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In *Hawley v. Indemnity Ins. Co. of North America*[1] the plaintiffs sought to fix liability upon defendant insurance company under the "omnibus clause"[2] of an automobile liability insurance policy issued by defendant to a corporation. One plaintiff suffered personal injuries and the other plaintiff's property was damaged when a vehicle owned by the latter collided with a truck owned by the corporation and driven by its employee. The employee, who had been given permission to use the vehicle to drive to and from work, and to keep it overnight at his home, was using it at the time of the accident on an entirely personal mission after returning home from work. Plaintiffs had recovered judgments against the employee which were unsatisfied at the time the present action was instituted. The insurer denied liability under the omnibus clause on the theory that the "actual use" of the vehicle at the time of the accident was outside the scope of the permission granted.

On appeal by defendant from an adverse judgment, the court held that plaintiffs' evidence[3] made a prima facie showing of express permission[4] for the use being made of the vehicle at the time of the accident. However, an instruction by the trial court which assumed, as a matter of law, that the initial permission to use the truck was comprehensive and unlimited if specific uses were not expressly prohibited was held erroneous in that it failed to place upon plaintiffs the burden of showing, as an affirmative matter, the *nature* and *extent* of the permission granted. The court found that the instruc-

[1] 257 N.C. 381, 126 S.E.2d 161 (1962).

[2] The policy definition of "insured" contained a clause which included as insured any person while using the vehicle, provided the *actual use* was with the permission of the named insured. Similar omnibus clauses are now contained in all standard automobile liability insurance policies. See Austin, *Permissive User Under the Omnibus Clause of the Automobile Liability Policy*, 29 INS. COUNSEL J. 49 (1962).

[3] The court held that evidence that the employee had been instructed only that he was not to "do too much running around with it at night" permitted the conclusion that non-excessive use at night was authorized. The court also held that the mere fact that the employee was carrying riders at the time in disobedience of instructions would not nullify such permission. This is in accord with the general rule. See, *e.g.*, Hartford Acc. & Indem. Co. v. Collins, 96 F.2d 83 (5th Cir.), *cert. denied*, 305 U.S. 627 (1938).

[4] It is universally held that permission under the omnibus clause may be either express or implied. 257 N.C. at 384, 126 S.E.2d at 164.

tion, in effect, was based on the liberal, "initial permission" rule[5] of construction,[6] and held that neither the omnibus clause required by the applicable Motor Vehicle Financial Responsibility Act of 1957,[7] nor the similar clause written into the policy in question,[8] justified the application of this rule.[9]

The main difference in the construction given an omnibus clause in other jurisdictions seems to be in "whether the permission is confined to the time when the accident occurs or whether it is defined as permission 'in the first instance.' "[10] Under the conventional analysis,[11] however, the decisions are divided into three groups.

[5] Under this rule, the person using the vehicle is insured if he has permission in the first instance, and any use while it remains in his possession is "with permission" even though that use is for a purpose not contemplated by the named insured when he parted with possession. See 257 N.C. at 385, 126 S.E.2d at 165.

[6] In a dictum the court stated that the instruction "is not improper" under the liberal rule, since most courts following this rule do not allow recovery when the personal use by the employee was specifically prohibited. However, the cases relied upon for this conclusion, Waits v. Indemnity Ins. Co. of North America, 33 So. 2d 554 (La. App. 1947) and cases therein cited, either did not apply the liberal rule, or held that there was no initial permission for the use. The *Waits* case itself was reversed by Waits v. Indemnity Ins. Co. of North America, 215 La. 349, 40 So. 2d 746 (1949). No decisions have been found denying recovery on such grounds while applying the liberal rule. This is to be expected since the very rationale of the liberal rule has been said to be that public policy will not allow the defense that the permittee went beyond the scope of his permission. See Arnold v. State Farm Mut. Auto. Ins. Co., 158 F. Supp. 1 (S.D. Ind.), *aff'd*, 260 F.2d 161 (7th Cir. 1958). *But see* Hubbard v. United States Fid. & Guar. Co., 192 Tenn. 210, 240 S.W.2d 245 (1951). Thus the lower court's instruction seems to be a confusing combination of the liberal and moderate rules.

[7] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1961). G.S. § 20-314 incorporates by reference the omnibus clause required by the Motor Vehicle Safety-Responsibility Act of 1953, codified as N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1961); this section provides that the policy shall insure "the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured . . . ."

[8] See note 2 *supra*.

[9] The court had not previously adopted a specific rule of construction. In several cases, specific exclusion clauses were given effect to bar recovery. See, *e.g.*, Johnston v. New Amsterdam Cas. Co., 200 N.C. 763, 158 S.E. 473 (1931); Holton v. Eagle Indem. Co., 196 N.C. 348, 145 S.E. 679 (1928). Recovery has also been denied on various other grounds. See, *e.g.*, Miller v. New Amsterdam Cas. Co., 245 N.C. 526, 96 S.E.2d 860 (1957) (vehicle involved not covered by policy).

[10] Hodges v. Ocean Acc. & Guar. Corp., 66 Ga. App. 431, 435, 18 S.E.2d 28, 31, *cert. denied*, 316 U.S. 693 (1942). See generally Ashlock, *Automobile Liability Insurance: The Omnibus Clause*, 46 IOWA L. REV. 84 (1960), in which many cases are classified on the basis of this "two rule" analysis.

[11] See generally 7 APPLEMAN, INSURANCE LAW AND PRACTICE, §§ 4366-372 (1962) [hereinafter cited as APPLEMAN]; Annot., 5 A.L.R.2d 600 (1949).

(1) Under the strict or "conversion" rule,[12] any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause. (2) Under the moderate or "minor deviation" rule,[13] a material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage. (3) Under the liberal or "initial permission" rule,[14] if the permittee has permission to use the automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties at the time of the bailment, is a permissive use within the terms of the clause.

Such a superficial analysis of the cases, however, tends to overlook the often critical effect of local statutes upon the construction given an omnibus clause by the courts. Since the clause indirectly extends protection to members of the public injured by the negligent operation of motor vehicles, the courts often give great weight to considerations of public policy suggested by legislation requiring automobile liability insurance of certain vehicle owners or operators. In a particular case, the traditional rules of construction of insurance policies must be balanced against these considerations of public policy.[15]

A few states require all[16] or some[17] automobile liability policies to contain a statutory omnibus clause. In most jurisdictions, however, the parties are generally free to include an omnibus clause of their choice and to make it as broad or narrow in scope as they

[12] See, *e.g.*, Gray v. Sawatzki, 291 Mich. 491, 289 N.W. 227 (1939); Cypert v. Roberts, 169 Wash. 33, 13 P.2d 55 (1932).

[13] See, *e.g.*, Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866 (1924); Lloyds America v. Tinkelpaugh, 184 Okla. 413, 88 P.2d 356 (1939).

[14] See, *e.g.*, Parks v. Hall, 189 La. 849, 181 So. 191 (1938); Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960); Stovall v. New York Indem. Co., 157 Tenn. 301, 8 S.W.2d 473 (1928). For an excellent discussion of the problems raised by the *Matits* case see Cohen & Cohen, *Automobile Liability Insurance: Public Policy and the Omnibus Clause in New Jersey*, 15 RUTGERS L. REV. 155 (1961).

[15] See generally 7 APPLEMAN § 4343 and Ashlock, *op. cit. supra* note 10, at 86-90, for cases applying statutory provisions.

[16] See, *e.g.*, IND. ANN. STAT. § 39-4309 (1953).

[17] See, *e.g.*, IOWA CODE ANN. § 321A.21(2)(b) (Supp. 1962); N.C. GEN. STAT. § 20-279.21(b)(2) (Supp. 1961). These are typical of statutes requiring an omnibus clause only in those policies furnished as proof of financial security following accidents, etc.

wish.[18] Thus it is not surprising to find that a majority of courts[19] have held that the parties had no intent to adopt the "hell and high water"[20] liberal rule. However, in the comparatively few instances where, as in the principal case, statutes require that a particular omnibus clause be included in the policy, most courts have taken the view that the clause should be liberally construed in favor of the injured plaintiff.[21]

Although North Carolina has required various statutory omnibus clauses since 1931,[22] no cases have been found in which the court has attempted to construe one of these clauses. In *Hooper v. Maryland Cas. Co.*,[23] the only case in this jurisdiction in which an omnibus clause had to be interpreted, the statutory clause was apparently not applicable and was not mentioned in the opinion. The court in that case expressly declined to adopt any one of the rules of construction, but its decision seems to follow the pattern of the strict or moderate rule jurisdictions.[24]

In recent years, several statutes[25] designed to increase the probability that innocent traffic victims will receive compensation have

[18] See, *e.g.*, McCann v. Continental Cas. Co., 8 Ill. 2d 476, 134 N.E.2d 302 (1956) (covered only named insured and relatives in his household).

[19] See, *e.g.*, Hodges v. Ocean Acc. & Guar. Co., 66 Ga. App. 431, 18 S.E.2d 28, *cert. denied*, 316 U.S. 693 (1942); Gulla v. Reynolds, 151 Ohio St. 147, 85 N.E.2d 116 (1949).

[20] The "hell and high water" appellation, with its inflammatory connotations, is often used by courts which, like the court in the principal case, wish to reject the liberal rule. It was probably originated by Appleman, a sharp critic of the rule. See 7 APPLEMAN § 4366, at 308.

[21] See, *e.g.*, O'Roak v. Lloyds Cas. Co., 285 Mass. 532, 189 N.E. 571 (1934).

[22] N.C. SESS. LAWS 1931, ch. 116, § 12(2) provided that policies issued thereunder "shall insure the insured named therein and any other person using . . . any such motor vehicle with the consent, express or implied, of such insured . . . ."

[23] 233 N.C. 154, 63 S.E.2d 128 (1951).

[24] By affirming a non-suit against the plaintiff on the grounds that he had not shown that the permission given the employee to use his employer's truck to drive to and from work extended to use for other personal purposes, it seems that the decision applied the "scope of permission" test of the strict or moderate rule. Since this decision there have been several decisions by federal courts applying North Carolina law which seem to follow the strict or moderate rule. See, *e.g.*, Williams v. Travelers Ins. Co., 265 F.2d 531 (4th Cir. 1959).

[25] See, *e.g.*, N.C. GEN. STAT. § 20-71.1 (Supp. 1961) (presumption that operator is agent of owner); N.C. GEN. STAT. §§ 20-279.1 to -.39 (Supp. 1961) (broader financial responsibility law); N.C. GEN. STAT. § 20-280 (1953) (taxicab operators must prove financial responsibility); N.C. GEN. STAT. §§ 20-281 to -284 (Supp. 1961) (vehicle lessors and renters must obtain insurance); N.C. GEN. STAT. § 58-194.1 (Supp. 1960) (requiring insurance for state-owned vehicles).

been enacted in this state. Among these is the Motor Vehicle Financial Responsibility Act of 1957.[26] With the enactment of this statute North Carolina became the third state[27] to require proof of financial responsibility as a condition precedent to the registration of motor vehicles. This act provided that automobile liability policies presented as proof must contain the statutory omnibus clause. If such a clause is not inserted, it will be read into the policy by the court.[28] In view of these recent expressions of a legislative intent to reduce the number of uncompensated automobile accident victims, it could have been predicted with some degree of confidence that the court would, given a proper case, adopt the liberal rule in construing the statutory omnibus clause in a policy issued in compliance with the 1957 act. With only the relatively weak precedent of the *Hooper* case to overcome, the court could have pointed out the obvious advantages offered by the liberal rule in effectuating the legislative policy.[29]

Perhaps this result would have been reached in the principal case[30] had the court not determined, by a rather strained interpretation of the statutory omnibus clause, that the legislative intent was to require no more "radical" coverage than that expressed by the moderate rule. The court pointed out that the omnibus clause in the superseded Motor Vehicle Safety and Responsibility Act of 1947[31] was broad enough to embrace the liberal rule in that it required coverage of anyone "in lawful possession" of the vehicle.

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[26] N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1961).

[27] Massachusetts enacted the first such legislation in 1925. See MASS. ANN. LAWS ch. 90, §§ 34A-34J (1959), as amended, MASS. ANN. LAWS ch. 90, §§ 34A-34K (Supp. 1961); MASS. ANN. LAWS ch. 175, §§ 113A-113J (1959), as amended, MASS. ANN. LAWS ch. 175, §§ 113A, 113D (Supp. 1961). New York enacted a similar law in 1956. See N.Y. VEHICLE AND TRAFFIC LAW §§ 310-321.

[28] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[29] *Cf.* Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960), by which New Jersey became the latest state to adopt the liberal rule. The rule was chosen in this case because of its advantages in carrying out the legislative policy indicated by the trend toward stronger financial responsibility legislation.

[30] The court in the *Hawley* case noted that due to the widespread enactment of financial responsibility and compulsory insurance laws, there was a decided trend in the courts toward liberal construction of omnibus clauses.

[31] N.C. SESS. LAWS 1947, ch. 1006, §§ 1-59. Section 4(2)(b) of this act provided that every owner's policy shall insure "the person named, and any other person using . . . the motor vehicle with the permission, expressed or implied, of the named insured, *or any other person in lawful possession* . . . ." (Emphasis added.)

Since the phrase "or any other person in lawful possession" was deleted from the omnibus clause required by the Motor Vehicle Safety-Responsibility Act of 1953,[32] the court reasoned that this indicated an intention on the part of the legislature to reject the liberal rule.[33] This argument, however, overlooks the more likely explanation that the legislature was simply acting to bring our financial responsibility law back into line with the uniform legislation enacted in other jurisdictions.[34] Indeed, if the true intent was to preclude the adoption of the liberal rule by our court, it is highly unlikely that the legislature would have utilized the very language often construed in other jurisdictions as expressing the liberal rule. In any event, before attributing an intent to the legislature to so restrict the coverage of a policy required by such a remedial statute, the court should have required more cogent evidence.[35]

The court could have found more persuasive evidence of the intended meaning of the current statutory omnibus clause by examining the background of the 1957 act. This act was copied with slight modification from the comparable statute enacted in New York

[32] See note 7 *supra.*

[33] The court apparently overlooks the possibility that the phrase "or any other person in lawful possession" might be construed as providing coverage in situations where even the liberal rule courts would refuse to find the insurer liable. Such a situation might be one in which the owner had bailed the vehicle for storage and the bailee did not have even an implied initial permission to *use* the vehicle on the highway. The deletion of the phrase, to eliminate the possibility of such a construction, would be consistent with an intention to limit coverage to that provided by the liberal rule.

[34] The first motor vehicle financial responsibility legislation in North Carolina, enacted in 1931, was based upon the model Safety-Responsibility Act developed by the American Automobile Association in 1928. See 9 N.C.L. REV. 384 (1931). The model act was later incorporated into the Uniform Vehicle Code as the Uniform Motor-Vehicle Safety Responsibility Act (1934). Section 23(a)(3) of this act provided that the policy "shall insure the person named therein and any other person using . . . said motor vehicle . . . with the express or implied permission of the said insured." This omnibus clause was essentially the same as that required by the 1931 North Carolina legislation. See note 22 *supra.* The 1947 act departed from the uniform act in many ways, including the addition to the omnibus clause of the phrase "or any other person in lawful possession." See note 31 *supra.* The 1953 act, however, is modeled after the uniform legislation; and the 1953 omnibus clause construed by the court in the principal case is identical to that required by the revised UNIFORM MOTOR-VEHICLE SAFETY RESPONSIBILITY ACT § 21(b)2 (1952).

[35] After construing the statutory clause the court held that the provision in the policy that the "actual use" must be with permission indicated the intention of the parties to limit the coverage to use within the scope of the permission granted. A majority of the courts applying the moderate rule have interpreted this type of omnibus clause in the same manner. See cases cited in 7 APPLEMAN § 4354, at n. 58.

in 1956.[36] The New York legislation was, in turn, a broader version of the 1925 Massachusetts compulsory insurance statute.[37] The wording of the omnibus clause required in North Carolina[38] in the compulsory policy is quite similar to the earlier Massachusetts act.[39] Since the New York courts had apparently not construed the comparable omnibus clause required by its new act before the North Carolina statute was enacted, well-known principles of statutory construction[40] would suggest that our court should have examined the construction given the Massachusetts clause by the courts of that state. Such an examination would have revealed that the Massachusetts court applies the liberal rule when construing the compulsory omnibus clause.[41] However, where there is inserted in the policy in addition to the compulsory clause a voluntary clause, similar to that relied on by the insurer in the principal case, the court applies the strict rule to the extent that the policy coverage is greater than the statutory amount.[42]

In selecting the liberal rule to construe the statutory omnibus clause, the Massachusetts court reasoned in one case[43] that:

> The full benefit of the compulsory security and of the provision precluding avoidance by default of the owner will be lost, if violations of rules of conduct laid down by an owner to be observed by such as he permits to use his motor vehicle upon

[36] See Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 118 S.E.2d 303 (1961). New York decisions were utilized in this case as an aid in construing the North Carolina statute.

[37] See Netherton & Nabhan, *The New York Motor Vehicle Financial Security Act of 1956*, 5 AM. U.L. REV. 37 (1956), in which a detailed comparison of the New York and Massachusetts laws is made.

[38] See statutes cited note 7 *supra*.

[39] MASS. ANN. LAWS ch. 175, § 113A(1) (1959) requires that the policy provide coverage for "any other person . . . while legally using . . . such motor vehicle . . . provided that such use is with the permission of the named assured."

[40] A statute adopted from another state will be presumed to have been adopted with the construction placed on it by the courts of that state before its adoption. Such construction will generally be followed if sound and reasonable and in harmony with justice and public policy, and with other laws of the adopting jurisdiction on the subject. Where courts of the foreign state have not construed the law, decisions of the courts of the state from which the statute was originally adopted will be considered. See generally 82 C.J.S. *Statutes* § 372 (1953).

[41] See, *e.g.*, Blair v. Travelers Ins. Co., 288 Mass. 285, 192 N.E. 467 (1934).

[42] See, *e.g.*, Blair v. Travelers Ins. Co., 291 Mass. 432, 197 N.E. 60 (1935).

[43] Guzenfield v. Liberty Mut. Ins. Co., 286 Mass. 133, 190 N.E. 23 (1934).

> our ways are held to defeat an injured person's enforcement of the policy by destroying the owner's consent to the use.[44]

A recent North Carolina case[45] followed the reasoning of the Massachusetts court as to the provision precluding avoidance by default by the owner. In the North Carolina case, the insurer pleaded certain policy violations by the insured after the accident as a defense to a suit on a compulsory policy, contending that the non-forfeiture provisions of the 1953 act did not apply to a policy issued under the 1957 act. In disallowing this defense, the court held that, as to the compulsory coverage provided by a motor vehicle liability policy, no violation of the policy would defeat or avoid said policy. To bar recovery because of such a violation, the court argued, would "practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury."[46] However, as to coverage in excess of or in addition to the coverage specified, such violation would constitute a valid and complete defense. Thus, the Massachusetts solution to the problem of coverage under the omnibus clause would seem to be in harmony with the view our court has taken as to the effect of the non-forfeiture provision of the statute. The Massachusetts rule of construction is designed to do justice both to the contracting parties and to the public. It should have been adopted by the North Carolina court as being in accordance with the public policy of this state.

The effect of the *Hawley* decision will undoubtedly be to render coverage uncertain in many cases, foster litigation as to the existence or extent of any alleged deviation, and ultimately to inhibit the achievement of the legislative goal of broader coverage. Because this decision seems to be in sharp conflict with the policy underlying the 1957 act, the legislature should seriously consider amending the act to express its intent in this matter more clearly.

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[44] *Id.* at 136, 190 N.E. at 24.

[45] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[46] *Id.* at 126, 116 S.E.2d at 487. In Lane v. Iowa Mut. Ins. Co., 258 N.C. 319, 128 S.E.2d 398 (1962), the court extended *Swain* and held that the non-forfeiture provisions of the act apply even to assigned risk policies.