

"USE OR OPERATION OF AN AUTOMOBILE": THE SUPREME COURT SPEAKS

by *Richard F. Horak*

In two long-awaited decisions the Supreme Court of Canada has clarified the interpretation to be given to the phrase "arising directly or indirectly from the use or operation of an automobile". *Herbison* and *Vytlingam*, both of which were released on October 19, 2007, were cases in which a unanimous Supreme Court of Canada overruled split decisions in the Ontario Court of Appeal.

Lumbermen's v. Herbison 2007 SCC 47

Justice Binnie, writing the majority decision, posed the question for the court as follows:

"Can it be said that when a hunter steps away from his pick-up truck under cover of darkness, leaving the engine running, and negligently shoots at a target he can not see one thousand feet away, and hits a companion in the leg thinking him to be a deer, that the injury arose "directly or indirectly from the use or operation" of the insured truck within the meaning of Section 239(1) of the Insurance Act, R.S.O. 1990, Chapter I.8".

The majority decision in the Court of Appeal relied on the

decision in *Amos*¹ and the two part test (purpose and causation). Justice Borins, writing the majority decision, concluded that the 1990 amendment to Section 239(1), which added the words "directly or indirectly", had "effectively removed the requirement of an unbroken chain of causation from the causation test".

The Supreme Court of Canada rejected this analysis. While it indicated that "it is tempting to look at an insurer's deep pockets as the only available source of compensation for a seriously injured and innocent victim", it must be remembered that the insurance in this case was "automobile insurance". Justice Binnie asked the rhetorical question:

"Can it 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 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".

In reversing the majority decision of the Court of Appeal Justice

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FIRM NEWS

1. *Amos v. Insurance Corp. of British Columbia* [1995] 3 S.C.R. 405

Noteworthy

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Binnie indicated that the majority "did not give adequate weight to Wolfe's separate, distinct and intervening act of negligence in firing the rifle at a target one thousand feet away that he could not see".

Justice Binnie also pointed out that *Amos* was a case which was concerned with no fault statutory accident benefits; the focus was therefore on the use of the claimant's car, while in *Herbison* the focus was on the use of the tortfeasor's vehicle. As Wolfe interrupted his motoring to start hunting, the chain of causation was broken.

Justice Binnie distinguished the factual situation in *Herbison* from that in *Lefor*², a previous decision of the Court of Appeal. In *Lefor*, a mother parked her car on the opposite side of the street and got out of the car with both of her children, intending to cross the street to drop them off at their grandmother's house. One of the daughters was struck and injured by an approaching vehicle while crossing the street.

Justice Binnie agreed with the analysis in *Lefor*, to the effect that the mother's negligence in crossing the street did not break the chain of causation because "it is in the ordinary course of things for a child dropped on the wrong side of the street to "dart" to the other side to get to her grandmother's house, with all the foreseeable risks that such a crossing entails". The actions of the mother were "so closely intertwined with her

negligent parking that from the perspective of causation, direct or indirect, the two were not 'severable'".

Citadel v. Vytlingam 2007 SCC 46

The Plaintiff was catastrophically injured when a large boulder was dropped from an overpass on the car in which he was travelling, by two local thrill seekers who were high on alcohol and drugs. At issue was whether the Plaintiff could recover under the "inadequately insured motorist" coverage (OPCF 44R). In spite of the "undisputed and highly sympathetic facts", Justice Binnie, writing for the majority of the court, held that the coverage could not be "stretched so far".

The court concluded that the OPCF 44R "backstops" Section 239(1)(a) of the *Insurance Act*, in cases where the tortfeasor's own insurance was inadequate. The issue was whether the tortfeasor was "at fault as a motorist"; as in *Herbison*, the Supreme Court concluded that the chain of causation had been broken.

Justice Binnie again noted that in *Amos* the issue was entitlement to statutory accident benefits. Moreover, in *Amos* the insurer was liable because the Plaintiff was driving in his van and was engaged in an "ordinary and well-known" activity to which the vehicle could be put, at the time of the shooting. In *Amos* it was the use or operation of the claimant's vehicle, but in *Vytlingam* the focus

was on the tortfeasor's vehicle (as in *Herbison*).

Justice Binnie noted that in *Amos* the court had signalled that someone who uses a vehicle for a non-motoring purpose can not expect to collect motor vehicle insurance. He provided the following example:

"If, for example, a claimant got drunk and used her car as a diving platform from which to spring head first into shallow water and broke her neck, she could not reasonably expect coverage from her motor vehicle insurer, even though, in a sense, she "used" her motor vehicle. The same conclusion is compelled under Section 239(1)(a) because an injury resulting from such an off-beat use could not sensibly be said to arise "directly or indirectly from the use of operation" of the motor vehicle as a motor vehicle".

Justice Binnie expressly rejected the argument that because the Defendant had engaged in a criminal act there should be no coverage. For example, there would be no denial of indemnity if an accident was caused by bank robbers using a getaway car, because the tortfeasor would be at fault as a motorist. Justice Binnie expressly rejected criminality as an issue and noted as follows:

"The insurer is selling peace of mind to its insured and the endorsement will frequently (and

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2. *Lefor v. McClure* (2000) 49 O.R. (3d) 557

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properly) be invoked despite criminality, as in the case of an insured injured by a drunk driver, for example".

As in *Herbison*, "... for 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 is made". In order to succeed the Plaintiff "must implicate the vehicle in respect of which coverage is claimed in a manner that is more than merely incidental or fortuitous".

Comment

Would the result in *Herbison* have been different if the shooting had taken place while the shooter was still in the car? Would it have mattered if the shooter was still driving the vehicle when he fired his rifle? It appears that as the negligence arose from the shooting and not from an action by the tortfeasor as a motorist, coverage would not apply, unless this was considered to be so closely connected with the use of the car as to have the tort considered a "motorist" tort.

While it appears that there may still be cases in which actions are considered so closely intertwined as to be not severable, the decisions in *Herbison* and *Vytlingam* make it clear that in liability cases the focus must be placed on the defendant's liability as a motorist and whether the chain of causation has been broken.

OFFERS TO SETTLE; DON'T FORGET YOUR CUSHION

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In a decision which came as a shock to many in the personal injury bar, the Court of Appeal has determined that the deductible mandated by Section 267.5(7) of the *Insurance Act* is not to be taken into account in determining whether the Defendant is presumptively entitled to costs pursuant to Rule 49 (see *Rider v. Dydyk* (2007) O.N.C.A. 687).

The Defendant had made a Rule 49 Offer to Settle the action by offering to pay \$5,000.00 each to the Plaintiffs Rider and Kent, plus pre-judgment interest and costs, and dismissing the *Family Law Act* claims of their spouses. At trial the jury awarded \$15,000.00 damages to Kent and \$20,000.00 to Rider. After application of the deductible of \$15,000.00 (Bill 59), Judgment was entered for Rider in the amount of \$5,000.00. The amounts awarded under the FLA to the spouses were less than the \$7,500.00 deductible.

The Defendant argued that as the Judgment received by the Plaintiffs was as favourable or less favourable than the terms of the Rule 49 Offer, he should be entitled to costs on a partial indemnity scale from the date of the Offer onward. The trial judge refused to award costs to the Defendant on the basis that the "saving provision in the *Insurance Act* (Section 267.5(9)) would be thwarted if the Defendants were to recover costs ...".

Section 267.5(9) of the *Insurance Act* provides as follows:

"In an action for loss or damage from bodily injury or death arising directly or indirectly from the use of operation of an automobile, the determination of a party's entitlement to costs shall be made without regard to the effect of paragraph 3 of subsection 7 on the amount of damages, if any, awarded for non-pecuniary loss."

In rejecting the Defendant's appeal, the court considered the decision of the Divisional Court in *Wicken v. Harssar* (2004) 73 O.R. (3d) 600. In *Wicken* the Divisional Court had concluded that Section 267.5(9) did not apply to Rule 49 Offers to Settle and that the determination of a Defendant's entitlement to costs under Rule 49 should proceed after taking into account the deductible. The Court of Appeal unanimously determined that the decision in *Wicken* was wrong.

The Court of Appeal agreed with the premise underlying the Divisional Court's decision in *Wicken*, i.e. application of the deductible has the objective of eliminating small cases from the system, but concluded that the Divisional Court failed to recognize that Section 267.5(9) works in tandem with the disincentive created by the deductible by providing an incentive to settle early. According to the Court of Appeal, the purpose of

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Section 267.5(9) was to protect Plaintiffs from the more onerous cost consequences resulting from the statutory deduction.

The Court of Appeal stated as follows:

"When this is kept in mind, interpreting Section 267.5(9) to require that insurance companies "cushion" their offers to Plaintiffs by \$15,000.00 in order to rely on Rule 49 is not, as I see it an "arbitrary benefit" to Plaintiffs. Rather, such an interpretation encourages insurance companies to make

offers of settlement that are based on an assessment of the damages actually suffered by the Plaintiff. Offers of settlement that fairly reflect the Plaintiff's actual damages, without deduction, will encourage settlement."

Comment

The decision in *Rider* was made in the context of Bill 59, which provides for a \$15,000.00 deductible for injured Plaintiffs. Under Bill 198, the deductible for injured Plaintiffs has been raised to \$30,000.00.

Based on the decision in *Rider*, Defendants are left with a diffi-

cult choice. Assuming the case is one involving only general damages for one Plaintiff, if the Plaintiff obtains judgment for \$20,000.00, i.e. \$50,000.00 minus the \$30,000.00 deductible, in order to obtain the cost consequences of Rule 49 the Defendant must offer to settle for \$50,000.00, not \$20,000.00. While this may be seen by many as an unpalatable alternative, the reasoning of the Court of Appeal is that providing this "cushion" will encourage settlement.

It remains to be seen if the *Rider* decision will produce the results suggested by the court.

FIRM NEWS

To all of our friends who have children of that magical age, mark Sunday November 18, 2007 at Noon in your calendar for the Hughes Amys 2007 Santa Claus Parade Party. Watch your mail for our invitation.

Pam Stevens will be returning as co-chair of the Ontario Bar Association seminar "3rd Annual Hot Topics in Motor Vehicle Insurance" on November 12, 2007.

We are pleased to congratulate Jamie Trimble on his election as Vice-President of the Ontario Bar Association.

James Maloney has been appointed by the Attorney General of Ontario to the Public Accountants Council of Ontario.

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