

## TRICKS OF THE TRADE 2007: PRACTICAL STRATEGIES FOR WINNING AUTO CASES

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### WHAT IS USE OR OPERATION?

#### *Introduction*

“Invariably, a successful lawsuit consists of a right, a wrong and money to bridge the two. For a plaintiff’s lawyer, a defendant without means is like a pen without ink. Neither is sufficient to sign the cheque at the end of the day. Furthermore, common sense suggests that the greater the wrong, the deeper the pocket required. In a society where the automobile is as ubiquitous as air, the Ontario Court of Appeal has had little difficulty, and even less reservation, about tapping into the auto policy as a means of bridging the gap between a plaintiff’s right and a defendant’s wrong”.<sup>1</sup> However, with two emerging decisions that have recently been heard on appeal by the Supreme Court of Canada, the rules about how we view the auto policy in the Province of Ontario may be changing.

#### *Legislative History: What is an Accident?*

Much of the existing case law concerning what is an accident and what is use or operation relies upon statutory principals and definitions that are set out in the *Insurance Act* as well as in the *Statutory Accident Benefits Schedule*. In order to interpret what qualifies as an accident, an overview of the historical legislative scheme is in order before current provisions can be examined.

To begin, entitlement to statutory motor vehicle accident benefits is established by section 268(1) of the *Insurance Act*,<sup>2</sup> which states:

Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provision, exclusions and limits set out in that *Schedule*.

Prior to the 1996 *Schedule* coming into force, the term “accident” was defined in the two previous *Schedules* as an incident in which the use or operation of a motor vehicle

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<sup>1</sup> J. Griffiths, “Commentary: appeal court uses auto policy in unusual ways” *The Lawyers Weekly* 25:13 (12 August 2005).

<sup>2</sup> *Insurance Act*, R.S.O. 1990 c. I.8.

“directly or indirectly” causes injury or impairment. The term “accident” was defined in the 1990 *Schedule*<sup>3</sup> as follows:

“Accident” means an incident in which the use or operation of an automobile causes, directly or indirectly, physical, psychological or mental injury or causes damage to any prosthesis, denture, prescription eyewear, hearing aid or other medical or dental device. (emphasis added)

Thereafter, 1994 *Schedule*<sup>4</sup> then redefined “Accident” as follows:

“Accident” means an incident in which, directly or indirectly, the use or operation of an automobile causes an impairment or causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device. (emphasis added)

The current *Schedule* governing claims for statutory accident benefits is Ontario Regulation 403/96: *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996*. Most benefits that can be claimed under this *Schedule*, such as weekly income replacement benefits, medical benefits and rehabilitation benefits, require an insurer to pay the benefit to an insured person “who sustains an impairment as a result of an accident.”

Pursuant to the 1996 *Schedule*, the word “indirectly” was completely eliminated from the definition of “accident”. As a result, individuals involved in accidents on or after November 1, 1996 are entitled to accident benefits only if they sustain an impairment that is directly caused by the use or operation of an automobile.

As such, as authorized by the Legislature, insured persons claiming benefits under the 1996 *Schedule* must meet a narrower or more stringent causation requirement than the previous 1990 and 1994 *Schedules* had set out.<sup>5</sup>

The term “Accident” is currently defined in the *Schedule* at section 2(1). The current definition of “Accident” is described as follows:

“Accident” means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device. (emphasis added).

The change to the definition of “accident” was part and parcel of the legislative changes effected under the *Automobile Insurance Rate Stability Act*, 1996, S.O. 1996, c. 21, which were intended to stabilize premium costs. The change redrew the balance in the

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<sup>3</sup> Ontario Regulation 672/90

<sup>4</sup> Ontario Regulation 776/93

<sup>5</sup> *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (Ont. Court of Appeal) at par. 11, 14.

“exchange of rights” between statutory benefits and tort. Access was broadened on the tort side, restoring, subject to limited exceptions, the right to recovery of pecuniary loss, which had been removed under the Bill 164 scheme.<sup>6</sup>

The tort definition pursuant to the *Insurance Act* continues to include coverage for both loss or damage arising from “direct” and “indirect” use or operation of an automobile. Specifically, section 239 of the *Insurance Act* provides that the standard owners policy insures against liability for loss or damage arising from the ownership or directly or indirectly from the use or operation of an automobile and resulting from bodily injury, death or damage. Sections 267.5 protects specified defendants in set circumstances from liability for loss from bodily injury or death arising directly or indirectly from the use or operation of an automobile.

In its analysis of the changes to the *Schedule*, the Ontario Court of Appeal noted that the legislative history of the *Schedule* shows an intention to differentiate between direct and indirect causes. The Court of Appeal was also of the view that the Legislature implemented these changes as a cost saving measure, since the 1996 *Schedule* now limits coverage to incidents in which the use or operation of an automobile directly causes an injury.<sup>7</sup> By removing the word “indirectly” from the definition of accident, the drafters clearly intended to move in the direction of a more exacting causal connection, thus, narrowing the scope and level of accessible benefits.

### ***The Case Law: What is Use and Operation of an Automobile?***

When used in legislation, common law terms and concepts are presumed to retain their common law meaning, subject to any definition supplied by the legislature.<sup>8</sup>

Prior to 1990, the phrase “arising out of the ownership, use or operation of a vehicle” had been judicially considered. The two leading Canadian cases were *Stevenson v. Reliance Petroleum Ltd.*<sup>9</sup> and *Law, Union & Rock Insurance Co. v. Moore’s Taxi Ltd.*<sup>10</sup>

In *Stevenson*<sup>11</sup>, the court established the purpose test. This case involved the negligence of the driver of the insured, a company engaged in the distribution of oil and gas, which led to gasoline overflowing, igniting and destroying the premises. The Court held that the accident arose out of the use or operation of a motor vehicle. The Court further stated that the expression “use or operation” included all accidents resulting from the ordinary and

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<sup>6</sup> *TTC Insurance Company v. Correia*, Director’s Delegate S. Naylor, FSCO Appeal P00-00061, July 16, 2001 at p.7.

<sup>7</sup> *Chisholm*, supra at par. 13

<sup>8</sup> Driedger on the Construction of Statutes (3<sup>rd</sup> ed. 1994), at p.301

<sup>9</sup> [1956] S.C.R. 936.

<sup>10</sup> [1960] S.C.R. 80.

<sup>11</sup> *Stevenson*, supra.

well-known activities to which automobiles are put; all accidents which the common judgment in ordinary language would attribute to the utilization of an automobile as a means of different forms of accommodation or service.

In *Law, Union & Rock Insurance Co.*<sup>12</sup>, the court created the causation test. In this case, the insured taxi company held a contract to transport mentally handicapped children to and from school. The drivers were to take the children directly to their homes. One of the drivers, in breach of that arrangement, stopped on the opposite side of the street. The child, while crossing the street alone, was hit by a truck and was severely injured. The issue was whether the insured's liability arose out of the use or operation of a motor vehicle. The Court held that the insured's liability arose from a breach of duty that occurred after the vehicle was stopped, when the child crossed the street unescorted. This duty was a contractual duty, and had nothing to do with the use or operation of the insured's vehicle. In its reasoning, the Court stated the following:

... the words "claims arising out of ... the ownership, use or operation... of any motor vehicle" as used in this exclusion can only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other.<sup>13</sup>

In 1995, in *Amos v. Insurance Corporation of British Columbia*<sup>14</sup>, the Court revisited both the purpose and causation test and created a two-part test summarizing the case law interpreting the phrase "arising out of the ownership, use or operation of a vehicle."

The Supreme Court of Canada held that both the purpose test and the causation test as established in *Stevenson* and *Law, Union & Rock Insurance Co.* were complementary and that both had to be satisfied before a plaintiff could claim certain benefits.

In *Amos*, the Court held that while the section dealing with use or operation of a vehicle "must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage."<sup>15</sup> Justice Major specifically created a test that should be applied when determining if an accident has in fact arisen out of the ownership, use or operation of a vehicle. The test was set out by Justice Major as follows:

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

<sup>12</sup> *Law, Union & Rock Insurance Co.*, supra.

<sup>13</sup> *Law, Union & Rock Insurance Co.*, at p. 5.

<sup>14</sup> *Amos v. Insurance Corp. of British Columbia* [1995] 3 S.C.R. 405.

<sup>15</sup> *Ibid*, at par. 17.

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?<sup>16</sup>

In 1996, following *Amos*, amendments to the *Schedule* came into effect. The word "indirectly" was eliminated from the definition of accident. Notably the definition of accident was not altered in the Insurance Act, leaving two different definitions; one for accident benefits and another for tort. Subsequent to this change, as reflected in the case law, insured persons were entitled to accident benefits only if their impairment or injuries were directly caused by the use or operation of an automobile.<sup>17</sup> This change to the *Schedule* created a more stringent causation requirement in the definition of accident under the 1996 *Schedule*, meaning that the *Amos* test, or at least the causation part of that test, could no longer be used to interpret the definition. In fact, judges and arbitrators at the Financial Services Commission of Ontario have concluded that the *Amos* test no longer applied or at best had very limited relevance.<sup>18</sup>

In 1998, in *Petrooniak v. Security National Insurance Company*, FSCO elaborated on the concept of direct causation, wherein "direct cause" was defined as "the active, efficient cause that sets in motion a chain of events which brings about a result, without the intervention of any force started and working actively from a new and independent source."<sup>19</sup>

In 2002, in *Chisholm v. Liberty Mutual Group*, the Ontario Court of Appeal held that claimant must meet a redefined causation test that could be set out in the form of two questions:

1. Was the use or operation of the vehicle a cause of the injuries?
2. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"?<sup>20</sup>

Justice John Laskin described the causation test in *Chisholm* in the following way:

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<sup>16</sup> Ibid, at par. 17.

<sup>17</sup> *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (1999), 46 O.R. (3d) 154.

<sup>18</sup> *Chisholm*, supra. at par. 20.

<sup>19</sup> *Petrooniak v. Security National Insurance Company* (1998) FSCO A98-000198, p. 7.

<sup>20</sup> *Chisholm*, supra. at par. 24-29.

“When one thinks of direct causation one thinks of something knocking over the first in a row of blocks, after which the rest falls down without the assistance of any other act.”<sup>21</sup> Justice Laskin held that gunshots that injured the driver in *Chisholm* constituted an intervening act, breaking the causation link.

The court in *Chisholm* held that an intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the automobile – it is “part of the ordinary course of things.”<sup>22</sup> The Court further held that gun shots from an unknown assailant can hardly be considered to be an intervening act in the “ordinary course of things”. The Court felt that the shooting did not arise from the vehicle’s use or operation, and that such an act clearly breaks the chain of causation.<sup>23</sup>

When trying to determine if a direct or proximate causal connection exists between the plaintiff’s injuries and the ownership, use or operation of his vehicle, the Court found it useful to consider the “dominant feature” test enunciated in *Heredi v. Fensom*<sup>24</sup>, noting that in *Chisholm*, “it was the gun shots, and not the use or operation of an automobile, that could be said to be the ‘dominant feature’ of Mr. Chisholm’s injury.”<sup>25</sup>

The Supreme Court of Canada in *Heredi* held that the true intent of Saskatchewan’s *Highway Traffic Act* is that “damages occasioned by a motor vehicle” requires that the presence of a motor vehicle be the dominant feature, or constitute the true nature, of the claim. Whether framed in contract or in tort, where the presence of a motor vehicle is a fact ancillary to the essence of the action ought not be regarded as within the scope of that phrase.<sup>26</sup>

Additionally, the Court also emphasized that all courts must depart from the sharp distinction that has, in the opinion of some courts, been created between cases framed in contract and cases framed in tort. The legislation aims to have a reasonably wide effect and does not distinguish between these divergent forms of action.

Further, The Supreme Court also added that in order to determine whether an action is for “damages occasioned by a motor vehicle”...a substantive approach ought to be taken. The nature of the facts and the nature of the action ought to be considered together in order to make a determination as to the fundamental nature of the action...If the role of the motor vehicle in the causal chain is too insignificant, or if the causal chain is itself not the most illuminative way to characterize the claim, the action ought not be regarded as subject to

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<sup>21</sup> *Chisholm*, supra. at par. 27.

<sup>22</sup> *Chisholm*, supra. at par. 29.

<sup>23</sup> *Chisholm*, supra. at par. 34, 37.

<sup>24</sup> [2002] 2 S.C.R. 741.

<sup>25</sup> *Chisholm*, supra. at par. 34.

<sup>26</sup> *Heredi*, supra. at par. 35.

the limitation. If, on the other hand, the dominant feature of the damages is their relation to a motor vehicle accident, the limitation period ought to be applied.<sup>27</sup>

In 2004, the Ontario Court of Appeal in *Greenhalgh v. ING Halifax* held that the language used in the definition of “accident” under the 1996 *Schedule* requires consideration of two specific questions:

1. Did the incident arise out of the use or operation of an automobile?
2. Did such use or operation of an automobile directly cause the impairment?<sup>28</sup>

In *Greenhalgh*, the claimant’s vehicle became stuck in snow. Her cell phone battery had no charger, so she and her passenger left the vehicle and wandered around for an extended period of time during which she fell into frigid water and lost her boots. As a result of this ordeal, she sustained severe frostbite requiring amputation of her fingers and her legs below the knees. The Court found that, while getting stuck is an ordinary occurrence when using a vehicle, there had been too many intervening events breaking the chain of causation for the claimant’s injuries to have been directly caused by the use or operation of the motor vehicle.<sup>29</sup>

However, in contrast, in the FSCO decision *Belair Insurance Company v. Seale*<sup>30</sup>, Mrs. Seale’s vehicle got stuck on ice. She left her vehicle to go to the back and push it. A good samaritan offered to assist by driving the car while Mrs. Seale pushed. Before she could push, the vehicle slid down the hill. While returning to her vehicle by walking down the hill so that she could continue her trip home, Mrs. Seale slipped and fell on the ice and broke her arm. Throughout this incident, Mrs. Seale maintained her intention to use her vehicle to continue her trip home. She did not abandon her vehicle. When Mrs. Seale got out of the vehicle, her trip home by vehicle was interrupted. The ice on the road was the operative force which caused Mrs. Seale to both lose control of her vehicle and to fall. The use of the vehicle and the fall occurred in the same vicinity. Mrs. Seale fell within a minute of leaving the vehicle. In the Arbitrator’s view, as upheld on appeal to the Director’s Delegate, the injury was reasonably foreseeable in these circumstances and was not caused by an intervening act. The appeals officer found that the slip and fall in these circumstances was a normal and reasonably foreseeable risk of motoring.<sup>31</sup>

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<sup>27</sup> *Heredi*, supra. at par. 34.

<sup>28</sup> [2004], O.J. No. 3485 (Ont. Court of Appeal), at par. 10.

<sup>29</sup> *Greenhalgh*, supra. at par. 45, 46.

<sup>30</sup> *Belair Insurance Company v. Cassandra Seale*, Director’s Delegate N. Makepeace, FSCO Appeal P02-00005, January 28, 2002.

<sup>31</sup> *Ibid*, at p. 4.

Furthermore, in 2004, in *Kumar v. Coachman*<sup>32</sup>, it was decided that when a taxi cab driver, while operating a taxi cab, is assaulted by a passenger with a rock as part of an attempted robbery, which assault occurs while the car's still in gear and the driver is still seatbelted, following which his taxicab rolls into a ditch, the injuries are not directly caused by the use or operation of a motor vehicle. Leave to appeal this decision was refused by both the Ontario Court of Appeal and the Superior Court of Canada after being upheld by the Divisional Court on judicial review from FSCO.

In addition, in 2004, in *CGU Insurance v. Irving*<sup>33</sup>, where a cyclist is injured by a beer bottle thrown from the back of a moving pick-up truck, it was held that the injuries were not directly caused by the use or operation of the truck and that the incident could best be described as an assault with the dominant feature being the throwing of the beer bottle. It was held that it is insufficient that the use or operation of the truck was involved in some way in the incident that caused the impairment. The role played by the motor vehicle must be more than just the location, opportunity or motive of the incident.<sup>34</sup>

However, in the more recent 2005 decision in *Herbison v. Lumbermens Mutual Casualty Co.*<sup>35</sup>, the Plaintiff, Mr. Herbison, was shot in the leg by his hunting partner, Mr. Wolfe, who had mistaken him for a white tailed deer. At trial, Justice Denis Power concluded that Mr. Wolfe had been negligent and awarded Herbison \$832,272.85 plus interest and costs. Thereafter, Mr. Wolfe commenced a coverage application against Lumbermens arguing that the plaintiff's injuries arose indirectly from his use of his truck in the moments before the shooting where the truck's headlights were being used to illuminate the hunting area. In dismissing Mr. Wolfe's application, Justice Power noted that while "the legislation and the policy must be broadly interpreted" the "elastic band stretches only so far. Here, the band has clearly snapped." He concluded that when the shooting took place, the vehicle was not in use by Mr. Wolfe.

Undeterred by this earlier decision, Mr. Herbison then started a recovery claim against Lumbermens under the same general provisions of the *Insurance Act*. In his decision, Justice Bernard Manton concluded that the accident resulted from the negligent handling of a hunting rifle – something totally unrelated to the use of the truck for transportation. In the result, he dismissed the claim and Mr. Herbison appealed.<sup>36</sup>

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<sup>32</sup> *Kumar v. Coachman*, FSCO Office of the Director of Arbitrations, Director's Delegate N. Makepeace, Appeal P01-00026, August 9, 2002. Judicial review to the Ontario Divisional Court dismissal on June 9, 2004. Leave to appeal was refused by the Ontario Court of Appeal, [2004] O.J. No. 4421. Leave to appeal was refused by the Superior Court of Canada, [2005] S.C.C.A. No. 195.

<sup>33</sup> *CGU Insurance v. Irving*, FSCO Office of the Director of Arbitrations, Director's Delegate N. Makepeace, Appeal P03-00022, November 29, 2004.

<sup>34</sup> *Ibid*, at p. 1.

<sup>35</sup> [2005] O.J. No. 2262 (Ont. C.A.).

<sup>36</sup> *Ibid*, at par. 5, 8.



On appeal, Justice Borins, on behalf of the Court of Appeal, set aside the trial decision and ordered Lumbermens to indemnify Mr. Herbison for the amount of his judgment. According to Justice Borins, if it can be shown that the damages arose “indirectly, or can be more or less remotely connected to or grow out of the vehicle’s use or operation” coverage will be triggered. In justifying the result, Justice Borins concluded that “the causation analysis takes place in the context of a legislative intention to provide broad motor vehicle liability coverage for damages related to the use or operation of a vehicle coverage for damages related to the use or operation of a vehicle.”<sup>37</sup>

Accordingly to Justice Borins, if a vehicle can in any manner be linked to the accident, using the broader definition of accident found in the Insurance Act in tort, coverage will be triggered. It should be noted that the Supreme Court of Canada has granted leave to appeal the Court of Appeal decision and the Supreme Court of Canada heard this matter on December 11, 2006. The decision has yet to be released.

Furthermore, the conclusions in *Herbison* were reinforced in a separate decision of the Court of Appeal, released on the same day. In *Vytlingam (Litigation guardian of) v. Farmer*<sup>38</sup>, the plaintiff was seriously brain injured after his vehicle was struck by boulders thrown off of an overpass in North Carolina by the defendants. Neither of the defendants were in a vehicle at the time of the event but both had travelled in one of their cars to drive themselves and the boulders to the scene. The evidence established that the Defendant’s vehicle was necessarily used to transport the heavy boulder to the scene. Mr. Vytlingam commenced an action against the defendant who owned the vehicle the defendants travelled in, whose liability limits were equal to the \$25,000 minimum required by the State of North Carolina, together with his own insurance company, Citadel General Assurance, pursuant to the OPCF 44 endorsement. Citadel brought a motion for summary judgment on the grounds that the defendant was not a motorist at the time of the accident and that Mr. Vytlingam’s injuries did not result from the use or operation of an automobile. The motion was dismissed and Citadel appealed.

In the appeal, Justice Jean MacFarland concluded that the defendant was a motorist within the meaning of the endorsement and further, that there was a sufficient connection between the use or operation of the defendant’s vehicle and Mr. Vytlingam’s injuries that recourse could be made pursuant to the automobile policy.<sup>39</sup> The Supreme Court of Canada has also granted leave to appeal the Court of Appeal decision and the Supreme Court of Canada heard this matter on December 11, 2006. This decision as well has yet to be released.

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<sup>37</sup> Ibid, at par. 35, 100, 115.

<sup>38</sup> [2005] O.J. No. 2266.

<sup>39</sup> Ibid, at par. 40, 41.

## CONCLUSION

Clearly, when examining the changes made to the definition of “accident” and the interpretation of “use or operation of a motor vehicle” in the *Schedule*, together with recent FSCO decisions, it is evident that arbitrators have strictly applied the definition in a way that excludes recovery for damages arising from the indirect use or operation of an automobile. However, this is not the case when dealing with non-accident benefits decisions. According to the tort definition of accident, pursuant to the *Insurance Act*, recovery for damages arising from the indirect use or operation of an automobile is still compensable. The judicial system continues to allow for broader coverage under tort recovery.

The Ontario Court of Appeal has provided some guidance by addressing the requirements of “use or operation of an automobile” and “direction causation”, but in light of recent decisions such as *Herbison* and *Vytlingam*, the future of judicial case law remains unknown. The outcome of the Supreme Court of Canada decision with respect to this issue will likely solidify the meaning of accident and provide guidance with respect to how use or operation of a vehicle will be interpreted in the future.

It is undeniable that our case law is still evolving and decisions are routinely appealed as we modify definitions and mould a system that works for both the institutions and the public in tandem. The definitions of what is an accident and what is use or operation of a vehicle will likely never be boiled down to an unalterable science. It is the constant search for specificity in meaning that will bring us as close to accuracy as can be possibly achieved. Of course, once that accuracy is archived it can be expected that the legislature will alter the definition yet again so as to bring about more litigation on the issue.