



Motor Vehicle
Coverage Disputes:
Bullets, Boulders &
Booze:
Is Everything Covered?

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OVERVIEW

1. Automobile Insurance: The Unique Contract
2. Definition of “Automobile”
3. “Use or Operation” of an Automobile
4. Scope of Coverage: Indemnity to the insured and the Absolute Liability Provisions of the *Insurance Act*
5. Scope of Coverage: Punitive Damages

Automobile Insurance: The Unique Contract

- Distinct from other contracts:
 - Presumptions in favour of insured
 - Ambiguity resolved in favour of insured
 - Statutory protection of innocent third parties (absolute liability on insurer)
 - Not party to contract
 - Even when no indemnity owed to insured

Automobile Insurance: The Unique Contract

- Combination of stated presumption in favour of insured and statutorily enshrined goal of protection of innocent third parties has had profound impact on judicial landscape

Automobile Insurance: The Unique Contract

- What are the limits:
 - Need to enhance predictability and confidence in system
- The gateway to coverage:
 - must involve an “automobile”
 - the “use or operation” of a motor vehicle – *prima facie* coverage
 - s. 239(1) of the *Insurance Act* and the plain language Policy – s.3 OAP1

The Elusive Meaning of “Automobile”

- *Copley v. Kerr Farms* (Ont. C.A.)
 - Plaintiff injured connecting tomato wagon to truck in farmer’s field
 - Flatbed trailer used to haul tomatoes from field to processing plant, when being hooked up to a transport truck:
 - Automobile?

The Elusive Meaning of “Automobile”

- Two step analysis:
 1. Automobile within ordinary sense of the word?
 2. If cannot be answered, does vehicle come within definition under s.221(1)(a) of *Insurance Act*, which requires it to be “a motor vehicle required under any Act to be insured under a motor vehicle liability policy”?

The Elusive Meaning of “Automobile”

- Court looked to *Compulsory Automobile Insurance Act* and *Highway Traffic Act* definitions
- Although trailer fit within definitions under CAIA and HTA, and was therefore a “motor vehicle”; since it was not being operated on the highway at the time and place where the accident occurred, it was not required to be insured
- Therefore, not an automobile for the purpose of s. 267.1(1) of *Insurance Act* (Bill 164 restriction on plaintiff’s right to recover damages)

The Elusive Meaning of “Automobile”

- Does it make sense to look at precise location of vehicle at time of accident?
- Does vehicle transform to automobile once positioned a few meters onto highway?

The Elusive Meaning of “Automobile”

- *Adams v. Pineland Amusement Ltd*:
 - Operating go-cart on outdoor track
 - Was the go-cart an “automobile”?
 - Justice Kealey added hypothetical element:
 - If the go-cart was operated on a highway, it would require insurance
 - So, fits definition of “automobile”

The Elusive Meaning of “Automobile”

- *Adams* at odds with *Copley*
- Why?
 - Plaintiff bias?
 - Search for coverage?
 - Result driven?

More Clarity?

- Court of Appeal: *Adams v. Pineland Amusement Ltd.*
- Applied a three-part test:
 - Is the vehicle described as an “automobile” in the wording of the insurance policy?
 - Is the vehicle an “automobile” in the ordinary parlance?
 - **Does the vehicle fall within any enlarged definition of “automobile” in any relevant statute?**

More Clarity?

- Court of Appeal refers to *Copley*:
 - motion judge erred: conclusion based on the possibility that a go-kart could hypothetically be driven on a highway

More Clarity?

- Proper question: whether the go-kart required insurance at the time and in the circumstances of the accident.

More Clarity?

Result:

- *Adams* – lower Court overturned.
- Go-kart not an “automobile” within the scope of the father’s automobile policy.
 - Not an automobile as described in the policy
 - Not an “automobile” in ordinary parlance
 - Did not meet the expanded “definitional labyrinth” because:
 - Did not require automobile insurance at the “time and in the circumstances” of the accident.

The Elusive Meaning of “Automobile”

- Need practicality:
 - Does it make sense to focus on the precise location of vehicle at time of incident?
 - Vehicle transforms into “automobile” as travels
 - Designed or intended for use on a highway, then automobile
 - Not designed or intended for use on a highway, not automobile

What about legislature?

The Elusive Meaning of “Automobile”

- Bill 198 (October 2003):
 - S.224(1) amended to include:
 - (b) “automobile” includes “a vehicle prescribed by regulation to be an automobile”
- Over 3 years later, no regulation

Use/Operation of a Motor Vehicle

- What constitutes “use or operation” of an automobile?
- Test from *Amos v. ICBC* (1995 S.C.C.)

Amos v. ICBC

Amos Test:

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

Amos v. ICBC

- In *Amos*:
 - the incident was a direct result of the fact that the insured was driving his vehicle at the time of the attack
 - and a result of the assailant's failed attempt to gain entry to the vehicle
 - Justice Major: truly random shooting would not meet test – more than “but-for” test required
- coverage found

The *Amos* Test Applied

- Since *Amos*
- Ontario Court of Appeal and recent Supreme Court of Canada decisions:
 - *Herbison et al. v. Lumbermens Mutual Casualty Company*
 - *Vytlingam (Litigation Guardian of) v. Farmer*

BULLETS

Herbison v. Lumbermens Mutual Casualty Company

- Wolfe was driving to his hunting stand.
- He got out of his vehicle, loaded his hunting rifle and fired a shot at a “deer”
- The “deer” was Herbison
- Catastrophic injury - permanently disabled
- Use/operation?

Herbison – Court of Appeal majority decision

Majority:

- **Purpose Test** satisfied:
 - Wolfe used the vehicle for transportation purpose as well as the lights to illuminate the darkness (both ordinary and well-known uses)
- **Causation test** satisfied:
 - “the damages can arise indirectly, or can be more or less remotely connected to or grow out of the vehicle’s use or operation”

Herbison – Court of Appeal majority decision

- Is this a “but-for” test?
- “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”

Herbison – Court of Appeal minority decision

Minority:

- **Failed the Purpose Test** because the use of the truck was unrelated to the negligent shooting incident
- **Failed Causation Test:** In order for the Causation Test to be satisfied, it is necessary that the ownership, use or operation of the motor vehicle contribute to or add to the injury, in some manner

BOULDERS

*Vytlingam (Litigation Guardian of)
v. Farmer*

- Used vehicle to transport boulders to an overpass bridge
- Dropped boulders on Vytlingam driving in his car below
- Catastrophic and permanent injuries
- Use/Operation of wrongdoer's vehicle?

Vytlingam – Court of Appeal majority decision

- **Purpose Test satisfied:**
 - the Farmer vehicle was
 - (i) necessary to transport the boulders;
 - (ii) required to transport Farmer and Raynor to the scene; and
 - (iii) central to the escape

Vytlingam – Court of Appeal majority decision

- **Causation Test satisfied:**
 - there was a sufficient connection between the “use or operation of Farmer’s vehicle and the throwing of the boulders
- Again, is this not a but-for test?

Vytlingam – Court of Appeal minority decision

- Minority:
- **Purpose Test** not met:
 - The purpose for which the vehicle was used did not cause the injuries sustained by Vytlingam
- **Causation Test** not met:
 - The injuries were not causally connected to the Farmer vehicle: “the act of Farmer and Raynor dropping the boulder...caused the damage in this case. This independent act was unconnected to the car”

Supreme Court of Canada

- Supreme Court approach to *Amos* test?
- Court to clarify or re-cast the *Amos* test to fit within the realm of third party indemnity insurance?

Applicant's Submissions to the Supreme Court of Canada in *Vytlingam*

- Courts have been wrongly applying *Amos* (a first party case) in the context of indemnity coverage?
 - focusing on whether **the loss or damage** arises from the use or operation of a motor vehicle
 - Should be asking whether **the liability** of the wrongdoer arises out of the use or operation of the wrongdoer's motor vehicle?

Justice Binnie: The Purpose Test

- Justice Binnie:
- a foreshadowing of the alteration to the first (purpose) branch of the test to eliminate the element of causation

Justice Binnie: The Purpose Test

- Remove the causation element from the Purpose Test and much of the confusion would be eliminated

Applicant: The Causation Test

- Applicant: further adjustment to the Causation Test:
 - There must be a **cause related to the use** or operation of the motor vehicle
 - Courts have been simply looking at “some nexus” as opposed to a “causal nexus”
 - Courts should **focus on the liability of the wrongdoer** and proof of a causal connection between the accident and use or operation of the wrongdoer’s vehicle

What did the Supreme Court do?

- Overturned the Court of Appeal decisions in *Herbison* and *Vytlingam*
- Arguably a new test for coverage emerges in the third party liability context:
 - 1. is the claim in respect of a tort committed in the course of using a motor vehicle as a motor vehicle and not for some other purpose? [**The Purpose Test**]
 - 2. is there an unbroken chain of causation linking the injuries to the use and operation of the tortfeasor's vehicle which is shown to be more than simply fortuitous or "but for"? [**The Causation Test**]

The Supreme Court's Approach in *Herbison*

- First branch of test easily disposed with: vehicle was used for transportation = ordinary use.
- Second branch – causation – was the claimant's difficulty:
 - The tortfeasor interrupted his motoring to start hunting.
 - No complaints about the use or operation of the vehicle, but complaints about the gunshot that put the bullet in his knee.

The Supreme Court's Approach in *Herbison*

- The Supreme Court agreed that the addition of “directly or indirectly” to s. 239 relaxes the causation requirement
- But – some causation link in an *unbroken* chain must be found

The Supreme Court's Approach in *Vytlingam*

- *Amos* is not a template to resolve indemnity coverage:
- the type of insurance and the coverage requirements in *Amos* did not require the presence of an at-fault motorist.

The Supreme Court's Approach in *Vytlingam*

- “no amount of carrying rocks all over the country for whatever purpose gives rise to one iota of civil liability. Liability comes from dropping those rocks”
–Justice Binnie in his reasons for judgment
- Rock throwing = independent act which broke the chain of causation.
- “But for” test specifically rejected. “There must be an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made.”

Supreme Court of Canada on “use or operation”

- **Purpose Test: Fairly easily satisfied.**
 - Tort committed in the course of using a motor vehicle as a motor vehicle and not for some other purpose, i.e. diving platform.
- **Causation Test:**
 - An unbroken chain of causation linking the injuries to the use and operation of the tortfeasor’s vehicle which is shown to be more than simply fortuitous or “but for”.
 - To break the chain, the intervening act must be severable from the use of the vehicle.
 - In *Lefor* (mother parked car and let child run across the street) it was not severable (post vehicle conduct so closely intertwined with negligent parking not severable).
 - In *Herbison and Vytlingam*, the shooting/boulder dropping were intervening acts severable from use of the motor vehicle.

Prima Facie Coverage

- Have loss that involves “use or operation” of an “automobile”
 - *Prima facie* coverage
- Unique features of automobile insurance.
- How does this affect scope of coverage?

Scope of Coverage:

Indemnity to the Insured and the Absolute Liability Provisions of the *Insurance Act*

- Ambit of coverage limiting provisions outside four corners of agreement
- Public Policy:
 - Read into (or applied with respect to) every contract, including insuring agreement.

Demeter Principle

- From *Demeter v. Dominion Life Assurance Co.* (1982 On Court of Appeal)
- Wrongdoer cannot profit (through insurance) from illegal act.
- But even it is watered down in Ontario?

Scope of Coverage:

Indemnity to the Insured and the Absolute Liability Provisions of the *Insurance Act*

- S.118 – saving provision:

- contravention of any “criminal or other law” does not by that fact alone void indemnity under insuring agreement, except where intent to bring about loss/damage
- Section also imports an intentional act exclusion (where act and harm intended) into automobile insurance coverage (see *Joachin v. Abel*)

Scope of Coverage:

Breach of Public Policy - Intentional Acts

- *Joachin v. Abel* (2003 Ont. C.A.)
 - Insured, Abel, intentionally ran down the plaintiff with his truck
 - Used vehicle as weapon
 - At common law, under *Demeter* principle, coverage would be forfeited

Scope of Coverage:

Breach of Public Policy - Intentional Acts

- But in Ontario, insurance cases must look further, at s.118
- Purpose of s.118:
 - 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 commission of a crime

Scope of Coverage:

Breach of Public Policy - Intentional Acts

- *Abel*:
 - No indemnity to Abel
 - Against public policy
 - Not saved by s.118:
 - an insured's **right to indemnity is rendered unenforceable** when the insured commits an unlawful act with the intent of bringing about loss or damage - *Abel* (C.A.)
 - C.A. goes further to state that an insurer can rely on s.118 to deny an insured's claim for indemnity (previously considered a watering down of *Demeter* principle, now may be considered a statutorily imposed intentional act exclusion)

The Absolute Liability Provisions

Insurance Act, s.258:

- **Purpose:** to enable innocent, injured third parties to recover and not be deprived of remedy based solely on conduct of insured – *Abel (C.A.)*
 - If the Insured is in breach of express or implied terms of insuring agreement:
 - Can forfeit entirely its right of indemnity
 - But insurer still absolutely liable to innocent party

The Absolute Liability Provisions

- Plaintiff's action under s.258(1):
 - independent of the insured's right of indemnification
- Insurer, pursuant to s.258(13):
 - right to pursue the insured for the amount it paid by reason of s.258(4)

The Absolute Liability Provisions

- Therefore payments made **not “indemnity payments”**:
 - Statutory payments
 - A defaulting motor vehicle defendant insured is not “indemnified”
 - insurer has a right of reimbursement for amounts paid

The Absolute Liability Provisions Applied

- Innocent accident victim:
 - Still entitled to recover 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*

The Absolute Liability Provisions Applied

- *Abel*:
 - “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...An innocent third party is **not to be deprived of his or her remedy** because of criminal conduct of the insured”
 - S.258 applied and Abel’s putative insurer responsible for \$200K of plaintiff’s damages.

Breach of Statutory Condition

- Statutory Condition 4(1): Authority to Drive
- *Northover v. Regier (2000 Ont. S.C.J.)*
 - Breach of a G1 or G2 restriction is sufficient to see one in breach of statutory condition 4(1) of the standard automobile policy
 - the insured held a G2 license and admitted to having had a “sip of beer” shortly before the collision

Breach of Statutory Condition

- Not “authorized to drive” – breach of condition 4(1):
 - Insured forfeits rights to indemnity
 - Absolute Liability applies:
 - Still absolute liability on insurer (minimum limits to innocent third party)

Scope of Coverage

- What brings one completely outside of scope of coverage?
 - Difficult to predict, but some guiding principles emerge

Scope of Coverage

- Use of a motor vehicle in such a way that coverage is excluded under contract of insurance.
- Situations where unauthorized individuals using the insured vehicle; and/or authorized insured individuals using unauthorized vehicles take one outside of coverage and even outside reach of absolute liability provisions.
- Even an **innocent third party may be precluded from any recovery** against the insurer.

Absolute Liability Not Applied

No Consent

- *Walker v. Allstate (1989 Ont. C.A)*: driver was driving **without the consent of the owner**
 - Outside scope of coverage:
 - driver not an insured
 - Absolute liability - **no**
 - Innocent party cannot recover on judgment

Absolute Liability Not Applied

No Consent

- *Walker*:
 - 1. there can be no recovery by a third party plaintiff unless the insured could have been entitled to indemnity under the contract
 - 2. the provisions that make the **insurer absolutely liable (s.258(4))**, apply only after the possibility of **indemnity** to the insured has been established

Absolute Liability Not Applied Other Automobile

- *Winch v. Keogh* (2006 Ont. C.A.):
 - Insured's use of heavy commercial vehicle
 - Insured outside scope of coverage on private passenger vehicle policy
 - Vehicle outside insuring agreement
 - Absolute liability – **no**
 - No possibility of indemnity
 - Innocent party cannot recover on judgment

Scope of Coverage – What Are The Boundaries?

- Full Indemnification to Insured?
- Minimum Limits to Innocent Third Party?
 - Is insured or vehicle completely outside of insuring agreement?
 - Difficult to predict: but some guidance

Scope of Coverage – What Are The Boundaries?

Generally:

- Breach of statutory condition or breach of existing policy by authorized insured – absolute liability provisions apply
- Use of insured vehicle without consent of insured owner, or named insured using specifically excluded vehicle – no threshold entitlement to coverage or indemnity, therefore no absolute liability
- Use of insured vehicle by “excluded driver”: no coverage to driver or owner and no absolute liability
- Is there a clear rule?
 - because of unique nature of insuring agreements?

BOOZE

Scope of Coverage: Punitive Damages

McIntyre v. Grigg (2006 Ont. C.A.)

- award of punitive damages against a defendant in the context of a motor vehicle accident where the defendant was seriously intoxicated
- Court stated punitive damages only available in negligence based cases where misconduct in question is intentional and deliberate and of such a serious and offensive nature as to warrant censure and punishment

Scope of Coverage: Punitive Damages

- Grigg made **deliberate choice** to drink excessively and then drive
 - Conduct: **conscious and reckless disregard for the lives and safety of others**

Scope of Coverage: Punitive Damages

- Inferred intent to harm:
 - the misconduct was **intentional and deliberate** and
 - of such a serious and offensive nature as to warrant censure and punishment

Scope of Coverage: Punitive Damages

- Coverage not examined by majority
- Dissent:
 - Punitive damages, in auto regime, do not advance the objectives of punishment, deterrence and denunciation
 - **Other drivers are punished** (because assumed coverage)
 - Would not have awarded punitive damages

Punitive Damages: Indemnity Coverage?

- Punitive Damages – is there indemnity?
- Purpose:
 - Punish the wrongdoer
 - Not met when awarded in motor vehicle negligence if indemnify the wrongdoer
 - The insuring public, not the wrongdoer, pays the penalty

Punitive Damages: Indemnity Coverage?

- Given that majority in *Grigg* did award punitive damages, then to remain consistent with objectives of punitive damages and to waylay concerns expressed in dissent, coverage should not apply

Punitive Damages: Indemnity Coverage?

- Against public policy to indemnify for punitive damages:
 - *Demeter* Principle
 - Cannot benefit under policy from commission of unlawful act

Punitive Damages: Indemnity Coverage?

- Not within Coverage Granting provisions
 - S.3.3 of O.A.P. 1
 - “...may be legally responsible for the bodily injury to, or death of others...In that case, we will make any payments on your behalf...that the law requires, up to the limits of the policy”

Punitive Damages: Indemnity Coverage?

- “payment that the law requires”
 - Informed in important way by first part, and arguably must flow from:
 - Legal responsibility for “bodily injury to or death of others”

Punitive Damages: Indemnity Coverage?

- Punitive damages do not flow from or address bodily injury.
- Rather, flow from egregious conduct of insured wrongdoer.
- Arguably fall outside coverage granting provisions.

Punitive Damages: Indemnity Coverage?

- Contract interpretation:
- *Demeter* Principle
 - Cannot benefit under policy from commission of unlawful act.
 - *Ex Turpi Causa* (*Hall v. Hebert*, 1993 S.C.C.)
 - Justice systems – seamless web.
 - Court cannot give penalty with the right hand (civil tort) and take with the left (civil contract).

Punitive Damages: Indemnity Coverage?

- Public policy and/or *ex turpi causa*
 - Court will not interpret coverage granting provisions as against public policy.
 - If within coverage granting provisions, court arguably should still not enforce to preserve integrity of justice system.

Punitive Damages: Indemnity Coverage?

- Saved by Section 118 of *Insurance Act*?
 - “...a contravention of any criminal or other law enforced in Ontario...does not, **by that fact alone**, render unenforceable a claim for indemnity...except where...committed by the insured...with intent to bring about the loss...”

Punitive Damages: Indemnity Coverage?

S. 118 may not apply

- Punitive damages not awarded based solely on criminal conduct.
- It is the egregious nature of conduct, regardless of criminality.
- The insured's right to indemnity is forfeited, not because of criminality, but because of doctrine of public policy and *ex turpi causa* (offends harmonious nature to give with one hand and take with the other).
- S. 118 not engaged - it applies when coverage is attempted to be forfeited because of criminality (or breach of law) and by reason of that "fact alone".
- Egregious nature of actions and public policy considerations forfeit insureds' right to indemnity.

Punitive Damages: Indemnity Coverage?

- S. 118 does apply, but does not save indemnity:
 - An insured's right to indemnity under insuring agreement is rendered unenforceable when the insured commits an unlawful act with **intent** of bringing about loss or damage (*Abel*)
 - Court arguably inferred **intent** on the part of Grigg

Punitive Damages: Indemnity Coverage?

- Submitted, that the very element of an award of punitive damages (deliberate, intentional harm causing conduct) will attract the (intent to injure) exception in s.118, and the public policy rules considered above
- Against public policy to indemnify
- And not saved by s.118
- Support is:
 - Coverage granting provisions - OAP
 - Public policy considerations
 - C.A. in *Abel*
 - S.118 *Insurance Act*

Punitive Damages: Indemnity Coverage?

- No Indemnity to Insured
- ...do Absolute Liability Provisions apply?

Punitive Damages: Absolute Liability?

- Intent of s.258:
 - To ensure that an innocent third party is not deprived of **his or her remedy** because of the unlawful conduct of the insured – *Abel*
- Punitive damages awarded to punish the wrongdoer
 - not remedial in nature

Punitive Damages: Absolute Liability?

- Compensatory damages:
 - Aimed at making an injured party whole again
- Punitive damages are (from the perspective of innocent third party made whole by compensatory damages) a **financial windfall**?
 - Innocent party not deprived of remedy

Punitive Damages: Absolute Liability?

- Given the objectives of s. 258 and of punitive damages and given that it is not a “claim for which indemnity is provided” within the language of s. 258 as discussed in *Winch* – absolute liability provisions ought not to apply to a plaintiff’s judgment for punitive damages
- **No Absolute Liability**

Why Are We Here?

- Inadequate guidance by the legislature?
- Supreme Court?
- Result-driven approach of lower courts?
- Simply uniqueness of automobile insurance policies?
- There are limits, but are they clear enough?
- Need to be more clearly defined?