Clearing up the confusion on 'use of vehicle' coverage

The question of whether a particular loss arises from the "ownership, use or operation of a motor vehicle" has been vexing one in, especially where a vehicle is being used in an unusual fashion or its involvement in the loss is arguably peripheral.

The courts must determine whether the loss "arose from the ownership, use or operation" of the vehicle in two contexts: (1) claims against one's own auto insurer for no-fault benefits; and (2) claims against a CGL policy, where that policy excludes coverage for auto-related losses.

In Amos v. Insurance Corp. of British Columbia, [2005] 3 SCR 405, the Supreme Court enunciated the now-famous two-part test:
1. Did the accident result from a joint and well-known activity to which automobiles are put (the purpose test)?
2. Is there some nexus or causal relationship between the appellant's injury and the ownership, use or operation of the 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 application of this easily-stated test led to a large body of conflicting decisions. Critics posit that they can only be rationalized by recognizing a judicial tendency to reach result-oriented decisions so that the "poor little" insured succeeds in the claim against the "big bad" insurer.

In 2007, the Supreme Court released two companion cases that have significantly clarified and corrected the law in this area.

In the first decision, Citadel General Assurance Co. v. Vytlacil, [2007] S.C.J. No. 46, the Vytlacils were Ontario residents driving down a freeway in North Carolina when their vehicle was struck by an overpass by two trucks. They had used their truck to pick up the boulders, transport them to the overpass and escape afterwards. The Vytlacils sought indemnity benefits from their auto insurer. The Supreme Court dismissed the appeal against the insurer.

In the second decision, Lumbermen Mutual Casualty Co. v. Herbsom, [2007] S.C.J. No. 47, the plaintiff Herbsom and the defendant Wolfe went hunting. Wolfe, being disabled, had to drive his truck. In the dark, he saw something that he assumed was a deer. He stopped his truck and stepped out with his rifle, leaving the headlights on. He saw a flash of white, which he thought was a deer. He fired into the darkness, although he could not see what he was shooting at, injuring Herbsom.

Herbsom ultimately brought an action to recover from Wolfe's auto insurer pursuant to a 239(1) of the Ontario Insurance Act, arguing that his loss arose "from the ownership or directly or indirectly from the use or operation" of Wolfe's vehicle. The Supreme Court rejected this argument.

The Supreme Court emphasized a distinction between claims against one's own insurer for no-fault benefits, like Amos, and claims for indemnity, like Vytlacil and Lumbermen.

The two-part Amos test continued to apply to no-fault claims. However, the same test cannot be applied to indemnity claims in the same way. In no-fault claims, the inquiry relates to the "ownership, use or operation" of the insured's vehicle. For indemnity claims, the focus is on the use or operation of the tortfeasor's vehicle. The mere fact that the loss would not have occurred "but for" the involvement of the vehicle is insufficient to establish the necessary causal link to the loss.

In the court held that the purpose test had been satisfied. Transportation of cargo (even weapons) qualifies as a traditional vehicle use. The fact that the truck was used to get to the scene and then escape did not mandate the opposite conclusion. However, an unbroken chain of causation linking the tortfeasors' conduct as motorists to the Vytlacils' loss was lacking. Dropping the rock from an overpass onto the highway below was an independent, separable activity from the use of the truck. The driving did not give rise to civil liability.

In Lumbermen, the Supreme Court similarly found that the purpose test had been established with Wolfe's transporting himself to the scene. However, the causation test was not. The loss was caused by Wolfe's shooting at a target he could not see, not the use of his truck. The use of his truck had merely created an opportunity in time and space for the damage to be inflicted.


But controversy remains with respect to drive-by-torts. In Russo, the insured was injured when a motorcyclist shot him in a restaurant as they drove by in their vehicle. The shooting was characterized as a separate and independent act to the operation of the vehicle and the tortfeasors were not acting as "motorists."

In Harder Estate, the insured's murder of his son in his running vehicle was seen as an independent act from the use of the vehicle. However, in Hannah v. John Doe, [2008] B.C.J. 1580 (B.C.S.C.), the insured was drugged when a van drove by her and a passenger grabbed her purse, and the robbery was not considered an independent, separable act.

The exact policy or statutory wording involved in any coverage issue is critical, notwithstanding Amos, Vytlacil or Lumbermen.

In Haakel v. Allstate Insurance Co., [2007] A.J. No. 144 (Alta. C.A.), these decisions were held to be inapplicable to claims for Alberta's no-fault Section B benefits. Section B benefits are payable with respect to losses arising "directly and independently of the other causes by an accident arising out of the use or operation of an automobile."

The phrase "directly and independently of all other causes" narrows the scope of coverage, requiring that the "use of the vehicle be the direct and proximate cause of the injury and death" and that the vehicle's use be a dominant feature of the loss.

Where a loss is caused by non-vehicular and vehicular negligence, the concurrent non-auto allegations may not be excluded by an auto exclusion in the defendant's CGL policy. Derksen v. 339938 Ontario Ltd., [2001] 3 SCR 398. Since Vytlacil and Lumbermen, this argument has often been unsuccessful — the covered non-auto claims are found to be merely "derivative" of the automobile-related claims and thus excluded.

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