

“ARISING OUT OF THE OWNERSHIP, USE OR OPERATION”

Tracing the Development and Questioning the Trend of Canadian Automobile Insurance Coverage

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The writer here reviews the extensive case-law surrounding the phrase “arising out of ownership, use or operation of a vehicle” in insurance law. He concludes that the “purpose test” and the “chain of causation test” have both been read with increasing breadth by the judiciary and as a result the threshold has been lowered. He speculates that an unarticulated “reasonable expectation” test now underpins many judicial determinations in this area of law.

L’auteur passe en revue la jurisprudence considérable concernant la phrase «qui découle de la propriété, de l’usage ou de l’utilisation d’un véhicule» en droit des assurances. Il en arrive à la conclusion que le «test téléologique» et celui de la «chaîne de causalité» ont été interprétés de façon de plus en plus large par la magistrature; en conséquence, le seuil a été abaissé. Il se demande si un test flou des «attentes raisonnables» ne constitue pas maintenant, en fait, le fondement de bien des décisions judiciaires dans ce domaine du droit.

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Introduction

On August 21, 1991, Briton Amos, a resident of Vancouver, was driving his 1976 Volkswagen van in East Palo Alto, California when he was attacked by a gang of six men. Amos had just pulled away from an intersection when the assailants forced him to slow down and surrounded his vehicle. As the van crept

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slowly ahead, the men pounded on its locked doors and windows. In the ensuing fracas, the driver's side window was shattered and two shots were fired. One bullet lodged itself in the van's glove compartment. The other bullet found a more vulnerable target, striking Amos in the spinal cord.

Remarkably, Amos was able to escape the incident alive. Unfortunately, he sustained serious, permanent injuries, both physical and mental. As a result, he applied to his public insurer, the Insurance Corporation of British Columbia (the "ICBC") for "no-fault" benefits under the *Revised Regulation (1984) Under the Insurance (Motor Vehicle) Act*. However, the ICBC denied Amos' application on the grounds that his injuries did not "[arise] out of the ownership, use or operation of a vehicle" as mandated by section 79(1) of the *Revised Regulation*.¹

In the litigation that followed, the courts were compelled to revisit an issue they had faced many times before: when does an accident "arise out of the ownership, use or operation of a vehicle?"² Both the trial court and the Court of Appeal for British Columbia dismissed Amos' claim. They concluded that Amos' van was merely the "situs" of the attack and thereby lacked a causal connection between the use of the van and the injuries that were sustained. However, the Supreme Court of Canada took a different view. The Supreme Court held that Amos' injuries were causally connected to his use of the van and directed the ICBC to indemnify him accordingly.

No doubt, the Supreme Court's decision in *Amos v. Insurance Corp. of British Columbia*³ produced a welcome result. But, in its aftermath, one thing has become clear. Although it was a logical progression in the broad and liberal interpretation of the phrase "arising out of the ownership, use or operation", the *Amos* decision expanded Canadian automobile insurance coverage to a new breadth.

This paper, therefore, has two related objectives. The first is to trace the development of the phrase in question. It will be evident that the courts have

¹ B.C. Reg. 447/83. This phrase, or some variation thereof, can be found in many *Insurance Act* provisions and the respective regulations. However, it is typically used in provisions relating to: (a) third party liability coverage; see e.g. R.S.B.C. 1979, c.200, s.234; R.S.A. 1980, c.I-5, s.301; R.S.S. 1978, c.S-26, s.194; R.S.M. 1987, c.140, s.239; R.S.O. 1990, c.I-8, s.239; R.S.N.B. 1973, c.I-12, s.232; R.S.N.S. 1989, c.231, s.114; R.S.P.E.I. 1988, c.I-4, s.222; R.S.Nfld. 1990, s.[A-22] 10; and (b) accident benefit coverage for injury or death; see e.g. B.C. Reg. 447/83 s.79, Alta. Reg. 352/72 subsection 3; R.S.S. 1978, c.A-35, s.22(1), (2); Manitoba Reg. 333/74, s.5(1), (3) [as amended]; R.S.O. 1980, c.218, Schedule C; S.P.E.I. 1983, c.22, Schedule B.

In *Amos*, the regulation in issue provided:

79.(1) Subject to subsection (2) and sections 80 to 88, 90, 92, 100, 101 and 104, the corporation shall pay benefits to an insured in respect of death or injury caused by an accident that *arises out of the ownership, use or operation of a vehicle* and that occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America. [emphasis added]

² It was agreed at trial that the plaintiff's injuries were "caused by an accident". ICBC simply argued that the accident did not arise "out of the ownership, use or operation of a vehicle..."

³ [1995] 3 S.C.R. 405, 31 C.C.L.I. (2d) 1 [hereinafter *Amos* cited to the C.C.L.I.].

interpreted it broadly and continuously increased the extent of coverage from one subsequent case to another. The second objective is to question the trend and query whether judicial activity in this area meets with the rules of statutory interpretation and the common objectives of insurance law. Many developments suggest that it does not.

I. *Tracing the Two-Part Test*

The phrase "arises out of the ownership, use or operation of a vehicle" has two discrete aspects. The first demands that an insured will only be indemnified for particular *kinds* of activities — that is, those that occur through either the "ownership", "use" or "operation" of a vehicle. The second aspect requires that there be some *connection* between the activity and the accident. Only those accidents that "arise out of" the described activities will be covered.

Courts have long recognized these discrete aspects and consistently ask two questions when interpreting the phrase: First, did the accident result from an ordinary and well-known activity to which automobiles are put? This is commonly known as the "purpose test" as established in *Reliance Petroleum Ltd. v. Stevenson*.⁴ Second, is there a nexus or causal link between the ordinary activity and the injury? This is commonly described as the "chain of causation test" as established in *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*⁵

(a) *The Purpose Test*

The purpose test descends from the notion that an insured should not recover for injury or death sustained from the abnormal use of a vehicle. Automobile insurance should only provide coverage for those activities typically related to the purpose of an automobile. To stretch the cover of automobile insurance beyond this standard is to introduce uncertainty into the assessment of the risk and the effective provision of automobile insurance.

In *Reliance Petroleum*, a fire broke out while gasoline was being delivered from a tanker truck to one of the service stations it supplied. The blaze caused considerable damage to the station and to third party property. The crucial question for the Supreme Court was whether fuel delivery, in itself, was an activity to which the vehicle was normally put.⁶ Because the tank trucks were

⁴ [1956] S.C.R. 936, 5 D.L.R. (2d) 673, [1956] I.L.R. 1-238 [hereinafter *Reliance Petroleum* cited to the S.C.R.] at 941.

⁵ [1960] S.C.R. 80 [hereinafter *Law, Union & Rock*].

⁶ The fuel company had an automobile liability policy expressly insuring against liability "arising from the ownership, use or operation" of the tanker truck. The fuel company also had a general liability insurance policy that specifically excluded "any claim arising by reason of ... Any motor vehicle". The issue was which policy provided the coverage.

not merely used to transport oil and gasoline, but were ordinarily used in the business of distributing and discharging these products, the Court held that the accident was within the purpose of the tank truck.⁷

In subsequent cases,⁸ courts have been confronted with many novel situations involving the interpretation of "ownership, use or operation." With very few exceptions, the decisions have come down on the side of expanded coverage. For example, in *Huba v. Schulze*, Justice Bastin concluded that injuries sustained in loading furniture onto a dumptruck were the result of ordinary and well-known activities to which dumptrucks are put.⁹ In *Travelers Canada v. MacDonald*, Justice Saunders held that injuries suffered by a passenger in a motor vehicle related to *her* use of the

⁷ Both Chief Justice Kerwin and Justice Rand made the distinction between "operation" and "use" and rejected the assertion of Roach J.A. in the Court of Appeal decision in *Reliance Petroleum* that the two terms were synonymous. After all, the statute uses both words and meaning must be given to each. Chief Justice Kerwin went as far as to hold that the fuel delivery activities would not have been covered had the policy only provided for coverage against "loss or damage arising from the operation of the vehicle". The word "use" provided expanded coverage.

See also *Kracson v. Pafco Insurance Co.*, (1981), 32 O.R. (2d) 336, [1981] I.L.R. 1-1441, 121 D.L.R. (3d) 498, where it was said that "operation denotes some locomotion". (at 337) This interpretation is reinforced by the use of the word "conduite" in every French version.

⁸ The *Reliance Petroleum* case was upheld and strictly applied in two subsequent "fuel delivery cases" at the Supreme Court of Canada. In both *Winnipeg Supply & Fuel Co. v. Canadian General Insurance Co.* (1959), 66 Man.R. 453, [1960] I.L.R. 1-358 (Q.B.) and *Irving Oil Co. v. Can. Gen'l Ins. Co.*, [1958] S.C.R. 590, [1958] I.L.R. 1369, the Court held that the damages suffered clearly arose from the "use" of the delivery truck which included not only the transportation of the fuel, but also its delivery into a customer's oil tank. In many ways, there is nothing remarkable about this development. A tanker truck's principle function is to transport and deliver fuel. It does this regularly as a routine function of its daily operations.

⁹ (1963), 7 D.L.R. (2d) 570 (Man.Q.B.). An individual suffered serious injuries when the tail-gate of a dumptruck onto which he was loading furniture, fell and struck him. Clearly, the loading of furniture *per se* was not an ordinary and well-known activity to which dumptrucks are put. However, by recharacterizing the issue, Justice Bastin concluded that the purpose of the truck was to carry loads in general, and therefore, injuries sustained through either loading or unloading were directly related to its "operation or use". (at 574-575).

This case arose in the context of an application by a judgment creditor for payment out of the Unsatisfied Judgment Fund pursuant to s.154(1) of the *Highway Traffic Act*, R.S.M. 1954, c.112. Section 154(1) only authorized payment out of the Fund for damages "arising out of, the ownership, maintenance, operation, or use ... of a motor vehicle ... by the judgment debtor".

¹⁰ 4 C.C.L.I. 313, [1984] I.L.R. 1-1763 (Ont.H.C.) aff'd (1984), 8 C.C.L.I. 314, 48 O.R. (2d) 714, 39 M.V.R. 191, 14 D.L.R. (4th) 88, 7 O.A.C. 280, [1985] I.L.R. 1-1878 (C.A.). The insured's daughter was severely injured in an automobile accident in Michigan. The court could have readily denied coverage on the basis that she was merely a passenger in the vehicle. In other words, her injuries did not arise out of *her* use of the vehicle. Justice Saunders flatly rejected this suggestion stating:

I consider this too narrow an interpretation ... It would seem to me that on the plain meaning of the words that Lynne Macdonald was using the vehicle to travel to wherever her destination may have been that day." (at 319)

vehicle.¹⁰ Similarly, in *Whitehead v. Whitehead*, the British Columbia Supreme Court held that alighting from a vehicle is an ordinary and well-known use.¹¹

In addition to these novel situations, there has clearly been a trend in the wake of *Reliance Petroleum* toward the broad and liberal interpretation of the words "use or operation" in certain classes of cases. This is particularly evident in cases of vehicle repair. The courts have held that: (1) drilling a hole through a vehicle's trunk to connect trailer wiring;¹² (2) welding portions of a spouse's car in place;¹³ (3) detaching and independently repairing the exhaust assembly from a vehicle;¹⁴ (4) draining the fuel tank of a motorcycle in the basement of the insured's home;¹⁵ and (5) cleaning removed parts of a motorcycle motor

¹¹ 7 C.C.L.I. 299, [1984] I.L.R. 1-1820 (B.C.S.C.). The insured's mother tripped and injured herself over a block of wood after exiting his vehicle. The wood was actually a "chock" used to prevent the insured's car from rolling down his steep driveway when parked.

¹² *Gramak Ltd. v. State Farm Mutual Automobile Insurance Co.*, (1975), 10 O.R. (2d) 518, 63 D.L.R. (3d) 630, [1975] I.L.R. 1-709 (H.C.) aff'd (1976), 12 O.R. (2d) 553n, 69 D.L.R. (3d) 505n (C.A.) [hereinafter *Gramak*]. An employee of the insured brought his automobile onto his employer's premises for the purpose of drilling a hole through its trunk in order to connect the travel trailer wiring. In the course of the drilling, the gasoline tank was punctured, and a fire erupted causing considerable damage to the employer's premises. Justice Donohue applied *Reliance Petroleum* and held that the damages were covered by the automobile insurance policy. In fact, he indicated that in the absence of any policy exemptions, "... selling, repairing, maintaining, storing, servicing or parking automobiles" all fall within the phrase "ownership, use or operation". (H.C. cited to O.R. at 523).

¹³ *Elias v. Insurance Corp. of British Columbia* (1992), 12 C.C.L.I. (2d) 135, 95 D.L.R. (4th) 303 (B.C.S.C.) [hereinafter *Elias* cited to C.C.L.I.]. The insured was carrying out repair work on his wife's car when a spark from the welder he was using set the vehicle on fire causing extensive damage to the car and the surrounding premises. In holding the ICBC liable to indemnify, Justice Boyle found that the repair work was an incident of both "ownership" and "use" of the vehicle. On the latter point, he said:

The work being done, went to the "use" of the vehicle. It was not repair work without which the vehicle was immobile, unsafe or underperforming but it was consonant with, and not severable from, its use during a hoped-for period of long service. Prevention of deterioration by a family member is an integral part of use. Repair work need not be necessary to immediate driveability to come within the meaning of "use" in the regulation. (at 141)

¹⁴ *Munro Estate v. Johnston* (1994), 25 C.C.L.I. (2d) 34 (B.C.S.C.). The insured was doing repair work on the exhaust assembly of his car, in his garage, when he caused a fire, doing considerable damage to his home. In holding the ICBC liable to indemnify Justice Drake stated that the repair work fell within the penumbra of "use" of the vehicle. In fact, even though the insured had removed the exhaust assembly from the car, Justice Drake held that it did not lose its character as part of the vehicle, and therefore did not break the chain of causation.

¹⁵ *Shelton v. Insurance Corp. of British Columbia* (1991), 7 C.C.L.I. (2d) 48, 33 M.V.R. (2d) 272, [1992] I.L.R. 1-2835 (B.C.S.C.). The insured brought his motorcycle into his basement to perform some repairs to its fuel tank. In the process a fire started, causing considerable damage to the insured's house. Justice Lowry held that the handling of fuel is a necessary part of the "use" of a motorcycle and is a well known activity to which motorcycles are put in the same way that filling the fuel tank is part of its use.

inside an apartment complex,¹⁶ are all activities that fall within the "ownership, use or operation" of a motor vehicle.¹⁷

The courts have similarly favoured a broad and liberal interpretation in various "towing cases". For example, the courts have held that damage caused when a car disengaged from the towing apparatus and smashed into a garage,¹⁸ and an accident resulting from the removal of a sailboat from the water using the insured's trailer¹⁹ involved the "use or operation" of the vehicle.²⁰

¹⁶ *Kracson v. Pafco Insurance Co.*, (1981), 32 O.R. (2d) 336, [1981] I.L.R. 1-1441, 121 D.L.R. (3d) 498. The insured was cleaning removed parts of his motorcycle motor in the basement area of his apartment complex when there was suddenly a flash of flames. A fire resulted causing considerable damage to the building. Honey Co.Ct.J. said:

... it may be that "ownership" of the motor cycle could found a basis for liability in this case. I make no comment on that but confine my consideration to use", that being the operative word to which our Courts have directed their attention as witness the jurisprudence which it has developed. (at 337)

Judge Honey then determined that the insured's "use" of his motorcycle was dependent upon its maintenance ie. the accident occurred in furtherance of the motorcycle's use.

¹⁷ There has been some suggestion that repair work constitutes "maintenance" and should therefore be excluded from the cover of automobile insurance. After all, many insurance contracts and statutes used to provide for coverage in the event of accidents caused by the "ownership, use, maintenance or operation" of a vehicle. Therefore, where "maintenance" is not an insured activity, there should be no indemnity for accidents arising out of a vehicle's repair. See e.g. *Czarnuch v. Devon Transport Ltd.*, (1989), 37 C.C.L.I. 1, 34 B.C.L.R. (2d) 389, 56 D.L.R. (4th) 748, [1989] I.L.R. 1-2452 (C.A.).

¹⁸ *Dagg v. Abram's Towing & Storage* (1994), 21 O.R. (3d) 377 (Gen. Div.). The plaintiff engaged the insured towing company to tow his automobile from one garage to another. While the plaintiff was sitting in his car to steer it, his car disengaged, rolled-back and smashed into the garage. In holding that the towing company was liable to indemnify Justice Jennings wrote:

The motor vehicle in this case was a tow truck. Its primary purpose is to tow. It was towing when the accident occurred, albeit the motor vehicle was stationary. Thus, when the accident occurred, the motor vehicle was being "used" in accordance with its purpose.

¹⁹ *Canadian Indemnity Co. v. Security National Insurance Co.*, (1994), 26 C.C.L.I. (2d) 295 (Sask. Q.B.). The insured and a friend were removing a sailboat from the water onto the insured's trailer. In the attempt to tow the trailer to level ground, the boat's mast contacted a power line killing the insured and seriously injuring his friend. In directing the automobile insurer to indemnify, Justice Scheibel concluded that "pulling a boat trailer is included in the ordinary use of a vehicle". (at 302) He said, "there can be no doubt that an ordinary use of a boat trailer is for hauling and transporting boats." (at 302)

²⁰ For further discussion, see cases involving tractor-trailers. Tractors and trailers are generally insured independently, particularly given that there may not be common ownership or even a connection between the two vehicles. In each case the issue has been whether injury, death or damage resulting from an accident involving a tractor-trailer falls within the insurance of the tractor or the trailer. In *State Farm Mutual Automobile Ins. Co. v. Zurich Ins. Co.*, (1988), 66 O.R. (2d) 176, 33 C.C.L.I. 172, [1988] I.L.R. 1-2381 (H.C.), the insured was involved in a collision while he was towing his trailer with his tractor. Each was independently insured. The issue was whether the accident arose out of the "ownership, use or operation" of the trailer. Justice Craig held that the accident did not arise out of the operation of the trailer, because the insured was operating the tractor at that time, and the trailer was a merely an appendage to it. But this should be contrasted with cases such as *Aetna Insurance Co. v. Canadian Surety Co.* (1994), 24 C.C.L.I. (2d) 257 (Alta. C.A.) where liability was held to have arisen from the use and operation of both the tractor and the trailer.

More recently, the trend has been seen in cases involving accidents caused by dogs. In *Boell v. Schinkel*, a dog leaped through the open window of a parked car into the path of an oncoming motorcycle.²¹ In *Longarini v. Zuliani*, a hunting dog leaped through the window of a parked car and attacked a child who was playing football nearby.²² In both cases, the courts concluded that the accidents arose out of the "ownership, use or operation" of the insured's vehicle. In both cases the judges acknowledge that they were applying the "purpose test" broadly.

*Chan v. Insurance Corp. of British Columbia*²³ confirms that even the most extraordinary use of a motor vehicle will satisfy the purpose test. In *Chan*, the plaintiff was riding as a passenger in the insured's vehicle when she was struck and injured by a brick which came through its windshield. Because of related incidents, it was established that the brick had been thrown from another vehicle as some sort of a prank. Although the insured and his passenger were merely driving in their own vehicle and thus clearly "using" it when the accident occurred, the court turned the analysis on its head, focussing on the other vehicle. Justice Warren held without reservation, "[i]n my view, where the injuries result from action taken by a person who is in a car or motor vehicle, that satisfies the purpose test."²⁴

This survey of cases suggests that the courts have rarely used a case to narrow the "purpose test".²⁵ Now, almost any activity involving a motor

²¹ (1991), 5 C.C.L.I. (2d) 189, 3 O.R. (3d) 741, 32 M.V.R. (2d) 80 (Gen. Div.). The plaintiff was driving his motorcycle when a dog leapt through the window of a parked automobile directly into his path. The plaintiff hit the dog, went out of control, crashed, and sustained serious injuries. The issue that arose in the ensuing litigation was whether the incident arose out of the "ownership, use or operation" of the insured's vehicle. Justice McTurk expressly declared that the common law has developed two distinct tests for this issue. On the purpose test, he said "our courts have tended to apply the same broadly" (at 192). Accordingly, he concluded:

I have no hesitation in finding that the transporting of a pet dog by the owner in her motor vehicle and its jumping from the parked car into the path of the motorcyclist fell within the purpose test and the resulting accident resulting from an ordinary and well known activity to which automobiles are put. (at 192)

²² (1992), 16 C.C.L.I. (2d) 312 (Ont. Gen. Div.). A child was playing football near the insured's parked vehicle when the insured's hunting dog leaped out an open window, attacked the child and caused considerable injuries, primarily to his face. Justice Hoolihan determined that the injuries sustained did arise out of the "ownership, operation or use" of the insured's vehicle and therefore came within the third party liability coverage provided under the insured's automobile insurance.

²³ (1994), 30 C.C.L.I. (2d) 60 (B.C.S.C.) [hereinafter *Chan*].

²⁴ *Chan*, *supra* footnote 23 at 65. In *Chan*, the crucial factor was the determination that the brick had come from another vehicle. But, given *Amos*, it is now likely that indemnity would follow had the brick merely been thrown by a pedestrian.

²⁵ The only recent case in which a court has made a narrow application of the purpose test is *Chateauvert v. Economical Mutual Ins. Co.*, [1980] I.L.R. 1-1223 (Ont. H.C.). In *Chateauvert*, the victim was killed, while sleeping, from the exposure to fumes that came from the hibachi barbecue that he used inside his camper. The court held that his death did not meet the purpose test because sleeping on temporary bedding and using a hibachi were not ordinary and well-known activities to which camper vans are put. Strangely, the court framed the analysis with respect to the particular van in question, and not campers in general. This confirms that the "purpose test" is largely a function of the characterization of the activity in question. Surely one could say that cooking and sleeping are fall ordinary activities associated with a camper, but this is not how the court perceived it.

vehicle, and not just those which are "ordinary and well-known", tends to fall within the statutory coverage. Can it be said that the transportation of furniture in a dumptruck, or the drilling of a hole in the trunk of a car to connect trailer wiring, or the syphoning of fuel in the basement of an apartment complex are routine and customary vehicle activities? They are certainly activities to which vehicles might occasionally be put, but it is highly debatable whether they can be considered "ordinary" or "well-known". Therefore, in applying the "purpose test", it would be far more accurate to ask:

Did the accident result from a recognized activity to which a vehicle might be put?

It is also evident from reading these decisions, that the "purpose test" depends entirely upon the manner in which the court frames the activity in question. By characterizing the hole drilling or syphoning more generally as vehicle repair or fuelling activities, it is far more plausible that they can be deemed "ordinary" or "well-known".

Given these changes, it is particularly interesting to return to the comments of Justice Rand in *Reliance Petroleum*. In *obiter*, he listed a number of activities that he considered would not fall within the definition of "use" of an automobile:

... receiving visitors on a home trailer while stationary; using spray-painting equipment set up on and moved from place to place on a truck; a circus truck carrying a cage from which a lion escapes and does mischief; a peanut or like familiar stand set up in a truck and disposing of its wares at different places.²⁶

It is now quite likely that these listed activities would pass the purpose test. With the possible exception of lion escape scenario, all of them are recognized activities to which a vehicle might be put. Perhaps this demonstrates how far the law has developed.

In this context, it is easy to see that the first part of Justice Major's decision in *Amos* was not particularly remarkable. Justice Major curtly wrote in only a few lines:

The appellant here was driving his van down a street; the accident clearly resulted "from the ordinary and well-known activities to which automobiles are put". The first part of the two-part test is satisfied.²⁷

This conclusion was hardly profound. Thirteen years earlier, in *Storrie v. Newman*, Justice Ruttan depicted riding or driving in a vehicle as the most conventional purpose there is.²⁸

²⁶ *Reliance Petroleum*, *supra* footnote 4 at 940.

²⁷ *Amos*, *supra* footnote 3 at 27.

²⁸ (1982), 39 B.C.L.R. 376, 139 D.L.R. (3d) 482 (S.C.) [hereinafter *Storrie*]. The defendant punched the plaintiff in the face when she told him that he had taken a wrong turn. In the ensuing scuffle, the plaintiff jumped out of the car and sustained several injuries. Justice Ruttan held that the "purpose" test was not of any significance because "[t]he motor car was not being used for any purpose other than the conventional one of riding and driving when the incidents giving rise to liability occurred". (at 382)

However, in his annotation to *Amos*,²⁹ James Rendall protests Justice Major's "brisk resolution" of the purpose test.³⁰ Perhaps Rendall's remark stems entirely from his frustration that Justice Major skirted the issue of "ownership". But, if he meant more by it, his comment is misguided. What activity could be more ordinary and well-known than driving down a street? Briton Amos was not delivering fuel to a customer. He was not drilling a hole or repairing a part of his vehicle in his basement. He was not leaving a dog in a parked car. He was not hitched to the back of a tow-truck. Briton Amos was using his vehicle for its most common activity, to carry himself from one place to another.

Where are courts going to draw the line on the purpose test? It is not abundantly clear. The only way the courts seem to find that an activity does not fall within the "ownership, use or operation" is by mingling the "purpose test" with the "chain of causation test", and finding that an intervening act removes it from the coverage of the act.³¹ This leads one to question whether the "purpose test" still exists or requires anything more than a cursory analysis. Its rationale still applies, but the cases show that even the most abnormal uses of vehicles have led to indemnity.

(b) *Ownership*

Until recently, the concept of "ownership" has been judicially ignored and given little substance. The most plausible explanation for this development is that the word was merely an add-on to insurance statutes to narrowly refer to an owner's derivative, vicarious responsibility for the accidents of uninsured third party drivers. After all, the respective provincial *Highway Traffic Acts* impose liability upon the "owner" of a vehicle for loss or damage caused by any driver, unless that driver was operating the vehicle without the owner's consent.³²

²⁹ *Amos*, *supra* footnote 3 at 3-10.

³⁰ *Ibid.* at 3.

³¹ See for e.g. *Collier v. Insurance Corp. of British Columbia* (1995), 30 C.C.L.I. (2d) 69, 100 B.C.L.R. (2d) 201, 10 M.V.R. (3d) 115, 54 B.C.A.C. 81, 88 W.A.C. 81, leave to appeal to the Supreme Court of Canada refused (October 26, 1995), Doc.24560 (S.C.C.), 30 C.C.L.I. (2d) 69n [hereinafter *Collier*]. In *Collier*, the insured was part of a group that organized a stag party. When the guest of honour escaped on foot from some of the more unpleasant activities of the evening, the insured and others chased him in the insured's vehicle. The groom-to-be was eventually located and cornered, and in the wrestling that subsequently ensued outside the car, he was seriously and permanently injured. The British Columbia Court of Appeal denied the insured's application for indemnity from the ICBC. Justice Hollinrake dismissed the claim on the basis that "In my opinion, automobiles are not used, in ordinary language, to commit the tort of assault." (at 105) However, as Justice Southin made clear, *Collier* was really about the intervening act of wrestling that interrupted the chain of causation and lead to the serious injuries that were sustained by the victim.

³² See for e.g. *Highway Traffic Act*, R.S.O. 1990, c.H-8, s.192(1).

This narrow interpretation has gained favour in a number of cases.³³ It is also reinforced by the deliberate exclusion of the word "ownership" from the statutory provisions relating to non-owner's policy coverage.³⁴ However, others have described the narrow view as tempting yet unconvincing. In his annotation to *Amos*, James Rendall maintains:

This supposition was never very comfortable because the motor vehicle liability insurance coverage is provided for "liability ... for *loss or damage* arising from the ownership, use or operation of the automobile." This language, which mirrors the statutory prescription... clearly anticipates that *loss or damage* may arise from ownership.³⁵

Despite this divergence of opinion, there are some preliminary indications that the courts are beginning to give "ownership" a distinct and unprecedented vitality. In *Kracson v. Pafco Insurance Co.*, Honey Co.Ct.J. said: "it may be that "ownership" of the motor cycle could found a basis for liability in this case."³⁶ Similarly in *Gramak*, Justice Donohue observed "I do not exclude the possibility of ownership being a ground of liability".³⁷ More notably, in *Elias*, Justice Boyle remarked:

The word "ownership" in the regulations cannot be taken to be limited in its meaning to the statutory definition of "owner". The meaning must be taken to be that of more general usage, not colloquial but understood in the law ... "Ownership" in the regulations must mean the whole collection of rights and duties that accrue to an owner.³⁸

³³ See e.g. the remarks of Southin J.A. in *Collier*, *supra* footnote 31.

³⁴ Contrast for e.g. s.239(1) and s.241 of the Ontario *Insurance Act*:

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.

241. Every contract evidenced by a non-owner's policy insures the person named therein and such other person, if any, as is specified in the policy against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

- (a) arising directly or indirectly from the use or operation of an automobile within the definition thereof in the policy, other than an automobile owned by him, her or it or registered in his, her or its name; and
- (b) resulting from bodily injury to or the death of any person, and damage to property.

³⁵ *Amos*, *supra* footnote 3 at 3.

³⁶ (1981), 32 O.R. (2d) 336, [1981] I.L.R. 1-1441, 121 D.L.R. (3d) 498, cited to O.R. at 337.

³⁷ *Gramak*, *supra* footnote 12 cited to the D.L.R. at 663.

³⁸ *Elias*, *supra* footnote 13 at 141. Justice Boyle then answered the "purpose test" on the basis of "ownership". He wrote:

As owner, with the consent of his wife, the co-owner, he decided to carry out the repair work in the place and manner that led to the fire. There is an unbroken chain of causation ... founded in *ownership* which brings the plaintiff within the terms of coverage under the I.C.B.C. regulation. [emphasis added]

Perhaps these are empty statements that pay little more than lip service to the concept of "ownership". It is more plausible, however, that they mark the beginning of a new trend. When claimants have found themselves on the margin of "use or operation", judges have been more content to justify coverage on the basis of "ownership". "Ownership" is vague enough to invite an even greater latitude of judicial decision making.

Although Justice Major said that Amos' injuries arose from the "use" of his Volkswagen van, his reasons hinted that "ownership" was, at least in part, at the root of the Court's judgment. James Rendall was emphatic about this in his annotation. He gave two reasons for this conclusion. First, Justice Major said "[t]he shooting appears to have been the direct result of the assailants' failed attempt to gain entry to the appellant's van."³⁹ In other words, Amos was injured because he was inside the van, and he was inside the van because he owned it. Second, Justice Major stated that "a motor vehicle need not be the instrument of the injury to satisfy the causal connection requirement."⁴⁰ Although, this remark was intended to mean that proof of negligence or fault are not required ingredients of indemnity, it also suggests that proof of use or operation is not necessary either. It is difficult to conceive of a situation in which an injury arising from the use or operation of a vehicle does not involve the vehicle as the instrument of that injury.

Justice Major's first hint is derived from parallel developments in American law. Dubiously, American courts have already visited the issue of coverage in "car-jacking"⁴¹ scenarios, and developed some relevant principles on the subject. In *Novak v. Government Employees Insurance Co.*,⁴² two Florida courts held that the innocent victim of a "car-jacking" will be indemnified, regardless of the manner in which his/her injuries are sustained. The victim must provide, however, some proof of the assailant's intent to steal or commandeer the vehicle in order to establish the causal connection.

Not only did Justice Major endorse the *Novak* approach, he seemingly went one step further. He wrote:

Such proof [of the assailant's intent to steal the vehicle] is helpful in establishing the necessary nexus or causal link, but it should not be mandatory for an injured plaintiff

³⁹ *Amos*, *supra* footnote 3 at 30.

⁴⁰ *Ibid.*

⁴¹ "Car-jacking" is a colloquial expression used to refer to the hijacking of an automobile.

⁴² 424 So.2d 178 (Fla. Dist.Ct. App. 4th Dist. 1983), *aff'd* 453 So.2d 1116 (Fla. 1984) [hereinafter *Novak*]. The insured was shot by her aggressor after she refused his request for a ride. Both courts asserted:

We do not understand that the automobile must be the instrumentality of the injury nor do we believe the type of conduct which causes the injury must be foreseeably identifiable with the normal use of the vehicle." (at 1119, 453 So. 2d)

to establish an assailant's intent. It is always open to the courts to draw reasonable inferences regarding causation from the facts.⁴³

This waiver of the intent requirement, suggests that *Amos* is a watershed in the discrete development of the notion of "ownership". It does not mean that automobile insurers are automatically obliged to provide coverage in the event of random acts of violence remotely connected to a vehicle. But, where a court believes that injuries can be attributed to a "have/have not" dynamic, indemnity may follow.

Despite these budding developments, courts still choose to focus on "use" and remain apprehensive of fashioning a new, substantive category of indemnity. This attitude may stem from the unpredictability of the meaning of "ownership". It may also be the product of the wording of the "purpose test". For forty years, courts have asked "did the accident result from an ordinary and well-known activity to which automobiles are put?" Ownership is not an activity, nor does it make much sense to speak of ownership as causing an accident.

Therefore, while "ownership" appears to be in its initial stages of developing a separate vitality, courts seem to prefer to use the *indicia* of ownership as an aspect of "use". Instead of amending the "purpose test" to account for its inclusion, courts have treated the adding-on of "ownership" in the various insurance statutes as further justification to broaden coverage.

(c) *The Chain of Causation Test*

The "chain of causation test" stems from the need to limit automobile insurance coverage to those accidents that are linked to the vehicle activity in question. Where the injuries or damages have nothing to do with an automobile, indemnity should have nothing to do with automobile insurance.

Recall that automobile insurance generally covers those losses "*arising out of the ownership, use or operation of a vehicle.*"⁴⁴ No doubt, "arising out of" requires that there be some form of a causal connection, but there has been great debate on the extent of this requirement. On the one hand, proponents of a more relaxed causal connection trace legislative developments. For example, in *Amos* Justice Major maintained:

Originally, section 7.01 ... provided benefits for death and disability where the injuries were caused by an accident "arising from the use or operation of a motor vehicle". Subsequently ... section 79(a) stated that benefits would be paid in respect of death or injury caused by an accident that "arises from the operation of a vehicle". The final version of section 79 ... broadened the wording, providing benefits in respect of death

⁴³ *Amos*, *supra* footnote 3 at 29.

⁴⁴ Some provisions use the words "*arising from*" as a substitute, but the distinction is insignificant.

or injury caused by an accident that “arises” out of the ownership, use or operation of a vehicle”. The most recent amendment shows a legislative intent to establish broader coverage.⁴⁵

According to Justice Major, the legislative changes reflected a deliberate purpose to relax the causal requirement, and thereby provide for coverage where the vehicle activity was not the actual cause of the accident. Applying this standard to the facts, Justice Major then elaborated:

The question is whether the requisite nexus or causal link exists between the shooting and the appellant’s ownership, use or operation of the van. With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase “arising out of” is broader than “caused by”, and must be interpreted in a more liberal manner ... the words “arising out of” have been viewed as words of much broader significance than “caused by”, and have been said to mean “originating from”, “having its origin in”, “growing out of” or “flowing from”, or, in short, “incident to” or “having connection with” the use of the automobile.⁴⁶

This logic was explicitly attacked in *Collier*.⁴⁷ In *Collier*, Justice Southin expressed the view that the phrases “arising out of” and “arising from” are the equivalent of “caused by” and should not be interpreted as anything else. She argued:

I have concluded that “arising out of” and “arising from” do mean, in the context of the *Insurance (Motor Vehicle) Act* and its regulations, “caused by”, when it is the use or operation of the vehicle which is in issue. The reason, I deduce, why, over the years, the draftsman went from “caused by” in some places to “arising out of” and, in others, added “arising out of”, was not to introduce into automobile insurance law some concept different from proximate cause. The reason was that one could not speak, if one had any regard for the English language, of something as being “caused by the ownership of an automobile”. When, therefore, vicarious liability for the acts of someone not one’s servant or agent became part of the statute law relating to automobiles, something had to be done with the original words “caused by”. The draftsman who first introduced the phrase “arising out of” ought to have remembered Horace, “In striving to be brief, I become obscure.”⁴⁸

The arguments are equally compelling. However, they both depend upon suppositions of legislative intent, neither of which is indubitable. The former position assumes that the change in language reflected a legislative intent to broaden coverage. The latter position attributes the change to the intent of legislators to be grammatically correct.

In the end, the ordinary meaning of the words is the only way to reconcile the two postures. Because the legislators did not provide coverage for losses “arising from the ownership, or caused by the use or operation of a vehicle”, the phrase can only be taken to mean that the legislators intended to relax the causation requirement and broaden coverage.

⁴⁵ *Amos*, *supra* footnote 3 at 26.

⁴⁶ *Ibid.* at 28-29.

⁴⁷ *Supra* footnote 31.

⁴⁸ *Ibid.* at 97.

Given that "arising out of" provides a relaxed standard, how far are the courts willing to go to find a nexus or connection? Initially, the answer appeared to be simple. Where there was an intervening act of fault or negligence unrelated to the use of the vehicle, there was no connection. In the landmark case *Law, Union & Rock*,⁴⁹ one of the insured's taxi drivers had the duty of transporting mentally challenged children home from school. On one occasion, he let one of the children out on the opposite side of the street from his home. In attempting to cross the street, the child was struck by a truck and seriously injured. The Supreme Court held that the accident did not arise out of the use of the taxi.⁵⁰ Although the obligation to conduct the child to the door of his home formed part of the taxi driver's contract, Justice Ritchie concluded that it had nothing to do with the motor vehicle. In doing so he said:

It is sufficient to say that the words "claims arising out of ... the ownership, use or operation ... of any motor vehicle" ... can only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other.⁵¹

The chain of causation was broken because the taxicab was stationary at the time of the accident, and because the taxi driver's failure to escort the boy constituted an intervening act unrelated to his use of the taxi.

After *Law, Union & Rock* other courts have found that the interposition of a new act of negligence or fault has interrupted the "chain of causation". In *Yurkowski v. Federated Mutual Implement & Hardware Insurance Co.*, Justice Rae determined that the negligence causing the accidental discharge of a hunting rifle mounted in the back of the insured's pick-up truck suspended the chain of causation.⁵² In *Johnstone v. Lee*, Justice Toy held

⁴⁹ *Supra* footnote 5.

⁵⁰ The issue arose in the context of the taxi companies comprehensive insurance policy which provided universal coverage, but excluded claims "arising out of ... the ownership, maintenance, use or operation by or on behalf of the Insured of any motor vehicle, trailer or semi-trailer which is obliged by law to carry a licence or of any aircraft or watercraft". (at 81)

⁵¹ *Law, Union & Rock*, *supra* footnote 5 at 84-5.

⁵² [1975] 4 W.W.R. 689 (B.C.S.C.). The insured and a friend were returning home from a hunting trip in the insured's pick-up truck. During a rest stop, the insured attempted to move from his field of view one of the rifles that was positioned in a horizontal gun rack behind him. In doing so, the weapon accidentally discharged, killing his passenger. Justice Rae determined that the accident did not arise from the "ownership, use or operation" of the insured's vehicle. He said:

... the vehicle had been used to transport the weapon in question; but it cannot be said on the facts here that there was any real connection between the use or operation of the pick-up truck and the firing of the weapon which caused the death. (at 698)

It is also clear from reading the reason's for decision that Justice Rae made no distinction between the purpose and causation tests. In the end, he seemed to accept or at least ignore the purpose aspect of the approach, being sufficiently convinced that the actions of the insured interrupted the chain of causation.

that injuries sustained by the insured in a fight after an automobile accident were the result of a new and independent activity and unconnected to the use of the vehicle.⁵³ In *Storrie v. Newman*, Justice Ruttan found that injuries sustained when a passenger jumped out of a moving car after she had been hit in a scuffle over a wrong turn constituted assault, and broke the chain of causation.⁵⁴ In *Fraser Valley Taxi Cabs Ltd. v. Insurance Corp. of British Columbia*, Justice Seaton held that the killing of a drunken taxicab passenger who left the vehicle more than 30 minutes before he was hit by a car was not connected because it arose from the cessation of its use and not its use *per se*.⁵⁵

However, even before *Law, Union & Rock*, courts have been willing to take a broad approach to causation. One illustrative example is *Shynall v. Priestman and Smythson*.⁵⁶ *Shynall* involved a high speed police chase where the police constable, in attempting to shoot the assailant's car's tires, hit the assailant himself, knocking him unconscious. The assailant's car then went out of control and ploughed into a house killing two bystanders. The Court of Appeal held that the negligent and criminal driving of the assailant was the beginning of a series of incidents which resulted in the deaths of the bystanders.

Similarly, in *McIndoe v. Insurance Corp. of British Columbia*⁵⁷ the plaintiff was a passenger in the insured's vehicle when it was being chased by police. When pursuing the automobile on foot, the police constable drew his service revolver and it accidentally discharged, injuring the plaintiff in the eye. Justice Skipp held that the chain of causation was not broken in that the "negligent use or operation of the vehicle [by the insured] was a contributing cause" of the injuries sustained.

However, perhaps the most telling example of the trend toward a more broad and liberal application of the chain of causation test is *Wu v. Malamas*.⁵⁸ In *Wu v. Malamas*, a six year old was seriously injured when she left her

⁵³ (1979), 17 B.C.L.R. 324 (S.C.).

⁵⁴ *Storrie*, *supra* footnote 29.

⁵⁵ (1993), 75 B.C.L.R. (2d) 94 (C.A.). The deceased was a passenger in the insured's taxicab. Because he was drunk and abusive, the driver kicked him out of the vehicle before he reached his destination. More than 30 minutes later, as a pedestrian, the deceased was struck by another vehicle and killed. The issue was whether the ICBC should indemnify the insured's next of kin for his death as an accident "arising from the ownership, use or operation" of the insured's taxicab. Seaton J.A. held that ICBC was not obliged to indemnify because the "action of the driver in ceasing to use and operate the motor vehicle ... is the source of the claim." (at 98)

⁵⁶ (1957), 8 D.L.R. (2d) 744, 118 C.C.C. 312 (Ont.H.C.), rev'd [1958] O.R. 7, 119 C.C.C. 241, 11 D.L.R. (2d) 301 (C.A.) [hereinafter *Shynall*].

⁵⁷ (1990), 45 C.C.L.I. 68 (B.C.S.C.).

⁵⁸ (1985), 67 B.C.L.R. 105 (C.A.).

mother's car, attempted to cross the street to her school, and was struck by an oncoming vehicle. Justice Esson distinguished the case from *Law, Union & Rock*. He said:

"[t]he double parking, the position of the vehicle, combined with the reasonable foreseeability that the child would disobey instructions which had been impressed upon her, worked together to bring about the unfortunate consequence."⁵⁹

It is difficult to understand how the facts in *Wu v. Malamas* materially differed from *Law, Union & Rock*. Both involved pedestrian accidents after a child alighted from a stopped vehicle. Moreover, it was just as reasonably foreseeable to the taxi driver in *Law, Union and Rock* that the mentally challenged child he let off on the wrong side of the road would get hit by a car in attempting to cross. This, in particular, shows how far the courts have come in developing the chain of causation test.

These developments might be considered loyal to the distinction between "caused by" and "arising from". Courts have relaxed the standard of causation such that intervening acts that previously interrupted the chain of causation now simply obscure it. It is only where it is patently clear that an act of negligence or fault has nothing to do with the "ownership, use or operation" of a vehicle, that a court will consider the chain broken.⁶⁰

More than any other case before, *Amos* demonstrated the extent to which courts will bend the chain of causation standard. *Amos* reflected a tension between the concept of random acts of violence and accidents connected to the use of a vehicle. On the one hand, both the trial court and the Court of Appeal for British Columbia dismissed *Amos*' claim. Both courts held that there lacked a connecting factor between the operation of the van, and his assailants' random attack. They concluded that the van was merely the "situs" of the incident. By contrast, the Supreme Court held that there was a nexus. Justice Major was not

⁵⁹ *Ibid.* at 109. But see *Cie d'Assur. Generale de Commerce v. Legault*, [1968] Que. C.S. 505, 65 D.L.R. (2d) 230, where a child was injured after alighting from the driver's side of a vehicle because the passenger side door was not functioning properly.

⁶⁰ Causation is also a function of purpose. That is, it depends entirely on how the courts choose to characterize the initial act. Recall *Boell v. Schinkel*, *supra* footnote 21, where a dog leaped from an open window in a parked car and caused a motorcyclist to crash. Surely if people were asked if the motorcycle accident arose from the use of the parked vehicle, most answers would be no. Most people surveyed would likely say that the accident was caused by the intervening negligence of the dog's owner by leaving it unattended. The duty to supervise the dog was unrelated to a duty relating to the vehicle.

However, once it is established that the transportation of dogs is well-known and ordinary use of a vehicles, the chain of causation becomes much easier to follow. Suddenly it is almost facile to conceive of the owner's negligence as relating to a distinct duty of automobile users.

particularly lucid in establishing the link, but he emphasized that the shooting appeared to be “the direct result of the assailants’ failed attempt to gain entry to the appellant’s van.”⁶¹

Regardless of how the attack was perceived or justified, there is little doubt that Justice Major created a new standard of causation. He said:

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.⁶²

Therefore, as long as Amos’ use of his van could be identified as a contributing cause of the accident, the causation requirement was met. This is effectively saying that even where a vehicle *is* the “situs” of an injury, the injured party may be indemnified.

II. Questioning the Trend

It can be seen from the foregoing that the Supreme Court’s decision in *Amos* was novel yet not particularly remarkable. It fit rather snugly within the trend of statutory interpretation to give broad and liberal meaning to the phrase “arising out of the ownership, use or operation of a vehicle”. But does this mean that the trend is correct? Does the trend itself meet with the rules of interpretation and the common objectives of insurance law?

In assessing coverage, the courts have tended to focus on the ambiguity of both “arising out of” and “use”. Traditionally, courts have resolved contractual ambiguity by applying the *contra proferentem* rule.⁶³ However, there are two important reasons to doubt the use of the *contra proferentem* rule in this context. First, automobile insurance contracts are not typical contracts of adhesion. Basic automobile insurance is compulsory in all provinces, and most of the terms are imposed by statute and regulation.⁶⁴ Consequently, it is senseless to

⁶¹ *Amos*, *supra* footnote 3 at 30. The real difficulty with this formulation is that Amos’ “use” of the van was the element that satisfied the purpose test, yet the connecting factor in the chain of causation was his “ownership”.

⁶² *Ibid.*

⁶³ *Contra proferentem* is an abbreviation of the maxim *verba cartarum fortius accipiuntur contra proferentem*. *Contra proferentem* demands that the meaning of the words of a contract are construed strictly against the person offering them. Typically, the rule has been invoked in commercial contexts with contracts of adhesion. The rationale for the rule is that the offeror has drafted the contract, and therefore, had the opportunity to address ambiguities at the outset.

⁶⁴ As Southin J.A. remarked in *Collier*, *supra* footnote 31 at 93-94: “In approaching this question of the meaning of the phrase “arising out of” and, thus, the ultimate issue of whether there was here an event within the ambit of the insuring contract, one must remember that the question in truth is one of construction — here, not of a private insurance contract, but of an insurance contract the obligations of which are fixed by statutory instrument.”

speak of construing the words of a contract strictly against the person offering them, when neither party is effectively offering terms.⁶⁵

The second reason to exclude the *contra proferentem* rule is that it has been subsumed by a larger approach. It is now unequivocal that courts should resolve insurance contract ambiguities by assessing the "reasonable expectations" of the parties.⁶⁶ One of the guiding principles of this approach is that coverage provisions should be construed broadly and exclusion clauses narrowly. Presumably, this is to accord with the "compensation" objective of insurance law. Particularly in an automobile insurance context, one of the law's principal objectives is to ensure that all victims are compensated in the event of accident and loss. This is why certain forms of basic automobile insurance are compulsory in all provinces. But again, public policy is misplaced in this context. A survey of the cases in this area reveals that very few of them, if any, are about jeopardizing an individual's right to indemnification *per se*. Instead, almost all of them debate which insurance contract, be it automobile, fire, accident and sickness, or general liability should provide coverage.⁶⁷ Given this tension, does it make sense to construe the coverage section so broadly? Why should all accidents remotely involving a vehicle be presumed to fall within the

⁶⁵ Of course, this too is highly controversial and debatable. One counter-position is that the private insurance contracts pre-dated the statutory requirement and thus the statute merely reflects a starting point that private insurers initially created. This is not a compelling argument, particularly given that the statutes have been amended a number of times since the first appearance of such a provision.

A more compelling argument is that the legislation itself is a pluralist product of pulling and hauling between the legislators and insurance companies in various legislative committees. Some would even argue that insurers themselves draft the legislation and thereby dictate social policy. However, what this means for the *contra proferentem* rule remains open to question.

⁶⁶ This notion was first introduced in Canada in *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), but firmly established by the Supreme Court in *Brisette v. Westbury Life Insurance Co.* (1992), 13 C.C.L.I. (2d) 1 (S.C.C.) and *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.* (1993), 13 C.C.L.I. (2d) 161 (S.C.C.). In *Reid Crowther*, Justice McLachlin wrote:

In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:

- (1) the *contra proferentem* rule;
- (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
- (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

⁶⁷ For e.g. see *Reliance Petroleum*, *supra* footnote 4. The fuel company had an automobile liability policy expressly insuring against liability "arising from the ownership, use or operation" of the tanker truck. The fuel company also had a general liability insurance policy that specifically excluded "any claim arising by reason of ... Any motor vehicle". The issue was which policy provided the coverage.

coverage of automobile insurance, when the alternative would still result in indemnification?

Of course, this observation might explain, to some degree, the outcome in *Amos*. *Amos* asked the court to determine whether Briton Amos should be indemnified at all for his losses. This causes one to wonder whether the Supreme Court would have decided *Amos* differently if, for example, it were a matter of determining liability between an automobile insurer, on the one hand, and an accident and sickness insurer, on the other.⁶⁸

The remaining overarching principle of interpretation is to give effect to the “reasonable expectations” of the parties. Accordingly, *Amos* might be justified to the extent that it reflects a common assumption that any injuries suffered in the course of operating an automobile are covered by automobile insurance. However, this overshoots the analysis. Instead, one should ask:

If, at the time in which they entered into the insurance contract, the parties put their minds to the manner and nature of Amos’ accident, would they have reasonably considered his injuries to fall within its coverage?

To answer this question, the courts should avoid an interpretation that results in either a windfall to the insurer or an unanticipated recovery to the insured.

Unfortunately, an infinite number of reformulations of the “reasonable expectations” of the parties does not accomplish much. Who can say, with any certainty whether, the ICBC would receive a windfall if Amos were not indemnified? No one ever contemplated the gang attack on Amos, and in hindsight it is difficult to apprehend what the parties would have expected had the scenario even entered their minds. Perhaps this is why Justice Major never turned his attention to any of these questions.

Intuitively, however, this brings the analysis full circle. There is some safety in concluding that most motorists would expect to be indemnified for every loss, regardless of its nature, that occurs while driving a vehicle. In fact, most people might reasonably expect to be indemnified in cases of random acts over which they had no control, rather than accidents that were their fault. For this reason alone, it could be said that the *Amos* decision was consistent with reasonable expectation. In fact, it is far easier to question the reasonable expectations in a case such as *Boell v. Schinkel*,⁶⁹ where it was much less clear that the parties would have anticipated indemnity in the event of an accident caused by a dog jumping through the open window of a parked car.

If nothing else, the trend in interpreting the phrase “arising out of the ownership, use or operation of a vehicle” creates a threshold of certainty. Automobile insurers can be quite confident that when the question of

⁶⁸ Contrast for e.g. with cases such as *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] S.C.R. 888, 112 D.L.R. (3d) 49 which was a fight between two large and competing insurance companies.

⁶⁹ *Boell*, *supra* footnote 21.

interpretation arises, the case is more likely to find itself within the language than beyond it. Of course, this runs counter to the desire to exclude generalized bias in the interpretation of insurance policies. One should be quite sceptical, therefore, whether this is the certainty automobile insurance law hopes to achieve.

Conclusion

Since the founding cases of *Reliance Petroleum* and *Law, Union & Rock*, both the "purpose test" and the "chain of causation test" have undergone incremental yet considerable change. Courts have consistently widened the breadth of activities and simultaneously relaxed the required causal connection in determining whether an accident falls within the coverage provisions of the respective provincial insurance acts.

No previous case reflects the extent of these changes more than *Amos v. Insurance Corp. of British Columbia*. On the one hand, *Amos* and its predecessors demonstrate how trivial the purpose test has become. Now, as long as it can be said that the accident arose from an activity to which vehicles are occasionally or might be put, the "purpose test" is satisfied. At the same time, as long as the accident occurred during the activity in question without a completely new and independent intervening cause, the chain of causation remains intact. This leads inextricably to the conclusion that the two-part test, as formulated after *Reliance Petroleum* and *Law, Union & Rock*, has become obsolete and passé. Now, given the recent trends and developments of the common law, a court need only ask:

Did the accident occur in the course of activities to which a vehicle might be put?

The inclusion is interpreted broadly and the threshold is particularly low.

At the same time, the concept of "ownership" is in the infancy of developing a separate vitality. Given parallel developments in American law and the undercurrents of Justice Major's reasons in *Amos*, "ownership" may be of considerable relevance where injuries result from the attempt to steal or "car-jack" a vehicle. However, because "ownership" is a passive concept that does not denote an activity, it may remain subservient to the issue of "use" or even "operation" until the question of coverage is completely reformulated.

The dynamic of past cases also suggests that compensation principles should not be applied blindly without first questioning their relevance. In the context of many cases in this area of automobile insurance, the fight is not between the individual and his or her insurance company. The issue is not about coverage or no coverage. More often than not, the dispute is between two competing insurance companies, and the issue is over which of their insurance contracts is responsible for indemnifying the loss. It is questionable whether any benefit is gained by construing inclusion provisions broadly when the beneficiary of such a presumption is merely another insurance company.

One cannot help but wonder whether “reasonable expectations” lie silently at the root of each decision. Although no judge expressly refers to the “reasonable expectations” of the parties, underlying each case may be a common assumption that all accidents remotely involving a motor vehicle should be covered by automobile insurance. This would surely account for the ongoing trends in interpretation and no doubt justify further liberal developments.