THE SHARE-EXPENSE AGREEMENT AND AUTOMOBILE INSURANCE

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The practice of sharing of expenses of automobile operation by a driver and his passengers is increasing in popularity, as a survey of the "want-ad" section of any newspaper will indicate. The increased use of such share-the-cost agreements may create difficult problems in the field of automobile insurance law.

Let us suppose that a passenger, the plaintiff, has agreed to share the operating costs of an automobile in return for his transportation. If the driver were grossly negligent, and a resulting accident injured the plaintiff, he would have a right of action against the driver's insurer provided that the driver's policy included passenger hazard coverage and the plaintiff is considered a gratuitous passenger.[1] If the injured party is treated as a passenger for hire different considerations will decide the problem. The insurance companies regard hiring as having a material effect upon the risk and protect themselves through the terms embodied in their policy and through the operation of the Alberta Insurance Act[2] which terms hiring a "use prohibited without permission."

Our hypothetical case involves an interpretation of the Alberta Insurance Act's statutory condition three which is deemed to be a part of every policy. The relevant portion reads:

> . . . unless permission is expressly given by an endorsement of the policy, and in consideration of an additional stated premium, the automobile shall not be rented or leased, nor shall it be used, . . . (c) As a taxi-cab, public omnibus, livery, jitney, or sight-seeing conveyance or for carrying passengers for compensation or hire.[3]

What types of uses are covered by the condition? The common forms of hiring are, of course, covered by the express prohibition. But what about other forms of "consideration" passing between the parties? We must determine whether the statute covers such arrangements as car pools, carriage of passengers who meet operating expenses, isolated hirings, and our original example of share-expense agreements between strangers.

In examining the statutory condition, we notice, first, the terms, "rented or leased." The meaning of these terms was considered in *Johnson* v. *British Canadian Insurance Co.*[4] where, in consideration of repair work done to the automobile, the owner allowed a mechanic to use the vehicle with the stipulation that the owner and his wife would also have a prior right to use it. The automobile caught fire while the mechanic was using it and the insurer defended on the ground that the car was "rented or leased". Lamont J., speaking for the majority in the Supreme Court of Canada, held for the plaintiff, deciding that the words "rented or leased" required a transferring of exclusive possession and control of the vehicle.

Normally, when the driver and passenger are both in the vehicle, the passenger cannot be said to have possession within the principles laid down by the court. Moreover, even a passenger in a taxi-cab cannot be said to be in possession or control inasmuch as he controls only the destination. On the basis of the Supreme Court decision it is submitted that "rented or leased" is applicable only to true cases of leasing or hiring, such as carried out by car rental agencies.

Section (c) enumerates the vehicles which are habitually in use for profit. Excluding the reference to vehicles "carrying passengers for compensation or hire" the enumeration in section (c) does not, it is submitted, describe any of the expense-sharing agreements we have mentioned. Carrying passengers under a car pool agreement may be an habitual practice but it cannot be said to have the commercial character of the operation of a commercial vehicle. Similarly when friends combine to share the cost of a trip, the term "taxi" is inapplicable. Nor do any of the terms used in the act accurately describe expense-sharing agreements, isolated carryings for reward, or the carrying of passengers for the cost of the operation.

The concluding reference to carriage for 'compensation or hire" might embrace the types of agreements we have numerated. One possibility is that the phrase, being closely connected with the terms preceding it, should be interpreted in a commercial connotation under the principles of *eiusdem generis.*

Another possibility is a strict interpretation against the insurer as being the "author" of the ambiguity present in the policy. If the insurer's own terms were capable of bearing two interpretations, pure commercial and non-commercial, the court would certainly interpret against him. The courts may well use the same approach in dealing with a statutory condition as they would in dealing with a policy condition. This strict interpretation approach was used by the Judicial Committee in *Curtis's and Harvey (Canada) Ltd.* v. *North British Mercantile Insurance Co.*[5] Lord Dunedin, delivering their Lordships' judgement, stated:

> The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree . . . that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability.[6]

Although this statement was made in reference to statutory conditions in a fire policy it is submitted that the same reasoning should apply to automobile insurance.

The courts, in dealing with the types of agreements we have mentioned, have faced the problem of defining "hire" and "compensation". In *Bonham* v. *Zurich General Accident and Liability Insurance Co. Ltd.*[7] the phrase "hire" was considered by Uthwatt J. deciding that "hire necessarily imports an obligation to pay."[8] Much the same approach was employed by Atkinson J. in *McCarthy* v. *British Oak Insurance Co. Ltd.*[9] when he declared that a hiring involves, "a stipulated reward, a *quid pro quo.*"[10] In *Semon* v. *Canada West Insurance*[11], H. J. Macdonald J. accepted the New Century Dictionary

definition of hire; "The price or compensation paid or contracted to be paid for the temporary use of something. . . ."[12] It is submitted that the conclusion to be drawn from these interpretations of the term hire is that the word connotes a commercial relationship arising out of a contractual agreement.

Does the word "compensation" in the Act have a meaning identical to the word "hire"? Uthwatt J. in the *Bonham* case[13] discussed the words "hire" and "reward" as used in the proposal form for a policy. The learned judge stated:

> The inclusion of the second word is not, in my opinion, merely for the purpose of giving an alternative to "hire", meaning the same thing, but for the purpose of bringing in a subject matter which does not include hire, and including (I do not say confined to that) cases where there is no obligation to pay.[14]

A similar reasoning may apply to our terms, "hire or compensation."

If compensation conveys a different meaning than does hire there still remains the problem of deciding when we have a case of compensation. In the *Bonham* case it was decided that there need not be an obligation to pay in order that there be a case of carriage for reward. In that case the owner drove to work every day, habitually carried passengers and, although there was no request for payment nor contract of hire, two of the passengers paid an amount equal to taxi fare. On these facts it was held that there was a carrying for reward but not for hire.

On the other hand, Godfrey J. interpreted compensation in an opposite manner in the Ontario case of *Shaw* v. *McNay*.[15] The learned judge held that compensation meant payment by way of profit or gain. One must note, however, the context from which "compensation" was taken as the phrase under consideration was "in the business of carrying passengers for compensation." We must notice that the word "business" is used and also that the word "compensation" alone appears, not the phrase "compensation or hire". Accordingly we may expect compensation to cover a much broader area than it does in our statute.

The judicial definitions of the terms used in our statute does not give decisive formulae for deciding the applicability of the condition in any given situation. A car pool, for example, does not have the commercial character of normal business ventures. Compensation, even if we equate it to reward does not cover the pool arrangement because there is no payment.

Canadian courts in interpreting highway traffic legislation and in deciding whether a right of action lies against an owner, have dealt with the problem of persons sharing expenses on a trip. Although the traffic acts do not bear the same wording as our insurance condition, the terms are sufficiently similar that the general attitude of the courts may be determined through a study of these cases. In *McKay* v. *Minard*[16], where fellow employees of a Brandon bank undertook a trip to Saskatchewan under a share-expense agreement, Maybank J. in discussing the problem under the Manitoba Highway Traffic Act[17] declared:

> I consider 'payment for such transportation' [the phrase under consideration] to have a commercial connotation and it does not extend to relationships where friendship or friendliness is the basis of the arrangement and the sharing of expenses is incidental as in the present case.[18]

Similarly in British Columbia, the problem arose in the interpretation of s. 74 (b) of the Motor Vehicle and Highway Traffic Act,[19] which states that a person "transporting passengers for hire or gain" is liable to him in negligence. Fisher J., in *Guerard et al* v. *Rodgers et al*,[20] decided that the section was inapplicable because of the original intention of the parties. The question to be asked becomes: Is the primary purpose of the arrangement compensation rather than companionship? It is submitted, in the light of these decisions, that if friendliness is the basis of the arrangement neither "hire" nor "compensation" may be applied.

When an automobile owner carries passengers regularly for payment, the courts have, in some cases, found a type of hiring. In the Ontario case of *Wing v. Banks*[21] the plaintiff approached the defendant and suggested an arrangement whereby the latter should drive him to Kingston from his home for a weekly sum. Gale J. held that the defendant was "in the business of carrying passengers for compensation" as set out in the Ontario Highway Traffic Act.[22] His decision was based on the fact that there was a definite agreement for a fixed fee and a history of continued carriage. This type of arrangement would, it is submitted, be covered by our statute, inasmuch as there is a commercial aspect to the agreement.

In Alberta the case of fixed payment, even on an isolated occasion, is in no doubt since the decision in the *Semon case*.[23] In that case the owner met several strangers in an Edmonton cafe and agreed to transport them to Fort Saskatchewan for a sum equivalent to taxi fare. H. J. Macdonald J. held that there was a hiring within the statutory condition.

An expense sharing agreement between strangers has been considered under highway traffic legislation although it has yet to arise under insurance regulations. *Shaw v. McNay* was decided under s. 47 of the Ontario Highway Traffic Act.[24] Godfrey J. in holding the driver not liable to a passenger who paid one-half the cost of gas and oil, decided the section does not apply to an owner of a motor car who, on an isolated occasion, carries a passenger who merely pays part of the cost of operation.[25]

In summarizing our conclusions, it is submitted that neither the term "rented or leased" nor 'taxi-cab, livery, public omnibus, jitney, or sight-seeing conveyance" can properly be applied to these situations: a friendly expense sharing agreement, payment for transportation to place of employment, payment of a fixed sum on an isolated occasion, or an expense sharing agreement between strangers. 'Rented or leased" is inappropriate because it implies exclusive possession or control. Further, "taxi, jitney, etc.," are inapplicable as they are terms descriptive of commercial vehicles. Finally, it is submitted that "carrying passengers for compensation or hire" is inapplicable to those agreements which are by their very nature casual relationships. The cases discussed, *viz*, *McKay* v. *Minard*[26], *Guerard* v. *Rodgers*[27], and *Shaw* v. *McNay*[28], support this contention. However, on the authority of *Wing* v. *Banks*[29] it is submitted the phrase does apply to payments for transportation to work, and on the authority of *Semon* v. *Canada West Insurance*[30], payments of a fixed amount for transportation.

The different arrangements we have discussed are similar in many respects, yet they have been variously held to be cases of hiring and not hiring. It is submitted that the uncertainty has arisen from loose interpretations of terms such as "hire" and "compensation". The possible solution might be found in equating "compensation" with "hire" and defining "hire" as did Atkinson J. in *McCarthy* v. *British Oaks Insurance Co. Ltd.* when discussing a policy use for social and domestic purposes, but excluding use for hire:

> I think that what was intended by the policy is something which is a genuine business contract for hiring, something which is a real hiring, a doing something for a stipulated reward, a stipulated *quid pro quo*. To hold otherwise would mean that a great many users of cars almost every day of their lives must be stepping outside the cover of insurance policies.[31]

FOOTNOTES

[1]This article is primarily concerned with the insurer's liability to passenger carried under various share-expense agreements. However, if there were found to be a carrying of passengers for hire, other aspects of the owner's automobile insurance may be affected.

[2]The Alberta Insurance Act, R.S.A., 1942, c. 201.

[3]s. 262, schedule D.

[4][1932] S.C.R. 680, [1932] 4 D.L.R. 281.

[5][1921] 1 A.C. 303.

[6]*Ibid.*, at p 310.

[7][1945] 1 K.B. 292.

[8]*Ibid.*, at p. 300.

[9][1938] 3 All E.R. 1.

[10]*Ibid.*, at p. 4.

[11](1951), 3 W.W.R. (N.S.) 45.

[12]*Ibid.*, at p. 48.

[13]*supra*, footnote 7.

[14]*Ibid.*, at p. 300.

[15][1939] 3 D.L.R. 656, [1939] O.R. 368.

[16](1952), 5 W.W.R. (N.S.) 175.

[17]R.S.M., 1940, c. 93; s. 85 (1).

[18]*supra*, footnote 16, at p. 182.

[19]R.S.B.C., 1936, c. 193.

[20][1942] 2 W.W.R. 59.

[21][1947] O.W.N. 897.

[22]R.S.O., 1937, c. 288, s. 47 (2). See also the *Bonham* case, *supra*, footnote 7.

[23]*supra*, footnote 11. See also the *Wyatt* v. *Guildhall Insurance*, [1937] 1 K.B. 653; [1937] 1 All E.R. 792, and *Lemieux and Lemieux* v. *Bedard* [1952] O.R. 500, [1952] 4 D.L.R. 421.

[24]*supra*, footnote 22.

[25]Chitty in his text, Motor Vehicle Liability Insurance, states categorically that "carrying passengers on a share-expense trip is a hiring of the car, and the use of the car for carrying passengers for compensation so as to avoid the policy for violation of this condition." (at p. 62).

In a footnote the author observes that this is true of an isolated incident, citing *Wyatt* v. *Guildhall Insurance*. It is submitted that in the light of the cases the general comment on share-expense arrangements is too broad, and further that *Wyatt* v. *Guildhall Insurance* cannot properly be used for his proposition since there was, in that case, a payment of a fixed sum, not a share-expense agreement.

[26]*supra*, footnote 16.

[27]*supra*, footnote 20.

[28]*supra*, footnote 15.

[29]*supra*, footnote 21.

[30]*supra*, footnote 11.

[31]*supra*, footnote 9, at p. 4.