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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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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.
>
> 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.

The submissions of the applicant, Citadel General Assurance Company, in *Vytlingam*, and the questions and comments of Mr. Justice Binnie, among others on the bench in that case, are of particular assistance in providing some insight into how the court may approach the *Amos* test. Specifically, the comments illustrate how the Court may clarify or re-cast the *Amos* test, and re-formulate it to fit within the realm of third party indemnity insurance.

The applicant suggested a compelling way of dealing with the issue at hand in the context of third party liability coverage. The applicant submitted that courts have been wrongly applying *Amos* (a first party case) in the context of indemnity coverage. By doing so, they have been wrongly focusing on whether the loss or damage arises from the use or operation of a motor vehicle. This is agreeable in the first party setting, like *Amos*, but in third party indemnity situations, courts have to ask whether the liability of the wrongdoer, or the person whose policy one is trying to trigger, arises out of the use or operation of that person's motor vehicle. In short, the *Amos* test is fine for first party insurance coverage, but should be re-framed to fit within the realities of third party indemnity insurance.

The applicant proceeded to apply this new formulation to the cases at hand. In *Herbison*, Wolfe's liability arose out of the fact that he aimed and fired a rifle at his friend, Herbison; it did not arise out of the use or operation of a vehicle. Similarly, in *Vytlingam*, the applicant pointed out that simply transporting rocks does not give rise to any civil liability. The liability, however, comes from dropping those rocks over the bridge and injuring an innocent party below; that liability did not involve an automobile.

In re-formulating the *Amos* test for third party liability situations, the applicant began with an examination of the Purpose Test, which asks, "did the accident result from the ordinary and well-known activities to which automobiles are put?"[51] The applicant submitted that the words "result from" contained therein, seem to inject an element of causation into the Purpose Test. If the Purpose Test infers causation then this creates confusion, blurring the first and second branches of the test, and ignoring what was originally intended.

Justice Binnie, specifically, appeared interested and engaged by this submission and recommended a possible alteration to the first branch of the test to eliminate the element of causation. He queried of counsel for the intervener, The Insurance Board of Canada,

> Would it make sense to try to distinguish the two [branches] by reformulating the

[51] *Amos, supra* at note 22, at para. 17.

> Purpose Test: did the accident occur in the course of the ordinary activities, and then you deal with the...causation element just in one place? ... Instead of saying, 'did the accident result from ordinary and well known activities', which you say imports causality, to keep the two branches of the test separate, would it help to say, 'did the accident occur **in the course** of the ordinary and well known act?' That's the framework and then within the framework you look at the issue of causation under the second part of the test. [emphasis added][52]

Justice Binnie suggested that by removing the causation element from the first part of the *Amos* test, much of the confusion would be eliminated. The focus would be solely on whether or not the accident occurred in the course of the ordinary and well-known activities to which automobiles are put, as opposed to whether the accident resulted from these activities. Arguably, this modification of the Purpose Test would take the test back to what was originally intended: simply a determination of whether the vehicle was in the course of an ordinary and well known activity when the accident took place.

After expressing much approval for Justice Binnie's suggestion for a modified Purpose Test, the applicant's closing submissions to the Supreme Court of Canada suggested a further adjustment to the Causation Test as well. He suggested there must be a cause related to the use or operation of the motor vehicle, and that in *Vytlingam,* there was nothing about the use or operation that was causative of the accident. In fact, the applicant submitted that Ontario Courts have read out the causative element form the Causation Test. By simply looking for "some nexus", as opposed to a "causal nexus", courts have found that in cases where the use or operation of the motor vehicle had no connection to the cause of the accident, or the liability of the insured, there still was a nexus between the accident and the use and operation of the motor vehicle. Rather, courts should focus on the liability of the wrongdoer, and what is required is proof of a causal connection between the use of the automobile and the accident:

> ...in some intuitive way, most people would suggest that these two situations [in *Herbison* and *Vytlingam*] are not the stuff of automobile insurance. All that is needed in the final analysis or all that would serve to help stem this tremendous tide of litigation, (Justice Borins said in *Herbision* that there are already 120 reported cases interpreting *Amos*)... All that would be needed to help stem the tide...is a slight tweaking of *Amos*.
>
> ...the second alteration I would urge upon the court is an alteration that does nothing more than reinforce that the *Amos* test is "**causal** nexus" and "**causal** connection" because what has happened is that the lower courts have paid mere lip service to causation and have attempted to find any sort of nexus. It is important to remind the profession and the bench that it's a causal nexus and if you don't do that you end up with these results that are beyond the counter(*sic*)-intuitive spectrum. You can't rely on

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[52] *Vytlingam (Litigation Guardian of) et al. v. Farmer et al.*, Supreme Court of Canada recorded submissions at 1:08:54 to 1:09:43

> the facts of [*Vytlingam*] because the facts of this case do nothing more, no matter how you strive to twist them and present a but-for analysis, which has not only been rejected, but rejected because it leads to bizarre results, such as the bank robber who plans the whole robbery and *has* to use a car because he's robbing a rural bank or *has* to use a car because he has a great big weapon and couldn't hide it by walking along the street...That's covered if you use a but-for analysis. [emphasis added][53]

It is of course challenging to predict what the Supreme Court of Canada will decide, however, given the submissions of the applicant, and the comments and questions of the Court, specifically Justice Binnie, we have been presented with a possible reformulation of the *Amos* test and rejection of the 'but-for' analysis in this context.

It is submitted that the new test would likely read:

1. *did the accident occur **in the course** of the ordinary and well known activities to which automobiles are put?**[The Purpose Test]***

2. *is there some **causal** nexus or **causal** relationship (direct or indirect) between the **wrongdoer's liability** and the ownership, use or operation of the **wrongdoer's vehicle?[The Causation Test]***

This test recognizes that it is the liability of the wrongdoer (as opposed to the injuries sustained by the victim) that must arise directly or indirectly from the use or operation of the wrongdoer's motor vehicle for third party liability insurance to apply. In essence, the indemnity stems from the liability.

If the dissenting Justice Juriansz in *Vytlingam* is correct, and if the Supreme Court of Canada accepts the submissions of the applicant and the comments of Justice Binnie, as noted above, the Court may well reformulate the *Amos* test (as suggested or otherwise) to better fit the needs of third party indemnity situations, rather than first party benefit entitlement considerations. These two decisions are awaited with great anticipation and with a hope that the result will "serve to help stem the tremendous tide of litigation" that has resulted from the uncertainty in this area of law.

Once it has been established that an "automobile" is involved and that the defendant insured's use of that automobile is sufficiently connected to the injuries sustained (and/or liability of the defendant) so as to satisfy the present or a re-formulated *Amos* test, then *prima facie* coverage is established.

What follows is an analysis of certain policy breaches or exclusions that might

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[53] *Ibid.* at 2:16:35 to 2:19:47.

render an otherwise insured defendant without indemnity coverage and/or an accident victim with either a lower level or even no insurance proceeds to collect from.

SECTION 3: BREACH OF STATUORY CONDITIONS AND THE ABSOLUTE LIABILITY PROVISIONS

The uncertainty created by courts continues right into the heart of the motor vehicle liability policy. This section will examine further controversial coverage granting and coverage limiting terms in the standard automobile policy and the effect of the absolute liability provisions of the *Insurance Act.* This will include a brief review of the case law in this area and an examination of when an insurer is required to provide full coverage, when it is required to provide only certain minimum payments to an innocent third party, and when an insurer is simply not obligated to respond at all.

i. Absolute Liability Provisions

The *Insurance Act* sets out certain conditions that must be met for full indemnity to be provided under the policy. In situations where an insured is in breach of these statutory conditions, an insured forfeits entirely its right of indemnity. An innocent accident victim is entitled in certain situations and only upon obtaining a judgment against a putative insured, to recover payment pursuant to that judgment against the defendant's putative insurer up to the applicable minimum limits of liability insurance in Ontario (generally, $200,000 pursuant to s. 251 and s. 258 of the *Insurance Act*).

An insurer may not raise any act or default of its insured as a defence to a claim on the judgment by a plaintiff for any amount up to the applicable minimum limits. The insurer may, however, avail itself of any defence that it is entitled to set up against its own insured for amounts that exceed the applicable minimum limits.

If an insurer is obligated to pay amounts pursuant to the absolute liability provisions of the *Insurance Act* that it would not otherwise be required to pay, the insured must reimburse the insurer for these amounts, and an action lies at the hands of the insurer against the insured for re-imbursement (ss. 258(13)).

Payments made pursuant to the absolute liability provisions of the *Insurance Act* are not "indemnity payments," but statutory payments required by operation of statute that would not otherwise be required by the insuring agreement.

A defaulting motor vehicle defendant insured is not "indemnified" by such

payments as his/her insurer has a right of reimbursement for amounts paid.

When there is no act or default of the insured, an insurer is obligated to indemnify its insured up to the full liability limit of the policy.

In certain situations, the nature of the use of the insured vehicle by the putative insured defendant motorist is such that no payments are owed under the policy, either by operation of statute (the absolute liability provisions) or by contract (the insuring agreement). In such situations, neither the putative insured nor an innocent third party has a right or mechanism to require payment pursuant to the automobile policy.

What follows is a brief discussion of the operation of the absolute liability provisions including circumstances when an insured is and is not required to pay innocent third parties pursuant to the *Insurance Act.*

ii. Absolute Liability Provisions Applied

a. Intentional Acts

In *Joachin v. Abel*[54], the defendant, Abel, intentionally operated his truck in order to strike and injure the plaintiffs. Although the plaintiffs sued Abel for damages caused by the collision, Abel's insurer was not required to defend those actions on Abel's behalf because he acted intentionally in causing the plaintiffs' injuries. As a result of Abel's intentional act, he was not entitled to indemnity.[55]

The court reviewed s.118 of the *Insurance Act*, which provides:

> Unless the contract otherwise provides, a contravention of any criminal or other law enforced in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contraventions committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage but in the case of a contract of life insurance, this section applies only to disability insurance undertaken as part of the contract.[56]

The court approved its previous proclamation that the purpose of this section is to relieve against the common law rules of public policy which prevent an insured from recovering under an insurance policy any benefit derived from the

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[54] *Joachin v. Abel*, [2003] O.J. No. 1584 (S.C.) [*Abel*].

[55] The issue before the Ontario Court of Appeal was which insurer (that of the putative insured defendant, Abel, or that of the plaintiff pursuant to the uninsured motorist coverage provision of the plaintiff's policy), was responsible for the first $200,000 of the claims owed to the plaintiffs.

[56] *Insurance Act, supra* note 1 at s.118.

commission of a crime.[57]

Based on this section, the court in *Abel* acknowledged that, "an insured's right to indemnity under the insuring agreement is rendered unenforceable when the insured commits a criminal act with the intent of bringing about loss or damage".[58]

However, an innocent third parties' right to recovery is separate and distinct from the insured's right to indemnity under the contract. The court's analysis turned primarily on subsections 258(1), (4) and (5) of the *Insurance Act* which provide:

> Application of insurance money, 3rd party claims, etc.
>
> 258(1) **Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy**, even if such person is not a party to the contract, **may, upon recovering a judgment therefor** in any province or territory of Canada against the insured, **have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment** and of any other judgments or claims against the insured covered by the contract **and may,** on the person's own behalf and on behalf of all persons having such judgments or claims, **maintain an action against the insurer to have the insurance money so applied.** R.S.O. 1990, c. I.8, s. 258 (1).[59] [emphasis added]
>
> Insurer absolutely liable
>
> (4)The right of a person who is entitled under subsection (1) to have insurance money applied upon the person's judgment or claim is not prejudiced by,
>
> (a) an assignment, waiver, surrender, cancellation or discharge of the contract, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the contract;
>
> (b) any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract; or
>
> (c) any contravention of the *Criminal Code* (Canada) or a statute of any province or territory of Canada or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile,
>
> and nothing mentioned in clause (a), (b) or (c) is available to the insurer as a defence in an action brought under subsection (1). R.S.O. 1990, c. I.8, s. 258 (4).
>
> Section applicable to purported policy
>
> (5) It is not a defence to an action under this section that an instrument issued as a motor

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[57] *Shakur v. Pilot Insurance Co.* [1990] O.J. No 1613 (C.A.).
[58] *Abel, supra* note 54 at para. 8.
[59] *Insurance Act, supra* note 1 at s.258(1).

> vehicle liability policy by a person engaged in the business of an insurer and alleged by a party to the action to be such a policy is not a motor vehicle liability policy, and this section applies with necessary modifications to the instrument. R.S.O. 1990, c. I.8, s. 258 (5).[60]

In its final analysis, the Court of Appeal in *Abel,* held with respect to the absolute liability provisions, that:

> **The intent of s.258(1) is to enable innocent, injured third parties to recover from the insurer of the driver who struck them and caused their injuries.** The rights between the tortfeasor and his or her insurer are dealt with in different provisions, including s.118. While an insurer can rely on s.118 to deny an insured's claim for indemnity, s.258(4) makes it clear that an innocent third party is not to be **deprived of his or her remedy** because of the criminal conduct of the insured.[61] [emphasis added]

The court decided that the combination of subsections 258(1) and (4) creates absolute liability on the part of the insurer toward the plaintiff/third party who was injured by the insured's misconduct, regardless of the nature of the behaviour. The court stated that "a plaintiff's action under s.258(1) is independent of the insured's right of indemnification".[62] As such, the Court of Appeal dismissed the appeal and found that the defendant, Abel's insurer was responsible for payment to the injured plaintiff to the extent of the minimum limits. Despite Abel's intentional criminal act, he was insured under a contract of insurance which provided for indemnity, despite the fact that the insured's actions meant that this right of indemnity was forfeited. A breach of the terms of the insuring agreement could not deny a plaintiff minimum recovery, but because the insured's indemnity rights were forfeited, the insurer, pursuant to s.258(13), had the right to pursue the insured for the amount it paid by reason of s.258(4).

b. Breach of Condition: Authority to Drive

A driver who is in possession of a G2 license has the following restrictions, pursuant to the *Highway Traffic Act,* and as outlined in Ontario Regulation 340/94, amended to Regulation 597/05:

> **6.** (1) The holder of a Class G2 driver's licence may drive a Class G2 motor vehicle on a highway subject to the following conditions:
>
> 1. The novice driver's blood alcohol concentration must be zero at all times while he or she is operating the motor vehicle.
>
> 2. The number of passengers in the motor vehicle must not exceed the number of

[60] *Insurance Act,* supra note 1 at ss.258(4) and (5).
[61] *Abel, supra,* note 54 at para. 11.
[62] *Ibid.* at para. 13.

operable seat belt assemblies installed in it.

3. Between the hours of midnight and 5 a.m., there must not be more than one passenger in the motor vehicle who is under the age of 20, other than a person who is a member of the novice driver's immediate family. O. Reg. 340/94, s. 6 (1); O. Reg. 196/05, s. 1 (1).[63]

Breach of a G1 or G2 restriction on one's license is sufficient to see one in breach of statutory condition 4(1) of the standard automobile policy, which states:

Authority to drive

4(1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.[64]

In the case of *Northover v. Regier*[65], the insured held a G2 license and had admitted to having a "sip of beer" shortly before the collision. The insured sought a declaration that the insurer was liable to indemnify him up to the policy limits. The insurer took the position that it was only liable (to the innocent victim) up to the minimum limits.

Justice Granger noted that where an insured contravenes any term of the policy, the insured may forfeit any rights to indemnification pursuant to the policy. Justice Granger stated:

> Any lawful authority which a driver has to operate a motor vehicle in the Province of Ontario is dependent on the licence which the Minister of Transportation issues to him or her. Accordingly, where a driver breaches a condition of his or her driver's licence, he or she is not authorized by law to drive within the meaning of the motor vehicle insurance policy.[66]

The court in *Northover* held that driving in a manner inconsistent with one's license was a breach of statutory condition 4 (1). In such a situation, the insurer would only be required to provide the minimum statutory limits of $200,000 to the plaintiff (subject to a claim for reimbursement from the insured (ss. 251 and 258 of the *Insurance Act*). [67]

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[63] *HTA, supra* at note 8, Ontario Regulation 340/94, s.6(1)

[64] *Insurance Act, supra* at note 5, Ontario Regulation 777/93, s.4(1)

[65] *Northover v. Regier*, [2000] O.J. No. 3660 (S.C.) [*Northover*].

[66] *Northover, supra*, at para. 17

[67] While Courts have found that violation of license conditions would bring the insured driver out of the full indemnity protections of the insurance contract, they have been loath to apply this reasoning to the cases at hand. In these cases, courts have found reasons to permit full recovery. For example, in *Northover*, Justice Granger found that the evidence which showed the insured driver had consumed alcohol before getting in the vehicle, and the evidence of alcohol in his

Other situations where the absolute liability provisions apply include misrepresentation as to ownership (see *Campanaro v. Kim)*[68]; failure to notify the insurer of a material change in risk (see *Mininstry of Transport v. Economical Mutual Ins. Co*[69]; and see *Campos v. Aviva Canada Inc.*[70]); lack of notice of action to the insurer (see *Findlay v. Madill)*[71].

c. Judgment is Required To Recover From Insured

Section 258(1), by its express language, requires the innocent third party plaintiff to have recovered a judgment against the (defaulting) insured. The recent Ontario Court of Appeal decision of *Lockhard v. Quiroz*[72], presents a situation where the appellant driver, Quiroz, appealed the motion judge's decision to grant the respondent insurer summary judgment under the provisions of s.258, for reimbursement of settlement monies paid by the insurer to the plaintiff. In this case, the plaintiff sued the appellant driver seeking damages for property and personal injury losses from a motor vehicle accident in which the appellant was driving the plaintiff's car with her permission. The situation was complicated however, by the fact that the driver, Quiroz, drove the plaintiff's vehicle in contravention of his driver's license. CAA insured the plaintiff's motor vehicle, and thus Quiroz, who was driving with her permission. CAA ultimately added itself as a statutory third party under s.258(14) of the *Insurance Act* because of the insured's contravention.

The insurer settled all of the plaintiff's claims, and on consent, a judgment in favour of the plaintiff was obtained as against the plaintiff's own insurer. However, no judgment was ever obtained against the appellant insured.

The motion judge held that due to the absolute liability provisions of the *Insurance Act*, s.258(4) entitled the plaintiff under s.258(1) to have insurance monies applied to her claim and not be prejudiced by the default of Mr. Quiroz, the insured. The judge also found that Quiroz, due to his breach of the policy and driving while not authorized by law, was required to reimburse the insurer for the monies paid to the plaintiff. The motion judge also rejected the driver's

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system after the accident was not enough to establish that his blood alcohol was above zero at the time of the accident. Therefore there was not sufficient evidence to establish that at the time of the accident, he was in fact not authorized to drive. (see also *Economical Insurance Group v. Tatomir* [2003] O.J. 972)

[68] *Companaro v. Kim*, [1998] O.J. No. 3518 (C.A.).

[69] *Ministry of Transport v. Economical Mutual Ins. Co.* (1979), 1 O.R. (2d) 459.

[70] *Campos v. Aviva Canada Inc.* [2006] O.J. No. 2298

[71] *Findlay v. Madill,*. 28 O.R. (2d) 673.

[72] *Lockhard v. Quiroz,* [2006] O.J. No. 5220 (C.A.) [*Lockhard*].

argument that s.258(1) required a judgment, *vis a vis* the plaintiff and the insured, in order to have the right to recover money paid out to the plaintiff.

The Court of Appeal disagreed with the motion judge's ruling and held that the insurance proceeds should not have been paid prior to judgment being obtained against the appellant driver directly. It also stated that the insurer did not have a right to bind the appellant driver to settlement without his consent. Accordingly, unless waived by all parties, a judgment (by the plaintiff) as against the defaulting insured is required before payment is required by the insured's putative insurer and/or before that insurer can demand re-imbursement for amounts paid from it's insured.

iii. Absolute Liability Provisions Not Applied

In contrast, when liability results from the use of a motor vehicle in such a way that coverage is excluded under a contract of insurance, even an innocent third party may be precluded from any recovery against the insurer. The following discussion will highlight and distinguish this situation from that exemplified in *Abel* and *Northover* above.

a. No Consent

In the case of *Walker v. Allstate*[73], s.226(1) (now s.258) of the *Insurance Act* was at issue which contained the phrase "for which indemnity is provided by a contract evidenced by a motor vehicle liability policy". In *Walker,* the driver of an automobile involved in an accident was **driving without the consent** of the owner of the vehicle. Because consent was a necessary yet absent precondition to coverage in that circumstance, the driver was not someone "for which indemnity is provided by a contract evidenced by a motor vehicle policy". As the driver did not have permission to drive the vehicle, he was not entitled to indemnity under the policy and the plaintiffs who had judgment against the driver were not entitled to recover from the driver's putative insurer.

Walker stands for the proposition that firstly, there can be no recovery by a third party plaintiff unless the insured could have been entitled to indemnity under the contract. Secondly, the provisions that make the insurer absolutely liable (s. 226(4) of the former Act and 258(4) of the current Act) apply only after the **possibility** of indemnity to the insured has been established (although it may be forfeited by the insured's conduct).

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[73] *Walker v. Allstate Insurance Co. of Canada,* [1989] O.J. No. 710 (C.A.) aff'g [1986] O.J. No. 764 (S.C.J.) [***Walker***].

b. "Other Automobile" Restrictions

Following *Walker* is the recent Ontario Court of Appeal decision of *Winch v. Kedgh.*[74] At the time of the accident, Keogh (improperly named in the title of proceeding), was not driving his own vehicle, but a cube van with a manufacturer's gross weight rating of over 4,500 kilograms. Keogh's own insurance policy insured other vehicles driven by the insured, but contained a provision indicating that coverage did not extend to vehicles with a gross weight rating of more than 4,500 kilograms. As such, the motion judge found that the insurer was not obliged under s.258(1) of the *Insurance Act* to compensate the plaintiff. The relevant portions of s.258 of the *Insurance Act* were ss.285(1), (4) and (5) as outlined above.

The plaintiff's insurer argued that, while the defendant's insurer could dispute its obligation to indemnify Keogh because coverage for the cube van was excluded, ss.258(4) and (5) of the Act precluded this defence against the plaintiff up to the statutory minimum requirement of $200,000 of insurance money.

The Court of Appeal held that the motion judge was correct in applying *Walker* in that there could be no recovery by a third party beneficiary under s.258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy, and that ss. 258(4) and (5) applied only after the possibility of indemnity to the insured had been established:

> On a plain reading of s.258(1), it is triggered only when a person *has a claim* against an insured *for which indemnity is provided* by a motor vehicle policy. Where, as here, the policy does not provide coverage for the claim that is advanced, there is no *possibility* of indemnity.[75] [emphasis added]

Winch is an example of a case where s. 258 does not apply and payment to an innocent third party is flatly denied because indemnity would not have been provided by the policy in question (to the putative insured) due to the absence of a necessary pre-condition to coverage.

The absolute liability provisions of the *Insurance Act* apply where there is a contract of automobile insurance in place for which indemnity is provided. By operation of statute, an insurer is absolutely liable to an innocent third party (subject to its right of reimbursement from its putative insured) for payment of monies pursuant to a judgment against its putative insured up to the applicable minimum limits of coverage, regardless of the subsequent conduct of the

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[74] *Winch v. Kedgh*, [2006] O.J. No. 3182 (C.A.) [***Winch***].

[75] *Ibid.* at para. 14.

insured. Where there is no contract for which indemnity is provided (to the putative insured), the absolute liability provisions do not apply.

The distinction between these two situations (absolute liability vs. no absolute liability) is the nature of the putative insured's default. Traditionally, where the insured's actions remove a condition precedent to the insuring agreement (i.e. driving without consent; driving a specifically excluded vehicle), there is in effect no contract, no *possibility* of indemnity, and therefore no absolute liability.

The nature, extent and boundaries of indemnity provided by the insuring agreement have arguably been tested yet again in the context of an insured's default under the contract which is so abhorrent as to give rise to an award of punitive damages.

What follows is a discussion of the recent Ontario Court of Appeal case of *McIntyre v. Grigg*[76], and the potential effect this decision may have on the scope of indemnity owed by an insurer to an insured, and by extension to innocent third parties.

SECTION 4: PUNIIVE DAMAGES AND THE SCOPE OF INDEMNITY TO THE INSURED

i. The Ontario Court of Appeal holding in *McIntyre v. Grigg*

In *Grigg*, the Ontario Court of Appeal upheld an award of punitive damages against a defendant in the context of a motor vehicle accident, where the defendant was seriously intoxicated. In that case, the driver, Mr. Grigg, struck a pedestrian with his motor vehicle, who as a result suffered serious physical and psychological injuries.

The question that naturally arises, and which was left unanswered by this decision, is whether the punitive damage award would be covered under Mr. Grigg's motor vehicle liability policy.

What follows is a review of the *Grigg* decision, an analysis of the nature of punitive damages, the potential impact of *Grigg*, and specifically how both relate to the scope of indemnity owed to an insured under a motor vehicle policy.

a. <u>The Trial Decision</u>

At trial, Grigg (the drunk driver), was found 70% liable for the plaintiff's

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[76] *McIntyre v. Grigg*, [2006] O.J. No. 4420 (C.A.) [*Grigg*].

damages and the owners of a McMaster University pub 30% responsible. The jury awarded general damages of $250,000, aggravated damages of $100,000, payable solely by the defendant Grigg, as well as an award of punitive damages in the amount of $100,000, again payable solely by the defendant, Grigg. The apportionment of liability, the imposition of punitive damages, as well as the costs and compensatory damage awards, were all appealed.

b. The Appeal

The Ontario Court of Appeal reviewed the apportionment of liability between the defendant and the McMaster pub and the compensatory aspect of the damage award against the defendant. However, for the purpose of this paper, the focus is on the court's discussion of the punitive damage award.

c. Punitive Damages

i. The Majority

The majority of the Court of Appeal acknowledged that the issue before it regarding punitive damages in an action framed in negligence was indeed novel, as there were no Canadian authorities on this issue. The majority did take into consideration, however, the large number of American decisions on the issue and conducted a thorough review and analysis of the principles relating to punitive damages in the context of negligence based actions. The court found that,

> By making the deliberate choice to drink excessively and then drive, Andrew Grigg's misconduct was more than mere negligence. It demonstrated a conscious and reckless disregard for the lives and safety of others. There was evidence that he was two to three times over the legal limit for alcohol consumption and was speeding and driving recklessly. In our view, this was sufficient evidence for the jury to find that an award of punitive damages was warranted.[77]

The majority further recognized that punitive damages were "designed to express the repugnance of the public, which is represented by the jury, towards the outrageous and heinous conduct of the defendant".[78] In the court's view, "negligent conduct can only attract punitive damages if the misconduct in question was **intentional and deliberate**" [emphasis added] and of such a serious and offensive nature as to warrant censure and punishment[79].

The court was convinced in this case that the defendant's conduct was indeed intentional and deliberate, finding: "his decision to drink excessively and drive,

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[77] *Ibid.* at para. 57.
[78] *Ibid* at para. 61.
[79] *Ibid.* at para. 62.

his intoxication, and the evidence that he was speeding and was driving erratically" demonstrated "a conscious and reckless disregard for the lives and safety of others".[80]

The court therefore upheld the imposition of a punitive damage award as against a drunk driver. The court however, reduced the quantum of the award of punitive damages from $100,000 to $20,000. In its decision, the majority considered the lower level of moral blameworthiness given the isolated nature of the misconduct, the lack of relationship between the parties, the fact that the harm was not directed specifically at the plaintiff, as well as the other penalties (a $500 fine pursuant to a careless driving conviction) to which the defendant had been subjected.

While the majority did accept the award of punitive damages in the context of motor vehicle negligence, they did not specifically examine issues of insurance coverage and whether such an award would in fact be covered under the defendant's motor vehicle policy. However, this very issue was raised by Justice Blair in his dissenting judgment.

ii. The Dissent

Justice Blair would have allowed the appeal by the defendant, Grigg, on the issue of punitive damages, finding that such an award was not appropriate in this case. Like the majority, Justice Blair also commenced his analysis with a thorough review of the principles of punitive damages. However, the dissenting judge found that punitive damages, in the context of motor vehicle negligence, do not materially advance the objectives of punishment, deterrence and denunciation.

Justice Blair went further to note that the defendant, Grigg, is required by law in Ontario to be insured and observed that there is nothing in the Standard Automobile Owner's Policy that excludes punitive damages from coverage. As such, Justice Blair found that it would be unlikely that wrongdoers in situations similar to that of Mr. Grigg would have to pay the punitive damages awarded, subject to the policy limits.

"What, then", queried Justice Blair, "is accomplished in the way of punishment or deterrence by such an award?"

> An award of punitive damages in these circumstances does little to advance the objectives of punitive damages...particularly when weighed against the injunction that such awards are to be reserved for exceptional cases that justify an exceptional

[80] *Ibid* at para. 75.

remedy.[81]

Justice Blair also expressed concern with respect to the social cost to other drivers who would be faced with the inevitable increase in insurance premiums if punitive damages are required to be covered by insurers.

ii. The Impact of the *Grigg* Decision

Justice Blair, in dissent, makes a compelling argument in his finding that awarding punitive damages in the context of automobile negligence is inappropriate. Justice Blair (assuming there would be coverage under Grigg's automobile policy), found that the punitive damage award would not serve to meet the objectives of the general principles of punitive damages, but rather would be placed on the head of the at fault party's insurer, and then in turn upon the public in general.

The wisdom of this argument, although arguably founded on incorrect assumptions, is telling. Punitive damages are not compensatory, but are designed to punish the wrongdoer. Courts strive to award compensatory damages to injured parties (although, as suggested as the basis of this paper, sometimes with absurd and unpredictable results). The fundamental object of punitive damages, which is to punish a wrongdoer, Justice Blair suggests, are not met when awarded in motor vehicle negligence cases based on the assumption that such damages are covered under a motor vehicle liability policy. The insuring public, not the wrongdoer would then pay the penalty.

Given that the majority did indeed award punitive damages against Grigg, then consistent with the objectives of punitive damages, and the concerns expressed by Justice Blair, punitive damages should not be recoverable under the defendant's insurance policy.

The public policy reasons (retribution, deterrence and denunciation) and the fundamental nature of punitive damages as punishment **require** that they be felt directly by the at fault party. Providing indemnity to an insured pursuant to the insured's insurance policy frustrates the entire purpose behind the imposition of the award, and is likely against public policy.

Although the coverage granting provisions found in the *Insurance Act* and the Standard Ontario Automobile Policy are extremely broad, and make no specific exclusions for punitive damages, the public policy reasoning behind the

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[81] *Ibid* at para. 132.

imposition of a punitive damage award would prohibit a defendant from shifting such a penalty to its insurer, who in turn would transfer it to the general insuring public.

Support for the position that punitive damages are not covered under the third party liability provisions of the Standard Automobile Policy is found in s. 118 of the *Insurance Act* and the Court of Appeal decision in *Abel*.[82]

In *Abel*, the Court of Appeal affirmed that the purpose behind s. 118 is to relieve against the public policy rule which prevents an insured from recovering under an insurance policy any benefit derived from the commission of a crime. However, as seen in *Abel*, that relief is not available when an insured commits an unlawful act with the intent of bringing about the loss or damage.

The defendant Grigg, by the very nature of his unlawful act was found to have demonstrated a "conscious and reckless disregard for the lives and safety of others" and therefore, in essence, to have "intentionally and deliberately" caused damage to a third party.

In *Abel*, the Court of Appeal acknowledged that based on s. 118, an insured's right to indemnity under the insuring agreement is rendered unenforceable when the insured commits an unlawful act with the intent of bringing about loss or damage. Based on *Grigg*, an action framed in negligence can only attract punitive damages if the misconduct in question is intentional and deliberate and of such a serious and offensive nature as to warrant censure and punishment.

Accordingly, the very elements of an award of punitive damages will attract the application of s. 118 of the *Insurance Act*, and the public policy rule against an insured recovering from an insurance policy any benefit derived from an unlawful act.

It is submitted therefore, that as a result of s. 118 and the appellant level decision in *Abel*, punitive damages are not recoverable by an insured in the motor vehicle third party liability context.

iii. Punitive Damages and the Absolute Liability Provisions

Assuming that indemnity for punitive damages would not be provided to a putative insured, the next challenge is to determine whether the innocent third party may still place a judgment for punitive damages at the feet of the insurer (pursuant to s. 258(4)), regardless of the insured's indemnity rights (or lack

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[82] *Abel, supra*

thereof). Arguably, in the language of s. 258(1), there is a "claim for which indemnity is provided by a contract" in the case of a punitive award (assuming there is a compensatory aspect to the award given to the innocent third party in addition to the punitive award), and as such, the absolute liability provisions would apply to the putative insured's insurer.

However, a closer analysis may suggest that a judgment against an insured for punitive damages may not be successfully presented to the (insured's) insurer pursuant to s. 258.

The intent of s. 258 is to ensure that an innocent third party is not deprived of his or her **remedy** because of the criminal conduct of the insured.[83] The intent behind an award of punitive damages is to punish the wrongdoer. The objectives as specifically stated in *Grigg* are "punishment, deterrence and denunciation."[84] Punitive damages are penal in nature and aimed at the wrongdoer; they are not remedial in nature and aimed at an innocent third party.

Compensatory damages are aimed at making an injured party whole again. Punitive damages, unlike aggravated damages, are not compensatory damages and an award of punitive damages are, from the perspective of the innocent third party (presumably made whole by the compensatory damages) a financial windfall. Accordingly, it makes little sense to facilitate the recovery of punitive damages to a plaintiff *vis a vis* the absolute liability provisions of the *Insurance Act*. The innocent third party will not be deprived of his or her "remedy" because punitive damages are not remedial.

It is submitted that since an insurance contract cannot provide indemnity for punitive damages, then the absolute liability provisions of the *Insurance Act* ought not to apply to an award of punitive damages. Having in mind the objectives of s. 258, and of punitive damages and in the language of the Court of Appeal in *Winch*, since in actuality "it is not a claim for which indemnity is provided" the absolute liability provisions ought not apply to a plaintiff's judgment for punitive damages.

In short, it is submitted that although the issue is admittedly debatable, the proper interpretation of the prevailing authorities and the applicable legislative provisions favours the finding that the absolute liability provisions do not apply to punitive damages.

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[83] *Abel, supra.*

[84] *Grigg, supra.*

SECTION 5: WHY ARE WE HERE?

Intuition and common sense do not seem to always rule the day when courts analyze third party liability policies in the automobile context. Whether this is because of inadequate guidance by the legislature, by the nation's top Court, or simply a messy bed made by the result-driven approach taken by the province's lower courts, this area of the law is blurred with confusion and unpredictability.

One would hope that following a common sense approach to third party liability coverage would provide clear and consistent guidance to injured parties and insurers alike. That way, both insurers and their insureds can understand what exactly it is they are signing up for when they formulate and negotiate the insuring agreement. Mr. Wolfe may say that he believed his actions would be covered under his auto policy when he was aiming his rifle at Herbison, but he would be good to remember that misrepresentations could affect his coverage.

Bibliography

LEGISLATION

Compulsory Automobile Insurance Act, R.S.O. 1990 Chapter C. 25.

Highway Traffic Act, R.S.O. 1990, Chapter H. 8.

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

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].

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

JURISPRUDENCE

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

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

Companaro v. Kim, [1998] O.J. No. 3518 (C.A.).

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

Findlay v. Madill,. 28 O.R. (2d) 673.

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).

Joachin v. Abel, [2003] O.J. No. 1584 (S.C.J.).

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

Lefor (Litigation Guardian of) v. McClure, [2000] O.J. No. 2244 (C.A.).

Lockhard v. Quiroz, [2006] O.J. No. 5220 (C.A.).

McIntyre v. Grigg, [2006] O.J. No. 4420 (C.A.).

Ministry of Transport v. Economical Mutual Ins. Co. (1979), 1 O.R. (2d) 459.

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

Northover v. Regier, [2000] O.J. No. 3660 (S.C.J.)

Shakur v. Pilot Insurance Co. [1990] O.J. No 1613 (C.A.).

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

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).

Walker v. Allstate Insurance Co. of Canada, [1989] O.J. No. 710 (C.A.) aff'g [1986] O.J. No. 764 (S.C.J.).

Whiten v. Pilot Insurance Co. [2002] S.C.J. No. 19 (S.C.C.).

Winch v. Kedgh, [2006] O.J. No. 3182 (C.A.).

SECONDARY MATERIAL: DVD

Vytlingam (Litigation Guardian of) et al. v. Farmer et al., Supreme Court of Canada recorded submissions, December 11, 2006.