

Supreme Court of Canada reviews “arising directly or indirectly from the use or operation of an automobile.”

On October 19, 2007, the Supreme Court of Canada rendered two decisions dealing with the language “arising directly or indirectly from the use or operation of an automobile” as it relates to automobile accident insurance coverage. In each of *Vytlingam (Litigation Guardian of) v. Farmer*, [2007] 3 S.C.R. 373, and *Herbison v. Lumbermens Mutual Casualty Co.*, [2007] 3 S.C.R. 393, the Supreme Court of Canada overturned the decision of the lower court, finding that there was an insufficient causal link between the injuries or loss claimed for and the use or operation of an automobile to engage coverage.

In *Vytlingam*, the Vytlingams’ car was struck by a boulder which had been thrown from an overpass as they were driving down an interstate in North Carolina. Michael Vytlingam was catastrophically injured. His sister and mother suffered psychological injuries.

The issue before the Court was whether the Vytlingams’ were entitled to recover from their Ontario Insurer pursuant to the following endorsement in their policy:

. . . 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.

When the matter came before the Ontario Court of Appeal, it applied the following two part test set out by the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405:

- (1) did the accident result from the ordinary and well-known 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?

The Court of Appeal found the first part of the test was met since transporting goods is an ordinary and common use of a motor vehicle and the tortfeasors had used their vehicle to transport the boulder to the overpass. With respect to the second part of the test, the Court found that the use or operation of a vehicle was not fortuitous or incidental but central to the tortfeasors’ entire plan. The vehicle was necessary for their transportation to the scene, essential to transporting the boulders, and their means of escape.

The Supreme Court of Canada disagreed with both the conclusion of the Court of Appeal and its approach. The Court stated that *Amos* was not the template to be used in determining whether there is coverage under an indemnity provision. *Amos* dealt with

whether the insured was entitled to statutory no fault benefits for “death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle.” The Court pointed out that in *Amos* the focus was on the insured’s vehicle and further, that the provision in *Amos* did not require the presence of an at-fault motorist as did the indemnity provision in *Vytlingam*.

The Supreme Court of Canada stated that the appropriate questions to be asked were as follows:

- (1) was the claim in respect of an inadequately insured tortfeasor whose fault occurred in the course of using a motor vehicle as a motor vehicle and not for some other purpose; and
- (2) was there an unbroken chain of causation, which was more than simply fortuitous or “but for,” between the loss or injuries claimed and the use or operation of the motor vehicle?

The Court concluded that while the use of the tortfeasors’ vehicle contributed to their ability to commit the tort, the tort was not committed in the tortfeasors’ capacity as an at-fault motorist. The throwing of the boulder was a tort completely severable from the use or operation of the vehicle.

In *Herbison*, the insured mistook a member of his hunting party for a deer and shot him in the leg. The insured, who was disabled and unable to walk to the hunting site, was traveling to the hunting site in his truck when he thought he saw a deer. He got out of his truck and fired striking a fellow hunter. At the time of the shooting, lighting conditions were poor and the insured’s headlights were the only source of illumination on his target.

The issue in *Herbison* was whether the insured’s motor vehicle insurer was liable to satisfy the judgment obtained against the insured in respect of the shooting. The insured’s policy required the insurer to provide coverage for legal liability arising from the ownership or directly or indirectly from the use or operation of an automobile.

The Ontario Court of Appeal, applying the *Amos* test, found in favour of coverage. The Court found that the use of a motor vehicle to transport a disabled person to a hunting site and the use of head lights to illuminate the darkness are well known uses of trucks. In terms of causation, the Court felt that the role of the truck was crucial to the incident as it transported the insured to the site of the incident and the headlights illuminated the target at which he shot.

When the matter came before the Supreme Court of Canada the court applied the same reasoning as it had in *Vytlingam*. The Court stated that the phrase arising “directly or indirectly” does not remove the requirement of an unbroken chain of causation between the injuries or loss claimed and the use or operation of a motor vehicle. As in *Vytlingam*, the Court held that the shooting was an intervening act, severable from the insured’s use or operation of his motor vehicle.

The Supreme Court of Canada has made it clear in *Vytlingam* and *Herbison* that the fact that the use or operation of a motor vehicle contributed in some way to the loss or injury will not be sufficient to engage coverage under an automobile accident insurance policy. There must be a continuous chain of causation, which is more than “but for” or fortuitous, in order to bring the loss or injuries claimed for within the scope of coverage.