

## **CHISHOLM CAUSATION TEST CITED IN DISSENT: THE “BUT FOR” CAUSATION APPROACH APPLIED TO RELATE HUNTING ACCIDENT TO HUNTER’S TRUCK**

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*Herbison v. Lumbermens Mutual Casualty Company*, released June 7, 2005, began as a tort action stemming from a hunting accident in which Harold Herbison was seriously injured when he was shot in the leg with a rifle by a member of his hunting party, Fred Wolfe, who mistook Mr. Herbison for a deer. The issue before the Ontario Court of Appeal was whether this accident arose “out of the ownership, use or operation of a vehicle”.

Mr. Wolfe, was driving his truck across a field in poor lighting conditions, when he saw movement in the distance that he assumed was a deer. He then exited the truck, took out his rifle and fired a shot which struck the Plaintiff in the thigh. At trial, Mr. Wolfe admitted he would not have “taken the shot” but for the illumination provided by the truck’s headlights.

Mr. Wolfe was a named insured under a standard motor vehicle liability insurance policy issued by Lumbermens Mutual Casualty Company and prior to the trial of the Tort Action, the Wolfes applied for declarations that Lumbermens was obliged under the Policy to defend the Tort Action and to indemnify them for all sums that they might become liable to pay to the Herbison Group. The Coverage Application was dismissed and Lumbermens did not participate in the Tort Action.

After the trial, the Herbison Group sued Lumbermens under s. 258(1) of the *Insurance Act*, seeking to have the proceeds payable under the Policy applied in satisfaction of the sums awarded to them in the Tort Action on the basis that their losses arose “from the ownership or directly or indirectly from the use or operation” of Mr. Wolfe’s pick-up truck within the meaning of the coverage condition in the Policy (the “Recovery Action”). This recovery action was dismissed without costs and the Herbisons appealed.

The dissenting justice, Cronk J.A., at paragraph 73, cited with approval the causation test established in *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.), and concluded “The rifle shot was unrelated to the use or operation of the Wolfe vehicle and, in Laskin J.A.’s words in *Chisholm* at para. 29, ‘can hardly be considered an intervening act in the ‘ordinary course of things’. The rifle shot, which caused Mr. Herbison’s injuries, constituted an intervening act, independent of the use or operation of Mr. Wolfe’s truck that broke the chain of causation. As in *Chisholm*, the use or operation of

the Wolfe truck, at best, was ancillary to the infliction of injuries upon Mr. Herbison.”

The majority decision’s causation analysis focused on establishing whether damages arose from a recognized activity to which a vehicle might be put. It was held that the phrase “directly or indirectly” in s. 239(1)(b) of the *Insurance Act* has effectively removed the requirement of an unbroken chain of causation from the causation test.

The causation test was satisfied in this case, because the evidence established “*some nexus or causal relationship*” between Mr. Herbison’s damages and Mr. Wolfe’s use or operation of his truck that was more than “merely incidental or fortuitous”. It was noted that Mr. Wolfe was driving his truck to the deer-hunting stand to meet his friends to join them for a deer hunt when he stopped the truck to hunt what he believed was a deer. He would not have been in a position to do so but for operating his truck to go deer hunting. The insurer was ordered to indemnify the plaintiffs in the amount of \$832,272.85, the judgement in the tort action.

Although some are referring to this as liberal statutory interpretation, it appears – in the face of a strong dissent - that this particular panel of the Court of Appeal is watering down the causation test to find coverage. This slippery slope is leading back to the ‘but for’ causation which can swiftly relate events that are clearly at opposite ends of the causation continuum. It is unknown at this time whether the decision will be appealed to the Supreme Court of Canada. It is hoped that if appealed, the Supreme Court confirms that, at the end of the day, we are dealing with an “automobile policy”.