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Spring 2008

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The Minnesota No-Fault Automobile Insurance Act: Defining the Edges of *Klug*

By Darwin S. Williams

I. The *Klug* Test

In 1987, the Minnesota Supreme Court formulated a three-prong test to assist in determining whether an injury arose out of the "maintenance or use" of a vehicle under the Minnesota No-Fault Automobile Insurance Act. *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn 1987); *see* Minn. Stat. § 65B.47, subd. 3 (2006).

Under the *Klug* test, the court must first consider the extent of the causation between the vehicle and the injury. The vehicle must be an "active accessory" in the cause of the injury. This is, "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."

Second, if causation is present, the court is to consider whether "an act of independent significance" broke the causal chain. For example, if a driver exits his vehicle to punch another driver, the tortious act of assault would break the causal connection between the use of the vehicle and the injury to the person who was assaulted.

Third, if no intervening act breaks the causal chain, the court must determine whether the vehicle was being used for "transportation purposes" at the time of the injury. A common example of the denial of coverage under this part is when an insured uses a vehicle to commit suicide by asphyxiation.

II. Recent Case Law Defines the Edges of *Klug*

In three recent cases, the appellate courts define some of the gray edges linking the "maintenance or use" of a vehicle to the injury sustained.

Auto-Owners Insurance Co. v. Great West Casualty, 695 N.W.2d 646 (Minn. Ct. App. 2005), *review denied* (Minn. July 19, 2005).

The insurer of cars on a transport trailer brought action against the trailer insurer for declaratory judgment that it was responsible for no-fault benefits for vehicle owner's injury while unloading a stalled vehicle from the trailer. The district court entered summary judgment in favor of the car insurer reasoning that the trailer was an "active accessory" to the injury. The trailer insurer appealed.

The Minnesota Court of Appeals reversed and remanded holding that the owner's injury arose from "maintenance or use" of the vehicle, not the trailer, and thus, insurer of vehicle, not the trailer, was responsible for no-fault benefits. In so holding, the court applied the three-part *Klug* test to determine when an injury occurred from the "maintenance or use" of the stalled vehicle. The court determined that:
(1) The sudden movement of the stalled vehicle rolling toward the owner was the active cause of the injury. Thus, the stalled vehicle was the "active accessory" because it was the movement of the vehicle itself which caused the owner to jump out of the way and in so jumping, he seriously injured his leg,
(2) There was no act of independent significance that broke the chain of causation between the vehicle and the injury because the injury "occurred as a reasonable consequence" of the owners plan to pull the vehicle off the trailer so it could be jump-started; and
(3) The possibility of a vehicle stalling is "clearly a risk associated with motoring," and "[a]ttempting to move a stalled vehicle off the trailer was a risk integral to the nature of the use of the stalled vehicle."

In this way, the three-part *Klug* test was applied to the "maintenance or use" of a stalled vehicle and No-Fault benefits were found to be applicable.

Dougherty v. State Farm Mutual Insurance Co., 699 N.W.2d 741 (Minn. 2005).

Insured brought action against automobile insurer to recover no-fault benefits for frostbite injuries after the insured's car became stuck in a snowdrift and she walked and crawled 300 feet to her apartment building to seek safety. The temperature, including wind chill, was 45 degrees below zero, Fahrenheit. Insured was intoxicated. She left her hat and mittens in the abandoned car, and she likely fell asleep for a short period, sometime between leaving the vehicle and

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Workers' Compensation Subrogation Cases – Show Me the Money

By Thomas L. Cummings

A. Subrogation Rights of Employers and Insurers – Where the Money Comes From.

Employers and insurers have specific rights to recover payments made to or on behalf of an injured employee when the injury is caused by the actions of a third party. *See* Minn. Stat. § 176.061 (2006). Traditionally, this right to recover has been referred to as a right of subrogation. However, under traditional subrogation rights, the employer and insurer would have to "stand in the shoes" of the employee, with their recovery limited to what the employee would be able to recover through common law (i.e., tort or negligence law). An employer and insurer's right to recovery of workers' compensation benefits paid or payable on behalf of an injured employee is actually more of a right of indemnification, because it is established by statute and the right to recovery is not necessarily limited to what the injured employee is legally entitled to recover.

There are circumstances in which the employer and insurer have a right to recover workers' compensation benefits paid or payable, even if the injured employee cannot recover against a third party. For example, if the injury arises out of an automobile accident, the employer and insurer have the right to recover against the party causing the employee's injuries, even if the injured employee cannot sue for general damages because the tort thresholds of the No-Fault Act are not met. *Allstate Insurance Co. v. Eagle Picher Industries, Inc.*, 410 N.W.2d 324 (Minn. 1987). Furthermore, an employer and insurer may recover workers' compensation benefits payable even where the employee would have no common law remedy against the third party for certain types of damages, such as vocational rehabilitation services, travel and other expenses associated with placement, retraining expenses, and permanent partial disability benefits. *See* Minn. Stat. § 176.061, subd. 3 & 5 (2006).

The forum for a workers' compensation subrogation claim is in district court. This results in an intersection of different legal systems. Usually, the common law tort liability system intersects with the workers' compensation system.

The workers' compensation system is a "no-fault" system, whereas the common law tort liability system is based upon fault. The result of the intersection of the two systems is a blend of the two systems which does not always go smoothly. There are many complex principles that come into play in third party actions. These materials will attempt to highlight some of the considerations that are involved with workers' compensation subrogation cases.

B. Distribution of Proceeds from Third Party Cases – How the Money Gets Split Up.

The most common workers' compensation subrogation case occurs when the employee initiates their own negligence claim against a third party. Under these circumstances, the employee must share the proceeds they obtain through their lawsuit. The proceeds are subject to a distribution formula contained in Minn. Stat. § 176.061, subd. 6 (2006). The formula is commonly referred to as "the distribution formula."

Generally speaking, when the proceeds of a third party claim are distributed pursuant to the distribution formula, the employer and insurer's recovery will be limited to approximately two-thirds of the benefits paid and payable.

The distribution formula is set forth in Minn. Stat. § 176.061, subd. 6 (2006), as follows:

> The proceeds of all actions for damages or of a settlement of an action … shall be divided as follows:
>
> (a) After deducting the reasonable cost of collection, including but not limited to attorney's fees and burial expenses in excess of the statutory liability, then
> (b) One-third of the remainder shall in any event be paid to the injured employee or the employee's dependents, without being subject to any right of subrogation.
> (c) Out of the balance remaining, the employer or the special compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer or special compensation fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or the special compensation fund to the employee or the employee's dependents.
> (d) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the special compensation fund for any benefits which the employer or the special compensation fund is obligated to pay, but has not paid, and for any benefits that the employer or the special compensation fund is obligated to make in the future.

C. *Naig* and Reverse-*Naig* Settlements – I Will Take My Money and You are on Your Own.

The employee's claim against a third party tortfeasor and the employer and insurer's workers' compensation subrogation claim are technically separate and distinct. Minnesota courts have upheld settlement agreements allowing either the employee or the employer and insurer to settle their respective claims, without deference to the other party's claim.

The employee may enter into a settlement of just the interest over and above the workers' compensation benefits he or she is entitled to as a result of the injury. In doing so, the employee gives up the right to the statutory share of the overall case proceeds pursuant to the distribution formula of Minn. Stat. § 176.061, subd. 6 (2006). However, the employee's workers' compensation benefits will be unaffected by any future credit. Such settlements of the employee's separate interest are called "*Naig* Settlements," and stem from the case of *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977).

After the employee and third party have entered into a *Naig* settlement, the employer and insurer have the right to proceed against the third party for recovery of workers' compensation benefits paid and payable. The employer and insurer's recovery then is not subject to the distribution formula of Minn. Stat. § 176.061, subd. 6 (2006).

The employer and insurer may also settle with the third party for its subrogation interest. The employee is then left to proceed against the third party for just the interest over and above the workers' compensation benefits he is entitled to as a result of the injury. Such settlements of the employer and insurer's separate interest are called "reverse-*Naig* settlements."

D. Lambertson Liability – Where Did My Money Go?

The principle of comparative fault applies to workers' compensation subrogation claims. This is an issue when the fault of the employer and that of a third party combine to produce the work-related injury.

To accommodate the conflict between the tortfeasor's interest in paying no more than its share of liability and the employer's interest in an exclusive remedy consisting of payment of workers' compensation benefits, the courts developed a system of limited contribution for employers.

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In *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977), the Minnesota Supreme Court held that the third party tortfeasor had the right to make a claim against the employer for contribution towards damages payable to the employee in a third party case. Normally, an employer would have no liability for tort or negligence damages which arose from a work injury, because the injured employee's exclusive remedy against the employer would be for workers' compensation benefits. However, in *Lambertson*, the Court decided that the employer should bear a share of the damages proportionate to its fault, but that the contribution should be limited to the extent of the amount equal to the lesser of its share of the verdict in the third party claim, or the amount of its workers' compensation liability.

The principles of *Lambertson* have been partially codified. Specifically, Minn. Stat. §176.061, subd. 11 (2006) states in part as follows:

> To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any non-employer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault, but not to exceed the net amount the employer recovered pursuant to subdivision 6 (c) and (d).

The statute limits contribution liability to not more than the net recovery the employer and insurer would make under the distribution formula of Minn. Stat. § 176.061, subd. 6 (2006). Therefore, an employer should not be required to pay more in contribution towards a third party verdict than they would recover on their subrogation claim.

Minn. Stat. § 176.061, subd. 11 (2006) was also amended in 2000 to add the following provision:

> The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third party.

This amendment codifies the so-called "waive and walk" process. The employer and insurer now has the statutory right to be dismissed as a third party defendant in exchange for a total waiver of its workers' compensation subrogation claim. Since the 2000 amendment, and even before that, employers and insurers routinely waive and walk if it appears there is evidence of substantial negligence on behalf of the employer. •

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reaching the apartment building. The district court entered judgment in favor of the insured. The insurer appealed and the Minnesota Court of Appeals affirmed. The Court of Appeals relied greatly upon the fact that "the intended use of the vehicle had not been completed when the vehicle became stuck in the snowdrift." It reasoned that:

> Because the hazards of winter are a fundamental part of the driving experience, it is a foreseeable condition of vehicle use that vehicles may become disabled on the road due to snow or ice, and drivers may be exposed to injury in attempting, sometimes unreasonably, to provide for their safety. . . . [R]espondent's frostbite injuries, which were sustained after her vehicle became stuck in the snow, are a natural consequence of the use of her motor vehicle.

The Minnesota Supreme Court granted review and also affirmed. In determining that insured's injuries were causally connected to the use of the vehicle, the court held that "[w]hen a vehicle is stranded due to weather conditions or other emergency, it is a 'natural and reasonable incident or consequence' of the use of the vehicle that the driver leaves the vehicle to seek help or safety." The court then concluded that "the requisite causal connection" between the injuries and the use of the vehicle was met "because it is a 'natural and reasonable incident or consequence' of the use of a vehicle in Minnesota in the winter that a vehicle may become lodged in a snow drift and the driver may attempt to seek safety by leaving the vehicle."

As to the second part of the *Klug* test, the court held that insured's intoxication did not constitute an act of independent significance and did not break chain of causation. The courts agreed that to treat intoxication as an act that would break the causal chain would 'impermissibly blame [the victim] for her injuries,' which would be inconsistent with the No-Fault Act."

In a dissenting opinion, two Justices concluded that the insured's injuries were not reasonably attributable to the "maintenance or use" of a motor vehicle, but were attributable to "many different causes, including falling asleep outside with a wind chill of 45 degrees below zero, apparent inability to negotiate icy walking conditions or perhaps even her intoxication, but the use of the vehicle was entirely incidental to the injuries sustained."

Alexis v. State Farm Mutual Automobile Insurance Co., 696 N.W.2d 109 (Minn. Ct. App. 2005), *review denied* (Minn. Aug. 16, 2005).

In a tragic case, insured brought action against automobile insurer to recover no-fault benefits for her husband's accidental death from carbon monoxide poisoning in their garage. The parties stipulated that the first two prongs of the *Klug* test were met. The determining factor in the case was whether the vehicle was being used for "transportation purposes." The Court of Appeals affirmed the lower court's judgment in favor of insurer, holding that the husband was not using the motor vehicle for "transportation purposes," consistent with "motoring." Decedent had walked to and from his first job. He had then used another vehicle to go fishing. He was last seen in the garage at 9:00 p.m. and he did not show up for work at 11:00 p.m. He was found the next morning. The court stated that the facts of the case suggested that decedent had turned on the car ignition to warm the vehicle and/or listen to the radio. The court found no evidence that decedent had used the car to make a trip or was preparing to go anywhere when he turned on the vehicle. The plaintiff failed to meet her burden of proof establishing that the injury resulted from the use of the automobile as an automobile, i.e. for "transportation purposes".

A special concurring opinion by Judge Robert Schumacher (now retired) points out the incongruence of this decision with the primary purpose of the No-Fault Act, which is to protect the insured against risk of injury regardless of whether the tortfeasor was negligent or acted intentionally, or even if there were no tortfeasor. It is enough if the victim accidentally injures himself. Judge Schumacher states:

> Here, it is undisputed that the decedent died as a result of an accident caused directly by his use of a motor vehicle. And the decedent had No-Fault insurance. No-Fault insurance exists to cover just such a case. Where it is undisputed that an accident has occurred as a result of the operation of a motor vehicle, it should follow that an insured with No-Fault insurance should be compensated for the damage caused by the accident. Thus, I fear that the "transportation purposes" test now operates to exclude a class of accidents and victims that the Minnesota Legislature never intended to exclude when it passed the No-Fault Act.

Conclusion

To summarize, in Minnesota:

- when a stalled vehicle on a trailer moves and the vehicle owner who is attempting to pull it off the trailer gets injured, the vehicle's No-Fault insurance applies;
- when a vehicle gets stuck in a snow drift and the driver gets frostbite seeking shelter, the vehicle's No-Fault insurance applies; but
- when the car is being run only to power a stereo and results in accidental asphyxiation, the vehicle's No-Fault insurance doesn't apply.

Whether you agree or disagree, this is the current state of the law in Minnesota. •

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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