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## AUTO POLICY INSURERS MAY BE CALLED UPON TO INDEMNIFY PLAINTIFFS IN CASES THAT APPEAR TO BE UNRELATED TO MOTOR VEHICLE ACCIDENTS

The Ontario Court of Appeal recently held an auto insurer liable to a plaintiff who was accidentally shot in the leg by his hunting partner.

### FACTS

In *Herbison v. Lumbermens Mutual Casualty Co.* (June 7, 2005), the plaintiff was shot in the leg by his hunting partner, Wolfe, who mistook Herbison for a deer. Herbison, Wolfe and others planned to participate in a hunting excursion that day. Herbison began walking across a farmer's field to the hunting area while Wolfe drove his truck to the site with his wife in the passenger seat. Enroute, Wolfe saw movement in the distance and mistook the movement for a deer. He got out of his vehicle, grabbed his rifle, loaded it, moved away from the vehicle and shot Herbison.

Wolfe was a named insured under a standard motor vehicle liability policy. The policy provided coverage for loss or damage "arising from the ownership or directly or indirectly from the use or operation" of a vehicle owned by the insured pursuant to s. 239(1) of the *Insurance Act* (Ontario).

Prior to the trial of the tort action, the insured sought declarations that the insurer was obligated to defend and indemnify him under the policy. The application was dismissed and as a result, the insurer did not participate in the tort action.

The plaintiff was awarded damages in the amount of \$832,272.85 in the tort action. The plaintiff thereafter started a recovery action against the insurer.

## RULING

In a 2 to 1 decision, the Court of Appeal allowed the plaintiff's action against the insurer. In reaching its conclusion, the Court applied the two-part test in *Amos v. Insurance Corporation of British Columbia*.

*Amos* is Canada's leading case concerning the interpretation of the phrase "arising out of the ownership, use or operation of a vehicle." *Amos* resulted in a broad and liberal approach to interpreting these words.

In *Herbison*, the Court held that the use of the words "directly or indirectly" in the policy requires an even broader approach to interpretation. The interpretation should fulfill the intent of Ontario motor vehicle legislation which is to define liability coverage broadly enough to provide very extensive vehicle liability compensation to injured parties.

## PRACTICAL IMPACT FOR THE INSURANCE INDUSTRY

*Herbison* affirms that the indirect use of a motor vehicle in committing a wrong is enough to trigger an auto insurance policy. The injury itself does not have to be caused by the "ownership, use or operation of a vehicle." It is sufficient to establish that there is "some nexus or causal relationship" between the damages and the use or operation of a vehicle beyond "merely incidental or fortuitous" use.

Ontario auto insurers may begin to see more claims by both insureds and third parties where liability arises out of the "indirect use of a motor vehicle". Based on *Herbison* insureds and third parties may now be looking to "trigger" coverage by simply showing that a motor vehicle was used to transport the tortfeasor to the scene of the negligent act.

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