FALL 2007

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Insurance Bulletin

Since 1995 the Amos test has dominated the question: what is the "use or operation of an automobile?" The Supreme Court of Canada has shed new light on this frequently litigated issue.

VYTLINGAM AND HERBISON: A NEW TEST FOR "USE OR OPERATION OF AN AUTOMOBILE"

W. Colin Empke

Since 1995 insurers and policyholders have looked to the *Amos* decision to answer that most important question: did the accident result from the use or operation of an automobile? The *Amos* decision has been widely considered. It has been mentioned in over 170 cases in Canada since 1995. It has provided, for many, the ultimate test of what constitutes use or operation of an automobile. The Supreme Court of Canada has now revisited the *Amos* case and has changed the way that case is to be applied.

On October 19, 2007 the Supreme Court of Canada released two long awaited decisions: *Citadel General Assurance Co. v. Vytlingam* and *Lumbermens Mutual Casualty Company v. Herbison*. Both of these cases involved the thorny issue of motor vehicle insurance coverage for events which are, at first blush, not closely connected to a motor vehicle. In finding that a rock dropped from an overpass and that a hunting accident were not automobile accidents, the Supreme Court has revisited the *Amos* decision and found problems in the way it has been interpreted. The purpose of this brief article is to discuss how the Supreme Court has clarified the *Amos* test and provided guidance on how and when to apply it.

The Amos Test

In 1995 the Supreme Court of Canada found that Mr. Amos was entitled to receive no-fault accident benefits for injuries he sustained when he was shot by thugs as he was trying to flee them in his car. In order to qualify for benefits Mr. Amos needed to prove his injuries had been sustained in an accident arising out of the ownership, use or operation of his vehicle. In order to determine what activities constituted use or operation the Court reviewed all pre-existing case law and formulated a new two-part test:

> (a) Did the accident occur in the course of the ordinary and well-known activities to which automobiles are put? [the "purpose" test]
>
> (b) Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the policyholder's injuries and the ownership, use or operation of his or her vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous? [the "causation" test]

The assault on Mr. Amos was an intentional act. The gunshot itself was not connected to the use or operation of the vehicle. However, the reason Mr. Amos was shot was connected to his own use of his vehicle - the thugs were trying to steal it and he was trying to flee. The Supreme Court found there was a connection between his use

INSURANCE BULLETIN

Colin is a member of Blaneys' Insurance Litigation Group, practising in the areas of insurance coverage litigation and insurance related defence work.

Colin has participated in coverage cases involving liability policies of every description, including commercial general liability, automobile, homeowner and directors' and officers' policies. In addition, Colin defends insurance related and self-insured retention related claims.

Colin may be reached directly at 416.593.2988 or cempke@blaney.com

of the car and the reason for his being shot. First party accident benefits were payable.

Following the *Amos* decision the two-part test received wide acceptance and was, for a time, considered the single method of defining what "use or operation" of an automobile entailed. It was used in accident benefits cases. It was used in uninsured and underinsured insurance coverage cases. It was used in cases involving the automobile exclusion found in general liability policies.

Over time, however, it became apparent the *Amos* test was too broadly formulated and was simply not applicable to all situations. For example, in the *Derksen* decision the Supreme Court rejected its use in interpreting the automobile exclusion. The broadly formulated two-part test does not fully satisfy the requirement that exclusions be narrowly interpreted. We note, however, that the precursors to the two-part test appear to remain applicable in the exclusion context (see *Stevenson v. Reliance Petroleum* and *Law, Union & Rock Insurance v. Moore's Taxi*).

With the release of the *Vytlingam* and *Herbison* decisions, the Supreme Court has clarified the two-part test. The test has been modified to reflect its use in circumstances involving the interpretation of the third party liability coverage found in standard motor vehicle liability policies. The *Amos* test remains applicable to the interpretation of first party accident benefits coverage found in those policies.

The Cases On Appeal

The facts of the two cases before the Supreme Court were quite different. However, the language of the insurance provisions in issue was quite similar. Indeed, the Court noted that the same test should be applied to both the inadequately insured motorist coverage and the insuring agreement of the third party liability provisions found in standard automobile policies.

(a) Vytlingam

Michael Vytlingam was terribly injured while on a holiday when two drug and alcohol addled "thrill seekers" dropped a large rock from an overpass onto the Vytlingam vehicle. If readers have seen any coverage of this case at all (including a very compelling documentary on CBC radio) they will know that Michael's life was shattered by this accident.

Michael's insurer paid him some $1.4 million in no-fault accident benefits. He sued the thrill seekers (now in jail) and obtained judgment of nearly $1 million. But how to collect that judgment? The thrill seekers had no assets and their automobile insurance was only $25,000. That insurance paid out and never disputed the connection between the rock throwing and the use of an automobile.

Seeking recovery, Michael turned to his own insurer's "inadequately insured motorist" coverage, provided by form "OPCF 44R". This is a standard endorsement approved by the Financial Services Commission of Ontario and attached to most policies issued in the province. It is intended to protect policyholders against the risk that those who hurt them because of an automobile accident do not carry sufficient insurance.

Under the endorsement Michael was entitled to collect his judgment from his own insurer, provided he could demonstrate he was legally entitled to recover it 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 Supreme Court of Canada held there was no connection between the rock throwing and the thrill seekers use of their car. Accordingly, Michael's injuries were not sustained directly or indirectly from the use of their car. No coverage exists.

(b) Herbison

The opening words of the Supreme Court's decision in *Herbison* adequately summarize the facts of the case:

> 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 cannot see 1,000 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 s. 239(1) of the *Insurance Act*, R.S.O. 1990, c. I.8?

The hunter in question was Fred Wolfe. The unfortunate companion was Harold Herbison. Herbison sued Wolfe and recovered a judgment of $830,000. As with Michael Vytlingam, the real issue became how to collect that judgment. In this case, Herbison sought to recover the judgment from Mr. Wolfe's automobile insurer.

Wolfe was insured by a standard automobile policy, protecting him from liability he incurred by reason of his ownership or directly or indirectly from his use or operation of his vehicle. The question for the Supreme Court was whether the hunting accident was sufficiently connected to the use of the vehicle such that it covered by the policy. The Supreme Court refused to find any such connection.

The Reasons for Judgement

In both *Vytlingam* and *Herbison* the Supreme Court was concerned by the very broad manner in which the Ontario Court of Appeal had interpreted the *Amos* test and applied it to the facts of the cases. In the Court's view the *Amos* test had been stretched too far, in effect making the automobile policy cover far more than was intended. The lower court had found there was a sufficient connection with the use of a motor vehicle because the rock was transported to the overpass using a car and that Wolfe drove his car to the hunting stand. If the cars had not been used in this fashion the ensuing injuries could not have taken place. The Supreme Court noted the Court of Appeal, in effect, applied a "but for" test when linking the use of the cars to the injuries. The Supreme Court considered this to be too broad an interpretation which could "invite indemnification for everything from stag party assaults to self-immolations". In other words, coverage could be found for things no reasonable person would expect an automobile policy to cover.

The Court noted, however, that the lower courts have generally drawn the line in the correct place and cited several cases supporting this view. In *Vytlingam* and *Herbison* it was simply the case that the Supreme Court disagreed with where the lower courts drew the line based upon the facts of those cases. In making its disagreement known, the Court took the opportunity to reconsider the *Amos* test and to reformulate it. The reformulation simply ensures the test now recognizes the stricter requirements necessary before coverage is found under the liability (or indemnity) provisions of a motor vehicle liability policy. It is not fair to characterize the

INSURANCE BULLETIN

Amos test as being narrowed. Instead, it has been clarified for use in a context it was not originally designed for.

The Supreme Court did not find it necessary to reformulate the purpose test set out in the *Amos* decision. By doing so, the Court expressly recognized that which has been left unsaid for years: the purpose test is of little significance in most cases.

In the no-fault context, motorists' expectations are that they will receive benefits when they are using their vehicles in an ordinary and well-known manner. Similarly, in the indemnity context, policyholders' expectations are that they will be insured against risks arising from the ownership, use or operation of an at-fault car. In both situations it is only the most exceptional cases which will run afoul of the purpose test. In *Vytlingam* the Court described such situations as follows:

> The "ordinary and well-known activities to which automobiles are put" limits coverage to motor vehicles being used as motor vehicles, and would exclude use of a car as a diving platform (as above) or retiring a disabled truck to a barn to store dynamite (which explodes), or negligently using the truck as a permanent prop to shore up a drive shed (which collapses, injuring someone). In none of these cases could it be said that the tortfeasor was at fault as a motorist. In none of these cases could it be said that the motor vehicle was being used as a motor vehicle. That is the sort of aberrant situation that the *Amos* purpose test excludes, and nothing more.

The situations when the purpose test will remove coverage are self-evident. Simply put, if the motor vehicle is not being used as a motor vehicle at the time of the accident, there is no coverage.

The Supreme Court did find it necessary to restate the causation test. The Court recognized the risk that the *Amos* causation test invites too broad an interpretation when applied to indemnity insurance.

The *Amos* test works well in the no-fault context. It finds coverage if the policyholder's vehicle "in some manner contributes to or adds to the injury." In the no-fault context this test is appropriate and reflects the insuring agreement. Coverage depends on the use to which the policyholder is putting their own vehicle. If that use contributes to an injury benefits should be paid.

In contrast, a motor vehicle liability policy provides indemnity only if the use of the vehicle causes the injury. This is the source of tort liability for an automobile accident – negligence in the operation of a vehicle leading to injury. It is not enough that "but for" the use of the vehicle the injury occurred. The use of the vehicle must be causally connected to the injury. The *Amos* test recognizes the need for a connection, but states the connection too broadly for use outside of the no-fault context.

The focus must be on the elements of the tort giving rise to the wrongdoer's liability. If the wrongdoer's conduct giving rise to the injury is severable or distinct from the use of the automobile there is not a sufficient connection to trigger coverage. Thus, throwing a rock onto a car is an independent tort, as is shooting a fellow hunter. Both are acts entirely separate from the use of an automobile such that there is no link or connection between the injury and the vehicle. The Supreme Court noted that there must be demonstrated an "unbroken chain of causation linking the conduct of the motorist *as a motorist* to the injuries in respect of which the claim in made." There is no coverage unless a

INSURANCE BULLETIN

wrongdoer has used their vehicle in some manner that causes the injury. In this way the Supreme Court has modified the causation test to reflect the requirements of indemnity insurance.

The Implications

Press reports have been highly critical of the Supreme Court decisions in *Vytlingam* and *Herbison*. Considerable focus has been placed on the plight of these two injured men. Some have suggested the Court has unreasonably narrowed the scope of automobile insurance. One paper (the Toronto Star) conducted an online poll asking the question: "Was the Supreme Court decision in Vytlingam fair?" Seventy-five percent of respondents said the decision was not fair.

It is, perhaps, more accurate to say the Court has prevented automobile insurance from covering things which were never within the contemplation of either insurers or their policyholders. These decisions do nothing more than give effect to the reasonable insuring intentions of the standard motor vehicle liability policy.

It is likely these decisions will reduce some of the uncertainties regarding the interpretation of automobile liability insurance. The *Amos* test has been preserved for use in the no-fault context and slightly modified for use in the third party liability context. The questions to ask in that context are now:

> (a) Did the accident occur in the course of the ordinary and well-known activities to which automobiles are put? [the "purpose" test]
>
> (b) Is there 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 and is the connection to the vehicle more than simply fortuitous or "but for"? [the "causation" test]

The Supreme Court noted there is a temptation to "look to an insurer's deep pockets as the only available source of compensation for a seriously injured and innocent victim." However, the Court also noted that automobile insurance must be restricted to providing compensation for automobile accidents. Finding coverage any time a car is merely connected with an injury distorts the purpose of automobile liability insurance and risks undermining the coverage or adversely affecting premium calculations. By providing some restrictions on using the broad *Amos* test, the Supreme Court of Canada has provided some measure of guidance. ■

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

RMC Risk Management Counsel of Canada

Blaney McMurtry is a member of the *Risk Management Counsel of Canada*, a Canada-wide association of independent law firms with expertise in meeting the needs of the risk management industry by providing a range of services for the insurance industry, risk retention groups and self-insureds.

To learn more about *Risk Management Counsel of Canada* and how its members can assist you, contact Tim Alexander (416.593.3900) or Larry Reimer (416.593.3997).

Insurance Observer is a publication of the Insurance Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.
Editor: Giovanna Asaro (416.593.3902)
Assistant Editor: Caroline Mostyn (416.593.3960)

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416.593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.