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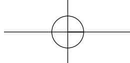

Alberta's Court of Appeal Weighs In on the "Use and Operation" of an Automobile

BY ALEXIS N. MOULTON

By now most people in the insurance business in Canada have become familiar with the two Supreme Court of Canada decisions rendered dealing with the use and operation of an automobile: *Citadel General Assurance Co. v. Vytlingam* [2007 S.C.C. 46] and *Lumbermens Mutual Casualty Co. v. Herbison* [2007 S.C.C. 47].

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In the *Vytlingam* case, the Vytlingams were driving along a highway in North Carolina when a boulder, thrown from an overpass as a prank, landed on their vehicle. The tortfeasors used their vehicle to transport the boulder to the overpass then left the scene of the accident in their vehicle. Michael Vytlingam suffered severe injuries and his sister and mother suffered psychological damages.

It turned out the tortfeasors were inadequately insured, and so the question was whether the Vytlingam's Ontario Policy Change Form 44R- Family Protection Coverage ("OPCF 44R") insurer had to respond to pay the inadequately insured motorist coverage.

The Supreme Court of Canada reversed the lower courts and held that the claim did not arise from the ownership or directly or indirectly from the use or operation of the third party vehicle. The Court noted the tort that caused the Vytlingams' injuries was not sufficiently connected to the use and operation of the third party's car for it to be committed by a "motorist." The fact that the word "indirectly" appeared in the Vytlingam's policy was not sufficient to overcome the fact that the tort was an intervening event wholly "severable" from the use and operation of the third party vehicle — the throwing of the boulder from the overpass was an independent act which broke the chain of causation.

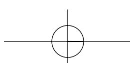
In the *Vytlingam* decision, a relevant excerpt from the OPCF 44R policy is as follows:

Insuring Agreement

…the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to or death of an insured person arising directly or indirectly from the use or operation of an automobile.

The Court in *Vytlingam* focused on the fact that in order for the Vytlingams to receive indemnity, the tortfeasor must be at fault as a "motorist." Further, for the coverage to exist 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 was made. In the *Vytlingam* decision, the Court found the causal link was simply not present.

The Court distinguished it's earlier decision in *Amos v. Insurance Corp. of British Columbia* as it dealt with payment of Section B Benefits and not the liability of a third party tort-



feasor. The Supreme Court in the *Vytlingam* decision and in the *Herbison* decision held that the two part "relaxed causation test" as set out in Amos was not relevant to the facts before them.

The *Herbison* decision also dealt with a defendant seeking to recover damages from an insurer on the basis of use and operation of an automobile. In that case, the plaintiff's insured had driven his vehicle into a field during a hunting expedition and mistook Herbison, the defendant for a deer. The insured left his vehicle, loaded his gun and shot the defendant, striking him in the leg and causing serious damage. Herbison sought indemnity from the insured's auto insurer for the judgment he had obtained against the insured. Herbison argued that the auto insurer should pay the judgment on the basis the shooting involved the use and operation of an automobile.

The Supreme Court agreed that in this circumstance, the insured was using his vehicle for transportation, which was an ordinary use of an automobile, but committed an act independent of the ownership, use or operation of his truck when he interrupted his motoring to start hunting. That act broke the chain of causation and therefore the injury could not be said to have arisen "directly or indirectly from the use or operation" of the insured truck within the meaning of the *Ontario Insurance Act*.

In the Court's view, the use of the truck merely created an opportunity "in time and space for the damage to be inflicted, without any connection, direct or indirect to the legal basis of Wolfe's [the insured] tortious liability." The Supreme Court also noted that *Amos* was a no-fault benefits case and was of no assistance to the plaintiff.

Courts are looking for a continual and unbroken causal connection between the automobile and the injuries suffered.

The Alberta Court of Appeal entered the use and operation debate in the recent decision of *Arruda (Estate)* v. *Allstate Insurance Company* [2007 ABCA 419]. This decision dealt with the payment of Section "B" Benefits to the Plaintiffs and while not directly on point with the payment of third party liability benefits reviewed in the two recent decisions from the Supreme Court of Canada, it is still an important Alberta case.

In *Arruda*, the victim was operating his motor vehicle and became involved in an altercation with two other vehicles. As a result of this altercation, a shot was fired through the rear window of the victim's vehicle. He pulled over and phoned the police who told him to stay where he was and await their arrival. Shortly after this initial call to the police, the assailants returned to the scene armed with butcher knives and a meat cleaver and proceeded to stab the victim, who eventually died from these wounds. At the time of the attack, the victim was outside of his motor vehicle waiting at the scene of the accident as instructed by the police.

As a result of the victim's death, his estate and dependants sought payment of Section B Benefits from the deceased's auto insurer. Of note is the wording of the Section B Benefits clause:

The insurer agrees to pay with respect to each insured person as defined in this Section who sustains bodily injury or death directly and independently of all other causes by an accident arising out of the use or operation of an automobile.

The Chambers Judge considered the Supreme Court of Canada decision in *Amos* v. *Insurance Corp. of British Columbia* which reviewed the phrase "an accident that arises out of the ownership, or operation of a vehicle." The Supreme Court in the *Amos* decision held this language does not require a direct or proximate causal relationship between the injuries and the ownership, use or operation of the vehicle; it requires only that there be some "nexus" between the injury suffered and the operation of the vehicle.

The Chambers Judge in *Arruda* determined that *Amos* did not apply to the Section B Benefits clause in the case before her because of the additional phrase "directly and independently of all other causes" which was not present in the wording of the policy considered in Amos. She held that this phrase narrowed and qualified the phrase "arising out of" and therefore payment of Section B benefits required a direct or proximate causal connection between Arruda's death and the operation of his automobile. She concluded that in this circumstance, that direct causal connection was not present and therefore no Section B benefits were payable. The Alberta Court of Appeal agreed with the Chambers Judge's reasoning.

The Court held the attack was:

…a clear intervening event between Arruda's use of the vehicle and his death. The intervening event, being the attack by the assailants was outside the ordinary use or operation of the vehicle and a consequence the chain of causation was broken.

The Alberta Court of Appeal decision in *Arruda* is yet another example of Courts narrowing the circumstances when an insurer will be found liable for payment to a victim when damages arise that are only peripherally connected to the use and operation of an automobile. In all three of the aforementioned cases, Courts are looking for a continual and unbroken causal connection between the automobile and the injuries suffered.

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