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Cone v. Nationwide: The Undue Narrowing of the Liability Insurance Policy's Modern Vehicular Exclusion

I. Introduction

In the late 1989 decision of *Cone v. Nationwide Mut. Fire Ins. Co.*,¹ a sharply divided New York Court of Appeals sustained a claim of negligent entrustment² of a motor vehicle under a homeowner's liability policy. The court held coverage was owed despite the policy's express inclusion of the standard modern vehicular exclusion, regularly enforced in other jurisdictions and previously enforced by New York appellate courts.³ The standard vehicular exclusion typically eliminates personal liability coverage⁴ under general liability policies for accidents "arising out of the ownership, maintenance, or use of . . . a motor vehicle."⁵

The exclusion appears in homeowner,⁶ comprehensive gen-

1. 75 N.Y.2d 747, 551 N.E.2d 92, 551 N.Y.S.2d 891 (1989).

2. According to the RESTATEMENT (SECOND) OF TORTS § 390:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (1965).

3. See *State Farm Fire & Cas. Co. v. Wolford*, 116 A.D.2d 1011, 498 N.Y.S.2d 631 (4th Dep't 1986).

4. There are two types of insurance coverage: third-party liability coverage and first-party coverage. ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* 298 (2d ed. 1988). A first-party insurer reimburses the insured for losses he incurs. *Id.* at 299. A third-party liability insurer indemnifies the insured for sums he becomes legally obligated to pay others. *Id.*

5. *Cone*, 75 N.Y.2d at 748, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

6. A homeowner's policy is a personal comprehensive liability policy designed to protect against risks that are home oriented. It is comparatively low in cost and intended to insure against non-business and non-automobile risk. 7A JOHN A. APPLEMAN, *INS. LAW & PRACTICE* § 4501.02 (Berdal ed. 1979).

eral liability (CGL),⁷ all risk,⁸ and other general liability policies,⁹ which are comprehensive in scope because the risks involved tend to be general or unspecified in nature.¹⁰ These policies are not designed to cover vehicular accidents because such coverage would significantly increase the insurer's exposure and, consequently, require an increase in insurance premiums.¹¹ Instead, automobile liability insurance can be purchased to provide coverage for motor vehicle accidents.¹²

In finding the plaintiff's claim for third-party liability coverage valid under the homeowner's policy at issue in *Cone*, the court of appeals held that the claim did not "arise out of the ownership and use of a motor vehicle,"¹³ but rather out of the policyholder's allegedly negligent entrustment of a dangerous instrumentality to his fourteen-year-old son.¹⁴ According to the majority, because the standard vehicular exclusion did not "clearly exclude"¹⁵ coverage for such entrustment, the exclusion did not preclude coverage under the policy.¹⁶

In reaching its conclusion, the *Cone* court did not appear to consider whether the homeowner's policy was designed to cover vehicular accidents; nor did it consider whether the insured, by seeking coverage under a homeowner's policy, was simply trying to get two types of coverage, motor vehicle liability and homeowner liability, for the price of one. Each type is widely available

7. "[An] automobile policy protects against liability arising out of a particular activity, that is, the use, ownership or maintenance of an automobile, whereas the comprehensive general liability [policy] protects for liability arising out of an accident or occurrence." *Id.* § 4492.03.

8. An all risk liability policy insures "all property risks, simply excluding those *not* wanted." Clayton H. Farnham, *All Risk — What Does It Mean?*, in *THE ALL RISK POLICY* 2 (American Bar Association 1986).

9. See generally 7A APPLEMAN, *supra* note 6, §§ 4491-4552 for a discussion of various liability coverages.

10. *Insurance Co. of North America v. Waterhouse*, 424 A.2d 675, 682 (Del. Super. Ct. 1980).

11. David B. Harrison, Annotation, *Construction and Effect of Provision Excluding Liability for Automobile-Related Injuries or Damage From Coverage of Homeowner's or Personal Liability Policy*, 6 A.L.R. 4TH 555, 558 (1981).

12. *Id.*

13. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 748-49, 551 N.E.2d 92, 93, 551 N.Y.S.2d 891, 892 (1989).

14. *Id.*

15. *Id.* at 749, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

16. *Id.*

for its own premium. The court nevertheless afforded motor vehicle liability coverage under a homeowner's liability policy, but only after an exercise in insurance contract construction that many, including three dissenting judges, have called into question.

The *Cone* majority ruling essentially reaffirms the 1972 decision of *Lalomia v. Bankers & Shippers Ins. Co.*¹⁷ In *Lalomia* the court required liability insurers to defend and indemnify claims that alleged the negligent entrustment of a motor vehicle. This precedential decision was rendered when the original, narrower version of the vehicular exclusion was in use.¹⁸ It did not contain the "arising out of" language,¹⁹ and thus excluded only claims that were directly related to the ownership, maintenance, operation, or use of a motor vehicle.²⁰ To clarify that liability policies are meant to exclude not only incidents directly related to ownership, maintenance, and operation of motor vehicles, but any and all incidents arising out of such ownership or use, insurers adopted the "arising out of" language which, prior to *Cone*, had been enforced.²¹ *Cone* eliminated the force of that language in New York, but did leave open to insurers the "opportunity to clearly exclude claims based on negligent entrustment from coverage in homeowner's liability policies."²²

Generally, a liability insurer's obligation to defend and indemnify is determined by its contract [the insurance policy], not by the theory of liability asserted against the insured.²³ Coverage exclusions are to be construed strictly against the insurer.²⁴ However, the terms of plainly written exclusions must be con-

17. 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972).

18. Gary Spencer, *Auto Claims Sustained in Homeowner Policy*, N.Y.L.J., Dec. 21, 1989, at 1.

19. *Id.*

20. *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 116, 312 N.Y.S.2d 1018, 1021 (2d Dep't 1970).

21. *Exclusions/Automobile*, INS. LITIGATION REPORTER, Apr. 1990, at 158.

22. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 749, 551 N.E.2d 92, 93, 551 N.Y.S.2d 891, 892 (1989).

23. *Id.* at 749, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (citing in part *Sperling v. Great Am. Indem. Co.*, 7 N.Y.2d 442, 450, 166 N.E.2d 482, 486-87, 199 N.Y.S.2d 465, 471-72 (1960)) (Kaye, J., dissenting).

24. *Cone*, 75 N.Y.2d at 749, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

strued to preclude coverage.²⁵

The *Cone* majority ignored the plain language of the modern vehicular exclusion and, in so doing, reached a conclusion contrary to that of the overwhelming weight of authority throughout the nation.²⁶ As a result, most liability insurers²⁷ are being unduly forced to defend and indemnify negligent entrustment claims brought in New York even though the vehicular exclusion language clearly precludes such coverage.²⁸

Part II of this Note examines the vehicular exclusion, both prior to and after its modernization, and related New York cases

25. *Id.* at 749, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (Kaye, J., dissenting).

26. *Id.* See *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042 (9th Cir. 1985) (predicting Alaska law); *Cooter v. State Farm Fire & Cas. Co.*, 344 So. 2d 496 (Ala. 1977); *Lumbermens Mut. Cas. Co. v. Kosies*, 124 Ariz. 136, 602 P.2d 517 (1979); *Aetna Cas. & Sur. Co. v. American Mfrs. Mut. Ins. Co.*, 261 Ark. 326, 547 S.W.2d 757 (1977); *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 190 Cal. Rptr. 425 (1983); *Insurance Co. of North America v. Waterhouse*, 424 A.2d 675 (Del. Super. Ct. 1980); *Gargano v. Liberty Mut. Ins. Co.*, 384 So. 2d 220 (Fla. Dist. Ct. App. 1980); *Grange Mut. Cas. Co. v. King*, 174 Ga. App. 716, 331 S.E.2d 41 (1985); *Hawaiian Ins. & Guar. Co. v. Chief Clerk*, 713 P.2d 427 (Haw. 1986); *State Farm Fire & Cas. Co. v. McGlawn*, 84 Ill. App. 3d 107, 404 N.E.2d 1122 (1980); *Picou v. Ferrara*, 412 So. 2d 1297 (La. 1982); *American Universal Ins. Co. v. Cummings*, 475 A.2d 1136 (Me. 1984); *Pedersen v. Republic Ins. Co.*, 72 Md. App. 661, 532 A.2d 183 (1987); *Barnstable County Mut. Fire Ins. Co. v. Lally*, 374 Mass. 602, 373 N.E.2d 966 (1978); *Michigan Mut. Ins. Co. v. Sunstrum*, 111 Mich. App. 98, 315 N.W.2d 154 (1981); *Fillmore v. Iowa Nat'l Mut. Ins. Co.*, 344 N.W.2d 875 (Minn. Ct. App. 1984); *Shelter Mut. Ins. Co. v. Politte*, 663 S.W.2d 777 (Mo. Ct. App. 1983); *Senteney v. Fire Ins. Exch.*, 101 Nev. 654, 707 P.2d 1149 (1985); *Hanover Ins. Co. v. Grondin*, 119 N.H. 394, 402 A.2d 174 (1979); *Williamson v. Continental Cas. Co.*, 201 N.J. Super. 95, 492 A.2d 1028 (App. Div. 1985); *Potosky v. Fejes*, 23 Ohio Misc. 2d 45, 492 N.E.2d 494 (1986); *Farmers Ins. Group v. Nelsen*, 78 Or. App. 213, 715 P.2d 492 (1986); *Pulleyn v. Cavalier Ins. Corp.*, 351 Pa. Super. 347, 505 A.2d 1016 (1986); *Great Cent. Ins. Co. v. Roemmich*, 291 N.W.2d 772 (S.D. 1980); *Fidelity & Guar. Ins. Underwriters v. McManus*, 633 S.W.2d 787 (Tex. 1982); *Farmers Ins. Group v. Johnson*, 43 Wash. App. 39, 715 P.2d 144 (1986); *Bankert by Habush v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 329 N.W.2d 150 (1983) (as cited in *Standard Mut. Ins. Co. v. Bailey*, 868 F.2d 893, 898 n.6 (7th Cir. 1989)).

27. At least one carrier has added language explicitly excluding coverage for these claims. The Insurance Company of North America (now CIGNA), the homeowner carrier that lost in *Lalonia*, added these words to the policy in bold print: "We will not cover claims that arise because you or another covered person entrusts a motor vehicle to any person." CIGNA HOMEOWNERS INS. POLICY, Form B — Broad Form, Claims We Will Not Cover, p. 15. An insurer may not alter the policy form language at policy renewal time without the approval of the New York Superintendent of Insurance, which must be satisfied that the new form contains at least substantially equivalent value in the aggregate of benefits. N.Y. INS. LAW § 3425(d)(3) (McKinney 1985).

28. *Cone*, 75 N.Y.2d at 749, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (Kaye, J., dissenting).

resolving liability coverage questions. The *Cone* decision and its progeny are fully discussed in Part III. Part IV examines the analysis many courts have utilized in logically finding the vehicular exclusion applicable when a claim for the negligent entrustment of a motor vehicle is brought. New York's rules for insurance contract interpretation are also summarized.

This Note concludes that the *Cone* precedent overburdens general liability policyholders. The court's narrow interpretation of the vehicular exclusion inflates each general liability carrier's monetary exposure. Carriers are now forced to defend and indemnify motor vehicle accident personal injury claims whenever plaintiff's counsel chooses to include a cause of action for negligent entrustment. The general liability carrier's vast exposure necessitates policyholder premium hikes. Only automobile policyholders should pay for insurance to cover claims arising from vehicular accidents. Unfortunately, low automobile policy limits force accident victims to seek recovery from "deep pocket" general liability insurers. This Note proposes that the state's mandatory minimum automobile policy limits of \$10,000 per person/\$20,000 per occurrence be raised to \$25,000/\$50,000, so that the majority of accident victims can be fully compensated by automobile insurers.

II. Background

A. *The Tort of Negligent Entrustment*

Since 1937, New York has recognized the common law principle that holds parents or masters liable for negligently entrusting to a child or servant an instrument whose nature, use, and purpose make it so dangerous in the latter's hands that it constitutes an unreasonable risk to others.²⁹ A cause of action in negligent entrustment arises after an accident occurs involving the entrustee's use of the dangerous instrumentality.³⁰ Most fact patterns involve parent-child or master-servant relationships,³¹

29. *Steinberg v. Cauchois*, 249 A.D. 518, 519, 293 N.Y.S. 147, 149 (2d Dep't 1937) (construing HARPER'S LAW OF TORTS § 283 (1933)).

30. *Joseph Kelner & Robert S. Kelner, Negligent Entrustment*, N.Y.L.J., Apr. 13, 1988, at 1.

31. *Id.* See, e.g., *Leek v. McGlone*, 162 A.D.2d 504, 556 N.Y.S.2d 704 (2d Dep't 1990); *Camillone v. Popham*, 157 A.D.2d 816, 550 N.Y.S.2d 722 (2d Dep't 1990).

in which the parent or master is capable of controlling the instrument's use.³² In assessing negligence, analysis turns on the entrustor's knowledge of the trustee's youth and inexperience, propensity for reckless and irresponsible behavior, or any other qualities "indicating the possibility that [he] will cause injury" while in possession of the instrument.³³

In *Nolechek v. Gesuale*,³⁴ the New York Court of Appeals defined the negligent entrustment tort and listed chattel that would qualify as dangerous instrumentalities under particular circumstances. The list included bicycles, lawn mowers, power tools, motorcycles, and automobiles.³⁵

In *Nolechek*, a sixteen-year-old boy was killed when the motorcycle he was operating struck a suspended steel cable.³⁶ His father had given him the motorcycle even though he was blind in one eye, of limited vision in the other, and had no driver's license.³⁷ The accident occurred shortly after the boy had switched motorcycles with a friend.³⁸ Defendants in the wrongful death claim brought by the father, counterclaimed for contribution on a theory of negligent entrustment.³⁹ The father lost a dismissal argument at the trial court level but prevailed on appeal.⁴⁰ The defendants then sought relief from New York's high court.⁴¹

The New York Court of Appeals ordered the negligent entrustment counterclaim reinstated.⁴² The high court held that the father might have breached a duty to protect third parties from harm⁴³ caused by his son's improvident use of a motorcy-

32. *Carmona v. Padilla*, 4 A.D.2d 181, 183, 163 N.Y.S.2d 741, 742 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 767, 149 N.E.2d 337, 172 N.Y.S.2d 820 (1958).

33. J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW* § 33.01 (rev. ed. 1990).

34. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

35. *Nolechek*, 46 N.Y.2d at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344.

36. *Id.* at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

37. *Id.* at 335-36, 385 N.E.2d at 1270, 413 N.Y.S.2d at 342.

38. *Id.* at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

39. *Id.* at 335-36, 385 N.E.2d at 1270, 413 N.Y.S.2d at 342. Defendants in *Nolechek* were the owners of the land where the accident occurred and the adjacent land, the town, and the town's superintendent of highways. *Id.*

40. *Id.* at 336, 385 N.E.2d at 1270, 413 N.Y.S.2d at 342.

41. *Id.*

42. *Id.* at 336, 385 N.E.2d at 1270, 413 N.Y.S.2d at 343.

43. In *Nolechek*, the harm to third parties was not direct; it was financial harm resulting from potential liability for the child's death. *Id.* at 339, 385 N.E.2d at 1272, 413

cle — a chattel constituting a dangerous instrumentality the father could control.⁴⁴

B. *The Traditional Vehicular Exclusion*

The New York Court of Appeals examined the issue of homeowner's policy coverage for the negligent entrustment tort twenty years ago in *Lalomia v. Bankers & Shippers Ins. Co.*⁴⁵ At that time, the homeowner's policy issued by the Insurance Company of North America (INA) required the company to "pay all sums which the insured would become legally obligated to pay as damages because of personal injury or property damage." The policy excluded from coverage, however, "'the ownership, maintenance, operation, use, loading or unloading' of automobiles . . ."⁴⁶

Lalomia stemmed from an accident between a car occupied by the Lalomia family and a motorized bicycle powered by a gasoline engine and operated by Daniel Maddock's twelve-year-old son.⁴⁷ The bicycle had no brakes and could be stopped only by "shorting" the sparkplug.⁴⁸ The twelve-year-old and Mrs. Lalomia were killed in the crash.⁴⁹

Subsequently, Mr. Lalomia commenced a declaratory judgment action to determine whether either Maddock's automobile or homeowner liability policy provided coverage for his wife's wrongful death.⁵⁰ The Second Department ruled that the motorized bicycle fell outside Maddock's automobile policy's definition of an automobile,⁵¹ and released his automobile insurer from liability.⁵² Instead, Lalomia's automobile insurer was required to cover the Lalomia claim⁵³ under the uninsured motor-

N.Y.S.2d at 345.

44. *Id.* at 336, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

45. 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972).

46. *Lalomia*, 35 A.D.2d at 116, 312 N.Y.S.2d at 1020.

47. *Id.* at 115-16, 312 N.Y.S.2d at 1019.

48. *Id.* at 116, 312 N.Y.S.2d at 1020.

49. *Id.* at 115, 312 N.Y.S.2d at 1019.

50. *Id.*

51. *Id.* at 116, 312 N.Y.S.2d at 1020.

52. *Id.*

53. *Id.* at 116-17, 312 N.Y.S.2d at 1020-21.

ist endorsement.⁵⁴

The Second Department then turned its analysis to the traditional vehicular exclusion in Maddock's INA homeowner's policy. Because the policy defined "automobile" as a "land motor vehicle," the motorized bicycle qualified as a vehicle for purposes of the exclusion.⁵⁵ Consequently, coverage as to the ownership, maintenance, operation, or use of the bicycle was precluded.⁵⁶

However, Lalomia's theory that Maddock was negligent for placing a dangerous instrumentality in his son's possession, knowing it could be used in a dangerous manner likely to cause harm, was a valid cause of action grounded in common law,⁵⁷ and was not directly related to the "ownership, maintenance, operation, [or] use"⁵⁸ of the vehicle. The negligent entrustment claim thus fell outside the scope of the vehicular exclusion.⁵⁹ Therefore, INA was required to defend and indemnify Maddock for any judgment against him on the theory of negligent entrustment.⁶⁰ *Lalomia*, affirmed by the New York Court of Appeals in 1972,⁶¹ set a state precedent for interpreting the traditional vehicular exclusion that dominated throughout the decade.

In a New York Supreme Court case decided later that year, *Government Employees Ins. Co. v. Chahal*,⁶² a homeowner carrier was forced to cover a negligent entrustment claim brought against a father, after his son, an alleged drug addict,

54. Automobile policies generally contain an uninsured motorist endorsement that provides liability coverage for personal injury claims brought by insureds who have been struck by uninsured drivers. Such coverage is mandatory in New York. N.Y. INS. LAW § 3420(f)(1) (McKinney 1985).

55. *Lalomia*, 35 A.D.2d at 117, 312 N.Y.S.2d at 1020.

56. *Id.* at 116-17, 312 N.Y.S.2d at 1020.

57. *Id.* at 117, 312 N.Y.S.2d at 1020-21 (citing *Steinberg v. Cauchois*, 249 A.D. 518, 519, 293 N.Y.S. 147, 149 (2d Dep't 1937)).

58. *Lalomia*, 35 A.D.2d at 117, 312 N.Y.S.2d at 1021.

59. *Id.* (citing *McDonald v. The Home Ins. Co.*, 97 N.J. Super. 501, 503-04, 235 A.2d 480, 482 (App. Div. 1967)). In *McDonald*, the insured minor son, who had allegedly been drinking alcohol, drove into a tree while operating a car his parents had purchased for him. His passenger was killed in the crash. *McDonald*, 97 N.J. Super. at 502-03, 235 A.2d at 481.

60. *Lalomia*, 35 A.D.2d at 117, 312 N.Y.S.2d at 1021.

61. *Lalomia*, 31 N.Y.2d 830, 833, 291 N.E.2d 724, 724, 339 N.Y.S.2d 680, 680 (1972).

62. 72 Misc. 2d 207, 338 N.Y.S.2d 348 (Sup. Ct. 1972).

struck another car.⁶³ The automobile accident occurred while the son was driving a car allegedly paid for and given to him by his father.⁶⁴ The homeowner carrier brought an action for a determination of its liability under the policy after the occupants of the other car sued both father and son.⁶⁵ The occupants collected the son's auto liability policy limits, and continued their claim against the father.⁶⁶

The court followed *Lalomia*, reasoning that although the policy did not cover "the ownership, maintenance, operation, use, loading or unloading of . . . automobiles,"⁶⁷ the father's alleged liability was not claimed through his "ownership, maintenance, operation [or] use"⁶⁸ of the car. Rather, liability stemmed from the fact that the father had allowed his son to have and operate a car despite his knowledge of the boy's condition and possible consequential unsafe auto operation.⁶⁹

Although facts relating to the "ownership, maintenance, operation [or] use"⁷⁰ of the car had to be developed under the negligent entrustment claim, the court found these facts pertinent only to establish a causal relationship between the unreasonable entrustment and the later occurrence of the accident.⁷¹ Such facts did not affect the gravamen of the claim against the father which, in the court's view, was not excluded from coverage.⁷²

In a subsequent New York Supreme Court case, *Allstate Ins. Co. v. Reliance Ins. Co.*,⁷³ an automobile insurer obtained a declaratory judgment to force a homeowner insurer to cover a negligent entrustment claim.⁷⁴ The underlying action was brought by a minor daughter against her mother for injuries she sustained while operating a car her mother had permitted her to

63. *Id.* at 210, 338 N.Y.S.2d at 351.

64. *Id.* at 208, 338 N.Y.S.2d at 349.

65. *Id.*

66. *Id.*

67. *Id.* at 209, 338 N.Y.S.2d at 350.

68. *Id.*

69. *Id.*

70. *Id.* at 210, 338 N.Y.S.2d at 351.

71. *Id.*

72. *Id.*

73. 85 Misc. 2d 734, 380 N.Y.S.2d 923 (Sup. Ct. 1976).

74. *Id.* at 738, 380 N.Y.S.2d at 927.

use.⁷⁵ The traditional vehicular exclusion in the mother's homeowner policy was found not to relieve the carrier from coverage.⁷⁶

The *Allstate* court ruled that the negligent entrustment action was "only incidentally related to the 'ownership, maintenance, operation [or] use' of the . . . car."⁷⁷ Instead, the action was principally based upon the mother's negligent entrustment of a dangerous instrument.⁷⁸ In the court's words, "*Lalomia* settles the question of liability under a [h]omeowner's policy for entrustment of a dangerous thing, even if the dangerous thing [happens] to be a car."⁷⁹

The Third Department applied the reasoning of the *Lalomia* court⁸⁰ in *Heritage Mut. Ins. Co. v. Hunter*,⁸¹ a case that stemmed from an accident involving a truck and a teenage motorcyclist in which the motorcycle passenger was killed.⁸² The motorcycle owner was sued for negligently entrusting a dangerous instrumentality to his son, and he requested defense and indemnification from his homeowner's insurer.⁸³ The insurer refused and filed for a declaratory judgment precluding coverage.⁸⁴

As expected, the court followed precedent and ordered the insurer to defend and indemnify the motorcycle owner.⁸⁵ Relying on *Lalomia*, the court concluded that "the theory of action was not directly related to the 'ownership, maintenance, operation or use' of the vehicle"⁸⁶ and thus fell outside the vehicular exclusion.⁸⁷

75. *Id.* at 737, 380 N.Y.S.2d at 926.

76. *Id.* at 738-39, 380 N.Y.S.2d at 927.

77. *Id.* at 738, 380 N.Y.S.2d at 927.

78. *Id.*

79. *Id.* at 739, 380 N.Y.S.2d at 927.

80. For *Lalomia* reasoning, see *supra* notes 50-60 and accompanying text.

81. 63 A.D.2d 200, 406 N.Y.S.2d 625 (3d Dep't 1978).

82. *Id.* at 201, 406 N.Y.S.2d at 626. In *Heritage*, the insured's fifteen-year-old son permitted a fourteen-year-old (Hajdu) to operate the unregistered motorcycle. Without the fifteen-year-old son's consent, Hajdu let another boy operate the motorcycle while he rode as passenger. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 202, 406 N.Y.S.2d at 627.

86. *Id.*

87. *Id.* (citing *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 117, 312 N.Y.S.2d 1018, 1021 (2d Dep't 1970)).

C. *The Modern Vehicular Exclusion*

In the mid-1970's, liability insurers added the phrase "arising out of" to the "ownership, maintenance, operation, use of a motor vehicle" exclusion to broaden its scope and avoid coverage for negligent entrustment claims.⁸⁸ Until *Cone*, this addition achieved its desired effect.⁸⁹

State and federal courts throughout the country generally recognize that liability for these claims is dependent upon an entrustee's negligent use of the vehicle.⁹⁰ Therefore, any negligent entrustment claim indeed "arises out of" the use of the vehicle and thus falls within the modern vehicular exclusion.⁹¹ Prior to the *Cone* decision, New York courts construing the modern vehicular exclusion followed this reasoning. Liability insurers were relieved of defending and indemnifying actions alleging the negligent entrustment of a motor vehicle as well as actions alleging other types of negligence that were construed to fall within the exclusion.⁹²

For instance, in *Ruggerio v. Aetna Life & Casualty Co.*,⁹³ a taxi company was released from liability under its comprehensive general liability (CGL) policy because the causes of action brought after a vehicular accident were negligent hiring and negligent entrustment.⁹⁴ The taxi driver, who was drunk when his

88. The words "arising out of the ownership, maintenance or use of the automobile" were already being used in automobile policies to define instances where coverage applied, and had been interpreted by a New York court in *Jamestown Mut. Ins. Co. v. General Accident, Fire & Life Assurance Corp.*, 66 Misc. 2d 952, 322 N.Y.S.2d 806 (N.Y. County Ct. 1971). "The words . . . are broad and comprehensive terms meaning 'originating from' or 'having its origin in' or 'growing out of' or 'flowing from.'" *Id.* at 955, 322 N.Y.S.2d at 810 (citing *Red Ball Motor Freight Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir. 1951)).

89. *Exclusions/Automobile*, *supra* note 21, at 158.

90. *Harrison*, *supra* note 11, at 572.

91. *Id.* The only exceptions are found in the Tenth Circuit in *Milbank Ins. Co. v. Garcia*, 779 F.2d 1446 (10th Cir. 1985); *Douglass v. Hartford Ins. Co.*, 602 F.2d 934 (10th Cir. 1979) (applying Colorado law); *United Fire & Cas. Co. v. Day*, 657 P.2d 981 (Colo. App. 1982) (an intermediate appellate court decision). The Colorado Supreme Court overruled *Day* in *Northern Ins. Co. v. Ekstrom*, 784 P.2d 320 (Colo. 1989). See *infra* notes 164-99 and accompanying text. *Exclusions/Automobile*, *supra* note 21, at 158-59.

92. See Norman H. Dachs & Jonathan A. Dachs, *Insurance and No-Fault Law*, N.Y.L.J., Feb. 13, 1990, at 7, cols. 2, 3.

93. 107 A.D.2d 744, 484 N.Y.S.2d 106 (2d Dep't 1985).

94. *Ruggerio*, 107 A.D.2d at 744-45, 484 N.Y.S.2d at 106-07.

taxi struck another car, did not possess a taxi driver's license because his operator's license had been suspended due to his record of driving while intoxicated.⁹⁶ After the accident victim obtained a judgment against the taxi driver's employer, she sought to recover the proceeds of the employer's CGL policy.⁹⁶

The CGL policy, however, contained the standard vehicular exclusion for liability "'arising out of the ownership, maintenance, operation [or] use' of an automobile."⁹⁷ The trial court found the exclusion applicable because "no harm [was done] to the plaintiffs until [the driver] got behind the wheel . . ."⁹⁸ The Second Department agreed,⁹⁹ ruling that the theories of negligence in hiring an incompetent, unqualified driver and dispatching him in a drunken state did "'no more than provide reasons or subfactors . . .'"¹⁰⁰ to explain why the accident arose out of the operation of a vehicle.¹⁰¹

As a result of the exclusion, the accident victim was limited to collecting the taxi company's minimum automobile policy limit of \$10,000¹⁰² on a theory of vicarious liability,¹⁰³ despite her judgment in excess of \$200,000.¹⁰⁴ The court sympathized with her nominal recovery, but believed the problem lay in the meager automobile policy limits, an issue that could be addressed only by the state legislature.¹⁰⁵

In *State Farm Fire & Casualty Co. v. Wolford*,¹⁰⁶ the Fourth Department upheld a New York Supreme Court declara-

95. *Id.* at 744, 484 N.Y.S.2d at 106.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 745, 484 N.Y.S.2d at 107.

101. *Id.* at 745, 484 N.Y.S.2d at 107 (citing *Duncan Petroleum Transp. v. Aetna Ins. Co.*, 96 A.D.2d 942, 943, 466 N.Y.S.2d 394, 395 (2d Dep't), *aff'd*, 61 N.Y.2d 665, 460 N.E.2d 229, 472 N.Y.S.2d 88 (1983)).

102. *Id.* at 745, 484 N.Y.S.2d at 107.

103. Vicarious liability is defined as the principle that the vehicle owner is liable for injuries to persons or property resulting from negligence in the operation of such vehicle, in the business of such owner or otherwise, by any person using it with permission, express or implied, of the owner. N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 1986). See *infra* note 227.

104. *Ruggerio*, 107 A.D.2d at 745, 484 N.Y.S.2d at 107.

105. *Id.* See also *infra* notes 224-34 and accompanying text.

106. 116 A.D.2d 1011, 498 N.Y.S.2d 631 (4th Dep't 1986).

tory judgment that released a homeowner carrier from liability in a wrongful¹⁰⁷ entrustment claim.¹⁰⁸ The plaintiff in the underlying action had sued the insured for wrongfully entrusting his automobile to a younger brother who later collided with the plaintiff.¹⁰⁹ In a terse opinion, the court ruled that the accident had arisen out of the younger brother's operation of a motor vehicle and, therefore, fell within the policy's specific vehicular exclusion.¹¹⁰

Another case discussing the issue of coverage under a liability policy, *Aetna Casualty & Surety Co. v. Liberty Mut. Ins. Co.*,¹¹¹ stemmed from an explosion of an overloaded, parked, dynamite-laden truck.¹¹² Subsequent lawsuits alleged negligent use of the truck and negligent business practices by the explosives company, which had insurance under business-auto and CGL policies.¹¹³

On appeal, the Fourth Department interpreted the language "'arising out of'" to determine that the modern standard vehicular exclusion precluded coverage by the CGL policy.¹¹⁴ The court remarked that "[t]he words 'arising out of' have 'broader significance than the words 'caused by,' and are ordinarily understood to mean originating from, incident to, or having connection with the use of the vehicle.'"¹¹⁵ Because the claims arose from the explosion of an overloaded truck being used to transport explosives, "the claims [had] a connection with the use of the truck and [fell] within the risk covered by the [business-auto] policy," and outside the risk covered by the CGL policy.¹¹⁶

Finally, in *Duncan Petroleum Transp. v. Aetna Ins. Co.*,¹¹⁷

107. According to BLACK'S LAW DICTIONARY 1612 (6th ed. 1990), the term "wrongful" is more comprehensive than the term "negligent." Negligent acts are inadvertent, *id.* at 1032; wrongful acts are "wilful, wanton, [and] reckless." *Id.* at 1612.

108. *State Farm*, 116 A.D.2d at 1011, 498 N.Y.S.2d at 632.

109. *Id.*

110. *Id.* at 1011-12, 498 N.Y.S.2d at 632.

111. 91 A.D.2d 317, 459 N.Y.S.2d 158 (4th Dep't 1983).

112. *Id.* at 318-19, 459 N.Y.S.2d at 159-60.

113. *Id.* at 319, 459 N.Y.S.2d at 160.

114. *Id.* at 320, 459 N.Y.S.2d at 161.

115. *Id.* at 320-21, 459 N.Y.S.2d at 161 (quoting 6B JOHN A. APPLEMAN, INS. LAW & PRACTICE § 4317 (Buckley ed. 1979)). See also 12 COUCH'S CYCLOPEDIA OF INS. LAW § 45:61 (2d ed. 1959).

116. *Aetna*, 91 A.D.2d at 321, 459 N.Y.S.2d at 161.

117. 96 A.D.2d 942, 466 N.Y.S.2d 394 (2d Dep't), *aff'd*, 61 N.Y.2d 665, 460 N.E.2d

the insured sought a declaratory judgment regarding a CGL insurer's obligation to provide coverage when an explosion occurred while gasoline was being pumped from one tractor-trailer to another.¹¹⁸ Although the trial court held for the insured, the Second Department reversed, finding that the insurer did not have a duty to provide coverage.¹¹⁹ A negligent entrustment issue did not arise, but the insured claimed the accident had been caused by negligent acts that were covered, such as: failure to inspect the vehicles, failure to supervise and train personnel, failure to properly design and maintain the vehicles, and use of dangerous transfer procedures.¹²⁰

Prior to institution of the declaratory judgment action, the insured had submitted the claim to its CGL insurer, but coverage was denied because of the exclusion for "bodily injury . . . arising out of the ownership, maintenance, operation, use, loading or unloading of any [vehicle]"¹²¹ In its analysis, the Second Department used reasoning analogous to that in *Aetna Casualty & Surety Co. v. Liberty Mut. Ins. Co.*,¹²² to conclude that the allegations of negligence were mere factors of causation that did no more than explain why the accident arose out of the loading or unloading of the vehicle.

Acts or omissions which predated the loading operation but which allegedly brought about the explosion during the loading do not prevent invocation of the exclusion clause. Whatever the originating reason for the explosion, it arose out of the use of the vehicles while they were being loaded.¹²³

The New York Court of Appeals affirmed the Second Department's reversal, stating:

despite an insurer's broad duty to defend and despite an insurer's difficult burden of establishing that a policy exclusion is unam-

229, 472 N.Y.S.2d 88 (1983).

118. *Duncan*, 96 A.D.2d at 942, 466 N.Y.S.2d at 394.

119. *Id.*

120. *Id.* at 943, 466 N.Y.S.2d at 395.

121. *Id.* at 942, 466 N.Y.S.2d at 395.

122. Brief for Respondent at 10, *Cone v. Nationwide Mut. Fire Ins. Co.*, 149 A.D.2d 992, 542 N.Y.S.2d 1003 (4th Dep't), *rev'd*, 75 N.Y.2d 747, 551 N.E.2d 92, 551 N.Y.S.2d 891 (1989) [hereinafter Brief for Respondent]. For a discussion of *Aetna Casualty*, see *supra* notes 93-105 and accompanying text.

123. *Duncan*, 96 A.D.2d at 943, 466 N.Y.S.2d at 395.

biguously applicable to the claims in issue, it was clear that Aetna had fully met its burden by demonstrating that the aforesaid exclusion of its [CGL] policy was applicable to the instant situation . . . and . . . despite the claims that the accident was caused by varying types and degrees of negligence with respect to the gasoline transfer, nothing about those asserted factors, even if they were actually involved in causing the explosion, would negate the unequivocal and unchallenged fact that the accident arose out of the loading or unloading of the automobile.¹²⁴

In none of the above four cases¹²⁵ involving the modern vehicular exclusion did the courts make any attempt to distinguish or explain the conclusions reached by the high court in *Lalomia v. Bankers & Shippers Ins. Co.*¹²⁶ Indeed, except for one cite in the *Duncan* dissenting opinion,¹²⁷ the *Lalomia* case was never mentioned.¹²⁸ This suggests that New York courts viewed the change in the exclusion language as a general resolution of the negligent entrustment coverage issue.

III. The *Cone* Case and its Progeny

A. *Facts*

The plaintiff in *Cone v. Nationwide Mut. Fire Ins. Co.* owned a three-wheel all-terrain vehicle (ATV).¹²⁹ His fourteen-

124. *Duncan Petroleum Transp., Inc. v. Aetna Ins. Co.*, 61 N.Y.2d 665, 666-67, 460 N.E.2d 229, 229, 472 N.Y.S.2d 88, 88 (1983).

125. See *State Farm Fire & Cas. Co. v. Wolford*, 116 A.D.2d 1011, 498 N.Y.S.2d 631 (4th Dep't 1986), *supra* notes 106-10 and accompanying text; *Ruggerio v. Aetna Life & Cas. Co.*, 107 A.D.2d 744, 484 N.Y.S.2d 106 (3d Dep't 1985), *supra* notes 93-105 and accompanying text; *Duncan Petroleum Transp. v. Aetna Ins. Co.*, 96 A.D.2d 942, 466 N.Y.S.2d 394 (2d Dep't), *aff'd*, 61 N.Y.2d 665, 460 N.E.2d 229, 472 N.Y.S.2d 88 (1983), *supra* notes 117-20 and accompanying text; *Aetna Cas. & Sur. Co. v. Liberty Mut. Ins. Co.*, 91 A.D.2d 317, 459 N.Y.S.2d 158 (4th Dep't 1983), *supra* notes 111-16 and accompanying text.

126. *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972). For a discussion of *Lalomia*, see *supra* notes 45-61 and accompanying text.

127. *Duncan*, 96 A.D.2d at 945, 466 N.Y.S.2d at 398 (citing *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972)) (Gibbons, J., dissenting).

128. *Dachs & Dachs*, *supra* note 92, at 7, col. 3.

129. Brief for Appellant at 2, *Cone v. Nationwide Mut. Fire Ins. Co.*, 149 A.D.2d 992, 542 N.Y.S.2d 1003 (4th Dep't), *rev'd*, 75 N.Y.2d 747, 551 N.E.2d 92, 551 N.Y.S.2d 891 (1989) [hereinafter Brief for Appellant].

year-old son was operating the vehicle on a public highway in Portville, New York, when it collided with a pickup truck.¹³⁰ The boy sustained serious fractures of the femur, tibia, and fibula; poor healing ultimately necessitated a bone graft operation.¹³¹

Plaintiff Cone had a homeowner's policy with Nationwide that specifically excluded coverage for bodily injury or property damage "arising out of the ownership, maintenance, or use of . . . a motor vehicle."¹³² The boy qualified as an insured and the ATV qualified as a motor vehicle under the homeowner policy terms.¹³³

Cone, as father and natural guardian of his injured son, commenced a personal injury action against Williams, the owner and operator of the pickup truck.¹³⁴ Williams counterclaimed against Cone, alleging that he:

was reckless, careless and negligent and that he caused, suffered, permitted and allowed an improperly equipped motor vehicle to be operated upon the public highways . . . and was further reckless, careless and negligent and that he permitted and allowed the operation of an unregistered motor vehicle upon the highways of the State, by an inexperienced, unfit, unqualified and an unlicensed operator and entrusted a dangerous instrumentality to (his son) knowing that (his son) was unfit and unqualified to properly handle and/or manage same and knowing that such dangerous instrumentalities could be used in a manner which was dangerous to others and likely to cause harm to others.¹³⁵

Cone requested his homeowner carrier, Nationwide, to defend and indemnify him on the counterclaim.¹³⁶ Nationwide refused on the ground that the accident arose out of the "ownership, maintenance, or use of a motor vehicle," which was excluded under the policy.¹³⁷

130. Brief for Appellant, *supra* note 129, at 2.

131. Telephone Interview with Robert Kribs, Claimsperson for Nationwide Ins. Co. (Oct. 1, 1990).

132. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 748, 551 N.E.2d 92, 93, 551 N.Y.S.2d 891, 892 (1989).

133. Brief for Respondent, *supra* note 122, at 3-4.

134. *Cone*, 75 N.Y.2d at 748, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

135. Brief for Appellant, *supra* note 129, at 2.

136. *Cone*, 75 N.Y.2d at 748, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

137. *Id.*

B. *Procedural History*

In response to Nationwide's denial of coverage, Cone commenced a declaratory judgment action.¹³⁸ Upon completion of discovery, both parties moved for summary judgment.¹³⁹ "After full briefing and [a] memorandum decision . . . , judgment was granted on behalf of [Nationwide] and a declaration was entered that no coverage existed under the policy"¹⁴⁰ The ruling led to an appeal before the Fourth Department, where the trial court decision was unanimously affirmed without opinion.¹⁴¹ The Court of Appeals granted leave on June 30, 1989.¹⁴²

C. *The Cone Majority Decision*

The New York high court reversed the unanimous Fourth Department and entered judgment for Cone, declaring that Nationwide was obligated to defend and indemnify him on the negligent entrustment counterclaim.¹⁴³ The four-to-three vote underscored the controversy surrounding the coverage question.¹⁴⁴

Without explanation the *Cone* majority strayed from the reasoning of past New York decisions and, despite the existence of a broadened exclusion, resurrected *Lalomia*.¹⁴⁵ In the court's words:

The exclusion from coverage — always as a matter of interpretation construed strictly against the insurer — is governed by *Lalomia v. Bankers & Shippers Ins. Co.*, where we held that a cause of action sounding in common-law negligence, predicated on the entrustment of a "motor vehicle", was separate and distinct from claims excluded by a clause virtually identical to the one now at issue. Any minor variation in language between "arising out of" (the one here) and "based directly on" . . . is too insig-

138. *Id.*

139. Brief for Respondent, *supra* note 122, at 2.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 748, 551 N.E.2d 92, 93, 551 N.Y.S.2d 891, 892 (1989).

144. Gary Spencer, *Auto Claim Sustained in Homeowner Policy*, N.Y.L.J., Dec. 21, 1989, at 1, col. 3.

145. *Dachs & Dachs*, *supra* note 92.

nificant to permit varying legal consequences.¹⁴⁶

The majority reasoned that since *Lalomia*, "insurers have had an opportunity to clearly exclude claims based on negligent entrustment from coverage in homeowner's liability policies. They cannot be said to have accomplished that significant change by the ambiguous, as used here, 'arising out of' language."¹⁴⁷ Because the focus of the dispute was the negligent entrustment of a dangerous instrumentality, a matter the majority deemed "not directly related" to the child's negligent operation, and because the broadened exclusion language was found to have no effect on the coverage issue, the rule of *Lalomia* prevailed.¹⁴⁸

This unpopular decision in essence overruled *Duncan Petroleum Transp. v. Aetna Ins. Co.*,¹⁴⁹ in which the same court had found the same exclusion language preclusive of coverage under similar facts.¹⁵⁰ Yet, just as the high court majority had ignored *Lalomia* when it decided *Duncan*, it ignored *Duncan* when it decided *Cone*.¹⁵¹

146. *Cone*, 75 N.Y.2d at 749, 551 N.E.2d at 93, 551 N.Y.S.2d at 892 (citation omitted).

147. *Id.* at 749, 551 N.E.2d at 93, 551 N.Y.S.2d at 892.

148. *Id.* For a discussion of the *Lalomia* rule, see *supra* notes 55-61 and accompanying text.

149. For a discussion of *Duncan*, see *supra* notes 117-28 and accompanying text.

150. *Duncan Petroleum Transp. v. Aetna Ins. Co.*, 96 A.D.2d 942, 943, 466 N.Y.S.2d 394, 395 (2d Dep't), *aff'd*, 61 N.Y.2d 665, 460 N.E.2d 229, 472 N.Y.S.2d 88 (1983).

151. *Dachs & Dachs*, *supra* note 92. The *Cone* decision was followed by the Second Department when it granted a motion for reargument of an appeal from a trial court judgment. See *Byer v. Continental Ins. Co.*, N.Y.L.J., June 7, 1990, at 31, col. 1. The decision of Nov. 13, 1989, had affirmed a judgment relieving an insurer from the duty to defend or indemnify a homeowner in a case with facts nearly identical to those in *Cone*. *Byer v. Continental Ins. Co.*, 155 A.D.2d 503, 503, 547 N.Y.S.2d 363, 364 (1989), *vacated on reh'g*, 161 A.D.2d 744, 558 N.Y.S.2d 847 (2d Dep't 1990). In *Byer*, the infant son of the insureds, operating his father's three-wheeled ATV, hit a pedestrian who claimed injury. *Id.* The homeowner policy contained the standard modern vehicular exclusion. *Id.* For the facts of *Cone*, see *supra* notes 129-37 and accompanying text.

Following reargument in May 1990, the November 1989 decision was vacated. *Byer* at 31, col. 1. In a new decision, the insurer was ordered to defend the insureds in the underlying personal injury action and to indemnify them, subject to the policy limits, against any liability imposed on them for their negligent entrustment of a vehicle to their son. *Id.* The Second Department found the material facts of *Byer* indistinguishable from those in *Cone* and thus ruled in accordance with the *Cone* decision. *Id.*

D. Justice Kaye's Dissent

Justice Kaye's persuasive dissent, joined by two others,¹⁵² made *Cone* a four-to-three decision.¹⁵³ Justice Kaye vehemently criticized the majority's dismissal of the distinction between damages "arising out of" and damages "directly related to the 'ownership, maintenance, operation'" and use of a vehicle¹⁵⁴ as insignificant.¹⁵⁵ A logical analysis of *Cone* and *Lalomia* led her to conclude that the cases are entirely distinguishable because of the additional exclusion language.¹⁵⁶ She noted that the change in language "has often been recognized as a basis for distinguishing *Lalomia*"¹⁵⁷ and supported her conclusion with reference to an abundance of caselaw.¹⁵⁸

IV. Analysis

A. New York is the Sole Dissenter

Now that Colorado no longer requires coverage for vehicular negligent entrustment claims under the modern exclusion, New York is the only state jurisdiction that does.¹⁵⁹ Indeed, as Justice Kaye noted in her powerful *Cone* dissent,¹⁶⁰ "[o]verwhelmingly,

152. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 751, 551 N.E.2d 92, 95, 551 N.Y.S.2d 891, 894 (1989) (Kaye, J., joined by Alexander and Hancock, JJ. dissenting).

153. Spencer, *supra* note 144.

154. *Cone*, 75 N.Y.2d at 750, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (Kaye, J. dissenting).

155. *Id.* (citing *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 117, 312 N.Y.S.2d 1018, 1021 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972)) (Kaye, J. dissenting).

156. *Cone*, 75 N.Y.2d at 750, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (Kaye, J. dissenting).

157. *Id.*

158. *Id.* at 750, 551 N.E.2d at 94, 551 N.Y.S.2d at 893; *see also* *Standard Mut. Ins. Co. v. Bailey*, 868 F.2d 893, 899-900 n.9 (7th Cir. 1989). *See supra* note 26 and accompanying text.

159. The Colorado Supreme Court overruled a contrary appellate decision rendered eight years earlier at a time when a split of authority on the issue existed. *Exclusions/Automobile*, *supra* note 21, at 159. *Northern Ins. Co. v. Ekstrom*, 784 P.2d 320 (Colo. 1989), overruled *United Fire & Cas. Co. v. Day*, 657 P.2d 981 (Colo. App. 1982). *See supra* note 91. Since then, the large majority of courts have found vehicular negligent entrustment claims to be barred from general liability coverage. *Northern*, 784 P.2d at 324-25 n.3. *See supra* note 26 and accompanying text.

160. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 749, 551 N.E.2d 92, 93, 551 N.Y.S.2d 891, 892 (1989) (Kaye, J., dissenting).

courts throughout the country that have construed such a standard policy exclusion have found it applicable to claimed negligent entrustment."¹⁶¹ Justice Kaye based her statement on a statistic from *Standard Mut. Ins. Co. v. Bailey*¹⁶² that twenty-eight of thirty-one jurisdictions examining whether the vehicular exclusion is applicable to negligent entrustment claims have ruled affirmatively.¹⁶³

In *Northern Ins. Co. v. Ekstrom*,¹⁶⁴ the Colorado high court sitting en banc overruled *United Fire & Casualty Co. v. Day*,¹⁶⁵ an eight-year-old appellate ruling, and held that a CGL and special multi-peril liability policy's exclusion for liability "arising out of the ownership, maintenance, use, loading or unloading of any automobile" did indeed preclude coverage for a negligent entrustment claim.¹⁶⁶ Interestingly, the Colorado Supreme Court's decision was rendered just one day before the New York Court of Appeals decided *Cone*.¹⁶⁷

After the insured employee in *Northern* collided with a car while driving a truck either owned by or on loan to the insured, the car driver sued the insured, alleging, *inter alia*, negligent entrustment of the truck to the employee.¹⁶⁸ In addition to having a \$500,000 automobile policy with Maryland Casualty, the insured had coverage with Northern.¹⁶⁹ The Northern liability policy also had a \$500,000 limit; it contained both CGL and special multi-peril provisions, along with the standard vehicular

161. *Id.* at 750, 551 N.E.2d at 94, 551 N.Y.S.2d at 893 (Kaye, J., dissenting).

162. *Standard Mut. Ins. Co. v. Bailey*, 868 F.2d 893, 898 n.6 (7th Cir. 1989) (citing case law from numerous jurisdictions including the New York case, *Ruggerio v. Aetna Life & Cas. Co.*, 107 A.D.2d 744, 484 N.Y.S.2d 106 (2d Dep't 1985)).

163. *Standard*, 868 F.2d at 898.

164. 784 P.2d 320 (Colo. 1989).

165. 657 P.2d 981 (Colo. App. 1982). In *Day*, the court held that a homeowner's liability policy did not exclude coverage for a negligent entrustment claim. *Id.* at 984. The court concluded that liability for negligent entrustment arose out of the personal conduct of the insured, which did not involve the use of a vehicle. *Id.* at 983. Because claims based on the personal conduct of the insured existing separately from the use of the vehicle were not precisely excluded by the policy, coverage was owed. *Id.* at 984.

166. *Northern*, 784 P.2d at 321.

167. The *Northern* decision is dated December 18, 1989; the *Cone* decision is dated December 19, 1989.

168. *Northern*, 784 P.2d at 321. The court noted that the record did not clearly state whether the truck was owned or loaned to the insured. *Id.*

169. *Id.* at 321.

exclusion.¹⁷⁰

The plaintiff obtained a two million dollar personal injury judgment, collected the \$500,000 automobile policy proceeds, and filed a garnishment proceeding to obtain the Northern CGL/special multi-peril policy proceeds.¹⁷¹ She argued that the modern vehicular exclusion was ambiguous and prevailed at both the trial and appellate levels,¹⁷² but lost when the Colorado high court found that the exclusion unambiguously precluded coverage.¹⁷³ The Colorado Supreme Court espoused two principles in support of its conclusion: the use of a vehicle is an essential element of negligent entrustment, and the dovetail concept applies to negligent entrustment cases.¹⁷⁴

1. *Use of a Vehicle is an Essential Element of Negligent Entrustment*

For an accident victim's claim of negligent entrustment of a dangerous instrumentality to be successful, both the entrustor and the trustee must be found negligent.¹⁷⁵ The fact that the owner negligently entrusted a vehicle does not prove his act was the proximate cause¹⁷⁶ of the accident and injury. To establish proximate causation, a plaintiff must also prove that the trustee drove the vehicle negligently "and that his negligence was the proximate cause of the accident."¹⁷⁷ In other words, the act of entrusting — knowing that the trustee is inexperienced or incompetent — constitutes negligence. "[Entrusting] becomes [the] proximate cause of the injury when it combines with the negligent acts of the [trustee] causing the damage."¹⁷⁸

The *Northern*¹⁷⁹ high court reasoned that "[s]ince one element of a negligent entrustment claim must be the negligent use

170. *Id.*

171. *Id.* at 322.

172. *Northern Ins. Co. v. Ekstrom*, 762 P.2d 741 (Colo. App. 1988), *relying on United Fire & Casualty Co. v. Day*, 657 P.2d 981 (Colo. App. 1982). *See supra* note 165.

173. *Northern*, 784 P.2d at 324.

174. *Id.* at 323-24.

175. LEE & LINDAHL, *supra* note 33, § 33.04.

176. For a discussion of proximate cause, see *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, *reh'g denied*, 249 N.Y. 511, 164 N.E. 564 (1928).

177. LEE & LINDAHL, *supra* note 33, § 33.04.

178. *Id.*

179. *Northern Ins. Co. v. Ekstrom*, 784 P.2d 320 (Colo. 1989).

of an automobile, a claim for negligent entrustment of an automobile inextricably derives from or relates to the use, ownership or operation of an automobile," and is thus unambiguously excluded from coverage by the vehicular exclusion.¹⁸⁰ More simply, because the very element that triggers the exclusion — the negligent use of a vehicle — is an essential element of the negligent entrustment tort, the use of the vehicle is contiguous with the entrustment and both are excluded.¹⁸¹

The Seventh Circuit in *Standard*¹⁸² also relied on this principle to relieve a homeowner insurer under similar circumstances.¹⁸³ The court viewed negligent entrustment as undeniably "intertwined with . . . the more general concepts of ownership, operation, and use . . ." because the entrustor's liability does not occur until the trustee acts negligently while operating the motor vehicle.¹⁸⁴ Stated succinctly, "but for the incompetent driver's misconduct in the use of the automobile, no liability could result in the entrustor"¹⁸⁵

2. The "Dovetail" Concept

The Colorado Supreme Court's second reason for denying coverage was based on the "dovetail" concept.¹⁸⁶ Liability policies are designed to "dovetail" in the insurance business.¹⁸⁷ They are "to fit together into a coordinated and unified whole,"¹⁸⁸ providing non-duplicative liability coverage.¹⁸⁹

This objective is accomplished by using the same language in an automobile policy coverage clause and a general liability policy vehicular exclusion clause, so that the clauses are mutually exclusive.¹⁹⁰ The identical language regarding accidents

180. *Northern*, 784 P.2d at 323.

181. Brief for Respondent, *supra* note 122, at 14.

182. *Standard Mut. Ins. Co. v. Bailey*, 868 F.2d 893 (7th Cir. 1989).

183. *Standard*, 868 F.2d at 898-99.

184. *Id.* at 898.

185. *Id.* at 899 (quoting *Cooter v. State Farm Fire & Cas. Co.*, 344 So. 2d 496, 497 (Ala. 1977)).

186. *Northern*, 784 P.2d at 324.

187. *Id.*

188. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 681).

189. *Northern*, 784 P.2d at 324.

190. *Exclusions/Automobile*, *supra* note 21, at 160; see e.g., *Farmers Fire Ins. Co. v. Kingsbury*, 118 Misc. 2d 735, 461 N.Y.S.2d 226 (N.Y. Sup. Ct. 1983).

"arising out of the ownership, maintenance, operation, use, loading, or unloading" of a motor vehicle is construed identically to prevent an accident from escaping coverage under both policies.¹⁹¹ Instead, the accident will always be covered — but by only one of the policies — not both.¹⁹² When a claim alleging negligent entrustment of a motor vehicle arises following an accident, and there is coverage under the automobile policy, an insured should be precluded from obtaining the benefit of the higher coverage limits traditionally available under general liability insurance.¹⁹³

The insured in *Northern*¹⁹⁴ availed herself of the "dovetail" concept by purchasing both an automobile policy and a CGL/special multi-peril policy.¹⁹⁵ The high court construed the vehicular exclusion in the *Northern* policy and the coverage provision in the automobile policy identically to prevent duplicate coverage, finding no ambiguity in either policy.¹⁹⁶

In summary, the Colorado Supreme Court utilized the essential element theory and the "dovetail" concept in finding that the vehicular exclusion unambiguously precludes coverage of negligent entrustment claims.¹⁹⁷ Having been persuaded by abundant caselaw in the 1980's compelling this result, it reversed the *Northern* appellate court and overruled *United Fire & Casualty Co. v. Day*,¹⁹⁸ leaving New York the sole state jurisdiction finding coverage.¹⁹⁹

191. *Farmers*, 118 Misc. 2d at 736-37, 461 N.Y.S.2d at 227 (quoting *United Servs. Auto. Ass'n v. Aetna Cas. & Sur. Co.*, 75 A.D.2d 1022, 429 N.Y.S.2d 508 (4th Dep't 1980)).

192. *Standard Mut. Ins. Co. v. Bailey*, 868 F.2d 893, 898-99 n.7 (7th Cir. 1989) (citing *Pedersen v. Republic Ins. Co.*, 72 Md. App. 661, 670, 532 A.2d 183, 188 (1987)).

193. *Exclusions/Automobile*, *supra* note 21, at 160.

194. *Northern Ins. Co. v. Ekstrom*, 784 P.2d 320 (Colo. 1989).

195. *Northern*, 784 P.2d at 321.

196. *Id.* at 324.

197. *Id.*

198. *Id.* at 325.

199. *Exclusions/Automobile*, *supra* note 21, at 159.

B. *Literal Terms of Clear Policy Language Should Be Followed*

The *Northern* court prefaced its two-point analysis by summarizing the principles for interpreting insurance contracts.²⁰⁰ Although the court cited Colorado caselaw, there are similar rules of interpretation in every state.²⁰¹

It has long been recognized in New York that insurance policies are similar to other contracts.²⁰² "[T]hey are matters of agreement by the parties and it is the function of the [c]ourt in a dispute to determine precisely what the agreement was and to enforce it accordingly."²⁰³ The content must be construed in accordance with the parties' intent as expressed in the clear language of the policy.²⁰⁴ Clear provisions inserted by the insurer and accepted by the insured cannot be disregarded.²⁰⁵

In *Breed v. Insurance Co. of North America*,²⁰⁶ the New York Court of Appeals applied the general rules of contract interpretation to a homeowner insurance policy coverage dispute.²⁰⁷ In attempting to recover under a homeowner policy, the insured in *Breed* alleged that an ambiguity in the language existed.²⁰⁸ Insureds commonly make this allegation because of the principle that ambiguities in an insurance policy are construed against the insurer, particularly when found in an exclusion.²⁰⁹

200. *Northern*, 784 P.2d at 323.

201. 6B JOHN A. APPLEMAN, *INS. LAW & PRACTICE* § 4254 (Buckley ed. 1979).

202. Brief for Respondent, *supra* note 122, at 6 (citing *MetPath, Inc. v. Birmingham Fire Ins. Co.*, 86 A.D.2d 407, 412, 449 N.Y.S.2d 986, 989 (1st Dep't 1982)).

203. *Id.*

204. *Osterhout v. Hartford Accident & Indem. Co.*, 91 A.D.2d 1172, 459 N.Y.S.2d 141 (4th Dep't), *aff'd*, 59 N.Y.2d 846, 453 N.E.2d 541, 466 N.Y.S.2d 312 (1983).

205. *MetPath*, 86 A.D.2d at 412, 449 N.Y.S.2d at 989 (citing *Johnson v. Travelers Ins. Co.*, 269 N.Y. 401, 407, 199 N.E. 637, 640 (1936)).

206. 57 A.D.2d 31, 393 N.Y.S.2d 460 (3d Dep't), *rev'd*, 46 N.Y.2d 351, 385 N.E.2d 1280, 413 N.Y.S.2d 352 (1978). In *Breed*, the issue was whether a homeowners policy exclusion, which precluded coverage for theft of property by a tenant, was clear and unambiguous. *Id.* at 352, 385 N.E.2d at 1281, 413 N.Y.S.2d at 354. The insured sued the carrier to collect the value of personal property stolen from its dwelling by a tenant, who at the time was renting an apartment in the carriage house located on the property. *Id.* at 353, 385 N.E.2d at 1281, 413 N.Y.S.2d at 354.

207. *Id.* at 355, 385 N.E.2d at 1282, 413 N.Y.S.2d at 355.

208. *Id.* at 354, 385 N.E.2d at 1282, 413 N.Y.S.2d at 355.

209. *Id.* at 353, 385 N.E.2d at 1282, 413 N.Y.S.2d at 354 (citing *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 39, 357 N.Y.S.2d 705, 708 (1974)).

Before the rule governing the construction of ambiguous contracts is triggered, however, the court must first find ambiguity in the policy.²¹⁰ If the words under examination have a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, for which no reasonable basis for a difference of opinion exists, there is no ambiguity.²¹¹ Finding the modern vehicular exclusion ambiguous, and thus inapplicable to negligent entrustment claims, requires an impermissible enlargement of the insurance contract and a misreading of the exclusion language because the terms could not more plainly preclude coverage.²¹²

Indeed, a federal circuit court has harshly condemned minority decisions mandating coverage. In *Rubins Contractors, Inc. v. Lumbermens Mut. Ins. Co.*,²¹³ the District of Columbia Circuit ruled that courts which reject the vehicular exclusion in negligent entrustment actions torture the exclusion language.²¹⁴

It seems an extraordinary *non sequitur* to say that liability has not resulted from ownership or use of an automobile merely because the [negligent entrustment] tort has a component separate from motor vehicle operation. In effect, courts finding such exclusions inapplicable appear to read the language as if it excluded only liability arising *exclusively* from the *insured's* use of an automobile.²¹⁵

Such reasoning, the circuit court asserts, conflicts with the doctrine of vicarious liability for motor vehicle accidents.²¹⁶ That doctrine also involves a component beyond the conduct of the operator, because his negligence is imputed to another solely due

210. *Id.* at 355, 385 N.E.2d at 1282, 413 N.Y.S.2d at 355 (citing *Hartigan v. Casualty Co. of America*, 227 N.Y. 175, 180, 124 N.E. 789, 790 (1919)).

211. *Id.* (citing *Loch Sheldrake Assoc. v. Evans*, 306 N.Y. 297, 305, 118 N.E.2d 444, 448 (1954)).

212. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 749-50, 551 N.E.2d 92, 94, 551 N.Y.S.2d 891, 893 (1989) (Kaye, J., dissenting).

213. 821 F.2d 671 (D.C. Cir. 1987). In *Rubins*, the insured filed a declaratory judgment action to determine the obligations of its automobile and business liability insurers after a *Rubins* employee drove a company truck to a wedding and struck another vehicle on the way. *Id.* at 672-73.

214. *Id.* at 676.

215. *Id.*

216. *Id.* at 677. For a definition of vicarious liability, see *supra* note 103.

to some special relationship between the two.²¹⁷ Yet vicarious liability, which certainly does not arise exclusively from the use of the vehicle, is not suggested to fall outside of the vehicular exclusion.²¹⁸

In both *Cone* and the vast amount of case authority contrary to it, the vehicular exclusion was "framed in terms of the instrumentality causing harm."²¹⁹ The exclusion was "broadly worded [to clearly indicate] that the [insurance] policy was not intended to cover any injury resulting from the use of [a motor vehicle], irrespective of the theory on which liability rest[ed]."²²⁰

The few courts finding the exclusion inapplicable have typically done so when no other insurance existed to cover the loss and the accident victim likely would have gone uncompensated if the insurer's denial, based upon the vehicular exclusion, had been validated.²²¹ This was the situation in *Cone v. Nationwide Mut. Fire Ins. Co.*²²² Although a court's ultimate goal of ensuring a potential recovery for the accident victim is laudable, "the court should neither rewrite nor construe an insurance policy . . . to provide coverage where otherwise none exists."²²³

C. *Solution: Increased Auto Policy Limits*

1. *The Public Interest*

Any increase in insurance coverage available to the accident victim, such as that which results from the *Cone* precedent, generally means that more lawsuits will be filed because the rewards are potentially greater.²²⁴ This is especially true when either the

217. See *Connell v. Hayden*, 83 A.D.2d 30, 443 N.Y.S.2d 383 (2d Dep't 1981).

218. *Rubins*, 821 F.2d at 677. See also *Fortune v. Wong*, 68 Haw. 1, 702 P.2d 299 (1985). In *Fortune*, the modern vehicular exclusion precluded the homeowner policy's coverage. *Fortune*, 68 Haw. at 1, 702 P.2d at 300. The insured's teenage son had struck a bicyclist while operating a vehicle owned by Tasty Foods, Inc., a corporate entity controlled by the insureds. *Id.* at 5, 11-12, 702 P.2d at 302, 306-07. Negligent entrustment was not pleaded. *Id.* at 4 n.1, 702 P.2d at 302 n.1.

219. *Rubins*, 821 F.2d at 677.

220. *Id.*

221. *Id.* at 676.

222. Telephone Interview with Robert Kribs, Claims person for Nationwide Ins. Co. (Oct. 1, 1990).

223. Brief for Respondent, *supra* note 122, at 6.

224. Sam H. Verhovek, *Bill Would Raise Minimum for car Insurance Liability*, N.Y. TIMES, July 22, 1990, at 25, col. 1.

liability policy exposed is a "deep pocket" because it has higher liability limits than the automobile policy, or when no automobile coverage exists, so the liability policy is the sole source of recovery. According to James Brodsky, senior counsel for the American Insurance Association in Washington, D.C., "[Cone] reflect[s] a growing trend that the homeowner's policies are being pursued by the trial bar where they're shut off from other policies."²²⁵

Lawsuits, because of both the cost incurred to defend them and the higher damage awards they bring, drive up the price of everyone's insurance premiums.²²⁶ The public interest is to avert the increased premium charges that the *Cone* precedent necessitates, yet to ensure adequate recoveries for accident victims.

2. *The Preferred Alternative — Higher Automobile Policy Limits*

Perhaps the *Cone* court's intent in ruling contrary to other jurisdictions was to ensure adequate recoveries for New York vehicular accident victims. However, the appropriate means for achieving this result are an increase in the minimum automobile liability insurance limits, and improved procedures for reducing the number of uninsured motorists on New York's highways, tasks for the state legislature.

New York State law requires automobile owners to carry automobile liability insurance to provide coverage for bodily injury and property damage claims brought against them.²²⁷ The minimal policy limits permitted are \$10,000 per person and \$20,000 per occurrence for bodily injury, and \$5,000 per occurrence for property damage.²²⁸ These limits have not been changed in thirty-four years. In July 1990, seven months after *Cone*, the state legislature voted to increase the minimum allowable limits for bodily injury to \$25,000 per person and \$50,000 per occurrence.²²⁹ Governor Mario Cuomo vetoed the bill, claiming it

225. Spencer, *supra* note 18, at 2, cols. 4-5.

226. Verhovek, *supra* note 224.

227. N.Y. VEH. & TRAF. LAW § 311(4)(a) (McKinney 1986). See also N.Y. COMP. CODES R. & REGS. tit. 11, § 60.1(a) (Rev. 1989).

228. *Id.*

229. Verhovek, *supra* note 224.

would precipitate hefty insurance premium increases for people least able to afford them.²³⁰ The bill, which had also been passed by the legislature and vetoed by Cuomo in 1989,²³¹ got nowhere in the 1991 legislative session.²³²

V. Conclusion

The *Cone* majority erred in ruling that the modern vehicular exclusion is inapplicable when claims alleging the negligent entrustment of a motor vehicle are brought. The victims of this error include liability insurers, who are now forced to provide coverage for un contemplated risks, and their insureds, who face premium increases to compensate for the added risks. Risks involving motor vehicles should be covered by policies designed for that purpose, and the premiums should be paid only by those who choose to get behind the wheel.

Gerianne Hannibal

230. Angela K. Calise, *Cuomo Vetoes Bill to Raise New York Auto Cover Limits*, NAT'L UNDERWRITER CO.; PROP. & CASUALTY/ EMPLOYEE BENEFITS ED., Jan. 14, 1991, at 2.

231. *Id.*

232. Gary Spencer, *Cameras in Court Dies as Legislative Session Ends*, N.Y.L.J., July 8, 1991, at 1.