SUPREME COURT OF CANADA

CITATION: **Citadel General Assurance Co. *v.* Vytlingam,** 2007 SCC 46

DATE: 20071019
DOCKET: 31083

BETWEEN:

Citadel General Assurance Company
Appellant
v.
Michael Vytlingam by his Litigation Guardian, Chandra Vytlingam, Chandra Vytlingam and Suzana Vytlingam
Respondents
- and -
Insurance Bureau of Canada
Intervener

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 40): Binnie J. (McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

---

citadel general assurance *v.* vytlingam

Citadel General Assurance Company *Appellant*

v.

Michael Vytlingam by his Litigation Guardian, Chandra Vytlingam, Chandra Vytlingam and Suzana Vytlingam *Respondents*

and

Insurance Bureau of Canada *Intervener*

Indexed as: Citadel General Assurance Co. *v.* Vytlingam

Neutral citation: 2007 SCC 46.

File No.: 31083.

2006: December 11; 2007: October 19.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Insurance — Automobile insurance — Inadequately insured motorist coverage — Wrongdoer using motor vehicle to transport boulders to highway overpass, throwing boulders onto car driven by insured and driving off — Insured suffering catastrophic injuries — Wrongdoer inadequately insured — Insured receiving no-fault benefits from his insurer and seeking to recover his civil damages from insurer under inadequately insured motorist coverage — Whether coverage should be denied because wrongdoer was engaged in criminal activity — Whether insured's injuries "arising directly or indirectly from the use or operation of an automobile" — Whether tort that cause insured's injuries intervening event severable from use and operation of wrongdoer's motor vehicle — Insurance Act, R.S.O. 1990, c. I.8, s. 239.

The Vs were motoring along an interstate highway when their vehicle was struck by a large boulder dropped from an overpass by F and R, catastrophically injuring MV and causing CV and SV serious psychological harm. F and R were prosecuted, convicted, and imprisoned. The Vs received statutory no-fault benefits from their Ontario insurer and, since F was inadequately insured, they sought to recover the civil damages F had caused from V's insurer pursuant to the inadequately insured motorist coverage found in s. 3 of the Ontario Policy Change Form 44R. Under this endorsement, "the insurer shall indemnify an eligible claimant for the amount that he . . . is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to . . . an insured person arising directly or indirectly from the use or operation of an automobile". As F's vehicle had been used to transport the rocks to the scene of the crime and thereafter to escape, both the Ontario Superior Court of Justice and the Court of Appeal, citing *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, found the insurer liable and allowed the Vs claims.

Held: The appeal should be allowed.

The claim did not arise from the ownership or directly or indirectly from the use or operation of a motor vehicle. Although the use of F's vehicle (e.g. transporting rocks) fell within the scope of the ordinary activities to which automobiles are put, the word "indirectly" is not sufficient to overcome the requirement for an unbroken chain of causation linking the conduct of the tortfeasor as a motorist to the injuries in respect of which the claim is made. In this case, the relevant tort consisted of dropping the rocks from a highway overpass, not transporting rocks across the countryside. F was not at fault as a motorist. The tort was an independent act which broke the chain of causation. It was an intervening event severable from the use and operation of F's vehicle. [5] [7] [25] [33] [36-38]

Insurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured and insurer. No-fault insurance and indemnity insurance rest on different statutory provisions, but both fall to be interpreted in the context of a motor vehicle policy. Thus, for example, someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance. On the other hand, coverage cannot be denied simply because a motor vehicle is being used in the course of criminal activity such as a getaway car in a bank robbery, or is being driven by a drunk driver. [4] [16] [23]

Amos established that in the context of no-fault benefits, the mutual expectation of the parties is that no-fault benefits will be available when an accident occurs during the "ordinary and well known" use of their vehicles, provided that some

nexus or causal relationship between the use of the vehicle and the injuries can be established. However, this case does not involve no-fault statutory accident benefits, and the Court of Appeal erred in transferring without modification the "relaxed" causation test in *Amos* to the different context of indemnification insurance, where it must be shown that the tortfeasor is liable as a motorist. No amount of carrying rocks all over the country would give rise to civil liability. Liability came from dropping those rocks from the overpass. The fact that the word "indirectly" appears in s. 3 of the Policy Change Form 44R is not sufficient to overcome the fact that the tort was an intervening event wholly "severable" from the use and operation of the F's vehicle. [11-13] [24] [37-38]

While no-fault insurance and indemnity insurance rest on different statutory provisions, both fall to be interpreted in the context of a motor vehicle policy. Someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance. However, coverage cannot be denied simply because the tortfeasor is engaging in criminal activity. [16] [23]

Cases Cited

Distinguished: *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405; **disapproved:** *Herbison v. Lumbermens Mutual Casualty Co.* (2005), 76 O.R. (3d) 81; *Chan v. Insurance Corp. of British Columbia*, [1996] 4 W.W.R. 734; **referred to:** *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252; *Paulus v. Robinson* (1991), 60 B.C.L.R. (2d) 116, leave to appeal refused, [1992] 3 S.C.R. vii; *Thacker v. Lavell* (1992), 40 M.V.R. (2d) 306; *Jove v. Paialunga Estate* (1997), 42 B.C.L.R. (3d) 309; *Continental Stress Relieving Services Ltd. v. Canada West Insurance Co. of Canada* (1998), 221 A.R. 160; *Holdbrook v. Emeneau* (2000), 204 N.S.R. (2d) 96, 2000 NSCA 48; *Tench v. Erskine* (2006), 244 N.S.R. (2d) 55, 2006 NSSC 115; *Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1999), 44 O.R. (3d) 545; *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (1999), 46 O.R. (3d) 154; *Collier v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 201; *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 O.R. (3d) 338; *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776; *Jenkins v. Zurich Insurance Canada* (1997), 193 N.B.R. (2d) 135; *Axa Insurance v. Dominion of Canada General Insurance Co.* (2004), 73 O.R. (3d) 391; *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80; *Legault v. Compagnie d'assurance générale de commerce* (1967), 65 D.L.R. (2d) 230; *Wu v. Malamas* (1985), 67 B.C.L.R. 105; *Lefor (Litigation guardian of) v. McClure* (2000), 49 O.R. (3d) 557; *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936.

Statutes and Regulations Cited

Insurance Act, R.S.O. 1990, c. I.8, s. 239(1).

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Juriansz and MacFarland JJ.A.) (2005), 76 O.R. (3d) 1, 255 D.L.R. (4th) 114, 199 O.A.C. 136, 23 C.C.L.I. (4th) 272, 22 M.V.R. (5th) 163, [2005] I.L.R. I-4415, [2005] O.J. No. 2266 (QL), affirming a decision of Backhouse J. (2004), 23 C.C.L.I. (4th) 267, [2004] O.J. No. 6004 (QL). Appeal allowed.

Geoffrey D. E. Adair, Q.C., for the appellant.

Stanley C. Tessis and *Melanie C. Malach*, for the respondents.

Alan L. W. D'Silva, *Danielle K. Royal* and *Ellen Snow*, for the intervener.

The judgment of the Court was delivered by

1 BINNIE J. – The present appeal tests the limits of the "inadequately insured motorist" coverage under a standard Ontario automobile insurance policy.

2 The respondents, who are Ontario residents, were motoring northwards along Interstate 95 near Fayetteville, North Carolina when their vehicle was struck by a large boulder dropped from an overpass by two local thrill seekers, Todd Farmer and Anthony Raynor, who were high on alcohol and drugs. The respondent Michael Vytlingam received catastrophic injuries as a result of the crime. His mother Chandra and his sister Suzana Vytlingam suffered serious psychological harm. Farmer and Raynor were prosecuted, convicted and received substantial prison sentences.

3 The Vytlingams received "no-fault" benefits exceeding one million dollars from their Ontario insurer. The question now before the court is whether in addition to no-fault statutory benefits, the involvement of the Farmer vehicle (transporting Farmer and Raynor and the boulders to the scene of the crime) is sufficient *also* to require the Ontario insurer to pay under the inadequately insured motorist coverage, i.e. to stand in the shoes of Farmer and pay the amount Farmer ought to pay by way of civil damages. The damages suffered by Michael Vytlingam alone were assessed at $960,765.70 plus post-judgment interest from July 27, 2004. Farmer's policy limit was US$25,000.

4 There is no question that Farmer was inadequately insured. The question is whether the tort that caused the Vytlingams' injuries was sufficiently connected to the use and operation of Farmer's car for it to be concluded that the claim is based on a tort committed by a "motorist". The courts in Ontario, citing *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, found that the Vytlingams were entitled to the compensation claimed ((2004), 23 C.C.L.I. (4th) 267 (Ont. S.C.J.), aff'd (2005), 76 O.R. (3d) 1 (C.A.), but I do not think the "inadequately insured motorist" coverage can be stretched so far, despite the undisputed and highly sympathetic facts. Insurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured *and* insurer*: Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, at p. 269. I would allow the appeal.

Analysis

5 The relevant endorsement on the Vytlingams' policy (s. 3 of the Ontario Policy Change Form 44R — Family Protection Coverage ("OPCF 44R")) provides:

> Insuring Agreement
>
> . . . 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. [Emphasis added.]

Coverage under OPCF 44R requires there to be liability on the part of a tortfeasor *as a* "*motorist*" who is inadequately insured. The term " inadequately insured motorist" is defined in the policy, in part, as

> the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance or bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, obtained by the owner or driver is less than the limit of [the claimant's] family protection coverage. . . . [Emphasis added.]

As will be seen, the Court of Appeal paid close attention to the "inadequately insured" aspect but not enough, in my opinion, to whether or not Farmer's tort was committed as a "motorist", i.e. whether the claim arose through an unbroken chain of causation from the ownership or directly or indirectly from the use or operation of a motor vehicle.

6 Counsel for the appellant contends, with some justice, that "it makes no sense to have an insurance endorsement pursuant to which recovery depends on someone else's limits . . . [u]nless that insurance is designed to address occurrences that would trigger the liability insurance of the wrongdoer" (transcript, at p. 3). In Ontario the liability of the

tortfeasor would be triggered where the occurrence falls within s. 239 of the *Insurance Act*, R.S.O. 1990, c. I.8. which provides as follows:

> **239.**—(1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,
>
> (a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and
>
> (b) resulting from bodily injury to or the death of any person and damage to property.

7 The OPCF 44R, on this view, backstops s. 239(1)(a) in cases where the contribution of the tortfeasor's own insurer (if any) is inadequate. I think this view is correct. The OPCF 44R tracks the language found in s. 239(1)(a). Thus, Farmer may be a motorist (i.e. the owner or driver of the car) and he may be "at fault" for the respondents' injuries — but the question arises as to whether the claim can be said to arise "from the ownership or directly or indirectly from the use or operation of [an] automobile". In short, was Farmer *at fault as a motorist*? For the reasons that follow, I do not think that he was.

8 The Ontario Court of Appeal, Juriansz J.A. dissenting, held the appellant insurer liable based on its interpretation of *Amos*. But it was not a condition of the no-fault coverage in *Amos* that the claimant be "legally entitled to recover compensatory damages from an inadequately insured motorist" or anyone else. The "motorist" issue has its own line of jurisprudence in various contexts including *Paulus v. Robinson* (1991), 60

B.C.L.R. (2d) 116 (C.A.), leave to appeal ref'd, [1992] 3 S.C.R. vii; *Thacker v. Lavell* (1992), 40 M.V.R. (2d) 306 (Alta. C.A.); *Jove v. Paialunga Estate* (1997), 42 B.C.L.R. (3d) 309 (C.A.); *Continental Stress Relieving Services Ltd. v. Canada West Insurance Co. of Canada* (1998), 221 A.R. 160, 1998 ABQB 387; *Holdbrook v. Emeneau* (2000), 204 N.S.R. (2d) 96, 2000 NSCA 48; *Tench v. Erskine* (2006), 244 N.S.R. (2d) 55, 2006 NSSC 115.

9 Some of what is said in *Amos* is helpful to relate the claimants' *injuries* to the "use or operation of a motor vehicle", but *Amos* is not a template to resolve indemnity coverage, i.e., the "motorist" issue, because the type of insurance and the coverage requirements in *Amos* did not require the presence of an at-fault motorist.

A. *The Decision in Amos*

10 In *Amos*, the insurer contested no-fault liability to its own insured for statutory benefits payable "in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle".

11 The insured had been attacked by a gang of strangers while he was motoring along an urban street in California. He was shot and seriously injured as he fled in his van away from the assailants, who were on foot. Major J. said, "It is important that the shooting was not random but a shooting that arose out of the [claimant's] ownership use and operation of his vehicle" (para. 25). The claim was denied by the insurer but was allowed in this Court. Major J., for a unanimous bench, observed that while the statutory language "must not be stretched beyond its plain and ordinary meaning", nevertheless "it ought not to be given a technical construction that defeats the object and insuring intent

of the legislation providing coverage". At para. 17, he formulated a two-part "relaxed causation" test to be applied to the British Columbia regulation setting out the insurer's statutory obligation to provide no-fault benefits to its own insured, as follows:

> 1. Did the accident result from the ordinary and well-known activities to which automobiles are put? [The "purpose" test.]
>
> 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 "causation" test.] [Emphasis added; emphasis in original deleted.]

(There was some argument on this appeal that the *Amos* purpose test imports a causation element ("results from") which is duplicative of the *Amos* causation test. However, the supposed difficulty is avoided by substituting in the *Amos* purpose test the phrase "Did the accident occur *in the course of* the ordinary and well-known, etc.")

12 In this appeal, of course, we are not concerned with no-fault statutory accident benefits payable to an insured. In *Amos*, the focus was necessarily on the use of the claimant's car; the focus here is on the use of the tortfeasor's vehicle. The questions are, firstly, whether the Vytlingams' claim is 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 (as a diving platform, for example, as hereafter discussed), and secondly, whether the chain of causation linking the claimed loss or

injuries to the use and operation of the motor vehicle, which is shown to be more than simply fortuitous or "but for", is unbroken.

13 The insurer was liable in *Amos* because entry into the insured vehicle was the objective of the attackers and the claimant driving in his van was engaged in "ordinarily and well-known" activity to which his insured vehicle could be put. Motorists generally believe that, when an accident occurs while they are making "ordinary and well-known" use of their vehicles, no-fault benefits will be available. This is the mutual expectation of both the insured and the insurer.

14 In *Amos*, as stated, it was the "use or operation" *of his own vehicle* that put the claimant in harm's way. As Major J. explained:

> Was the attack in this case merely a random shooting, or did it arise out of the ownership, use or operation of the appellant's vehicle? While the appellant's van may have been singled out by his assailants on a random basis, the shooting which caused the appellant's injuries was not random. The appellant's vehicle was not merely the *situs* of the shooting. The shooting appears to have been the direct result of the assailants' failed attempt to gain entry to the appellant's van. It is not important whether the shooting was accidental or deliberate while entry to the vehicle was being attempted. [para. 25]

In the present case, there is no doubt that the Vytlingams were entitled to no-fault benefits since they were using their car for an "ordinary and well-known" motoring activity in

driving north on Interstate 95, and that the injuries they suffered were related to such "use and operation". Accordingly, their insurers have paid no-fault statutory benefits to Michael Vytlingam, and his mother and sister, in the total amount of $1,408,358.22 (appellant's factum, at para. 16). Although the Ontario statute is not worded precisely the same as the British Columbia statute, *Amos* clearly established the Vytlingams' entitlement to statutory benefits.

15 The *Amos* language has been broadly construed in relation to injuries suffered by an insured, see e.g., *Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1999), 44 O.R. (3d) 545 (C.A.), and *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (1999), 46 O.R. (3d) 154 (S.C.J.), and nothing said here should be construed to limit its application in a case of no-fault benefits or in similar contexts where similar language is in issue.

B. *The Use of the Motor Vehicle*

16 While no-fault insurance and indemnity insurance rest on different statutory provisions, both fall to be interpreted in the context of a motor vehicle policy. When Major J. said in *Amos* that it was a condition of no-fault coverage that the claim relate to "the ordinary and well-known activities to which automobiles are put", he was simply signalling that someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance. 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 s.

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 or operation" of the motor vehicle *as* a motor vehicle.

17 The appellant insurer seeks to restrict coverage in arguing, for example, that in this case, indemnification should be denied because Farmer used "the vehicle for the purpose of getting weapons to the scene of a crime", and "it is that kind of situation that should not fall . . . within the meaning of ordinary and well known activities" (transcript, at p. 18).

18 I am unable to agree. Firstly, even if transporting rocks across the countryside had been the effective cause of the Vytlingams' injuries, which it wasn't, transportation is what motor vehicles are for. The fact that transportation in this case was for a criminal purpose no more excludes coverage than the fact that Farmer may have been driving his vehicle on the night in question while impaired. Innocent drivers (or pedestrians) should not be denied indemnity if struck by (to give a further example) a getaway car "transporting" bank robbers from the crime scene. In all these cases, the tortfeasor, regardless of his or her subjective reasons for climbing into the car, is at fault as a motorist.

19 Secondly, and in any event, the appellant insurer's argument overstates the scope of the *Amos* purpose test. 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. Here, as in *Amos*, it is the causation test that did the work, not the purpose test.

20 In *Holdbrook*, an individual attempting to commit suicide in a truck parked in a warehouse caused an explosion. The fire insurer sought recovery from the truck auto insurer alleging that the damages occurred as a result of the ownership, use or operation of the truck. The claim was dismissed. Pugsley J.A., for the Court of Appeal, held, correctly, that the truck was not being operated or being used as a motor vehicle.

21 Similarly in *Continental Stress Relieving Services*, damage was caused by a vehicle repairman whose careless use of a cutting torch caused gasoline fumes to ignite damaging the building and disrupting the businesses carried on there. The insurers of the businesses sought to recover against the motor vehicle insurers but it was held that the careless repairman could not be considered to be an at-fault motorist.

22 However, to take another bizarre example for illustrative purposes. If instead of throwing rocks from the overpass Farmer had tried to jump his car at high speed over the interstate highway, Evel Knievel style, and crashed down on the Vytlingam vehicle, the insurer might want to argue that Farmer was not making an "ordinary and well-known" use of his vehicle. However, there is no doubt that Farmer would have been driving the vehicle and driving meets the *Amos* purpose test. Further, in the language of the OPCF 44R, the Vytlingam's claim in such a case would have arisen "directly or

indirectly from the use or operation" of the tortfeasor's vehicle being used as a motor vehicle. The OPCF 44R is a big tent and not much will be excluded as aberrant to the use of a motor vehicle as a motor vehicle.

23 Thirdly, to be quite explicit, I would reject the position of the appellant and the intervener Insurance Bureau of Canada that the OPCF 44R coverage can be denied if the tortfeasor is engaging (as here) in criminal activity. This is not so. The insurer is selling peace of mind to its insured and the endorsement will frequently (and properly) be invoked despite criminality, as in the case of an insured injured by a drunk driver, for example.

C. *The Chain of Causation*

24 In my view, the court below erred in transferring without modification the discussion of causation in *Amos* into the different context of determining whether the liability established here on the part of Farmer and Raynor arose directly or indirectly out of the use of the Farmer vehicle. In *Amos,* for example, Major J. says in the context of no-fault benefits that

> [n]egligence or fault in the use or operation of a motor vehicle does not need to be the cause of the injury. The liability for the injury may arise from a tortious act other than the negligent use of a motor vehicle. This is an important distinction.
>
> . . .

> Generally speaking, where the use or operation of a motor vehicle in some manner contributes to or adds to the injury, the plaintiff is entitled to coverage. [Emphasis added; paras. 23 and 26.]

25 As stated, the OPCF 44R requires the tortfeasor whose conduct is the subject matter of the indemnity claim be at fault as a *motorist*. The majority judgment in the Court of Appeal, with the greatest of respect, did not focus on this issue. The error appears as well in *Herbison v. Lumbermens Mutual Casualty Co.* (2005), 76 O.R. (3d) 81 (C.A.), a case argued before us at the same time as the present appeal and whose reasons are delivered concurrently. Juriansz J.A. observed in his dissent in the instant case:

> We live in a car culture. People use cars to get to the places where they cause or suffer damage. "But for" the use of cars, they would not be at those places and would not cause or suffer the damage. [para. 73]

I agree. His colleagues on the Ontario Court of Appeal in effect applied a "but for" test on the coverage issue, but that is not the correct test. 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.

26 The Court of Appeal's approach invites indemnification claims for everything from stag party assaults (*Collier v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 201 (C.A.)) to self-immolations (*Holdbrook*). In general, of course, the jurisprudence has drawn a reasonable line on the chain of causation issue. For example in *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 O.R. (3d) 338 (C.A.), a driver whose car was stranded in the country during winter left the vehicle and tried to walk

back to the main road. She became lost, fell into a river and suffered exposure and extreme frostbite. The court held, rightly, that the chain of causation had been broken. In *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.), an insured was injured when gunshots were fired into his car by an unknown assailant. Laskin J.A. held the shooting to be severable. There was no causal relationship between the claimant's injuries and the operation of his car.

27 In *Tench*, the injured party had been assaulted in a road-rage incident. The insured assailant got out of his father's vehicle in which he was a passenger, reached into the vehicle of the claimant and assaulted him. The assailant was at fault, but not as a motorist. An assault was also held severable from the use of a school bus in *Jenkins v. Zurich Insurance Canada* (1997), 193 N.B.R. (2d) 135 (C.A.).

28 On the other hand, in *Axa Insurance v. Dominion of Canada General Insurance Co.* (2004), 73 O.R. (3d) 391 (C.A.), the claimant was injured when struck in the eye by a bungee cord used to secure a friend's boat to a trailer. The motor vehicle insurer was required to indemnify "the friend" because the injury to the claimant "occurred, indirectly at least (*per* s. 239(1)(*b*) of the [Insurance] Act) from the ownership use and operation" of the motor vehicle and attached boat trailer (para. 18).

29 The claimant must implicate the vehicle in respect of which coverage is claimed in a manner that is more than merely incidental or fortuitous: *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80. In that case, a taxi company had contracted to deliver developmentally impaired school children door to door. Its driver had negligently parked on the opposite side of the street, leaving a child to cross to its home unassisted, in the course of which the child was severely injured. The parents

recovered against the taxi company and the taxi company sued its insurer for indemnification under a comprehensive policy that excluded coverage for loss arising out of the use of a motor vehicle. In these circumstances, Ritchie J. concluded that the driver's failure to escort the child across the street was *severable* from the "use or operation" of the insured vehicle (thus requiring the defendant insurer to pay up) stating:

> . . . the motor vehicle was stationary at the time of the accident and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver whose failure to escort the boy across the street was the factor giving rise to the [insured]'s liability. [Emphasis added; p. 85.]

Interestingly, in subsequent cases under *motor vehicle* policies, the outcome has been different. In *Legault v. Compagnie d'assurance générale de commerce* (1967), 65 D.L.R. (2d) 230 (Que. Q.B.), an adult dropped off her children on the wrong side of the street, but it was held that the motorist chain of causation was not broken. A similar result was reached by the British Columbia Court of Appeal in *Wu v. Malamas* (1985), 67 B.C.L.R. 105, and the Ontario Court of Appeal in *Lefor (Litigation guardian of) v. McClure* (2000), 49 O.R. (3d) 557. These cases are very fact specific. However, if the vehicle's involvement is held to be no more than incidental or fortuitous or "but for", and is ruled severable from the real cause of the loss, then the necessary causal link is not established.

30 While the use of Farmer's car "in some manner" contributed to Farmer's ability to commit the tort that caused the Vytlingams' injuries, such contribution does not

mean the tort was committed in his capacity as an at-fault "motorist" within the meaning of the OPCF 44R endorsement. In the words of Rand J. in *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936, "the question is whether we have . . . a severable activity" (p. 940). In the present case rock throwing was an activity entirely severable from the use or operation of the Farmer vehicle.

31 A similar issue may arise in unidentified vehicle indemnification insurance. In *Chan v. Insurance Corp. of British Columbia*, [1996] 4 W.W.R. 734 (B.C.C.A.), the claimant was injured while riding as a passenger in her boyfriend's car when she was struck by a brick thrown from an oncoming vehicle that left the scene and was never identified. The B.C. court asked itself whether the brick throwing could be "isolated" from the act of driving the assailant's car along a highway and accepted the trial judge's view that it was not possible to do so (para. 30). I accept that in *Chan*, as here, there was an understandable desire to give the innocent victim access to a pool of insurance money. Nevertheless, if the analysis had focussed on the elements of the tort that gave rise to the tortfeasor's liability (as it should have), the fact the brick was thrown from a car rather than a horse does not qualify it as a motoring activity. The rock throwing was an intervening act. Neither in *Chan* nor in the present appeal was the tortfeasor at fault as a motorist.

D. *Application of the Test to the Facts of this Case*

32 The courts below properly identified the role of the Farmer vehicle as the focus of their enquiry. If the Vytlingams had been proceeding along the highway by foot and had been struck by an inadequately insured motorist they would equally have satisfied

this branch of the OPCF 44R endorsement which, it will be recalled, refers to injuries arising out of the use or operation of *an* automobile. This is consistent with s. 1.6(*a*)(iii) of the endorsement which includes in its definition of insured persons someone who is "not an occupant of an automobile who is struck by an automobile".

33 As stated earlier, I do not accept the insurer's contention that the use of Farmer's vehicle for the purpose of transporting rocks to the scene of the crime fell outside the scope of the ordinary and well-known activities to which automobiles are put. This case turns rather on the question of causation.

34 The Ontario Court of Appeal held that Farmer was an "inadequately insured motorist". This is true in a general sense, but of what relevance was the use or operation of his car to the rock throwing that caused the injuries? Was Farmer's tort committed as a motorist or as a rock thrower, and if the latter, was the rock-throwing so closely connected with the use of his car to qualify the tort as a "motorist" tort for the purposes of the OPCF 44R endorsement? I do not think so.

35 Although the Ontario Court of Appeal formulated the issues differently than above, the disagreement between the majority and dissent turned essentially on whether the use of Farmer's car to transport the throwers and their rocks to the crime scene, and thereafter to escape, was severable from the act giving rise to the liability (rock throwing) and the injuries thereby inflicted. MacFarland J.A. for the majority concluded:

> As long as there is sufficient connection between the use or operation of the underinsured vehicle and the throwing of the boulder, one may conclude that

> the use or operation of the vehicle contributed to Michael Vytlingam's injuries. In my view, that necessary connection is present in this case. [Emphasis added; para. 40.]

As stated earlier, coverage under the OPCF 44R is dependent on the Vytlingams being able to demonstrate that their claim arose from the ownership of, or directly or indirectly from the use or operation of the Farmer vehicle. It is not enough to demonstrate that "but for" Farmer's car the tort could not have been committed in the way that it was. To suggest that any time a car is used to transport people to the scene of a tort or a crime is sufficient to engage "inadequately insured motorist" coverage stretches the intended coverage until it snaps. The trial judge found that "but for" Farmer's car the tortfeasors could not have transported the rocks weighing 27 and 30 pounds to the scene of the crime, but the insurer's liability turned on the nature of the tort not on the size of the rocks.

36 The claimant argues that the car was "integral" to this whole operation which was planned to include its use, but the test is concerned with the elements of the tort itself, which here consisted of dropping the rocks from a highway overpass, not transporting rocks across the countryside. As it was put by appellant's counsel, "No amount of carrying rocks all over the country for whatever purpose gives rise to one iota of civil liability. Liability comes from dropping those rocks" (transcript, at p. 9).

37 The claimant also puts reliance on the use of the car to escape the crime scene, but by that time the tort giving rise to the liability was complete. The car-related activities are *severable* from the tort. The fact that the word "indirectly" appears in the

OPCF 44R is not sufficient to overcome the fact that the tort was an intervening event wholly "severable" from the use and operation of the Farmer vehicle.

38 Juriansz J.A., dissenting, concluded that the rock throwing was an independent act which broke the chain of causation (para. 80). I agree.

Disposition

39 The Vytlingams failed to establish that Farmer's liability arose directly or indirectly out of the use or operation of Farmer's vehicle within the meaning of the OPCF 44R. The appeal must therefore be allowed.

40 In the circumstances, all parties will bear their own costs in all courts.

Appeal allowed.

Solicitors for the appellant: Adair Morse, Toronto.

Solicitors for the respondents: Laxton Glass, Toronto.

Solicitors for the intervener: Stikeman Elliott, Toronto.