

# How Far Can Coverage Be Stretched?

Recent Supreme Court of Canada Decisions of *Vytlingam v. The Citadel General Insurance Company* and *Herbison v. Lumbermens Mutual Casualty Company*

By Cheryl D'Sa

Presented by Deborah Taylor



Cheryl D'Sa  
Lindsay Kenney LLP

Deborah Taylor  
Lindsay Kenney LLP



## I. Introduction

When a hunter is negligently shot by another hunter, or a boulder is intentionally dropped on a driver from an overpass, the general reaction is that the wrongdoers should compensate the injured victims. When the wrongdoers do not have adequate (or any) third-party liability insurance, the victims must look to other potential sources of compensation. Often, the only potential source of insurance money is automobile insurance. However, on October 19, 2007 in two concurrently released decisions of the Supreme Court of Canada, the Court found that the burden does *not* automatically fall on the automobile insurers. While the deep pocket of an insurer is an easy solution, the Supreme Court of Canada held that the automobile insurer should be spared this burden when the use or operation of the vehicle was only incidental to the injury suffered.

In each of the concurrently released decisions, *Vytlingam v. The Citadel General Insurance Company*<sup>1</sup> and *Herbison v. Lumbermens Mutual Casualty Company*<sup>2</sup> the decisions of the Ontario Court of Appeal<sup>3</sup> were overturned and coverage denied. Prior to these decisions the state of the law with regard to coverage and what constituted the use and operation of a vehicle, differed from region to region. For example, before these cases were decided, the Ontario Court of Appeal, applied a “but for” test. In other words, if the tort could not have happened “but for” the vehicle, then the automobile insurer owed coverage. This is no longer the law.

Before we review the recent cases of *Vytlingam* and *Herbison*, it is useful to review the state of the law respecting the use and operation of a vehicle as it applied to coverage prior to October 19<sup>th</sup>, 2007.

---

<sup>1</sup> 2007 SCC 46 [*Vytlingam*]

<sup>2</sup> 2007 SCC 47 [*Herbison*]

<sup>3</sup> *Vytlingam v. The Citadel General Insurance Company* (2005) 76 O.R. (3d) 1 (C.A.) *Herbison v. Lumbermens Mutual Casualty Company* (2005) 76 O.R. (3d) 81(C.A.)

## II. The State of the Law Prior to the Recent Supreme Court of Canada Decisions

Prior to October 19<sup>th</sup>, 2007, the leading Canadian case respecting coverage that applied to the use and operation of a vehicle was *Amos v. ICBC*<sup>4</sup>. In *Amos*, Amos, a Canadian citizen, was driving his van in East Palo Alto, California when a gang of six surrounded his vehicle. With the doors to his vehicle locked, Amos tried to get away by driving slowly as some of the men pounded on the doors and windows, shattering the glass, when another man stepped in front of the van and pointed a gun at him. Amos ducked, and the man with the gun attempted to enter the vehicle. At least two shots were fired. One bullet was found lodged in the glove compartment of the van and the other struck Amos' spinal cord. Although seriously injured, with no control of his legs and with difficulty breathing, Amos used his arms to press down on his leg to keep his foot on the accelerator. Driving in this fashion he was able to escape his assailants who eventually fled.

As a result of this incident, Amos sustained serious disabling permanent injuries, both physical and mental, and needless to say, was unable to earn a living, leaving him permanently dependant on others.

At the time of the incident, Amos was insured by ICBC under a standard automobile insurance policy and he applied for medical and other benefits under Part VII. ICBC denied liability and Amos commenced an action for a declaration that he was entitled to benefits claimed. The Supreme Court of British Columbia dismissed Amos's action and the British Columbia Court of Appeal dismissed his appeal.

The Supreme Court of Canada considered three points in issue:

1. Did the Court of Appeal err in adopting a "causal connection" test in interpreting s. 79 (1) of the Revised Regulation?
2. In any event, did a causal connection exist between the accident and the ownership, use or operation of the appellant's van within the meaning of s. 79(1)?
3. Did the Court of Appeal err in holding that the appellant's van was merely the situs of a shooting and not causally connected to his injuries?<sup>5</sup>

The Supreme Court of Canada in *Amos* set out a two part test to be applied to interpret s. 79 of the Revised Regulation which provides benefits in respect to death or injury caused by an accident that "arises out of the ownership, use or operation of a vehicle."<sup>6</sup>

The two-part test considers the following two questions:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?

---

<sup>4</sup> [1995] 3 S.C.R. 405 [*Amos*]

<sup>5</sup> *Ibid.* at para. 11

<sup>6</sup> *Ibid.* at para. 17

2. Is there some nexus or causal relationship (it doesn't have to be 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?<sup>7</sup>

Mr. Justice Major for the Court pointed out that "...each case must be decided on its own facts, applying the two-part test outlined above."<sup>8</sup> Further, it was acknowledged that "it was not possible to predict every circumstance where an injury can be said to arise out of the ownership, or operation of a vehicle."<sup>9</sup>

Based on the facts in *Amos*, the Court held that coverage applied given its finding that there was "a nexus or connection between the injuries and the vehicle"<sup>10</sup> because the shooting occurred as the "direct result of the assailants' failed attempt to gain entry to the appellant's van."<sup>11</sup> In reaching this decision the Court explained that had Amos not been shot, but merely lost control of his car while trying to get away from his assailants, the injuries suffered as a result of a subsequent car crash would surely have been covered by ICBC. Further, if Amos had suffered injuries as a result of being intentionally hit by those same assailants using a car instead of a gun, ICBC would not have denied coverage. Therefore, "[g]enerally speaking, where the use or operation of a motor vehicle in some manner contributes to or adds to the injury, the plaintiff is entitled to coverage."<sup>12</sup>

The following cases are useful to illustrate how the *Amos* test was applied in British Columbia before October 19, 2007 when the Supreme Court of Canada revisited the *Amos* test in *Herbison and Vytlingam*:

In *Chan v. ICBC*<sup>13</sup>, the plaintiff was a passenger in her boyfriend's vehicle when she was struck by a brick intentionally thrown from an oncoming vehicle. The oncoming vehicle left the scene and was never identified. The British Columbia Court of Appeal applied the *Amos* test, and held that Chan's injury arose out of the use and operation of the unidentified vehicle. It was not possible to isolate the throwing of the brick from the operation of the identified vehicle. Therefore, the unidentified vehicle's use contributed to, or was connected with the injuries suffered.

In *Passmore v. Sherrell*<sup>14</sup>, the plaintiff was injured while standing outside his truck while the tires were being changed and one of the tires exploded. The British Columbia Supreme Court held that the repair of a flat tire is one of the ordinary and well-known activities to which vehicles are put. Therefore, even though the vehicle was not moving at the time of the injury, the repair of the flat tire constituted use of the vehicle. Consequently, the injuries sustained were covered under automobile insurance.

---

<sup>7</sup> *Supra* note 4 at para. 17

<sup>8</sup> *Ibid.* at para. 28

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at para. 25

<sup>12</sup> *Ibid.* at para. 26

<sup>13</sup> [1996] B.C.J. No. 17 [*Chan*]

<sup>14</sup> [1999] B.C.J. No. 2592 [*Passmore*]

As a final example, in *Insurance Corp. of British Columbia v. Vancouver*<sup>15</sup>, two police officers were in a police vehicle while a tactical take down was taking place. Unfortunately, a bullet was accidentally discharged by the police that resulted in serious injury to the suspect driver in another car. The Court in that case held that the *Amos* test was met because “a tactical maneuver to block a car is an ordinary and well-known activity to which police vehicles are put and the use of the revolver in the execution of such a maneuver [did] not take it outside of the range of ordinary and well-known activities to which police vehicles are put.”<sup>16</sup>

### III. The Recent Supreme Court of Canada Decisions

#### *Vytlingam v. The Citadel General Insurance Company* 2007 SCC 46

In *Vytlingam*, two men loaded their vehicle with boulders, then drove to a highway overpass, and dropped the boulders onto the traffic below. Unfortunately, the Vytlingam family was in one of the vehicles driving on the highway below; their vehicle was struck by one of the boulders causing significant injury to Mr. Vytlingam and psychological harm to the members of his family in the vehicle at the time.

The Vytlingams received statutory no-fault benefits from their Ontario insurer and sought to recover civil damages from Farmer, the owner of the vehicle that transported the boulders, who was inadequately insured. The Ontario Court of Appeal decided that the tort causing Vytlingam’s injuries was sufficiently connected to the use and operation of Farmer’s vehicle given its conclusion that the claim was based on a tort committed by a motorist. In coming to this conclusion the Ontario Court of Appeal applied the “but for” test. The reasoning was that but for Farmer’s vehicle, the tort could not have been committed. In other words, the Court found that if the vehicle in some way transported the tortfeasor to the place where he or she committed the tort, the vehicle was sufficiently connected to any resulting injuries. This reasoning of the Court obviously is stretching to find insurance coverage.

When this case reached the Supreme Court of Canada, the majority of the Court refused to stretch the boundaries for inadequately insured motorist coverage. Mr. Justice Binnie, in his judgment for the Court explained that the Ontario Court of Appeal did not pay close enough attention to whether or not Farmer’s tort was committed as a “motorist” – “whether the claim arose through an unbroken chain of causation, either from the ownership or directly or indirectly from the use or operation of a motor vehicle.”<sup>17</sup> He further explained that “if the vehicle’s involvement is held to be no more than incidental or fortuitous or “but for”, and is ruled severable from the real cause of the loss, then the necessary causal link is not established.”<sup>18</sup> Therefore, “it is not enough to demonstrate that but for Mr. Farmer’s car, the tort could not have been committed in the way it was.”<sup>19</sup>

---

<sup>15</sup> [1997] B.C.J. No. 1580 [*Vancouver*]

<sup>16</sup> *Ibid.* at para. 113

<sup>17</sup> *Supra* note 1 at para. 5

<sup>18</sup> *Ibid.* at para. 29

<sup>19</sup> *Ibid.* at para. 35

The Supreme Court of Canada strongly indicated that there is a limit to how much coverage can properly be stretched. The Court explained that “to suggest that any time a car is used to transport people to the scene of a tort or a crime is sufficient to engage ‘inadequately insured motorist’ coverage stretches the intended coverage until it snaps.”<sup>20</sup> The tort in this case involved dropping boulders from a highway overpass. The tort was not the transportation of the boulders. Therefore, the use of the vehicle was severable from the tort that caused the injury.

***Herbison v. Lumbermens Mutual Casualty Company 2007 SCC 47***

Wolfe was participating in a deer hunting party. While driving to his hunting stand in the early morning before sunrise, he saw a flash of white in his headlights. Thinking it to be a deer, Wolfe exited his truck, loaded his rifle, and fired a shot. Unfortunately, what he thought to be a deer was actually another hunter – Herbison.

At the trial level Wolfe was found liable and Herbison and members of his family were awarded damages of \$832,272.85 plus interest and costs. When the incident took place, Wolfe was the named insured under a standard motor vehicle liability insurance policy issued by Lumbermens Mutual Casualty Company (“Lumbermens”). The Herbisons sued Lumbermens for satisfaction of the judgment of \$832,272.85 plus interest and costs. The issue was whether Herbison’s injuries were covered by automobile insurance.

The Ontario Superior Court of Justice found that coverage did not apply because “[t]he operation of the headlights in no way contributed to that negligent act. In fact, one would expect a hunter to be less negligent when a target becomes illuminated.”<sup>21</sup>

The Ontario Court of Appeal allowed the appeal of the Herbisons and in interpreting both *Amos* and Sec. 239(1) of the *Ontario Insurance Act*<sup>22</sup>, reasoned that “Mr. Wolfe’s truck took on a special purpose as its use was the only way that he could travel to the site to join the deer hunting party.”<sup>23</sup> The Court of Appeal went on to state that “while Mr. Wolfe had not reached the deer-hunting stand when he shot Mr. Herbison, it is significant to the causation analysis that the reason that Mr. Wolfe had set out in his vehicle was to go deer hunting.”<sup>24</sup> The majority of the Court of Appeal thus adopted a “but for” analysis – but for the vehicle, Wolfe would not have been on his way to join the hunting party and thus would not have shot Herbison. Based on this analysis the court found that coverage applied.

The dissent reasoned that when Herbison was shot, Wolfe’s vehicle was not being used for a purpose from which the injuries resulted. When this case reached the Supreme Court of Canada, the majority agreed with the Court of Appeal dissent and with the trial judge and asked if it could:

... be said that Wolfe’s negligent shooting was fairly within the risk created by his use or operation of the insured truck, or did the use of the truck merely create an opportunity

---

<sup>20</sup> *Supra* note 1 at para. 35

<sup>21</sup> [2003] O.J. No. 3024 at para. 24

<sup>22</sup> R.S.O. 1990, c. I.8

<sup>23</sup> (2005) 76 O.R. (3d) 81 at para. 113

<sup>24</sup> *Ibid.* at para. 116

in time and space for the damage to be inflicted, without any causal connection direct or indirect to the legal basis of Wolfe's tortious liability?"<sup>25</sup>

The Supreme Court of Canada posed the following two-part test:

1. Was the tort committed by Wolfe "using his motor vehicle as a motor vehicle and not for some other purpose"?<sup>26</sup>
2. Whether an unbroken chain of causation [existed] linking Herbison's injuries to the use and operation of Wolfe's vehicle which is shown to be more than simply fortuitous or "but for".

In answering these questions, the Court found that Wolfe was clearly using his vehicle for transportation, so the first part of the test was easy to answer. The trouble arose when trying to answer the second question to determine whether there was an unbroken chain of causation.

The Court explained that Wolfe stopped his car to start hunting and reasoned that Herbison does not complain about Wolfe's use and operation of the insured truck. Rather, "he complains about the gunshot that put the bullet in his knee."<sup>27</sup> The Court cautioned that "some causation link must be found and it must constitute a link in an unbroken chain."<sup>28</sup> Therefore, based on this analysis, since the chain of causation connecting the vehicle to the injury was broken, the incident did not fall under the umbrella of the "use and operation of the vehicle" and the Ontario Court of Appeal decision was overturned.

In both of these recent Supreme Court of Canada decisions, the issue was whether the injuries arose directly or indirectly from the use or operation of an automobile. As a result of the decisions in *Herbison* and *Vytlingam*, it is apparent that the "but for" test has been rejected. In its place is the emphasis on a clear causal connection in order to claim liability under these policies. The chain of causation must not be broken, thus ensuring that insurance automobile coverage is not stretched beyond its intended scope.

Lindsay Kenney LLP  
1800 – 401 West Georgia Street  
Vancouver, BC V6B 5A1  
604.687.1323  
www.lklaw.ca

---

<sup>25</sup> *Supra* note 2 at para. 10

<sup>26</sup> *Ibid.* at para. 12

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at para. 14