

## Indirect Use or Operation; An Expansive Interpretation

by Richard Horak and Rick Lamanna

What constitutes loss or damage arising directly or indirectly out of the use or operation of one's automobile? Two recent Ontario Court of Appeal decisions have attempted to clarify this situation.

In both cases, the Court of Appeal found that the insurer was liable, holding in one case that the Citadel General Assurance Company ("Citadel") was responsible for indemnifying the Vytlingam family under an OPCF 44R Family Protection Coverage endorsement, and in the other that Lumbermens Mutual Casualty Company ("Lumbermens") was responsible for indemnifying the Herbison family, pursuant to s. 239(1) of the *Insurance Act*.

*Herbison v. Lumbermens Mutual Casualty Company*

*Herbison v. Lumbermens Mutual Casualty Company*<sup>1</sup> ("*Herbison*") involved a party of deer hunters. Fred Wolfe, a member of the party, was in poor health at the time, and drove his pickup truck along a roadway en route to his designated hunting location. As it was still dark outside, the headlights of the truck were on. Wolfe stopped and

exited the truck, took out his rifle and fired a shot; unfortunately he shot another hunter in the party, Harold Herbison, who became permanently disabled.

After the shooting, Mr. Herbison commenced a tort action as against Mr. Wolfe. He alleged in his Statement of Claim that the shooting arose directly or indirectly out of the ownership, use or operation of Wolfe's automobile. In essence, because Wolfe's truck transported Wolfe to the location where he shot Herbison, because the engine was on and because the truck's headlights were illuminated, Herbison claimed that Wolfe was using his automobile at the time of the shooting.

Wolfe applied for a declaration that his automobile insurance company, Lumbermens, was obliged to defend the tort action and to indemnify him for all sums that he might become liable to pay to Herbison. Justice Power determined that the allegations in the Statement of Claim could not be considered as arising directly or indirectly out of the use or operation of Wolfe's vehicle and therefore Wolfe's automobile insurer was neither obliged to defend the tort proceeding nor

(Continued on page 2)

## IN THIS ISSUE

**Indirect Use or  
Operation; An  
Expansive  
Interpretation.**

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**FIRM NEWS**

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<sup>1</sup>(2005), 255 D.L.R. (4th) 74 (Ont C.A.)

## Noteworthy

(Continued from page 1)

indemnify Wolfe for any damages awarded in that action.

After Herbison obtained a judgment in tort against Wolfe, he started a fresh Court proceeding as against Lumbermens, seeking recovery of the judgment as against the company. In its defence, Lumbermens relied on Justice Power's previous decision. Further, Lumbermens argued that even if Justice Power's decision was not binding upon Herbison, the facts were still such that any connection between the shooting and the automobile could only be described as "incidental" or "fortuitous" and therefore coverage under the policy of automobile insurance could not be triggered. Justice Manton dismissed the action for practically the same reasons as Justice Power had: the sole cause of Herbison's injuries was the negligent firing of the hunting rifle by Wolfe. Undeterred, Herbison appealed to the Ontario Court of Appeal.

In a 2-1 decision, the majority at the Court of Appeal allowed Herbison's appeal. The court held that "but for" his automobile, Wolfe would not have been able to access the location from where he ultimately fired his rifle. Effectively, the decision meant that the use of an automobile to transport a person to a location where a chain of events begins and which culminates in a tortious act, is sufficiently connected to the

automobile so as to be deemed as arising out of its use and operation.

Lumbermens' main argument was that the chain of events leading up to the shooting was independent and unrelated to the automobile. Further, the shooting of Herbison was temporally separated from the use and operation of the automobile by virtue of numerous and specific intervening acts Wolfe undertook between the time he stopped his vehicle and the actual time at which he fired his rifle. Lumbermens relied on the *Amos* test, set out in the leading Supreme Court case of *Amos v. Insurance Corporation of British Columbia*<sup>2</sup>. In that case, a plaintiff was swarmed by a gang and shot through the window of his van when one of his assailants attempted to enter the vehicle while the plaintiff was driving it. The court, in dealing with whether or not the loss arose "out of the ownership, use or operation of a vehicle" established a two-part test that included two questions, the first dealing with purpose and the second with causation:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
2. Is there some nexus or causal relationship (not necessarily direct or proximate causal relationship) between the [tort victim's] injuries and the ownership, use or operation of

his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental and fortuitous?

The court in *Amos* held that the words "arising out of," as they appeared in the regulation, were to be interpreted broadly, with the result that a motor vehicle need not be the instrument of the plaintiff's injuries to meet the causal connection requirement for liability.

In Herbison, Justice Borins, author of the decision, and Justice Feldman, in concurring majority reasons, deemed the *Amos* test to be satisfied. Justice Borins stated that the phrase "directly or indirectly" in s. 239(1)(a) of the *Insurance Act* has effectively removed the requirement of an unbroken chain of causation from the causation test, as recognized in *Lefor (Litigation Guardian of) v. McClure*<sup>3</sup> ("*Lefor*").

In a strongly worded dissent, Madam Justice Cronk concluded that the negligent shooting was unconnected to the use of the vehicle. In her opinion, *Amos* was still very relevant and remained the leading case. Though the use of a pick-up truck to give hunters and their equipment access to difficult terrain was in fact an ordinary and well-known activity to which such vehicles are put, the causal relationship had not been met. *Amos*, she held, required that

(Continued on page 3)

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<sup>2</sup>[1995] 3 S.C.R. 405 ("*Amos*")

<sup>3</sup>(2000), 49 O.R. (3d) 557 (C.A.). In this case, the insured parked her car, left it running, exited and was guiding her young children across the street, when one of them ran unexpectedly into the path of a car. The automobile insurer sought a ruling that it was not obligated to defend and indemnify. The court ruled that the expanded level of coverage under the Act, which included claims arising "directly or indirectly" from use or operation, materially changed the coverage available under the policy.

(Continued from page 2)

the nexus or causal relationship must be established to support coverage and that even under the wide causation principle embodied in s. 239(1)(a) of the *Insurance Act*, a causation requirement continues to apply. Although Justice Cronk cited *Lefor* as a case where there was a clear nexus between the use of the car and the injuries, she was not persuaded that Herbison's injuries were anything more than merely "incidental" or "fortuitous."

#### Vytlingam v. Farmer

In *Vytlingam v. Farmer*<sup>4</sup> ("Vytlingam"), two individuals used a vehicle to transport large boulders to a highway overpass in North Carolina, from where they planned to drop them onto oncoming vehicles traveling on the highway below. On March 14, 1999, Todd Farmer and Anthony Raynor, the two individuals in question, drove in Farmer's automobile to a service road where they loaded the vehicle with the boulders. Farmer then drove to a bridge overpass and parked the vehicle, leaving the engine running. They both got out and each dropped a boulder, one of them striking a vehicle with devastating precision. That vehicle was being driven by Michael Vytlingam, who was returning home with his father Dennis to Mississauga from a Florida vacation. As a result, Vytlingam was catastrophically disabled for life.

In February 2001, Michael Vytlingam, his mother Chandra

and his sister Suzana launched a claim against Todd Farmer, Anthony Raynor, Citadel and the Co-Operators General Insurance Company, which was the insurer of the vehicle operated by Michael Vytlingam at the time of the accident. It was admitted that Michael was at all material times both an "insured person" and an "eligible claimant" under his mother's automobile policy, which contained an OPCF 44R Family Protection Coverage endorsement. Farmer was deemed to be an "inadequately insured motorist" as per the policy.

The Vytlingams brought an action against Citadel claiming that they were entitled to recover pursuant to the Insurance Agreement of the OPCF 44R Family Protection Coverage endorsement. In response, Citadel filed a notice of motion for summary judgment against the Vytlingams, or, in the alternative, for an order determining a question of law, being whether the Vytlingams were entitled to recover damages pursuant to the policy. The motions judge dismissed Citadel's motion, finding that the Vytlingams were entitled to the damages claimed. Citadel appealed to the Court of Appeal.

In a 2-1 decision, the Court of Appeal upheld the decision of the motions judge, finding that the Vytlingams were in fact entitled to recover as per the insurance agreement. Again, the major issue was whether the loss arose "directly or indirectly from the use or operation of an

automobile."

Justice MacFarland, writing for the majority (Justice MacPherson concurring), quoted Justice Major's reasoning in *Amos* in which he stated that "where the use or operation of a motor vehicle in some manner contributes to or adds to the injury, the plaintiff is entitled to coverage." Justice MacFarland also held that Ontario's legislation contained the words "directly or indirectly" whereas in the *Amos* decision, the court was dealing with British Columbia legislation which used the words "arises out of." This was deemed to be vital because the former allowed for a much broader interpretation, as well as a relaxed causation requirement comparable to the one suggested by Justice Major in *Amos*. In essence, as long as there is sufficient connection between the use or operation of the underinsured vehicle and the throwing of the boulder one may conclude that the use or operation of the vehicle contributed to Michael Vytlingam's injuries. The majority held that the necessary connection was met in this case.

Justice Juriansz dissented, stating that the requirement of some nexus or causal relationship is at the forefront of Justice Major's formulation of the second question of the two-part *Amos* test. Justice Major, he stated, did not approve of a simple "but for" test. This is made apparent in Justice Major's reference that a stray bullet would not have

(Continued on page 4)

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<sup>4</sup>(2005), 255 D.L.R. (4th) 114 (Ont C.A.)

(Continued from page 3)

entitled Amos to coverage. Rather, it was the fact that the shooting “had connection with” the use of his van that entitled him to coverage. Justice Juriansz noted:

While the “but for” analysis is used to determine causation in other contexts, it is apparent that applying it in answering the second question of the *Amos* test would lead to finding of causal connection in limitless situations. We live in a car culture. People use cars to get to the places where they cause or suffer damage. “But for” the use of cars, they would not be at those places and would not cause or suffer the damage. People use cars to transport things to places where they then use those things in ways that cause damage. “But

for” the use of cars, a great many plans that result in damage, whether intentionally or unintentionally, could not be carried out...

The *Amos* test requires consideration not of whether the injuries would have occurred “but for” the use or operation of the vehicle, but whether the use or operation of the vehicle has a nexus or causal connection to the injuries. The use of a “but for” analysis in this context will identify relationships that may be merely incidental or fortuitous.

Justice Juriansz held that neither the purpose test nor the causation test established in *Amos* were satisfied in this case. The motions judge erred in applying a simple “but for” analysis, and Citadel’s appeal should be

allowed.

The decisions in these cases arguably show that merely using a vehicle to transport oneself to the site where a wrong is eventually committed is probably enough to trigger automobile coverage. Using the same logic and interpretation employed by the majority of the court in both decisions, it is difficult to envision a situation in which an automobile policy could not be accessed, assuming a vehicle is involved somewhere along the line.

In February 2006, leave to appeal was granted by the Supreme Court in the *Vytlingam* case. Leave to appeal has also recently been granted in the *Herbison* case. It will be interesting to see how the Supreme Court deals with these decisions in conjunction with the *Amos* case.

## FIRM NEWS

We are pleased to welcome back Michelle Dunbar, who recently became our newest lawyer. Michelle articulated with the firm and has now rejoined us; she will be doing a mix of tort and accident benefits work and will split her time between our Toronto and Hamilton offices.

On May 24 and 25, 2006 Michael Teitelbaum and Mario Pietrangeli will be speaking at the Canadian Institute’s 6th Annual Conference on Managing and Resolving Insurance Coverage