

Insurance--Aeronautics Exception Clause (Paradies v. Travelers Ins. Co., 52 N.Y.S.2d 290 (1944))

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INSURANCE—AERONAUTICS EXCEPTION CLAUSE.—Plaintiff was beneficiary under a policy insuring the life of a bombardier who was killed in action while performing duties in a military airplane. The defense invoked was a supplemental agreement in the nature of an aeronautics exception clause: "Death as a result, directly or indirectly, of service, travel or flight in any species of aircraft, except as a passenger on a licensed passenger aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered over an established route . . . is a risk not assumed under this contract. . . ." Conditions concerning military service, in another clause, called for indorsement on date of issue if such service be restricted; no such indorsement was on the policy. The plaintiff invoked the incontestability provision. The policy called for additional indemnity provided the death did not result from any act of war; no claim was made for recovery under this clause. *Held*, flying, as referred to in the aeronautics exception clause, includes death while flying with stunt pilot, or a sky writer, or private aviator—civilian flying, either business or pleasure; and there being no effective military service exclusion clause, "the defendant would have paid if the insured were killed in a foxhole, on a landing beach, or lost at sea", or, if the insured were killed in action in a military airplane. Plaintiff's motion for summary judgment granted. *Paradies v. Travelers Ins. Co.*, 52 N. Y. S. (2d) 290 (1944).

This decision is in accord with prior cases. Under similar circumstances, where insured died in a crash of a military airplane, the policy carried a rider extending coverage to insureds who entered military service. But the said policy also contained an exclusion clause where death resulted from aerial flight if insured was not a passenger in a licensed commercial airplane. The construction on both clauses combined was that "not only aviators but sailors, infantrymen or any other members of the armed services" injured or killed while on duty in a military airplane are covered by the contract.¹ Where the death of a naval cadet was the result of an aerial flight of duty, the aviation exclusion clause was read as intended merely to exclude from coverage the risks attendant upon civil aeronautics training and flight, and not the distinctive risks of military service.² If military risks were to be excluded from coverage there would have been a military risk exclusion clause which would have excepted death from participation in military aviation and also the other many risks of military service. And in still another case, where the policy contained an aeronautics exception clause (as to death resulting from service, travel, or flight in any species of aircraft as a passenger or otherwise) and there was no clause excluding war risks, the court held for the beneficiary when the insured's death resulted from

¹ *Schifter v. Commercial Travelers Mut. Accident Ass'n of America*, 50 N. Y. S. (2d) 376 (1944).

² *Green v. Mutual Ben. Life Ins. Co.*, 144 F. (2d) 55 (1944).

drowning after the plane was shot down and the life-boat machine-gunned while the victim was still on the fuselage of the plane.³

M. K. D.

TAKING OF AUTOMOBILE BY CHILD UNDER SEVEN YEARS OF AGE AS THEFT OF CAR WITHIN MEANING OF AN AUTOMOBILE INSURANCE POLICY.—The appellant brought an action on an automobile insurance policy in which the coverage clause declared, "To pay for any loss of or damage to the automobile, hereinafter called loss, except loss sustained by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset." The appellant parked his automobile on a hill facing downward, with the right front wheel turned at an angle against the curb, the handbrake on, the gears engaged, the ignition locked, and the keys thereto in his personal possession and the car door unlocked. Without his knowledge or consent and in his absence a three and one-half year old child entered the car and caused it to start down the hill. The car rolled with the child in it, until it was stopped and damaged by colliding with another automobile which was parked at a curb. *Held, reversed. The intentional appropriation of property, to a use inconsistent with the property rights of the person from whom it is taken, is theft within the meaning of an insurance policy. Any unusual destruction wrought in the doing of a wrongful act is vandalism.* In all cases of loss, the loss will be attributed to the proximate, not to the remote cause. *Unkelsbee v. Homestead Insurance Co.*, 41 A. (2d) 168 (1945).

Two questions were presented on this appeal: Was the loss attributable to theft or vandalism? Or, if not, was the loss caused by collision? The court first considered the question of theft. In support thereof it said that theft within the meaning of an insurance policy did not require that an intention be shown either to deprive the owner of the value of the property or to permanently deprive him of the use of the property but merely the intentional appropriation of property to a use inconsistent with the property rights of the person from whom it is taken.¹ With reference to the conclusive presumption of the common law which is carried into our jurisprudence, that a child under seven years of age is incapable of forming a criminal

³ Bull v. Sun Life Assurance Co., 141 F. (2d) 456 (1944).

¹ Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D. C. 161, 117 F. (2d) 774, 776 (1941). *Contra*: Home Insurance Co. of N. Y. v. Trammel, 230 Ala. 278, 160 So. 897 (1935); Fidelity and Guaranty Fire Corp. v. Ratterman, 262 Ky. 350, 90 S. W. (2d) 679 (1936); Kovero v. Hudson Insurance Co. of N. Y., 192 Minn. 10, 255 N. W. 93 (1934).