Citation: Davis vs. Aviva General Insurance Company, 2022 ONLAT 20-005334/AABS

Licence Appeal Tribunal File Number: 20-005334/AABS

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

Between:

Carrie-Anne Davis

Applicant

and

Aviva General Insurance Company

Respondent

DECISION [AND ORDER]

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Applicant:	Carrie-Anne Davis, Applicant Gordon W Harris, Counsel
For the Respondent:	Aviva General Insurance Company Geoffrey Keating, Counsel

HEARD: In Writing

REASONS FOR DECISION AND ORDER

Background

[1] Carrie-Anne Davis (the "applicant") was injured on November 22, 2017 when she approached her vehicle after leaving her workplace. As a result of her injuries, the applicant sought accident benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2020* (the "*Schedule*")[1]. A case conference took place on March 2, 2021 before Adjudicator Hines. The matter was scheduled for a written hearing August 30, 2021. On July 13, 2021, the respondent filed a Notice of Motion requesting an order for a preliminary issue hearing regarding whether the applicant was involved in an 'accident' as defined in s. 3(1) of the *Schedul*e.

[2] On September 16, 2021, Vice-Chair Maedel scheduled this matter for a preliminary issue hearing. The substantive issue hearing was adjourned to a later date.

[3] The respondent's position is that the applicant was not involved in an "accident" within the meaning of s. 3(1) of the *Schedule*. The applicant's position is the opposite.

PRELIMINARY ISSUE

[4] The preliminary issue to be decided is:

i. Whether the applicant was involved in an 'accident' as defined in s. 3(1) of the *Schedule*.

RESULT

[5] The applicant's injuries sustained as a result of the incident did not result from an "accident' as defined in s. 3(1) of the *Schedule*. The application is dismissed.

FACTS

[6] The facts in this matter are, for the most part, not in dispute between the parties.

[7] On November 22, 2017, the applicant was leaving work. She was in the parking lot. The applicant had her intelligent key fob in her hand to unlock the car. As she reached out to open the driver's door, she slipped on black ice. She attempted to catch herself on the vehicle in the next parking spot but was

[1] O. Reg 34/10

unsuccessful. She fell on the left side of her body. Her left shoulder hit the ground and her left leg slid underneath the vehicle. After the fall, the applicant proceeded to get into her vehicle and drive herself home.

PARTIES' POSITIONS

[8] The applicant submitted that she was involved in an accident on November 22, 2017. The facts and circumstances of this accident have satisfied both the purpose and causation test. The applicant asserted that there was no intervening act and that but for the use and operation of the vehicle, she would not have fallen and sustained her injuries.

[9] The respondent submitted that the November 22, 2017 incident is not an accident as defined by the *Schedule*. Slipping on ice constitutes an "intervening act" or results in the use or operation of the vehicle not constituting the "dominant feature" of the applicant's injuries, such that the use or operation of the vehicle cannot be said to be a direct cause of the applicant's injuries.

LAW

[10] Section 3(1) of the *Schedule* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment"[2].

[11] The onus is on the applicant to establish on a balance of probabilities that the use or operation of an automobile directly caused her injuries.

ANALYSIS

Was the incident an "accident"?

[12] For the following reasons, I find that the applicant was not involved in an "accident" as defined within s. 3(1) of the *Schedule*.

[13] The Ontario Court of Appeal established a two-part test to determine whether an incident is an "accident" as follows[3]:

> a. Purpose test: did the incident arise out of the use or operation of an automobile, and

[2] Supra note 1 at 1

[3] *Chisholm v. Liberty Mutual Insurance Group,* 2002 CanLII 45020 (ONCA)*; Greenhalgh v. ING-Halifax Insurance Company,* 2004 CanLII 21045 (ONCA) at para 10; *Economical Mutual Insurance Company v. Caughy,* 2016 ONCA 226 (CanLII) at para 10.

b. Causation test: did the use or operation of an automobile directly cause the impairment.

[14] The first stage is a determination of whether the incident involves "the ordinary and well-known activities to which automobiles are put".[4] Said another way, for what "purpose" was the vehicle being used at the time of the incident?

[15] The second stage then requires the adjudicator to determine if these "ordinary and well-known activities" were the direct cause of the impairments. Though there is no mechanistic means of conducting this stage of the analysis, the case law generally focuses on the following factors: the "but for" consideration; the "intervening act" consideration; and the "dominant feature" consideration.[5]

- The "but for" consideration screens out trivial acts and events that could not be a possible cause of the impairments;
- The "intervening act" consideration asks the adjudicator to determine if some other event took place that can better explain the cause of the impairments; and,
- Finally, when faced with a number of possible causes, the "dominant feature" consideration focuses on whether the ordinary and well-known activity at issue is what "most directly caused the injury".

[16] Overall, the case of *Webb v. Wawanesa Mutual Insurance Company Co.* reminds decision-makers to apply the definition of an "accident" in a common-sense fashion that focuses "on the nature of the risk covered by automobile insurance."[6]

[17] The application of this test to the facts of this case follows.

Did the applicant's injuries arise out of the use or operation of an automobile (the purpose test)?

[18] The respondent concedes that this incident meets the purpose test. On this basis, I find that the purpose test is satisfied. I will address the balance of the test.

[4] 2004 CanLII 21045 (ON CA).
[5] *Ibid*, at paras. 37 – 49.
[6] [2012] O.F.S.C.D. No. 102, at para. 70.

The Causation Test

[19] Within the causation test, a three-point analysis has been set out by the Ontario Court of Appeal[7]:

> i. whether the incident would have occurred "but for" the use or operation of the automobile;
>
> ii. whether there was an intervening act that cannot be said to be part of the ordinary course of the use or operation of the automobile; and
>
> iii. whether the use or operation of the automobile was the dominant feature.

Would the alleged injuries have occurred "but for" the use or operation of the automobile?

[20] The applicant is relying on *K.P. v. Aviva General Insurance*[8] and submitted that "but for" her traversing the parking lot to get into the car, the incident which caused her injuries would not have occurred. I agree that she might have not sustained these injuries "but for" her need to enter the vehicle to go home from work. However, the "but for" test does not conclusively establish legal causation, the cause that attracts legal liability.

[21] As Laskin J.A. noted in *Chisholm,* the purpose of the "but for" test of causation is an exclusionary test which serves to "eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome…the but for test does not conclusively establish legal causation."[9] Here, the applicant being proximate to the automobile when allegedly injured is not determinative of causation. Legal entitlement to accident benefits "requires not just that the use or operation of the car be a cause of the injuries but that it be a direct cause.

Was there an intervening cause?

[22] The applicant submitted that there is no intervening event that breaks the causal link resulting in the applicant's injuries. She was in the process of attempting to enter her vehicle, part of the ordinary course of the use or operation of an

[7] *Chisholm v. Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ONCA); *Greenhalgh v. ING-Halifax Insurance Company*, 2004 CanLII 21045 (ONCA).
[8] 2020 CanLII 35505 (ON LAT)
[9] Supra note 7 at 4

automobile, and there was a continuous chain of events preceding her fall and subsequent injuries.

[23] The applicant submitted that:

> The applicant's fall cannot be an intervening act within her ordinary vehicle use. She was in the process of entering her vehicle and therefore there was no physical or temporal distance to separate her act of entering the vehicle and the act of falling. While Carrie-Anne's injuries may not be physically connected to the vehicle, they were not the result of a new and independent force. Therefore, the events of November 22, 2017 occurred seamlessly as one unbroken chain of events.

[24] The respondent submitted there is no evidence to suggest that the applicant's use or operation of her vehicle in any way contributed to her fall and injuries. It was submitted that there is no evidence to suggest that anything other than the icy parking lot surface caused the applicant to slip and fall.

[25] I find that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile. Rather, I find that her injuries were caused by an intervening cause, which is ice on the ground. The ice that initiated the slip and fall that led to her injuries, not the use or operation of her automobile. Although the vehicle was physically near the ice, it did not cause the slip and fall.

[26] The ice on the ground and the applicant's slip and fall constitutes an independent intervening event that broke the chain of events. It started with her leaving work and heading towards her vehicle and ended her with her slipping and falling. The ice and the resulting slip and fall occurred independent of the automobile's use or operation. The icy conditions in the driveway and the applicant's consequent slip and fall caused the applicant's injuries.

Was the use or operation of the automobile a dominant feature of the applicant's injuries?

[27] As described in *Greenhalgh*, the "dominant feature" consideration requires an adjudicator to determine what element of an incident is "the aspect of the situation that most directly caused the injuries."[10] For instance, in *Greenhalgh*, the incident involved the insured person suffering from severe frostbite after getting her vehicle stuck on a country road. In dismissing the claim of an "accident" Justice Labrosse found, that "the 'dominant feature' of the insured's

[10] *Greenhalgh* at para. 49.

injuries could be best characterized as exposure with the elements, and that the use of the motor vehicle was ancillary to that injury."[11]

[28] The applicant submitted that these events were wholly centered her use of her vehicle – its use and operation was the dominant feature. She submitted that:

> She was leaving work and had begun the process of returning to her vehicle and driving off. After unlocking her vehicle, and while in reaching distance, she attempted to enter her vehicle when she slipped and fell. Her fall was undoubtedly secondary to her attempt to enter. Indeed, her proximity to the vehicle resulted in her landing partially underneath it. After the fall, she proceeded, with difficulty, to get into her vehicle and drive herself home as originally intended.

[29] The respondent submitted that there is no evidence to suggest that the applicant's vehicle played any actual role in causing either her fall or injuries. The respondent's position is that the dominant feature of the incident was the icy parking lot surface, not the applicant's use or operation of her vehicle. The respondent is relying on *Porter v. Aviva Insurance Company of Canada*[12]. In that case, Ms. Porter was walking towards a stationary rideshare Lyft car when she slipped and fell on ice in the driveway of her parents' home and was injured.

[30] The Divisional Court found that:

> In this case, the use or operation of the Lyft car cannot be said to be a direct cause of Ms. Porter's injuries. More is required than establishing that the car brought the applicant to the location of the incident (see *Greenhalgh*, at para. 37; *Dominion of Canada General Insurance Company v. Prest*, 2013 ONSC 92), and more is required than the car being the reason why Ms. Porter was at the location where the incident occurred. The location of the car in the driveway could be said to have led to Ms. Porter's injuries – and in that limited sense, her injuries were "as a result of" or connected to the use and operation of the car. But the use and operation of the car did not directly cause her injuries.

[31] I find that the use or operation of the automobile was not the dominant feature of the applicant's injuries. The dominant feature of the applicant's injuries was the ice on the driveway which caused her to slip and fall as she approached her automobile.

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[11] *Ibid.*
[12] 2021 ONSC 3107

[32] In the applicant's reply, she submitted that *Porter* was distinguishable because the insured had not yet begun the process of entering the vehicle as she was required to walk around to the other side before she could commence the process of entering it. Porter was not using any key fob to unlock the vehicle so that she may open the door and enter.

[33] Therefore, the process of her entering her vehicle, activating the chain of causation, had not yet commenced. She submitted that despite the proximity of the insured to the vehicle in *Porter*, her use of the vehicle prior to her slip and fall was more akin to using a hand railing for stability rather than to enter a vehicle to drive off. The applicant was actively engaged in the latter. The applicant was close to the door and her arm and hand were engaged in the act of unlocking the door so that she may enter her vehicle and drive home.

[34] In my view, the dominant feature of this incident was not the use or operation of the automobile. Moreover, I am not persuaded that this matter is different from the facts in *Porter* and that she was in the process of entering her vehicle at the time of her slip and fall. Although she was walking towards her vehicle in the parking lot, I do not find that her proximity to the vehicle or the use of her key fob to unlock the vehicle demonstrates that she was in use or operation of the vehicle as suggested by the applicant.

[35] While I agree that the applicant was in the parking lot for the sole purpose of entering her vehicle, the direct cause of her injuries was not related to her intended entry into the vehicle. Her injuries were due to ice in the parking lot, which was the "dominant feature" of this incident. The location of the vehicle was ancillary, as the ice would have been present regardless of the location of the vehicle.

[36] According to the facts in this case and the test from the applicable case law, I cannot conclude the use or operation of an automobile directly caused the applicant's injuries. Thus, this incident does not meet the definition of an "accident" as per s. 3(1) of the *Schedule.*

[37] As a result, I find that the incident does not meet the causation test of an "accident". This is the applicant's burden to prove, and she has not done so. Therefore, any impairments the applicant sustained as a result of the incident did not result from an "accident" as defined by the *Schedule*.

ORDER

[38] The applicant has not demonstrated the incident on November 22, 2017 constituted an “accident”, as defined in s. 3(1) of the Schedule.

[39] The written hearing scheduled for July 29, 2022 shall be cancelled.

[40] The application is dismissed.

Released: May 18, 2022

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Tavlin Kaur, Adjudicator