Expert Analysis

INSURANCE LAW

'Use or Operation' and 'Danger Invites Rescue' Doctrine

By **Jonathan A. Dachs**

One of the principles of law that readers of this column may remember learning in law school, but probably thought they would never see or use in practice, is the "danger invites rescue" doctrine. Liability may be imposed in favor of a person who voluntarily places him or herself in a perilous position to prevent another person from imminent life-threatening peril against a party who, "by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid." See *Provenzo v. Sani*, 23 NY2d 256, 260 (1968); *Fiederbach v. Lennett*, 65 AD3d 1011 (2d Dept. 2009). As prosaically described by Judge Benjamin Cardozo in the landmark case of *Wagner v. International Ry. Co.*, 232 N.Y. 176, 180 (1921), "The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.... The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." See also N.Y. Pattern Jury Instructions (Civil), 2:13; 2:41.

Although initially thought to apply to cases in which three (or more) persons are involved, as described above, the doctrine has expanded over time to encompass as well a two-party situation, where the culpable party has placed himself [or herself] in a perilous position, which invites rescue. See *Carney v. Buyea*, 271 App. Div. 338 (4th Dept. 1946), motion for leave to appeal denied, 296 N.Y. 1056 (1947); *Talbert v. Talbert*, 22 Misc.2d 782 (Sup. Ct. Schenectady Co. 1960).

Recent case law has made clear that the "danger invites rescue" doctrine is alive and well in New York—at least in the context of supplementary uninsured/underinsured motorist (SUM) coverage and the critical issue of whether it can be said that an injury to a rescuer arose out of the ownership, maintenance or use of a motor vehicle.

'Kesick'

In *Kesick v. New York Central Mutual Fire Ins. Co.*, 106 AD3d 1219 (3d Dept. 2013), the plaintiff, Kevin Kesick, a state trooper, licensed registered nurse and paramedic, responded to a "911" call for assistance following a two-vehicle accident that occurred when a vehicle owned by Joseph Prindle struck a vehicle owned by Ralph Williams from behind, causing Williams' vehicle to flip over. When Kesick arrived at the scene, Williams was trapped inside his vehicle and complained of pain in the chest, hip and neck. Once the fire department arrived and removed the roof of the vehicle with the Jaws of Life, Kesick entered the vehicle and stabilized Williams' neck.

Recent case law has made clear that the 'danger invites rescue' doctrine is alive and well in the context of supplementary uninsured/underinsured motorist (SUM) coverage.

While Kesick and two other individuals were lifting Williams out of the vehicle, Kesick injured his right shoulder. Kesick sued Williams and Prindle. The action against Williams was dismissed based upon the absence of his negligence, and Prindle settled the claim against him for the $25,000 limit of his automobile insurance policy. Kesick then sought SUM benefits under a policy he held with New York Central Mutual (NYCM), but that insurer denied coverage on the ground, inter alia, that Kesick was not injured as a result of a motor vehicle accident.

After noting that "[SUM] coverage policies, such as the one at issue herein, apply only when an insured's injuries are [proximately] 'caused by an accident arising out of [the underinsured] motor vehicle's ownership, maintenance or use,'" the Appellate Division, Third Department, ruled that there were questions of fact as to whether or not Kesick's injury was caused by the use of Prindle's underinsured vehicle. It rejected NYCM's view that the insured's injuries must be directly caused by an accident that arose out of the use of a vehicle and its related assertion that the "accident" in this case occurred only at the time of Kesick's injury.

Construing the language of the policy liberally, and resolving ambiguities in favor of the insured, the court concluded that the "use" of the underinsured vehicle was Prindle's negligent operation of his vehicle, and the "accident" occurred when he collided with Williams' vehicle.

The court then noted that Kesick invoked the "danger invites rescue" doctrine to establish the requisite causal connection between the motor vehicle accident and his injuries. Kesick's claims that Williams was injured as a result of the accident caused by Prindle's negligent operation of his vehicle and that Kesick, the first responder on the scene with medical training, was injured in the process of rescuing Williams, were uncontroverted. Thus, the court held that if the facts warranted application of the "danger invites rescue" doctrine, Kesick's injuries were not so remote in either time or space to the use of Prindle's automobile as to preclude a finding of proximate cause as a matter of law.

As explained by the court, "There is no dispute that Prindle's negligent use of his vehicle directly caused the accident that led to Williams' injuries which, in turn, led to plaintiff's intervention." Considering the open question of the applicability of the "danger

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invites rescue" doctrine and liberally construing the provisions of the SUM policy in Kesick's favor, the appellate court thus held that the Supreme Court properly denied NYCM's motion for summary judgment dismissing the complaint.

'Encompass v. Rich'

More recently, in *Encompass Indemnity v. Rich*, 131 AD3d 476 (2d Dept. 2015), Kenneth Goodman was driving his vehicle and speeding when he lost control and crashed into a utility pole. When firefighter Kevin Rich's engine company responded to the scene of the accident, Goodman was trapped inside his vehicle. In order to extract him from the vehicle, the firefighters used the Jaws of Life to cut the vehicle's roof, and Rich and three other firefighters lifted the roof off of the vehicle. In the process of doing so, Rich sustained injuries to his right shoulder.

After receiving a settlement offer of the full available limits of Goodman's auto insurance policy, Rich sought coverage under the SUM endorsement contained in his own policy, issued by Encompass. Encompass denied coverage on the ground that Goodman's use of his vehicle was not a proximate cause of Rich's injuries, and subsequently sought to stay arbitration on that ground.

In reversing the Supreme Court's grant of Encompass' petition for a permanent stay of arbitration, the Second Department noted that "SUM endorsements provide coverage only when the injuries are 'caused by an accident arising out of such underinsured motor vehicle's ownership, maintenance or use' (11 NYCRR 60-2.3[f][II]; see *Matter of Allstate Ins. v. Reyes*, 109 AD3d 468; *Matter of Liberty Mut. Fire Ins. Co. [Malatino]*, 75 AD3d 967, 968). Factors to be considered in determining whether an accident arose out of the use of a motor vehicle include whether the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produces the injury rather than merely contributes to cause the condition which produces the injury [citations omitted]. '[T]he [vehicle] itself need not be the proximate cause of the injury "but negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury"' [id.]. 'To be a cause of the injury, the use of the motor vehicle must be closely related to the injury' [id.]. '[T]he use of the underinsured vehicle must be a proximate cause of the injuries for which coverage is sought' [citations omitted]."

Like Kesick before him, Rich invoked the doctrine of "danger invites rescue" to establish that Goodman's negligent use of the underinsured vehicle proximately caused his injuries. The court held that Encompass failed to establish that Rich was not entitled to coverage under the SUM endorsement because "[t]he evidence in the record establishes that Goodman's negligent use of his vehicle directly caused the accident that led to him being trapped and in obvious need of medical attention, which, in turn, led to Rich's intervention and resulting injuries." Specifically, the court held that "It cannot be said, as a matter of law, that Goodman's negligent use of his vehicle was not a proximate cause of Rich's injuries under the doctrine of danger invites rescue."

It is notable that in rendering its decision, the Encompass court took pains to distinguish an earlier decision and order in a liability coverage case—*Zaccari v. Progressive Northwestern Ins.*, 35 AD3d 597 (2d Dept. 2006)—in which it found the doctrine of "danger invites rescue" to be inapplicable based upon the plaintiff rescuer's failure of proof as to the exact cause of his injury and when during the rescue the injury actually occurred.

In contrast, the proof proffered by Rich, which included his affidavit, "described in detail the scene of Goodman's accident, Goodman's physical condition following the accident, Rich's actions at the accident scene, and the exact cause of Rich's injury."

> In 'Pierre v. Olshever,' a case involving liability coverage, the Second Department rejected the plaintiff's claim of the applicability of the 'danger invites rescue' doctrine, and granted the initial driver's motion for summary judgment.

'Pierre'

Finally, and most recently, in *Pierre v. Olshever*, 137 AD3d 1243 (2d Dept. 2016), a case involving liability coverage, the Appellate Division, Second Department, rejected the plaintiff's claim of the applicability of the 'danger invites rescue' doctrine, and granted the initial driver's motion for summary judgment.

While driving his car westbound on the service lane of the Long Island Expressway, the defendant, Joseph Aiuto, lost control while trying to avoid debris in the roadway, left the roadway, and struck a tree, causing the vehicle to flip onto its driver's side and come to a rest in a portion of the right travel lane. Approximately 10 to 15 minutes later, after Aiuto had already exited his vehicle, walked to the opposite side of the roadway, and stood on a grassy area of the shoulder, plaintiff's decedent stopped his truck in the right lane behind the Aiuto vehicle, exited his truck, and began walking in the left lane toward the overturned vehicle, at which point he was struck by a vehicle traveling in the left lane.

In support of his motion for summary judgment, Aiuto established, via evidentiary proof, that he was "not negligent in causing the accident" involving the decedent and the other vehicle, and that his conduct "merely furnished the condition for the accident involving the decedent, and was not a proximate cause of the decedent's injuries and resulting death." After noting that neither the plaintiff nor the owner and operator of the other vehicle raised a triable issue of fact, the court found that the "danger invites rescue" doctrine was inapplicable because "There is nothing in the record to suggest that Aiuto was a culpable party who voluntarily placed himself in imminent life-threatening peril which invited rescue."

Moreover, although unstated by the court, there was nothing about the situation to suggest that the decedent could have reasonably believed that Aiuto was "actually at risk of serious injury" or "in imminent peril" at the time, or, even to establish that the decedent was actually intending to rescue Aiuto, rather than just take a look at the oddity of the upside down car. See *Tassone v. Johannemann*, 232 AD2d 627 (2d Dept. 1996).

Conclusion

The distinctions drawn and explanations offered in the above-cited cases provide the practitioner with important advice about how to establish a proper and valid "danger invites rescue" claim in the rare, but not extinct, circumstances in which it might apply.