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**COMMON LAW AND LEGISLATIVE
DEVELOPMENTS IN AUTOMOBILE INSURANCE:
THIRD PARTY LIABILITY COVERAGE:**

**MOTOR VEHICLE COVERAGE DISPUTES:
BULLETS, BOULDERS and BOOZE - IS EVERYTHING
COVERED?**

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MOTOR VEHICLE COVERAGE DISPUTES: BULLETS, BOULDERS and BOOZE - IS EVERYTHING COVERED?

We live in a car dominated society. Transportation, recreation, even the most menial tasks are increasingly accomplished through the use of motor vehicles.

Accidents inevitably occur and people get injured. Motor vehicle coverage disputes therefore play an integral role in balancing the requirements for insurance monies to be directed to the most deserving parties.

Ingenuity and novel arguments have looked to both extend and reel in the expansion of insurance coverage in the context of third party motor vehicle liability. However, because of what some view as result-oriented decisions of Ontario courts in response to these arguments, insurers and insureds are not provided with clarity or a true understanding of what is and what is not covered under their motor vehicle liability policies. Instead, uncertainty reigns supreme.

This paper is an effort to point out some of the most problematic areas of the law in this context, and to provide some guidance to insurers and insureds alike in determining where they stand in the muddled world of insurance law in the context of coverage disputes in third party motor vehicle liability policies.

SECTION 1: THE ELUSIVE MEANING OF "AUTOMOBILE"

"I am not alone in my discomfort", stated Justice Catzman out of frustration in his struggle to determine whether a backhoe could be considered an "automobile" for the purposes of the *Insurance Act*¹, in the Ontario Superior Court of Justice decision of *Morton v. Rabito*.² The judge in that case continued to outline his thorough dissatisfaction with the current legislative scheme in this area of law:

A number of judges and arbitrators have grappled with the definitions of "automobile" in s.1 and s.224(1) of the *Insurance Act* in an effort to distil an expression of legislative intent. ... [I]t would in my respectful view, be helpful if the Legislature would turn its attention to the policy questions arising in these cases and would answer them with a clear, self-contained definition of "automobile" that reflects with precision the

¹ *Insurance Act*, R.S.O. 1990 Chapter I.8.

² *Morton v. Rabito*, (1998), 42 O.R. (3d) 161.

parameters of the social policy it is endeavouring to achieve.

An analysis of the Ontario Court of Appeal decision in *Copley v. Kerr Farms Ltd.*³ and the Ontario Superior Court of Justice holding in *Adams v. Pineland Amusements Ltd.*⁴, will demonstrate the continued uncertainty and discomfort of the courts flowing from the difficulty in defining the word “automobile”.

Defining what is or what is not an “automobile” for the purpose of third party liability coverage is a vital element in determining automobile insurance coverage.

In the Ontario Court of Appeal decision in *Copley v. Kerr Farms Ltd.*,⁵ the plaintiff sustained serious injuries when he was attempting to connect a tomato wagon to a truck in a farmer’s field. The issue became whether a flatbed trailer used to haul tomatoes from the field to a processing plant, was an automobile for the purposes of s. 267.1(1) of the *Insurance Act*, when it is in a farmer’s field and in the process of being hooked up to a transport truck.

Section 267.1(1) (from Bill 164) states that an owner or occupant of an automobile, or any person present at the incident, is not liable in a proceeding in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile. This section is subject to subsection (2) which states that an individual is not relieved from liability for non-pecuniary damages if the injured party meets a threshold by sustaining:

- (a) serious disfigurement; or
- (b) serious impairment of an important physical, mental or psychological function.⁶

The plaintiff’s ability to sue in this case was directly dependent on the court’s ruling of whether or not a tomato wagon would fit into the definition of an “automobile” in s. 267.1 of the Act, above.

In *Copley*, the court applied a two-step analysis required to define “automobile” in s.224(1) of the *Insurance Act*. First, it must be determined whether the vehicle in issue is an automobile within the ordinary sense of the word. If this question cannot be answered, then the court must determine whether the vehicle comes within the broadened definition under s.224(1)(a) of the *Insurance Act*, which requires it to be “insured under a motor vehicle liability policy”.⁷

³ *Copley v. Kerr Farms Ltd.*, 212 D.L.R. (4th) 700 (C.A.) [*Copley*].

⁴ *Adams v. Pineland Amusement Ltd.*, [2006] O.J. 5172 (S.C.) [*Adams*].

⁵ *Copley*, *supra* note 3.

⁶ *Insurance Act*, *supra* note 1 at s.267.1(1) and (2).

⁷ *Ibid.* at s. 244(1)(a).

In order to explore the broadened definition under s. 224(1)(a) of the *Insurance Act*, the Court of Appeal looked to both the *Compulsory Automobile Insurance Act* (“CAIA”)⁸ and the *Highway Traffic Act* (“HTA”)⁹ for assistance.

The CAIA, in s. 1(1) states that a “motor vehicle has the same meaning as in the *Highway Traffic Act* and includes trailers and accessories and equipment of a motor vehicle”.¹⁰ Section 2(1) of the CAIA also requires the owner or lessee of a motor vehicle to insure the vehicle before it is operated, “caused or permitted” to be operated on a highway.¹¹

The court in *Copley* held that the mere fact that the tomato wagon was a trailer did not suffice to bring the wagon within the definition of “motor vehicle” under that Act. The court stated that it must be a trailer “of a motor vehicle” and commented that only trailers which are attached to and under the power and control of a motor vehicle would fall within this definition.¹²

Section 1(1) of the *Highway Traffic Act* defines “motor vehicle” to include:

An automobile, motorcycle, motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car, or other motor vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self-propelled implement of husbandry or road-building machine within the meaning of this Act.¹³

It goes on to define “vehicle” as:

A motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car.¹⁴

Finally, the court examined the definition of the word “trailer” in the HTA:

A vehicle that is at any time drawn upon a highway by a motor vehicle, except an implement of husbandry, a mobile home, another motor vehicle or any device or apparatus not designed to transport persons or property, temporarily drawn, propelled or moved upon such highway, and except a side car attached to a motorcycle, and shall be considered a separate vehicle and not part of the motor vehicle by which it is

⁸ *Compulsory Automobile Insurance Act*, R.S.O. 1990 Chapter C. 25 [CAIA].

⁹ *Highway Traffic Act*, R.S.O. 1990, Chapter H. 8 [HTA].

¹⁰ CAIA, *supra* note 8 at s.1(1).

¹¹ *Ibid.*, at s. 2(1).

¹² *Copley*, *supra* note 1 at para. 20.

¹³ HTA, *supra* note 9 at s.1(1).

¹⁴ *Ibid.*

drawn.¹⁵

Justice Doherty for the Court of Appeal came to the conclusion that due to the definition of the word “trailer” in the *HTA*, the tomato wagon was an automobile within the meaning of the *HTA*, and therefore also within the *CAIA*. However, he found that it did not fit within the meaning of s. 224(1)(a) of the *Insurance Act*, as it was not a vehicle that was required to be insured under a motor vehicle liability policy. Because the tomato wagon was not being operated on the highway *when the accident occurred*, section 2(1) of the *CAIA* did not require Kerr Farms to have the tomato wagon insured under an automobile insurance policy at the time and place where the accident occurred.

Therefore, Justice Doherty held that the tomato wagon was not an automobile for the purposes of s. 267.1(1) of the *Insurance Act*. The court’s reasoning appears to be very much based in the fact that the tomato wagon was not attached to a motor vehicle or being pulled along a highway when the accident occurred (and ignored the fact that the trailer was in the process of being attached to the vehicle to be towed on the highway only meters away). As such, it was not required to be insured under the *CAIA*, which ultimately excluded the tomato wagon from the definition of “automobile” contained in s.224(1)(a) of the *Insurance Act*.

One questions the utility of looking at the precise location of the vehicle at the time of the incident when deciding whether the vehicle is an “automobile”. It is hard to conceptualize a legal analysis that would see the same vehicle transformed into an “automobile” once positioned a few meters forward and onto a highway.

The courts’ continuing struggle with the meaning of the word “automobile” is apparent in the recent Ontario Superior Court of Justice decision of *Adams v. Pineland Amusement Ltd.*¹⁶ In that case, the insured and his son were operating go-karts on an outdoor track at an amusement park when an accident occurred in which the son suffered personal injuries. In the lawsuit that ensued, it was alleged that the defendant caused or contributed to his son’s injuries by the negligent operation of the go-kart he was driving. The defendant brought a third party claim against his insurer, which responded by moving under Rule 21¹⁷ for a determination as to whether the automobile policy covered the claim for damages resulting from the go-kart accident, and also whether the insurer had a duty to defend their insured.

¹⁵ *Ibid.*

¹⁶ *Adams, supra* note 4.

¹⁷ *Ontario Rules of Civil Procedure* R.R.O. 1990

In order to answer these questions, the court was required to consider whether the go-kart could be construed as an “automobile” within the automobile policy at issue and under the *Insurance Act*.

The court first examined the definition of “automobile” in section 1 of the *Insurance Act*, which “includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that run on rails, watercraft or aircraft”.¹⁸

It then examined the language in s. 224(1)(a) of the *Insurance Act*, discussed above in the context of the *Copley* case.

Justice Kealey concluded easily that a go-kart would be considered a “motor vehicle” pursuant to s.1(1) of the *CAIA*, which leads to s.1(1) of the *HTA*. He then moved in his analysis to s. 2(1) of the *CAIA* which indicates that no owner or lessee of a motor vehicle shall operate, cause or permit the motor vehicle to be operated on a highway, unless it is insured and under a contract of automobile insurance. Recall that in *Copley*, the Court of Appeal’s analysis turned on this requirement: the tomato wagon was not required to have insurance because it was simply sitting in the field at the time of the accident; it was not on a highway. Similarly, by extension, one would presume that because the go-kart was not being operated on a highway at the time of the accident, it was not required to be insured and therefore would not be considered an automobile under s.224(1)(a) of the *Insurance Act*.

However, Justice Kealey added a hypothetical element, and concluded that *if* operated on a highway, being a motor vehicle, a go-kart would require insurance under s.2(1) of the *CAIA*. The judge held that the go-kart was indeed an automobile for this reason, and required the insurer to cover and defend the claim.

This conclusion appears at odds with the holding of the Court of Appeal in *Copley* and arguably is not what the legislature intended in formulating the definition of automobile in this context. Go-karts are not intended to be driven on public highways of any kind and should thus never require insurance. The fact that *Copley* was superficially distinguished in this decision is unsettling and demonstrates the stark uncertainty of the law in this area, notably when different fact scenarios regarding insurance indemnity require a broader or narrower definition of automobile.

It is submitted that a matter of practicality be added to the equation. If a vehicle

¹⁸ *Insurance Act*, *supra* note 1 at s. 1.

is designed or intended for use on a highway, then that component of the expanded statutory definition ought to be satisfied. If a vehicle is not designed, intended or used on a highway (i.e. a go-kart), that criterion ought to be seen as not satisfied.

While at first blush, it may seem that articulating the meaning of “automobile” in the context of automobile insurance would be a reasonably straightforward endeavour, the legislature and the courts have evidently struggled and hesitated to set forth a clear description.

The legislature’s reluctance to thoroughly define the word is evidenced in section 224(1) of the *Insurance Act*, as discussed above. That section was amended with the advent of Bill 198 in October 2003, to include section (b), which states that an “automobile” includes “a vehicle prescribed by regulation to be an automobile”.¹⁹

With the Bill 198 amendments came a heightened anticipation for the long-awaited self-contained regulatory definition of “automobile”, which would clarify the legislature’s intent with respect to many of the provisions of the *Insurance Act*.

However, more than three years after the Bill 198 amendments, this regulation has yet to be drafted.

Courts have expressed their frustration and concern for the state of the law in this context on numerous occasions. In reference to the seemingly endless and circular analysis which courts must perform, Justice Catzman, in the 1998 Ontario Superior Court of Justice decision of *Morton v. Rabito* commented:

The resolution of cases that impact upon that policy would be better guided by reference not to ordinary parlance and not to a definitional labyrinth, but rather by clear legislative language that delineates the boundaries of the policy considerations sought to be achieved.²⁰

Further confusion is created when courts appear to ignore clearly binding judicial precedents, as arguably was the case in *Adams*. There is no doubt that courts and insurers alike will continue to await the implementation of the new regulation referred to in s.224(1)(b), not only to avoid getting lost in the seemingly endless “definitional labyrinth” of the required analysis, but also to reign in the often bizarre determinations by the courts, and to finally allow for

¹⁹ *Ibid.* at s. 244(1)(b).

²⁰ *Morton, supra* note 2 at paras. 43-45.

some clarity and consistency in this unpredictable and apparently result driven area of law.

SECTION 2: USE OR OPERATION OF A MOTOR VEHICLE

Assuming one can determine that any potential third party liability coverage issue involves an “automobile”, a further difficulty arises in determining whether the claim involves the “use or operation” of that automobile. The inconsistent and unpredictable decisions of courts in this area of the law are equally troubling with respect to the meaning and reach of the phrase “use or operation of a motor vehicle”.

Section 239(1) of the *Insurance Act* provides that third party liability coverage will be afforded for loss or damage: “arising from the ownership or directly or indirectly from the use or operation” of an automobile owned by the insured.²¹

The contractual and legislative framework appears relatively straightforward in this area. However, the analysis of the meaning of “use or operation” has been an enormous challenge with unforeseeable and often bizarre results. The fact that *Vytlingam (Litigation Guardian of) v. Farmer*²² and *Herbison v. Lumbermens Mutual Casualty Company*²³, two very controversial Ontario appellate level decisions on this subject, are currently before the Supreme Court of Canada, is telling. There is no question that leave was granted on this issue to address, and likely modify or recast, the current method of analysis, (the Purpose and Causation tests) as developed in the *Amos v. Insurance Corp. of British Columbia*²⁴ decision.

The following analysis will provide a brief overview of the current “Amos” test, the Court of Appeal decisions in *Vytlingam* and *Herbison*, and will conclude on a speculative note with respect to the Supreme Court of Canada’s anticipated approach to the issues currently before it.

i. The *Amos v. Insurance Corp. of British Columbia* decision

In *Amos*, the claimant, who was insured under a standard motor vehicle liability policy, was attacked and shot at by a gang of six people while driving his van. The attack wounded and gravely injured Mr. Amos. The issue before the Court was

²¹ *Insurance Act*, *supra* note 1 at s. 239(1).

²² *Vytlingam (Litigation Guardian of) v. Farmer*, [2005] O.J. No. 2266 (C.A.), (leave to appeal to S.C.C. granted, [2005] S.C.C.A. No. 376) [*Vytlingam*].

²³ *Herbison et al., v. Lumbermens Mutual Casualty Company*, [2005] O.J. No. 2262 (C.A.), (leave to appeal to S.C.C. granted, [2005] S.C.C.A. No. 369) [*Herbison*].

²⁴ *Amos v. Insurance Corp. of British Columbia*, [1995] S.C.J. No. 74 (S.C.C.) [*Amos*].

whether the insured was entitled to accident benefits under the first party no-fault regime in British Columbia.

Pursuant to the applicable legislation, an insured was entitled to benefits:

...in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle.²⁵

The Court canvassed the well-established case law in the area, summarizing it into a two-part test:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put? **[The Purpose Test]**
2. Is there some nexus, or causal relationship (not necessary a direct or proximate causal relationship) between the appellant's injuries and the ownership, use, or operation of his or her vehicle; or is the connection between the injuries and the ownership, use, or operation of the vehicle, merely incidental or fortuitous?²⁶ **[The Causation Test]**

In elaborating upon the Purpose Test, the Supreme Court of Canada cited its previous decision in *Stevenson v. Reliance Petroleum Ltd.*²⁷, and adopted the reasoning of Justice Rand as follows:

The expression "use or operation" would or should, in my opinion, convey to one reading it all accidents resulting from the ordinary and well-known activities to which automobiles are put, all accidents which the common judgment in ordinary language would attribute to the utilization of an automobile as a means of different forms of accommodation or service.²⁸

The Court in *Amos* concluded that, since the insured was driving his van down a street, the accident clearly resulted "from the ordinary and well-known activities to which automobiles are put".²⁹ Accordingly, the Court concluded that the first part (the Purpose Test) of the two-part test was satisfied.

The Court in *Amos* also elaborated upon the Causation Test. The Court determined that the central question was whether the requisite nexus existed between the shooting and the appellant's ownership, use, or operation of the van.

Although a bullet, rather than a motor vehicle, was the cause of the injury, the Court stated that a motor vehicle need not be the instrument of the injury to satisfy the

²⁵ Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, B.C. Reg. 447/83, s.79(1) [as amended by B.C. Reg. 335/84, Schedule, item 19, and B.C. Reg. 379/85, Schedule, item 31].

²⁶ *Amos*, *supra* note 22 at para. 17.

²⁷ *Stevenson v. Reliance Petroleum Ltd.*, [1963], S.C.R. 936 (S.C.C.) [*Stevenson*].

²⁸ *Ibid.* at p. 4.

²⁹ *Amos*, *supra*, note 22 at para. 17.

