LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Tribunal File Number: 18-000290AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* R.S.O. 1990, c. I.8, in relation to statutory accident benefits.

Between:

B.A.

Applicant

and

Gore Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Craig Mazerolle**

APPEARANCES:

For the Applicant: Carlos Ortiz, Paralegal

For the Respondent: Jocelyn Tatebe, Counsel

Held by Written Hearing: **June 11, 2018**

OVERVIEW

[1] This decision concerns the preliminary issue that was identified during the May 9, 2018 case conference: whether the incident which occurred on June 21, 2017 was an "accident" as defined in s. 3(1) of the *Statutory Accident Benefits Schedule — Effective September 1, 2010* (the "*Schedule*"[1])?

[2] A determination that the incident constitutes an "accident" will entitle the applicant to receive accident benefits from the insurer.

[3] For the following reasons, I find that this incident does not constitute an "accident".

INCIDENT

[4] On June 21, 2017, the applicant drove with a friend to an automobile repair shop to discuss issues he was having with one of the vehicles he had previously brought to this shop. The applicant parked his car in the shop's garage and left it running. He then stepped out of the vehicle, and a verbal disagreement quickly arose between the applicant and one of the mechanics. The car door remained open during the following events.

[5] Upon realizing that the applicant and one of his mechanics were engaged in a verbal altercation, the owner instructed his staff to assault the applicant. In a statutory declaration, the applicant described the assault as follows:

> … I struck the exterior of the vehicle. I was battered and pushed into my vehicle. My back struck the driver's side back while (on the driver's side) [*sic*]. My head struck the exterior of the vehicle as I was hit with a metal bar in [*sic*] my right shin, which caused bruising and bleeding in my right shin, as I was falling down on the concrete floor.

[6] According to the disability certificate provided to the Licence Appeal Tribunal – Automobile Accident Benefits Services (the "Tribunal") (dated November 6, 2017), the applicant suffered headaches and injuries to the neck, right shoulder, spine, right knee, and right calf.

[7] In the insurer's response to the applicant's claim for benefits (dated December 22, 2017), the respondent denied that the applicant had suffered an "accident": "Further to our investigation, it was determined that the automobile did not cause

[1] O. Reg. 34/10.

the injuries sustained in the incident of June 21, 2017. The injuries that you have sustained were as a direct result of an assault."

LAW

[8] Subsection 3(1) of the *Schedule* defines an "accident" as follows: "an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device…"

[9] Both parties cite the Court of Appeal for Ontario's decisions in *Chisholm v. Liberty Mutual Group*[2] and *Greenhalgh v. ING Halifax Insurance Co.*[3] for the two-part test that adjudicators must consider when interpreting this definition:

(1) Did the incident arise out of the use or operation of an automobile?

(2) Did this activity directly cause the impairment?[4]

[10] The first stage of the test is a determination of whether the incident in question involves "the ordinary and well-known activities to which automobiles are put".[5] The second stage then requires the adjudicator to determine if these activities were the direct cause of the impairment by considering the following factors: the "but for" consideration; the "intervening act" consideration; and the "dominant feature" consideration.[6]

[11] The "but for" consideration screens out trivial acts and events that could not be a possible cause of the impairments.[7]

[12] The "intervening act" consideration then asks the adjudicator to determine if some other event took place that could better explain the cause of the impairments. However, the adjudicator must also be alive to the possibility that this intervening act could be an event that takes place in the "ordinary course of things" when engaging in an ordinary and well-known activity. In other words, was the intervening act directly caused by the ordinary and well-known activity of the automobile?

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[2] 2002 CanLII 45020 (ON CA) ("*Chisholm*").
[3] 2004 CanLII 21045 (ON CA) ("*Greenhalgh*").
[4] *Ibid* at para. 10.
[5] *Ibid* at para. 11.
[6] *Ibid* at paras. 37-49.
[7] *Ibid* at para. 37.

[13] Finally, when faced with a number of elements that could be the cause of an impairment, the "dominant feature" consideration asks the adjudicator to consider whether the ordinary and well-known activity of the automobile "most directly caused the injury".[8]

PARTIES' POSITIONS

[14] Both parties agree that at least some of the events involved in the incident constitute ordinary and well-known activities to which automobiles are put. However, the scope of these activities differs between the parties. While the respondent concedes that parking and exiting a vehicle are ordinary and well-known activities, the applicant's position also includes the act of repairing and maintaining one's vehicle.

[15] Beyond these different characterizations, the parties also disagree on whether any of these activities were the direct cause of the applicant's impairments.

[16] The applicant submits that the assault would not have taken place unless he had taken his automobile to be repaired at the shop. Relying on the recent decision in *North Waterloo Farmers Mutual Insurance Co. v. Samad,*[9] the applicant argues that this ordinary and well-known activity meets the standard of "direct cause" since it was the event that caused the assault.

[17] Further, similar to *North Waterloo*—wherein a taxi driver was injured when one of his passengers pushed him—the applicant's injuries were mainly caused by striking the exterior of his car. That is, aside from the injuries he sustained to his legs from the metal bar, his main impairments were caused by falling into a vehicle as a result of an assault that was precipitated by ordinary and well-known activities to which automobiles are put.

[18] In response, the respondent contends that the case law concerning assaults and accidents is well-settled.[10] Unless the vehicle itself is directly associated with a specific impairment (e.g., in *Freeze Night Club*, the assailants ran over the insured person's foot while fleeing the crime scene), assaults are not considered "accidents" under the *Schedule*. Therefore, while the respondent accepts that

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[8] *Ibid* at para. 49. *North Waterloo Farmers Mutual Insurance Co. v. Samad*, 2018 ONSC 2143 (CanLII), at para. 82.

[9] 2018 ONSC 2143 (CanLII) ("*North Waterloo*").

[10] See e.g., *Chisholm*; *Lombard General Insurance Company and Liu* (Appeal P02-00030, January 8, 2004) (FSCO) ("*Liu*"); *Martin v. 2064324 Ontario Inc. (Freeze Night Club)*, 113 O.R. (3d) 561 (C.A.) ("*Freeze Night Club*"); and *Downer v. The Personal Insurance Company*, 2012 ONCA 302 (CanLII) ("*Downer*").

parking and exiting a vehicle are ordinary and well-known activities, the repair shop owner's order and the subsequent assault were intervening acts that broke the chain of events between parking the vehicle and the impairments.

[19] The respondent also argues that the applicant's reliance on *North Waterloo* is unfounded. Specifically, the assault and the operation of the cab were contemporaneous. In the present case, the verbal disagreement with the mechanic and the owner's order were not.

ANALYSIS

[20] After reviewing the facts presented to me, I am not satisfied that the ordinary and well-known activities that the applicant's automobile was being used for on June 21, 2017 were the direct cause of the applicant's impairments. As such, I find that this incident does not constitute an "accident" as defined under the *Schedule*.

[21] To start, I do accept the applicant's position that repairing one's vehicle is an ordinary and well-known activity, as one must ensure that her or his vehicle is in good working condition if it is going to be used at all. As such, limiting my inquiry to the act of parking and exiting the vehicle would not fully capture the actions that were taking place during the incident.

[22] Furthermore, I note that the present assault is closer in character to an "accident" than many of the other assault cases I was provided by the parties.

[23] First, the present incident arose after a disagreement involving the automobile itself. Whether it was the presence of the damaged automobile, or the threat from the applicant that he would not move it until he received a refund, it is clear to me that the automobile caused the disagreement that preceded the assault. This connection stands in contrast to other assaults cases, wherein the vehicle was simply the location of the assault.[11]

[24] Second, in *Chisholm*, *Liu*, and *Downer*, the assailants had no pre-existing relationship with the insured persons. Put another way, those were random attacks. Yet, in the present case, there was a pre-existing relationship between the applicant and the repair shop. Similar to the commercial relationship in *North Waterloo*, the incident in this case stemmed from a contract between the parties that involved the use and operation of an automobile.

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[11] See e.g., *Chisholm*.

[25] However, even in light of these differences, I still find that the present assault is not an “accident”.

[26] There is no mechanistic, step-by-step analysis mandated by the legal framework detailed above. However, when the two-part test is applied to cases involving assault, the “intervening act” consideration drives much of the analysis. That is, by viewing these assaults as “intervening acts”, adjudicators often characterize the decision to attack an insured person as a break in the chain of causation between an automobile’s ordinary and well-known activity and the impairment.

[27] The reason for this break is detailed in the Court of Appeal’s decision in *Chisholm.* By finding that a random, drive-by shooting was not an “accident”, Justice Laskin held that an intervening act could be the direct cause of an impairment, but this act must reasonably flow from the use of an automobile:

> [E]ven accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car -- if it is "part of the ordinary course of things”. … Gun shots from an unknown assailant can hardly be considered an intervening act in the "ordinary course of things". The gun shots were the direct cause of his impairment, not his use of his car.[12]

[28] I, too, cannot say that being assaulted over a disagreement involving vehicle maintenance is an intervening act in the “ordinary course of things”. Nor can I say that the activities of parking and exiting a vehicle (even if there is then a refusal to move said vehicle) would provoke a violent attack in the “ordinary course of things”. Instead, there was a clear decision from the shop’s owner to bring about the events that would, ultimately, cause the impairments.

[29] Justice Thorburn’s description of a “direct cause” from *North Waterloo* also provides helpful guidance: “a cause or an act that sets in motion an uninterrupted chain or train of events or the first in a row of blocks after which the rest fall down without the assistance of any other act or intervention of any other force”.[13]

[30] I am not convinced that the operation of the vehicle acted as “the first in a row of blocks” that eventually led to the applicant’s impairments. Rather, the owner’s

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[12] *Chisholm*, at para. 29 [citation removed].
[13] *North Waterloo*, at para. 65.

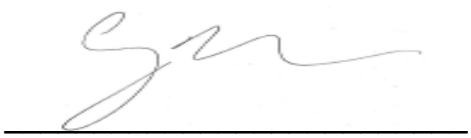
decision to instruct his staff to attack the applicant was an intervening act that broke the chain of events between the automobile's use and the impairments.

[31] In this same vein, I cannot say that the applicant falling against his vehicle during the assault was the direct cause of his impairments. In line with the findings above, the intervening act of the assault was the "first in a row of blocks" that led to the fall and then the impairments. To accept the applicant's argument would require me to conceive of falling against the vehicle as a second, intervening act (as opposed to one directly caused by the intervening act of the assault). For the reasons above, I am unprepared to make this finding.

CONCLUSION

[32] The applicant has not demonstrated that the incident on June 21, 2017 constitutes an "accident" as defined under the *Schedule*.

Released: August 27, 2018



Craig Mazerolle
Adjudicator