


Good News & More Good News

There has been plenty of good news around the firm lately. It begins with yet another honour for Eric Williams. In addition to his legal skills being recognized at a provincial and national level, he has now been honoured as one of the best trial lawyers in North America. For more details turn to page 4.

You will recall that Mark Charron and Jaye Hooper represented Lumbermens Mutual Casualty Company before the Supreme Court of Canada last December. In October, the Court handed down its decision in the case, ruling in favour of Lumbermens. Long-time readers of the newsletter will be familiar with this case, since our firm has been involved since the beginning. To read about the decision and its implications read, "Too Far from the Car".

Another motor vehicle insurance case, which is hot off the press, speaks to the relevance of the statutory deductible in determining cost awards.

Finally and just in time for the holiday shopping season, Ontario has become the first province in Canada to ban expiration dates on store gift cards. Gift cards must now spell out all terms and conditions and cannot require a fee to redeem them. 

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Too Far from the Car: The SCC Slams the Brakes on Coverage in Herbison

In the fall of 2001, we introduced you to an auto insurance case that our firm was involved with. Since then, the case of *Lumbermens Mutual Casualty Company v. Herbison et al.* has made its way through the Superior Court of Justice, to the Ontario Court of Appeal, to the Supreme Court of Canada.

In the Beginning

The story began in 1999 when Herbison and Wolfe decided to go deer hunting. Because he had a heart condition, Wolfe made the decision to drive his pick-up truck to the assigned hunting area. While driving to the hunting station, Wolfe spotted what he thought was a deer.

With the engine still running, Wolfe got out of his truck and stepped about three feet away from the vehicle. He then shot at the flash of white that he believed was a deer. Unfortunately, the deer turned out to be Herbison. As a result of being hit by Wolfe's bullet, Herbison suffered a serious injury to his upper thigh.

Herbison sued Wolfe for damages and was awarded \$832,272.85. Herbison then went after Wolfe's insurance company to recover the damage award. Relying on the wording of section 239 of the *Insurance Act*, Herbison argued that the insurance company should pay the damages since his loss arose from the ownership or directly or indirectly from the use or operation of Wolfe's truck.

Section 239

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 occu-

part 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

The Lower Courts

Superior Court of Justice

The Superior Court dismissed Herbison's action, concluding that "The accident resulted from the negligent handling of a hunting rifle--something totally unrelated to this use of the truck."

Court of Appeal

The Court of Appeal did not agree with this assessment of the situation. By a majority decision, the Ontario Court of Appeal reversed the lower court's decision. Mr. Justice Borins, on behalf of the majority, concluded that Wolfe's vehicle had been put to a known use, i.e. to transport people. They also found that the connection between Wolfe's truck, and Herbison's injuries was sufficient to attract liability. Underlying this reasoning was the court's finding that the legislature has sought to provide injured persons with extensive vehicle liability compensation.

Madam Justice Cronk, the third member of the Court of Appeal, disagreed with her colleagues. She believed that the injury had to be related to the purpose for which the vehicle was being used and in this case the transportation use of Wolfe's truck had been suspended at the moment of the

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shooting. In addition, she found that the shooting of the deer was an independent act, which had no relevant connection to Wolfe's vehicle.

The Supreme Court of Canada

In a unanimous decision, the Supreme Court put an end to this case by allowing Lubermens' appeal. In a nutshell, the Supreme Court concluded that when a hunter steps away from his pick-up truck under cover of darkness, leaving the engine running, 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 **does not** arise "directly or indirectly from the use or operation" of the insured truck.

Although the Court recognized that it is tempting to look to an insurer's deep pockets in such tragic circumstances, they found that the Court of Appeal had not given sufficient 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".

In reaching this conclusion, the Supreme Court considered two questions. The

first was 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". The second question was whether "there is an unbroken chain of causation linking the Herbison injuries to the use and operation of the Wolfe vehicle".

The Court answered the first question in the affirmative, finding that Wolfe had been using his vehicle for transportation and that this was its usual and ordinary use. However, the Court answered the second question in the negative. The Court concluded that the use of the vehicle was interrupted by Wolfe's decision to disembark from his vehicle and shoot his rifle. In other words, it was the use of the rifle and not the vehicle that led to Herbison's injuries.

Commentary

The approach adopted by the Supreme Court refocuses the analysis of liability on the act that causes the damage. They make it clear that attempts to stretch liability coverage under an automobile policy in cases where there is no apparent causal connection between the use

of the automobile and the injury should be restricted. Binnie J. states,

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.

In our view, the Supreme Court wants to ensure that there is a proper analysis of causation when deciding what should attract indemnity pursuant to an auto insurance policy. In future, courts should apply this two-part test.

- A) Was the vehicle being used as a motor vehicle and not for some other purpose?
- B) Was there an unbroken chain of causation linking the injuries to the use and operation of the vehicle which is shown to be more than simply fortuitous or "but for"?

The effect of this test should provide for an air of commercial reality and allow for a common sense approach to motor vehicle insurance coverage, which will benefit both the insurance industry and the motoring public. ☞

"But For" Does Not Cut It

On the same day that it released the decision in *Lubermens Mutual Casualty Company v. Herbison et al.*, the Supreme Court of Canada also released its decision in *Citadel General Assurance Co. v. Vytlingam*. Although the facts in this latter case were different than those in the Herbison case, the main issue was the same: was there a sufficient connection between the act that caused the plaintiff's injuries and the wrongdoers vehicle?

Vytlingam, his sister and his mother were driving along the interstate in North Carolina when their vehicle was struck by a boulder thrown from an overpass. Vytlingam suffered very serious injuries and he received no-fault benefits from his insurer. However, his insurer refused

to pay benefits under the inadequately insured motorist coverage, i.e. the amount the wrongdoer Farmer ought to pay by way of civil damages.

The question posed by the Supreme Court was "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".

Although Farmer was indeed an inadequately insured motorist, this fact was not relevant to the rock throwing. While Farmer used his vehicle to transport the boulder to the overpass, Vytlingam's injuries were caused by the rock being thrown not by it being transported in the

vehicle. Binnie, J., on behalf of the Court, stated that:

...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...

In determining insurance coverage, the tragedy of the circumstances must be set aside. Instead one must look to the use the relevant motor vehicle was put as well as the elements of the tort which caused the damages. ☞

The Deductible Matters in Settlement Talks

A key consideration in any lawsuit is the cost of taking it to a full trial¹. Recognizing the financial toll of lawsuits, the legislature has passed a number of laws designed to encourage settlement rather than full-fledged litigation. The Ontario Court of Appeal recently considered two of these laws in the case of *Rider et al. v. Dydyk*².

Rider et al. v. Dydyk: The Facts

In 1999, the parties were involved in a motor vehicle accident. Although Dydyk admitted being liable for the accident, there remained the issue of the quantum of damages. In 2004, Dydyk offered to settle Rider and Kent's lawsuit by paying them each \$5,000. The offer was not accepted.

Following an 11-day jury trial, which began in December 2005, Kent was awarded \$15,000³ for general damages and Rider was awarded \$20,000. However, both awards were reduced by the applicable statutory deductible of \$15,000 and a judgement was entered for Rider only, in the amount of \$5,000.

Cost of Litigation

Generally speaking, the successful party in a litigation is entitled to recover his or her costs from the losing party. The court has a fair amount of discretion when fixing the amount of the costs as well as whether the costs should be awarded on a partial or substantial indemnity basis. Costs on a partial indemnity basis may amount to as much as 60% of the actual legal fees and disbursements. Costs on a substantial indemnity basis may amount to 80% or more.

One of the main factors that will be taken into consideration when awarding costs is whether either party made one or more written offers to settle.

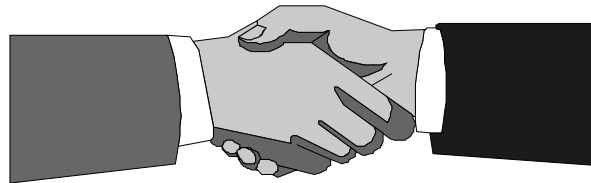
Rule 49

Rule 49 of the *Ontario Rules of Civil Procedure* is designed to encourage an early

resolution to a litigation. If an offer to settle is made but not accepted, the amount and timing of the offer could have a significant impact on any costs that may be awarded at the end of the trial.

Pursuant to Rule 49, a written offer can be made at any time up to seven days before the trial begins. Although offers can be made less than seven days before trial, they will not have the same positive effect on the costs.

The offer can be an offer to settle one or more of the claims being made. An offer can be accepted at any time before it is withdrawn or before the court decides the case. Offers to settle are not made known to the court until after the lawsuit has been decided.



The nonacceptance of an offer becomes important at the conclusion of a case when it is time to award costs. If the plaintiff made an offer that was not accepted by the defendant and the offer was less favourable or was as favourable as the judgement, the plaintiff will be entitled to partial indemnity costs prior to the date of the offer and substantial indemnity costs thereafter.

If the defendant made an offer that was not accepted by the plaintiff and the offer was as favourable or more favourable than the judgement, the plaintiff will be entitled to partial indemnity costs prior to the date of the offer but the defendant will be entitled to partial indemnity costs from the date of the offer onwards.

Ontario's Insurance Act

If you are injured in a motor vehicle accident in Ontario, section 267.5(7) of the *Insurance Act* allows you to sue the responsible driver for general damages if:

1. You have sustained a serious and perma-

nent impairment of an important physical, mental or psychological function or have sustained a serious and permanent disfigurement; and

2. Your injuries exceed the statutorily prescribed deductible of \$30,000. (For accidents that occurred prior to October 1, 2003, the prescribed deductible was \$15,000.)

Rider et al. v. Dydyk: The Costs

With the above in mind, one can see how costs became important in this litigation. In fact it was this issue which led to the appeal. Rider had claimed costs of approximately \$95,000 and Kent claimed approximately \$81,000. Dydyk also made a claim for costs of just over \$119,000.

At issue was whether the plaintiffs' results were more favourable or less favourable than Dydyk's offer to settle. Relying on Rule 49, Dydyk argued that his offer to settle was more favourable than the jury's award once the prescribed deductible was taken into account. However, Rider and Kent argued that the deductible should not be considered when determining the cost award. They relied on section 267.5(9) of the *Insurance Act*, which states that the determination of a party's entitlement to costs shall be made without regard to the statutory deductible.

The trial judge agreed with Rider and Kent. Dydyk appealed.

In dismissing the appeal, the appellate Court concluded that section 267.5(9) was not incompatible with section 267.5(7), which mandates the deductible, or with Rule 49.

Section 267.5(9) supports the objective of section 267.5(7) by discouraging litigation, while at the same time bringing balance and fairness to the system by shielding plaintiffs from cost consequences unless they have refused an offer that exceeds an accurate assessment of their actual damages.

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ERIC WILLIAMS

Admitted to American College of Trial Lawyers



2007 has been a good year for our firm's founding partner, Eric Williams. Eric's abilities as a litigator have been recognized once again, this time by the American College of Trial Lawyers. Fellowship in the College was extended to Eric at a ceremony in La Quinta, California earlier this year.

The College is composed of the best of the trial bar from the United States and Canada. Fellowship is extended only by invitation, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

Although there are currently more than 5,000 Fellows across the U.S. and Canada, membership can never be more than 1% of the total lawyer population of any state or province.


The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession. Qualified lawyers are called to Fellowship in the College from all branches of trial practice.

CONGRATULATIONS ERIC!

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According to the appellate court's interpretation of section 267.5(9), insurance companies are encouraged "to make offers of settlement that are based on an assessment of the damages actually suffered by the plaintiff." The Court went on to observe that "Offers of settlement that fairly reflect the plaintiff's actual damages, without deduction, will encourage settlement."

While those injured in a motor vehicle accident must deal with the prospect of a

\$30,000 deductible, we will have to wait and see if this decision will affect the way future offers are made in the settlement process. 

¹See *How Much Does a Lawsuit Cost?* in the Spring 2005 Legal Observer for more about costs.

²Rider v. Dydyk, 2007 ONCA 687

³For accidents that occurred prior to October 1, 2003 the statutory deductible was \$15,000. For accidents occurring after October 1, 2003, the statutory deductible is \$30,000.

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