SUPREME COURT OF CANADA

CITATION: **Lumbermens Mutual Casualty Co. *v.* Herbison**, 2007 SCC 47

DATE: 20071019
DOCKET: 31079

BETWEEN:

Lumbermens Mutual Casualty Company
Appellant
v.
Harold George Herbison, Mary Ann Herbison, and Jordan Daniel Herbison, Joseph Harold Herbison and Lydia Rachel Herbison, by their Litigation Guardian Harold George Herbison
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 15): Binnie J. (McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

lumbermens mutual casualty *v.* herbison

Lumbermens Mutual Casualty Company *Appellant*

v.

Harold George Herbison, Mary Ann Herbison, and Jordan Daniel Herbison, Joseph Harold Herbison and Lydia Rachel Herbison, by their Litigation Guardian

Harold George Herbison *Respondents*

and

Insurance Bureau of Canada *Intervener*

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Neutral citation: 2007 SCC 47.

File No.: 31079.

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 — Coverage of owner's policy — Hunter driving to his designated site before sunrise when he stopped and negligently shot at white flash thinking it to be a deer tail but it was another member of his hunting party — Victim seeking to recover his damages under tortfeasor's automobile insurance policy — Whether victim's injuries arising "directly or indirectly from the use or operation" of an automobile — Insurance Act, R.S.O. 1990, c. I.8, s. 239(1).

W, a member of a yearly deer hunting party, was driving to his designated hunting stand before sunrise when he thought he saw a deer. He got out of his truck, removed his rifle, loaded it, and shot at a flash of white, hitting H, another member of the hunting party. W was found liable in negligence to H and H's family. H and his family sought recovery from W's insurer under a standard motor vehicle liability insurance policy which, as required by s. 239(1) of the Ontario *Insurance Act*, provides coverage for loss or damage "arising from the ownership or directly or indirectly from the use or operation" of an automobile owned by the insured. The trial judge dismissed the claim against the insurer, but a majority of the Court of Appeal set aside the decision and found the insurer liable.

Held: The appeal should be allowed.

The insurance in this case is automobile insurance, and s. 239(1) of the *Insurance Act* requires that the victim demonstrate that the liability imposed by law upon the insured is for loss or damage arising from the ownership or directly or indirectly from the use or operation of the automobile. The questions are, firstly, whether the claim is in respect of a tort committed while using a motor vehicle as a motor vehicle and not for some other purpose, and secondly, whether there is an unbroken chain of causation

linking the injuries to the use and operation of the vehicle. While the addition of "directly or indirectly" to s. 239(1) relaxed the causation requirement, it did not eliminate the requirement of an unbroken chain of causation. An intervening act may not necessarily break the chain of causation if it arises "in the ordinary course of things" but, even under the relaxed rule, merely fortuitous or "but for" causation is not sufficient. [10] [12-14]

In this case, W was using his vehicle for transportation, which is its ordinary use. However, in an act independent of the ownership, use or operation of his truck, W interrupted his motoring to start hunting thereby breaking the chain of causation. The injury cannot be said to have arisen "directly or indirectly from the use or operation" of the insured truck within the meaning of s. 239(1). W's truck merely created an opportunity in time and space for the damage to be inflicted, without any causal connection, direct or indirect, to the legal basis of W's tortious liability. The "but for" approach taken by the majority of the Court of Appeal did not give adequate weight to W's separate, distinct and intervening act of negligence. [1][10][12]

Cases Cited

Applied: *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46; **distinguished:** *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405; *Lefor (Litigation guardian of) v. McClure* (2000), 49 O.R. (3d) 557; **referred to:** *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I. (2d) 284; *Kangas v. Aetna Casualty & Surety Co.*, 235 N.W.2d 42 (1975); *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398, 2001 SCC 72; *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776; *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936.

Statutes and Regulations Cited

Insurance Act, R.S.O. 1990, c. I.8, ss. 239(1), 258(1).

APPEAL from a judgment of the Ontario Court of Appeal (Borins, Feldman and Cronk JJ.A.) (2005), 76 O.R. (3d) 81, 255 D.L.R. (4th) 75, 198 O.A.C. 257, 26 C.C.L.I. (4th) 161, 23 M.V.R. (5th) 1, [2005] O.J. No. 2262 (QL), reversing a decision of Manton J. (2003), 2 C.C.L.I. (4th) 44, [2003] O.J. No. 3024 (QL). Appeal allowed.

Mark O. Charron and *Jaye E. Hooper*, for the appellant.

Barry D. Laushway and *Scott D. Laushway*, for the respondents.

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

The judgment of the Court was delivered by

1 BINNIE J. — 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? A majority of the Ontario Court of Appeal gave an affirmative answer to this question: (2005), 76 O.R. (3d) 81. It reasoned that the addition in 1990 of the phrase "indirectly or indirectly" to s. 239(1)(b) of the *Insurance Act* "effectively removed the requirement of an unbroken chain of causation" (para. 102). It was sufficient, in its view, if the use or operation of a motor vehicle "in *some manner contributes to or adds to* the injury" (para. 105 (emphasis added by Borins J.A.)). The dissent, on the contrary, concluded that not every "circumstance or activity associated with the use or operation of a motor vehicle will . . . engage s. 239(1) of the Act and the corresponding coverage condition of a motor vehicle liability insurance policy" (para. 38), and that the negligent shooting "was an act independent of the ownership, use or operation of" the hunter's truck (para. 62). I agree respectfully with the dissent. In my view, the appeal should be allowed.

I. Facts

2 As a member of a yearly deer-hunting party, Fred Wolfe (who is not a party to this appeal) was driving to his designated hunting stand when he thought he saw a deer. It was before sunrise. He stopped and got out of his truck. He removed his rifle, loaded it and, seeing a flash of white in the headlights (which he concluded was the tail of a deer about to take flight), he shot. Unfortunately, he hit another member of the hunting party, the respondent Harold George Herbison.

3 At a previous trial, Wolfe was found liable in negligence to Herbison and members of the Herbison family: [2002] O.T.C. 127. Damages were assessed at $832,272.85 plus interest and costs.

4 Wolfe is the named insured under a standard motor vehicle liability insurance policy issued by the appellant Lumbermens Mutual Casualty Company. The Herbisons sued Lumbermens, seeking to have the insurer satisfy their judgement against Wolfe. As required by s. 239(1) of the *Insurance Act*, Wolfe's automobile policy provides coverage for loss or damage "arising from the ownership or directly or indirectly from the use or operation" of an automobile owned by the insured. Section 258(1) of the *Insurance Act* provides, in part, that any person who has a claim against an insured for which indemnity is provided by a motor vehicle liability policy may have the insurance money paid over in satisfaction of the judgment. At trial, the Herbisons argued that Harold's injuries arose "directly or indirectly" from the use or operation of Wolfe's truck because:

> (a) Wolfe was using a 4 wheel drive truck which is commonly used by game hunters to access difficult terrains and drive in the bush.
>
> (b) [Wolfe was in] poor physical condition, having a heart condition and difficulty walking, [he] was dependent on his truck to get to his hunting stand . . .
>
> (c) The muffler on the Wolfe truck was in poor condition and noisy, and had it not been, it is possible that Wolfe could have heard Herbison and his nephew talk.
>
> (d) Although Wolfe says he was not intending to use the headlights on his truck to illuminate the target, he does not believe that he would have taken that shot had it not been for the headlights of the truck illuminating the general area to some extent. [(2003), 2 C.C.L.I. (4th) 44, at para. 11]

5 Lumbermens argued that Wolfe's shot was not related in any relevant way to the use or operation of his truck.

II. Relevant Statutory Provisions

6 *Insurance Act*, R.S.O. 1990, c. I.8

> **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.
>
> . . .
>
> **258.**—(1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contact and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

III. Judicial History

A. *Ontario Superior Court of Justice (Manton J.)* (2003), 2 C.C.L.I. (4th) 44

7 In a brief judgment, the trial judge concluded that "[t]he negligent shooting by Wolfe constituted an intervening act that was merely incidental to the use and operation of the vehicle" (para. 23). Moreover, "[t]he fact that the noisy muffler may have drowned out the victim's chatter amounts to mere speculation and is, in any event, an incidental use to the accident at the core of the litigation" (para. 23). Finally, "[e]ven if it was accepted that Wolfe would not have fired his gun but for the illumination of the headlights..., the illumination still amounts to an ancillary act in Wolfe's negligent misfiring. Wolfe's negligence was in firing a shot toward a target that he could not see. The operation of the headlights in no way contributed to that negligent act. In fact, one would expect a hunter to be less negligent when a target becomes illuminated" (para. 24). The claim against the insurer was dismissed.

B. *Ontario Court of Appeal* (2005), 76 O.R. (3d) 81

8 Borins J.A., for the majority, allowed the appeal. He referred to *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, which, at para. 17, in the context of no-fault motor vehicle benefits, set out the following two-part test:

> 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.]

Borins J.A. applied the test to indemnity insurance and held that the evidence here satisfied both the purpose and the causation branches. In his view, the 1990 amendment to s. 239(1), which added the words "directly or indirectly", had "effectively removed the requirement of an unbroken chain of causation from the causation test" (para. 102). Borins J.A. observed that "Mr. Wolfe's truck took on a special purpose as its use was the only way that he could travel to the site to join the deer hunting party" (para. 113), and that,

> [w]hile Mr. Wolfe had not reached the deer-hunting stand when he shot Mr. Herbison, it is significant to the causation analysis that the reason that Mr. Wolfe had set out in his vehicle was to go deer hunting. He was engaged in deer hunting when, tragically, he shot Mr. Herbison, having mistaken him for a deer. While Mr. Herbison's damages did not arise directly from Mr. Wolfe's use or operation of his pick-up truck, there was a sufficient nexus between its use or operation and the damages sustained by Mr. Herbison to find that his damages arose indirectly from the use or operation of the truck. In my view, this is sufficient to satisfy the causation test. [para. 116]

9 Feldman J.A., concurring, considered this case not to be distinguishable from *Lefor (Litigation Guardian of) v. McClure* (2000), 49 O.R. (3d) 557 (C.A.), adding that

> the injury at some point may be sufficiently remote from the insured vehicle, perhaps in time, in physical proximity, or in some other way, that it could not

> be considered to have arisen directly or indirectly from the ownership, use or operation of the vehicle. However, I agree with Borins J.A. that based on the existing case law, the circumstances of this case fall within coverage under the statutory language. [para. 123]

Cronk J.A., dissenting, stated that "when Mr. Herbison was shot, the Wolfe vehicle was not being used for a purpose from which the injuries resulted" (para. 54). Moreover,

> Mr. Wolfe's negligent shooting of Mr. Herbison was an act independent of the ownership, use or operation of the Wolfe truck and the ownership, use or operation of the truck was merely incidental to the injuries sustained by Mr. Herbison. In my opinion, there was no nexus or causal connection, direct or indirect, between these injuries and the ownership, use or operation of the pick-up truck. [para. 62]

She would have dismissed the appeal.

IV. Analysis

10 In a tragic case like the present, it is tempting to look to an insurer's deep pockets as the only available source of compensation for a seriously injured and innocent victim. However, the insurance in this case is *automobile* insurance, and s. 239 requires the victim to demonstrate that the "liability imposed by law upon the insured [Wolfe]" is for "loss or damage . . . arising from the ownership or directly or indirectly from the use or operation of [the insured Wolfe's] automobile". 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? Clearly, I think, the latter is the case. As Estey J. observed in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract" (pp. 901-2).

11 In my view, Cronk J.A. was correct to uphold the finding of the trial judge that the shooting was an act independent of the ownership, use or operation of Wolfe's truck. The approach taken by the majority did not give adequate weight to Wolfe's separate, distinct and intervening act of negligence in firing the rifle at a target 1,000 feet away that he could not see, and which turned out to be the unfortunate Mr. Herbison. As the Ontario Court of Appeal remarked in *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I. (2d) 284, "As liberally as one may choose to interpret legislation which provides benefits to persons who are injured, it must be remembered that this is automobile legislation" (para. 9). *Amos* itself rejected a simple "but for" test. In para. 21, Major J. quoted with approval from *Kangas v. Aetna Casualty & Surety Co.*, 235 N.W.2d 42 (1975), where the Michigan Court of Appeals stated, at p. 50:

> . . . there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and <u>which causal connection is more than incidental, fortuitous or but for</u>. [Emphasis added.]

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 Herbison claim is in respect of a tort committed by Wolfe in using his motor vehicle as a motor vehicle and not for some other purpose and, secondly, whether there is an unbroken chain of causation linking the Herbison injuries to the use and operation of the Wolfe vehicle which is shown to be more than simply fortuitous or "but for". The first question is easily disposed of. Wolfe was using his vehicle for transportation, which is its usual and ordinary use. It is the second question (causation) that is the claimant's difficulty. Wolfe interrupted his motoring to start hunting. Herbison doesn't complain about Wolfe's use and operation of the insured truck. He complains about the gunshot that put the bullet in his knee.

13 In reaching the opposite conclusion, i.e. that the addition of the words "directly or indirectly" eliminated the requirement "of an unbroken chain of causation" (para. 102), Borins J.A. relied on *Lefor*. In that case, the driver of a car, a mother hurrying to a concert, intended to drop her two young children at their grandmother's house for the evening. On arrival, she parked her car on the opposite side of the street, left the engine of her car running, and got out of the car with both of her children. Her daughter, while crossing the street, was struck and injured by an approaching vehicle. The insurer was held liable to indemnify the mother from the daughter's claim because, as I read the decision of Sharpe J.A., the mother's negligence in crossing the street did *not* break the chain of causation. He writes:

> Ms. Lefor's decision to park her car on the opposite side of the road from her mother's house and leave it running while she and her children darted across

> the street placed Netasha in a situation of danger and triggered the sequence of events that resulted in Netasha's injuries. The alleged negligence of Karen Lefor after she left her vehicle does not preclude coverage. . . . [para. 8]

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. *Lefor*, in my view, is a very different case from the present case. In *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398, 2001 SCC 72, the Court accepted that an intervening act may not necessarily break the chain of causation if the intervention can be considered "a not abnormal incident of the risk" created by use of the vehicle or is likely to arise in "the ordinary course of things" (para. 33). The same point is made by Laskin J.A. in *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.), at para. 29. This reasoning applies to *Lefor*. The mother's post-vehicle conduct was so closely intertwined with her negligent parking that from the perspective of causation, direct *or indirect*, the two were not "severable"; see *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936, at p. 940.

14 All the judges in the Ontario Court of Appeal considered that in the interpretation of s. 239, they were bound to apply the "no-fault" test set out in *Amos*. However, for the reasons set out in *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46, released concurrently, I believe their interpretation of *Amos* goes too far. *Amos* was a no-fault benefit case. Although the language of the "injuries arising" term in *Amos* is similar to the language of s. 239(1), that phrase does not exhaust the requirements of indemnity insurance. It is simply not enough to find that the use or operation of the tortfeasor's motor vehicle "in *some manner contributes to or adds to* the injury" (*Amos*, at para. 26, cited by Borins J.A., at para. 105). While I agree with the Ontario Court of

Appeal that the addition of the "directly or indirectly" language to s. 239 relaxed the causation requirement, nevertheless, *some* causation link must be found and it must constitute a link in an unbroken chain. I agree with the dissenting judgment of Cronk J.A. that here the source of Wolfe's liability to the Herbisons was a tort quite independent of the use and operation of his truck.

V. Disposition

15 I would therefore allow the appeal but, in the circumstances, with each side bearing its own costs here and in the courts below.

Appeal allowed.

Solicitors for the appellant: Williams McEnery, Ottawa.

Solicitors for the respondents: Laushway Law Office, Prescott.

Solicitors for the intervener: Stikeman Elliott, Toronto.