

EXPANDED COVERAGE FROM THE INDIRECT USE OF AN AUTOMOBILE

Deirdre L. Wade, Q.C and Talia C. Profit of Barry Spalding

The Supreme Court of Canada is currently seized of two matters which explore the notion of the “indirect” use of an automobile; one involving an individual who was injured by a gun shot and a second involving an individual injured by a boulder dropped from an overpass. The question before the Court was whether the applicable automobile insurance policy would indemnify the individual for the injuries suffered.

An insured and his wife drove to a hunting site just before sunrise. Illuminated by the headlights of the insured’s automobile, the insured saw movement in the woods, and believing it to be a deer, the insured shot another hunter. The Ontario Court of Appeal in *Herbison v. Lumbermens Mutual Casualty Co.*¹ confirmed that there existed some causal relationship between the injured hunter’s damages and the insured’s use or operation of his truck, such that the insured’s automobile insurance policy indemnify the injured hunter. In a second tragic situation, two youths used a vehicle to transport boulders to an overpass where they dropped boulders onto the highway beneath them, injuring the insured when a boulder hit his windshield. The insured claimed against his automobile insurance policy under the underinsured motorist endorsement for the damages he was otherwise entitled to from the youths. The Ontario Court of Appeal in *Vytlingam (Litigation Guardian of) v. Farmer*² similarly found that there was a sufficient connection between the use of the underinsured automobile and the throwing of the boulder to find that the automobile’s operation contributed to the injuries. The Supreme Court of Canada heard appeals from both of these decisions on December 11, 2006. No judgments have yet been delivered.

Recent caselaw and legislative amendments have broadened coverage for injuries arising directly or indirectly from the use or operation of an automobile. What does it mean for an injury to arise out of the use or operation of a vehicle? What does the inclusion of the

¹ (2005), 76 O.R. (3d) 81 (Ont. C.A.)

² (2005), 76 O.R. (3d) 1 (Ont. C.A.)

term “indirectly” mean to the cases pending before our highest court and other matters which turn on this terminology?

The leading decision on the application of the provision “arises out of the ownership, use or operation of a vehicle” is the Supreme Court of Canada’s unanimous decision in *Amos v. Insurance Corp. of British Columbia*³. Major J. for the Supreme Court of Canada set out the two-part test,

- “ 1. Did the accident result from the ordinary and well know activities to which automobiles are put?
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?⁴”

In *Amos, supra*, the insured was attacked by a gang while driving his van and was shot while trying to distance himself from his assailants. Major, J. found that the accident clearly resulted from the ordinary use to which automobiles are put, which was simply driving down the street. Major J. further confirmed that the “...motor vehicle need not be the instrument of the injury to satisfy the causal connection requirement⁵” and therefore found that the two part test was satisfied.

With regards to the scope of the tests to be applied, Major J. expressed that,

“Invariably, each case must be decided on its own facts, applying the two-part test outlined above. It is not possible to predict every circumstance where an injury can be said to arise out of the ownership, use or operation of a vehicle. A true random shooting not related to the use or operation of a vehicle under the present wording of s. 79(1) is not covered but where a nexus of connection between the injuries and the vehicle exists, the injured plaintiff is entitled to coverage where some connection is found between

³ [1995] 3 S.C.R. 405 (S.C.C.).

⁴ *Ibid*, paragraph 20

⁵ *Ibid*, paragraph 27

ownership, use or operation of a vehicle and the injuries sustained as a result of an accident⁶

The deciding factor in *Amos, supra*, was that the shooting appeared to be the direct result of the assailants' failed attempt to gain entry into the van.

The decisions which have considered the test set out in *Amos, supra* are decidedly fact specific. In one case, where a child was pulled off the school bus and beaten, the court found that the test was not satisfied as the injury was not related to being transported by a bus⁷. In another case, where a diabetic bus passenger suffered injuries during an extended trip when the bus driver delayed seeking medical assistance, the court found that the test was satisfied since the use of the vehicle contributed to the injuries⁸. In a road rage case, the court found that insured's use of her vehicle created anger in another driver which resulted in an assault, thereby satisfying the test⁹. Not only does this test apply to personal injuries, but also to property damage. In a pollution case, the court found that the test was satisfied as there was a nexus between the damage to the claimant's house and the use or operation of the fuel truck which pumped oil into a leaking supply system¹⁰.

A review of these cases and others which apply the test in *Amos, supra* reveals that the purpose test is easily satisfied where the accident arises from an activity to which a vehicle might be put. The causation test is likewise easily satisfied as long as there is some causal connection, not necessarily direct or proximate, between the injury and the use or operation of the vehicle. The language of the relevant dispositions in the preceding cases, like *Amos, supra*, do not include the phrase "arisingdirectly *or indirectly*" from the use or operation of a motor vehicle, unlike the two Ontario cases pending before the Supreme Court of Canada.

⁶ *Ibid*, paragraph 31

⁷ *Jenkins (Litigation Guardian of) v. Zurich Insurance Canada* [1997] N.B.J No. 457 (N.B.C.A.)

⁸ *Marjak Services Ltd. v. Insurance Corp. of British Columbia*, 2004 BCCA 455 (B.C.C.A.)

⁹ *Itani v. Stan Poulsen Trucking Ltd.* (2002), 2003 ABCA 8 (Alta.C.A.)

¹⁰ *Harvey's Oil Ltd. v. Lombard General Insurance Co. of Canada*, 2003 NLSCD 158 (Nfld. S.C.), aff'd 2004 NLCA 9 (Nfld. C.A.)

In *Vytlingam, supra*, MacFarland J.A. for the majority of the Ontario Court of Appeal agreed with Lederman J. in the matter of *Saharkhis v. Non-Marine Underwriters, Lloyd's London*¹¹ that “the use of the word “indirectly” imports a relaxed causation requirement comparable to the one suggested by Major, J. in *Amos*¹²”. While the Ontario Court of Appeal on the one hand confirmed the relaxed causation requirement proposed by Major J. in *Amos, supra*, it was not willing to suggest that the inclusion of the word “indirectly” further relaxed the causal connection requirement beyond that found in *Amos, supra*.

Borins J.A. however, for the majority of the Ontario Court of Appeal in *Herbison, supra*, seemed to suggest that the term “indirectly” has further relaxed the causal requirement beyond that found in *Amos, supra*, when it was expressed that, “...the phrase “directly or indirectly” in s. 239(1)(b) of the *Insurance Act* has effectively removed the requirement of an unbroken chain of causation from the causation test ...¹³”. Borins J.A. further discussed the effect of the inclusion of the word “indirectly”, saying that, “[a]s this court has recognized, the 1990 amendment providing coverage for damages arising directly or indirectly from the use or operation of an automobile has significantly broadened coverage¹⁴”; see *Lefor (Litigation Guardian of) v. McClure*¹⁵.

Although it is difficult to predict how the Supreme Court of Canada will decide the two Ontario Court of Appeal cases currently pending, one thing is sure, courts have consistently broadened and relaxed the coverage test. Now with the inclusion of the term “indirectly” in certain legislation, the task of convincing a court that there should be coverage for injuries is even simpler.

Jurisdictions who have not amended their legislation to include “indirectly” are likely to follow the Ontario legislature and adjust their more rigid legislation to follow this recent trend toward expanded coverage. It makes one wonder how far the courts are willing to

¹¹ (1999), 46 O.R. (3d) 154 (Ont. S.C.J.), aff'd (2000), 49 O.R. (3d) 255 (Ont. C.A.) at paragraph 14

¹² *Vytlingam, supra* footnote 2, at paragraph 37

¹³ *Herbison, supra* footnote 1, at paragraph 102

¹⁴ *Ibid*, paragraph 104

¹⁵ (2000), 49 O.R. (3d) 557 (Ont. C.A.) at paragraph 8

go; whether there may come a point where the courts are finding coverage based on the simple fact that there was an automobile in the vicinity. Depending on who your clients are, this current trend towards expanded coverage could be a welcome advancement or an impossible dilemma.