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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?

# 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]

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[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

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[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 21[17] 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.

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[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

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[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

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[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

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[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

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[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.

causal connection requirement. The Court indicated that the shooting was not random. If the shooting was random, presumably the causal link would not be established and no coverage would be found. Rather, the Court inferred that the shooting was the direct result of the assailants' failed attempt to gain entry to the insured's van. As noted by the Court, "...it is always open to the courts to draw reasonable inferences regarding causation from the facts."[30]

It is noteworthy that the Supreme Court of Canada was the first Court to draw this inference. There was no direct evidence proffered that the gang wanted access to the insured's vehicle. The key factual finding which forged the causal link was made by the Court furthest from the fact finding mission. Indeed, the trial judge found there was "no evidence that his assailants were attempting to hijack his van or that the van itself in any way contributed to or aggravated his injuries."[31]

Arguably, the inference drawn by the Supreme Court in *Amos,* was a stretch, and arguably was made so that the seriously-injured plaintiff would have recourse to compensation. The Court concluded by stating: **"...invariably, each case must be decided on its own facts, applying the two-part test outlined above."**[32] [emphasis added]

Nevertheless, once finding as a fact that the incident occurred as a direct result of the assailant's failed attempt to gain entry, and having found the insured was simply driving his vehicle down the road when the incident occurred, both aspects of the now entrenched two part test were met and coverage was found.

ii. Developments Since the *Amos* Decision

Since *Amos,* Ontario courts have attempted to apply the two-part test enunciated by the Supreme Court of Canada. *Herbison* and *Vytlingam* are two decisions by the Ontario Court of Appeal that reveal the difficulties posed in applying the *Amos* test.

Upon review of the strong dissents expressed in both of these decisions, it is not terribly surprising that the two cases have been granted leave to appeal by the Supreme Court of Canada. The courts' inability to uniformly agree on what constitutes "use or operation" accentuates the need for further clarification on the proper application of the *Amos* test. In its recent decisions, the Ontario Court of Appeal has demonstrated a willingness to perhaps overlook the required nexus between the use of a motor vehicle and the injuries sustained, favouring

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[30] *Ibid.* at para 22.
[31] *Ibid.* at para. 10.
[32] *Ibid.* at para. 28.

instead the application of what appears to be a generous 'but for' test. A thorough review of the *Herbison* and *Vytlingam* decisions will demonstrate the Court of Appeal's expansion of the *Amos* test into what can be characterized as a but-for approach, which (it is submitted) is likely not what was intended by the *Amos* decision.

iii. The *Herbison* Decision

The defendant, Wolfe, had dropped off his hunting partner, Herbison, so that he could walk to a hunting stand. Due to a disability, Wolfe was unable to walk and chose to drive to the hunting area. While driving, Wolfe mistook Herbison for a deer. Upon spotting the "deer" in his headlights, Wolfe stopped the vehicle, got out, loaded and fired his rifle, ultimately shooting Herbison as a result.

After obtaining judgment against Wolfe at trial, Herbison sued Wolfe's insurer, seeking payment under the insurance policy pursuant to s. 258(1) of the Ontario *Insurance Act*. Section 258(1) permits a contractual stranger to a motor vehicle liability policy (such as Herbison) to maintain an action against an insurer to have insurance proceeds payable under the policy applied against a money judgment obtained by the claimant. The section can only be applied if the claimant (Herbison) has "a claim against an insured (Wolfe), for which indemnity is provided by a contract evidenced by a motor vehicle liability policy".[33]

The issue of whether the policy "provided indemnity" within the meaning of section 258(1) of the *Insurance Act* was controlled by whether Herbison's losses or damages arose "from the ownership or directly or indirectly from the use or operation" of Wolfe's vehicle, pursuant to section 239(1) of the *Insurance Act*. In other words, the issue was whether Wolfe was entitled to third party liability coverage from his insurer for shooting his friend, Herbison.

At trial, the court concluded that the negligent act was merely incidental to the use of the vehicle, so that the third party liability coverage did not apply. The trial judge found that the accident resulted from the negligent handling of the hunting rifle, which was entirely unrelated to the use or operation of an automobile. The decision was overturned on appeal.

iv. The Majority Decision in *Herbison*

Justice Borins for the majority of the Ontario Court of Appeal found that the

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[33] *Herbison*, supra note 21 at para 29.

Purpose Test from *Amos* was satisfied as Wolfe was using the vehicle to transport himself to the hunting site. The use of the automobile for transportation purposes as well as the use of the lights to illuminate the darkness were both considered to be ordinary and well-known uses of an automobile. The transportation aspect was held to be integral to the venture in which Wolfe was engaged.

In arriving at his conclusion, Justice Borins looked to previous decisions which had interpreted the phrase "arising out of the ownership, or directly or indirectly out of the use or operation of an automobile" and noted that "they do not advocate a micro, moment-by-moment analysis of the use or operation of the driver. Rather, the cases look at the larger picture...".[34]

To determine the implications of the phrase "directly or indirectly", Justice Borins relied upon the Court of Appeal's previous decision in *Lefor (Litigation guardian of)* v. *McClure*.[35] In *Lefor*, a mother parked her car on the side of the road and got out of the vehicle with her daughter to assist her across the road to her grandmother's home. The daughter was struck by an oncoming vehicle while she crossed the road. The Court found that the motion judge correctly concluded that the accident arose, directly or indirectly, from the use or operation of her mother's parked car. The Court held that stopping vehicles on the side of a road to pick up and drop off passengers is an ordinary and expected use of an automobile and that the intervening acts of the mother stopping the vehicle and the daughter crossing the street did not break the chain of causation.

In *Herbison,* Justice Borins, in applying the Causation Test, noted that the *Insurance Act* does not speak in terms of cause or result. In light of the inclusion of the phrase "directly or indirectly" within the text of s. 239(1), Justice Borins held that the causation test in *Herbison* was satisfied. According to Justice Borins, "the damages can arise indirectly, or can be more or less remotely connected to or grow out of the vehicle's use or operation."[36] Justice Borins, relying heavily upon what really is a 'but for' causation analysis, found that the necessary connection flowed from the fact that Mr. Wolfe would not have been in a position to go hunting without the use of his vehicle for transportation. He commented that, "... absent the use or operation of the truck to transport him and his equipment to the deer hunting stand, Mr. Wolfe would have been unable to reach it."[37]

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[34] *Ibid.* at para. 102.
[35] *Lefor (Litigation Guardian of) v. McClure,* [2000] O.J. No. 2244 (C.A.) [***Lefor***].
[36] *Herbison, supra* note 21 at para. 115.
[37] See *Herbison, supra* note 21 at para 116 for the full 'but for' causation analysis.

After establishing *some* nexus or causal relationship between Mr. Wolfe's use or operation of his truck, said to be beyond "merely incidental or fortuitous" use, Justice Borins held that the causation element was satisfied. In concluding that both components of the *Amos* test had been successfully satisfied, the appeal was allowed and the insurer was ordered to indemnify the appellant.

Justice Feldman (concurring with Justice Borins) indicated:

> The conclusion that car insurance will respond to situations where the car is not the proximate cause of the injury, or where the injury appears to be only remotely connected to the car, is logically somewhat counter-intuitive. However, the policy of the legislature in defining liability coverage as broadly as it has is to provide very extensive vehicle liability compensation to injured parties. Furthermore, the case law has confirmed this legislative policy by according the statutory provision a very expansive interpretation.
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> Certainly there will be fact situations that will require the line to be drawn when applying the test for when an injury arises "indirectly" out of the use or operation of a vehicle. For example, the injury at some point may be sufficiently remote from the insured vehicle, perhaps in time, in physical proximity, or in some other way, that it could not be considered to have arisen directly or indirectly from the ownership, use or operation of the vehicle.[38]

As noted by Justice Feldman, the line must eventually be drawn with respect to the application of the *Amos* test. Pending Supreme Court of Canada intervention, it appears that in a society which relies on motor vehicles to transport people and all manner of potentially harm inflicting objects to a vast array of locations, all of which offer opportunity for injury to be inflicted on others (either accidentally or intentionally), this line continues to stretch. Arguably, and in accordance with the dissenting opinion in *Herbison*, the line should (and may soon) be drawn closer.

### v. The Minority Decision in *Herbison*

In the dissent, Justice Cronk noted that the purpose component of the *Amos* test emphasizes only those uses of motor vehicles which are "ordinary and well-known".[39] Justice Cronk further stated that the causation component of the *Amos* test requires a nexus or causal link between the injury at issue and the use or operation of the motor vehicle.

The dissent suggested that Wolfe's use of his truck on route to his hunting

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[38] *Herbison, supra* note 21 at para. 122.
[39] *Ibid.* at para 55.

station was "unrelated to the negligent shooting incident".[40] Therefore, it failed the Purpose Test. According to Justice Cronk, not only must the use of the vehicle be customary and accepted, but its use at the time of injury should be causally related with the injuries sustained. She stated that the situation of danger which led to Herbison's injuries was related to factors unassociated with the automobile. Further, that the use of the vehicle for transportation purposes was suspended when Wolfe stopped it to shoot at an unanticipated target. In deciding whether the Purpose Test was satisfied, Justice Cronk indicated that the act(s) that cause the injury must be related to the purpose for which the relevant vehicle was being used.[41]

Justice Cronk relied upon *Amos* in support of her determination that, for the causation element of the *Amos* test to be properly satisfied, it is necessary that the ownership, use or operation of the relevant motor vehicle contribute to or add to the injury, in some manner. In *Herbison*, it was the firing of the weapon that caused Herbison's injuries. The shooting was entirely independent of the ownership, use or operation of the vehicle and was merely incidental to the injuries sustained by Mr. Herbison.

Justice Cronk asserted that there was no nexus or causal connection, direct or indirect, between the injuries and the ownership, use or operation of the vehicle.

vi. The *Vytlingam* Decision

Kevin Farmer and Anthony Raynor used Farmer's motor vehicle to transport boulders to an overpass bridge in North Carolina with the intention of dropping them onto the highway below. They did so, and one of the boulders smashed through the windshield and roof of a motor vehicle operated by Michael Vytlingam, striking him in the head and body, and causing him catastrophic and permanent injuries. Farmer and Raynor then used the vehicle to flee the scene. At the time of the accident, Vytlingam was insured under an Ontario automobile insurance policy issued by Citadel to his mother. The policy contained an OPCF 44R Family Protection Coverage endorsement.

The minimum limits for third party liability coverage required in North Carolina ($25,000 was the amount carried on Farmer's vehicle) were insufficient to properly compensate Vytlingam for the damages he sustained. Whether Farmer's insurer owed coverage was never litigated as the direct action against Farmer was settled on the basis that, as between Farmer and his insurer, $25,000 (the policy limit amount) was paid. Vytlingam sought payment from Citadel

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[40] *Ibid.* at para. 44.
[41] *Ibid.* at para. 54.

pursuant to the Family Protection Coverage endorsement. Citadel brought a motion for summary judgment dismissing the action against it or, in the alternative, for an order determining a question of law, being whether Vytlingam and his family members were entitled to recover damages pursuant to the Citadel policy. To recover, the plaintiffs needed to demonstrate that the defendant Farmer was entitled to third party liability coverage and hence, that the injuries sustained by Vytlingam arose directly or indirectly from the use of [the Farmer] automobile. Summary judgment was granted against Citadel and in favour of the injured party. Citadel appealed.

vii. The Majority Decision in *Vytlingam*

Justice MacFarland for the majority of the Ontario Court of Appeal, considered the language used within the Family Protection Coverage endorsement (and hence third party liability coverage) to be broader in application than that used in *Amos* (a first party determination). The inclusion of the word "indirectly" was held to establish a "relaxed causation requirement." Justice MacFarland held that the purpose component had been properly satisfied and did not disturb the motion judge's factual findings that Farmer's motor vehicle was (i) necessary to transport the boulder, (ii) required to transport Farmer and Raynor to the scene, and (iii) central to the escape.

With respect to causation, Justice MacFarland was satisfied there was a sufficient connection between the use or operation of Farmer's vehicle and the throwing of the boulder. It did not matter that Farmer's vehicle was not in motion at the time of the incident, Justice MacFarland held:

> 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 [the] injuries. In my view, that necessary connection is present in this case.[42]

Having dispensed with both elements of the *Amos* test, Justice MacFarland (with Justice MacPherson concurring) held that the appeal should be dismissed and that Vytlingam was entitled to underinsured third party liability coverage from Citadel.

In reaching these conclusions, in both *Vytlingam* and *Herbison*, the Ontario Court of Appeal established what is arguably a very generous "but for" causation test. Provided that the injury would not have occurred absent the use of a vehicle to transport the assailants/defendants and the injury causing objects

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[42] *Vytlingam, supra* note 20, at para. 40.

(boulders/rifle) to or from the scene, the causation criteria will be satisfied. Perhaps sensing the long road such a broad 'but for' approach may take us down, Justice Juriansz authored a well reasoned and erudite dissent.

viii. The Minority Decision in *Vytlingam*

Justice Juriansz's dissenting decision asserted that the proper application of the Purpose Test is contingent upon the characterization of the activity to which the automobile is put. He stressed the importance of considering whether the injuries in question resulted from ordinary, well known activities of automobiles.

For similar reasons to those enunciated by Justice Cronk in *Herbison,* Justice Juriansz held that the purpose for which the vehicle was used did not cause the injuries suffered by Vytlingam. When Farmer and Raynor exited the vehicle to drop the boulders, they were no longer *using* the vehicle to transport anything. Dropping the boulders was an independent act, which did not constitute an ordinary, well-known activity to which automobiles are put, and it was this "boulder dropping" activity which caused the injuries. Justice Juriansz therefore held that the Purpose Test was not met.

With respect to causation, , Justice Juriansz referred to the Supreme Court of Canada's decision in *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*[43] in which Justice Ritchie stated that the words

> "claims arising out of ... the ownership, use or operation ... of any motor vehicle could only be construed as referring to claims based upon circumstances in which it is **possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other".** [44] [emphasis added]

The dissent emphasized that the necessary causation element requires the injury to be "foreseeably identifiable with the normal use, maintenance and ownership of the vehicle."[45] Justice Juriansz relied upon *Amos* in which Major J. placed particular emphasis on there being no intervening act independent of the ownership, use or operation of the vehicle to break the chain of causation. He found that the injuries were not causally connected to the Farmer vehicle, stating "...the act of Farmer and Raynor dropping the boulder on the Vytlingam vehicle while they stood on the overpass caused the damage in this case. This

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[43] *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.* (1959), S.C.R. 80, 22 D.L.R. (2d) 264 (S.C.C.) [*Law, Union & Rock Insurance Co.*].

[44] *Vytlingam, supra* note 20 at para. 63. See also *Law, Union & Rock,* at p. 4.

[45] *Vytlingam supra* note 20 at para. 64.

independent act was unconnected to the car"[46].

Justice Juriansz was firm in his conclusion that the *Amos* decision established that "a 'but for' analysis was insufficient to establish the requisite causal connection" in such circumstances.[47] Justice Juriansz concluded that the majority in *Vytlingam* mistakenly applied the "but for" test which he stated is ineffectual in a "car culture".[48]

> 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...
>
> In my view, more is required than the fact the participants and objects involved in an event have been conveyed to the site of the event in a car. 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 relationship to the injuries. The use of a "but for" analysis in this context will identify relationships that may be merely incidental or fortuitous.[49]

### ix. Conclusions Regarding *Herbison* and *Vytlingam*

The dissents in both *Herbison* and *Vytlingam* appear (it is submitted) more compelling than the decisions of the majority. The majority decisions arguably misconstrued and extended beyond recognition what constitutes a sufficient connection, favouring the application of a "but for" test over an actual causal relationship or nexus between a vehicle and the injuries sustained. The use of such a test in this context leads to obscure, potentially unpredictable results, however result oriented these decisions may appear.

The Supreme Court of Canada's willingness to hear the appeals of *Herbison* and *Vytlingam* provides hope for clarification of this uncertain area of the law, and potentially a re-working of the *Amos* tests. The following discussion provides a look inside the hearing at the Supreme Court of Canada and at some of the discussions and reactions of the panel and counsel involved. The questions and suggestions posed by the panel to the parties are revealing and provide some insight into a potential reframing of the *Amos* test.

### x. The Supreme Court of Canada's Anticipated Approach

*Law, Union & Rock Insurance Co.*, is said to be responsible for the genesis of the

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[46] *Ibid.* at para. 80.
[47] *Ibid.* at para. 72
[48] *Ibid.* at para. 73
[49] *Ibid.* at para. 73-74.

causation test at the Supreme Court of Canada level. In that case, the insured taxi company had a contract to transport mentally disabled children to and from school. The drivers were to take the children directly to their homes from school, and not let any child out on the side of the street opposite his or her home. One of the drivers, in breach of that arrangement, stopped on the opposite side of the street. The child, while crossing the street alone, was hit by a truck and severely injured.

The general liability insurer disputed liability, claiming the accident arose out of the use or operation of a motor vehicle, which was not covered under the policy. The court held that the insured's liability arose from a breach of duty that occurred after the vehicle was *stopped*, when the child crossed the street unescorted. The duty to assist the children was considered to be a contractual duty that had "nothing to do with the use or operation of the insured's vehicle."

It is important at this point to reiterate Justice Ritchie's reasoning in *Law, Union & Rock Insurance Co.:*

> . . . the words "claims arising out of . . . the ownership, use or operation . . . of any motor vehicle" as used in this exclusion can only be construed as referring to claims **based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other.** [emphasis added][50]

If *Law, Union & Rock Insurance Co.* is in fact the foundation upon which the Causation Test in constructed, then it follows that an unbroken chain of causation must exist between the use or operation of an automobile and the eventual injury. However, it must be remembered that this case is based on the interpretation of an exclusion clause, not a coverage granting provision within a policy, and courts generally view exclusions more narrowly and coverage granting provisions more broadly.

Although the above reasoning in *Law, Union & Rock Insurance Co.* is evidenced within the dissents of *Herbison* and *Vytlingam*, the reasoning adopted by the majority of Ontario Court of Appeal in *Herbison* and *Vytlingam* departs from that logic and relies more heavily on a straight "but for" analysis.

A review of the recorded submissions to the Supreme Court of Canada in *Herbison* and *Vytlingam* provides some compelling insight into how the court will likely handle the appeals, and specifically, what the panel could do with the controversial 'but-for' and *Amos* tests.

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[50] *Law, Union & Rock Insurance Co., supra* note 42 at p.4.