public, and not limited to certain persons and particular occasions or

[5] 158 A. 375, 376 (R. I., 1932).
[6] 150 Kan. 876, 96 Pac. 2d 852 (1939).

> governed by special terms. The words 'public conveyance' imply the holding out of the vehicle to the general public for carrying passengers for hire. The words 'livery conveyance' have about the same meaning."

This same definition is adopted by the courts in *Pimper v. National American Fire Ins. Co.*,[7] *Allor v. Dubay*,[8] and *McDaniel v. Glen Falls Indemnity Co.*[9] In the latter case the court repeated the axiom for interpreting insurance policies that no strained or unnatural construction of the policy would be adopted and that the policy must be construed most favorably to the insured. A similar definition, adopted in *Concordia Fire Ins. Co. of Milwaukee v. Nelson*,[10] would also seem to exclude single instances where the insured is not actively engaged in the livery business. The decision in *Wood v. Merchants Ins. Co. of Providence*[11] also supports the instant case.

The decisions are as yet sparse because of the relative newness of the present exclusion clause; however, those rendered to date indicate that just as the broader clause was held, almost universally, to exclude a single use, the newer and narrower clause will not exclude coverage unless the use as a public or livery conveyance has been frequent and usual, or, as in the *Concordia Fire Ins. Co.* case, special facts clearly label the vehicle as a "livery conveyance".

In concluding its opinion, the Court of Appeals reasoned further that the insurer in issuing the policy with the narrower exclusion clause might be considered to have "adopted" "the uniform judicial construction that it has received in other states", having found that "most of the reported cases in which the narrower clause has been construed were decided before the policy in suit was issued".[12] This reasoning, at least, relates the opinion more nearly to the pragmatic approach of construing a policy in relation to

[7] 139 Neb. 100, 296 N. W. 465, 467 (1941).
[8] 317 Mich. 281, 26 N. W. 2d 772, 774 (1947).
[9] 333 Ill. App. 596, 78 N. E. 2d 111, 113 (1948).
[10] 221 S. W. 2d 320 (Tex., 1949). An owner of a car rental firm rented his own personal auto to a customer. It was held that this was a use as a "livery conveyance". The Court said, p. 322:

> "Appellee was engaged in a business that is now subject to the same laws applicable to livery stables, the automobile having supplemented horse-drawn carriages as a means of transportation. The generally accepted definition of a livery stable is: 'A place where horses are groomed, fed, and hired, and vehicles are kept for hire'."

[11] 291 Mich. 573, 289 N. W. 259 (1939). A schoolboy carried fellow students along to school for a consideration. The words of the exclusion "used as a public or livery conveyance for carrying passengers for compensation" were held not to exclude such use.
[12] *Supra*, n. 1, 4.

the insurance coverage which the company purported to sell for the premium paid. For, if the company chose to issue the policy with a narrower exclusion clause after similar narrow clauses had been construed by the courts as above indicated, it is not unfair to assume that the company had appraised the risk accordingly.