1992 CarswellOnt 4891
Ontario Insurance Commission

Hunt v. Royal Insurance Co. of Canada

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Jimmie Joe Hunt, Applicant and Royal Insurance Company of Canada, Insurer

Palmer Arb.

Heard: August 31 - September 1, 1992
Judgment: October 15, 1992
Docket: A-000370

Proceedings: Affirmed, 1996 CarswellOnt 5276 (Ont. Insurance Comm. Dir. of Arbs.)

Counsel: Jimmie Joe Hunt Applicant
Wendy Oughtred and Mark Greenstein, for Applicant
Nestor Kostyniuk, for Insurer

Subject: Insurance; Civil Practice and Procedure

Headnote
Insurance

***Palmer Arb.*:**

Issues:

1 The Applicant, Jimmie Joe Hunt, was injured while riding on a Toronto Transit Commission bus on October 3, 1990. He was insured under a standard automobile owner's policy issued by the Insurer. Every motor vehicle policy provides the no-fault benefits set out in Ontario Regulation 273/90, the *No-Fault Benefits Schedule* (the "*Schedule*").

2 The Applicant applied for and received weekly income benefits in the amount of the $185.00, pursuant to section 13 of the *Schedule*. In May 1991, the Insurer terminated the Applicant's weekly income benefits. The Applicant disputed the termination of his benefits and, following mediation, the Insurer agreed to continue paying benefits to the Applicant until June 4, 1991.

3 The Applicant claimed he was entitled to benefits until March 1992. He applied for the appointment of an arbitrator to resolve the issue.

4 The issues to be determined in this arbitration were:

1. Did an "accident" occur, as defined under the *Schedule*?

2. If an accident occurred, did the Applicant suffer an injury on October 3, 1990?

3. Has the Applicant suffered a substantial inability to perform the essential tasks in which he would normally engage from June 5, 1991 until March 1992?

4. Should the Applicant repay benefits paid to him previously on the grounds that he deliberately defrauded the Insurer in this matter?

5 The Applicant also claimed his costs of the arbitration.

Result:

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1. An accident occurred on October 3, 1990, in which the Applicant suffered injury.

2. The Applicant did not suffer substantial inability to perform his essential tasks after June 5, 1991.

3. The Applicant did not deliberately defraud the Insurer.

4. The Applicant is entitled to his expenses of this arbitration.

Hearing:

7 An arbitration hearing was held at North York, Ontario, on August 31 and September 1, 1992, before me, K. Julaine Palmer, arbitrator.

Present at the hearing were:

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Applicant:	Jimmie Joe Hunt
Applicant's Representatives:	Wendy Oughtred Barrister & Solicitor Mark Greenstein Barrister & Solicitor
Insurer's Representative:	Nestor Kostyniuk Barrister & Solicitor

9 The following witnesses testified under solemn affirmation:

Jimmie Joe Hunt, Applicant

Reba Hunt, Applicant's spouse

Rhonda Flemming, Applicant's daughter

Clinvern Bent, T.T.C. Operator

Michael Brennagh, Psychiatrist

10 The parties filed 27 exhibits.

Evidence:

11 Clinvern Bent, a Toronto Transit Commission ("T.T.C.") operator, testified that on October 3, 1990, he was driving a bus south on Kennedy Road near Progress Avenue, when a car turned directly in front of him and he was forced to brake hard and quickly. After the incident, he looked around the bus and asked if anyone was injured. The Applicant told him that he had hurt his neck. The Applicant said that he was okay, but he wanted to get some information for future

reference. The bus continued to the Kennedy station and the Applicant remained on board. At the station, the operator reported the incident to his supervisor. The operator thought the Applicant spoke to the supervisor. The operator filed a report following the incident and noted that a passenger had "hit his neck on a vertical pole".

12 The Applicant gave evidence at the hearing. He testified that he is 61 years old and is married. He has a daughter living in Toronto and a daughter living in Florida. For the past five years, the Hunts have spent part of each year in Florida. They purchased a house there in 1988.

13 The Applicant testified that at the time of the accident he was seated on a bench seat, near the front of the bus. The seat faced into the centre of the bus. He testified that he was tossed forward after the bus stopped quickly and his body arched downward, his neck contacting a vertical pole. He testified that he fell forward down onto the floor for a few seconds. He believed he was injured. He continued on the bus to the Kennedy Station and reported his injuries to the supervisor there. An ambulance was called which took him to Scarborough General Hospital, where he was examined and x-rayed. The emergency doctor gave the Applicant some painkilling medication and told him to see his own doctor the next day.

14 The Applicant's home was only a short distance away from the hospital and he returned home by bus. He testified he intended to go to bed but, in the coming hours, his condition worsened and his headache progressed from being a dull, throbbing headache to one that he described as shooting pain, like sharp arrows protruding through his head. His neck started to pain him "as if someone had hit him with a 2 × 4." He said his left shoulder began to ache.

15 The Applicant testified he became so concerned about his condition that, later the same evening, he went to Scarborough Grace Hospital, two blocks from his house. At that hospital, they examined him and the emergency physician gave him a collar which he wore home. He did not sleep very well that night. The next day or the following day he went to see Dr. Ali, a family practitioner with a practice very close to his home. He had seen Dr. Ali a few times previously. Dr. Ali told him to continue with the Tylenol and gave him two prescriptions, one for a muscle relaxant and one for a salve which he rubbed into his neck.

16 The Applicant described his medical condition in the days after the accident. He testified that he wore his collar whenever he was driving or travelling on the bus. He took several hot showers each day. The medication he was taking made him sleepy and he slept a lot. Often he would sleep three hours in the middle of the day. His night sleep was disturbed. The Applicant estimated that he slept at least ten hours a day at that time.

17 About mid-October, the Applicant drove to Florida, to his home in Palm Harbour, near Clearwater. He drove alone for two and a half days. The Applicant testified that, during the trip, he took a lot of Tylenol, but not the other drugs that made him sleepy. He would drive about an hour and then get off the highway and walk around. The Applicant testified that he thought convalescence in the Florida sunshine would improve his condition.

18 The Applicant testified that in Florida he went for short walks during the day. He did not wear his collar when he was inside a shopping mall, but only where the terrain was rough. He saw no medical doctor during this portion of his stay in Florida. He had planned to return to Ontario in the middle of December, but he was persuaded by his family to stay until after Christmas. He contracted shingles on December 22 or 23, 1990 and, therefore, delayed his return to Toronto until the beginning of February 1991.

19 In 1985, the Applicant had been admitted to hospital because of mental illness and began seeing a psychiatrist regularly, about twice per year. Prior to the motor vehicle accident, his regular, daily medication was 300 mg of lithium carbonate. During the 1990-91 winter, the Applicant was concerned about his physical and psychological condition. He was under great stress. Without consulting a doctor, he increased his dosage of lithium to 900 mg, then 1200 mg, and finally 1800 mg per day. The Applicant testified that he had headaches and that the left side of his neck down into his arms hurt. He was very lethargic and withdrawn, and felt that everything was pressing down on him. He did not want to talk with anyone or do anything.

20 When the Applicant went to see a doctor in Florida about the shingles, he told him how much lithium he was taking, and was advised to decrease the dosage. The Applicant decreased the dosage to 1200 mg. (From about March 1992, he has been maintained on 600 mg of lithium per day.)

21 The Applicant testified that he saw his psychiatrist, Dr. Brennagh, in mid-February 1991. At that time, he felt that he was starting to improve and had more energy. He saw Dr. Ali, who immediately started him on physiotherapy. One of his doctors suggested he take up swimming. The Applicant found conventional swimming was "too violent on his upper body", but he tied a floating device on his upper back and floated in the water approximately three times per week. He continued with his pain medication, Parafon Forte, until his orthopaedic specialist, Dr. Kachooie, changed the medication.

22 The Applicant described a typical day in February 1991. He said that he got up between 9:00 and 10:00 a.m. and took a hot shower. He then ate breakfast, took his lithium, went to physiotherapy, returned, and had another hot shower. After lunch, he would slowly and carefully do some very mild stretching exercises. Then he went for a short walk of three blocks, took his Amitriptyline which made him sleepy, and napped for two or three hours. When he got up, he had another shower, went swimming, returned, and had another shower and had supper. Then he would lie on his bed. He very seldom watched television. He retired about 9:00 p.m. The Applicant testified that this was his daily pattern from February 1991 to October 1991.

23 On September 29, 1991, the Applicant was again travelling on a bus, seated on a bench seat. A similar incident to the first accident took place when the bus braked sharply, and he was tossed sideways. The Applicant reported the incident to the driver and told him that he had had a previous injury. The Applicant was scheduled to see Dr. Kachooie in the next few days. When he saw him, he told him about the second bus incident, which he felt had aggravated his condition. The Applicant began to experience what he described as "a double catch" in that he could not turn his head fully from side to side.

24 The Applicant testified that by March 1992 his headaches had tapered off, but he was "not cured, not wholly well". He had travelled to Florida in early November 1991 and remained there until May 1992, his longest stay at one time in the past few years. He testified that his activities remained much the same as before: taking three or four hot showers daily, doing exercises and taking short walks. He watched quite a bit of television.

25 The Applicant testified that he had stopped working and took early retirement in 1989. Previously, he had taught high school full-time with the York Region Board of Education. He testified that, after six months of enjoying life after retiring, he planned to return to different full-time employment, like social work or the ministry, and also intended to resume writing. After the accident, he lost motivation and energy and had neither the desire, the will nor the energy to pursue any of these activities.

26 The Applicant testified that just prior to the accident he had been working at his daughter's house doing renovations and repairs, and had drywalled the living room ceiling, where water had leaked. He had also spent two weeks working collating kits for Professional Management Associates of Canada. He went to the library and did research in theology, approximately twice per week.

27 The Applicant testified that he had had a prior accident on July 24, 1989, when he hit his head on a plate-glass window of a banking machine enclosure. After that incident, he felt nauseous and went to North York General Hospital. He had pains in his head and neck until November 1989. He saw a chiropractor during this time and gradually the headaches tapered off and cleared up.

28 The Applicant testified that he felt his essential tasks should be defined as the ability to "accommodate myself to the desires of the time". He testified that he was a registered renovator and that he is a sculptor as a hobby. He likes to write when he has the time and no writer's block. He now has three writing projects under way.

29 The Applicant testified that he has no desire to do renovation work now, because he does not think that that would be good for him.

30 The Applicant testified that before the accident of October 1990 he had a relaxed lifestyle with a close-knit family. He enjoyed physical activities. In the distant past, he used to teach weightlifting and boxing. He had been involved in karate and still did karate exercises. He used to run on the spot and liked to row boats and swim.

31 Under cross-examination, the Applicant admitted that he was last a classroom teacher in 1985. From 1986 to 1989, he received disability benefits.

32 The Applicant admitted that after the accident he continued with his Bible study, although sometimes he did not feel like it. He has never stopped praying and attends church regularly, although occasionally he does not feel like going.

33 The Applicant testified that he was given golf clubs two years before the accident, and had never used them. He intended to golf with his brother. He also intended to get back to punching a speed-bag. He has always been able to attend to his personal hygiene. He also admitted that he still has a good relationship with his grandchildren, although he is not able to toss them in the air as he did before the 1990 accident. The Applicant confirmed that, when he was in Florida over the winter 1991, returning to Canada in May 1992, he did not go to the hospital, see any doctor, take any physiotherapy, nor receive any treatment. Neither was he involved in any new motor vehicle accident or other accidents.

34 Reba Hunt, the Applicant's wife, testified that before the October 3, 1990 accident her husband was very active: he exercised, took his grandchildren out in a row boat, fished, swam, did "most anything", and pursued a lot of library research. Mrs. Hunt testified that prior to the accident her husband was in good mental health. She stated she believed he travelled to Florida in mid-November 1990. She had been in Florida since the first week of September.

35 Mrs. Hunt testified that in Florida after the accident the Applicant did not do much. He spent most of his time resting around the house. Two days before Christmas, one side of the Applicant's face became paralysed and he attended at the emergency room of a nearby hospital. Although the initial diagnosis was Bell's palsy, a specialist re-diagnosed shingles, and prescribed medication and an eye patch, because the Applicant could not close one eye. It was Mrs. Hunt's evidence that the symptoms from the shingles continued for more than two months. Her husband returned to Canada in February 1991 and she followed in April 1991.

36 The Applicant's spouse testified that in the summer of 1991 her husband took many hot showers and complained about his neck hurting him. She thought that sometime in the summer of 1991 his symptoms began to diminish.

37 On cross-examination, Mrs. Hunt testified that she first learned about the bus accident three or four weeks after her husband arrived in Florida when she answered a telephone call for him. She testified that before this she knew there was something wrong with his health, but he didn't tell her about it. Mrs. Hunt testified that it was not unusual for her husband to withhold information from her about the T.T.C. accident. She stated that anything like that he doesn't like to talk about a lot.

38 Mrs. Hunt testified that in November 1990 a neighbour cut the grass in Florida and her husband did no yard work. He had driven his own car to Florida but did not drive much after he reached Florida. Mrs. Hunt testified that her husband went to church in Florida most of the time, dressed himself, and attended to his own personal hygiene. Generally, he persevered and did his best. He used his heating pad and took a lot of Tylenol.

39 Rhonda Fleming testified. She is a daughter of the Applicant and lives in Toronto. She stated that prior to October 1, 1990 her father was very active. In 1989 he dug a vegetable garden for her and maintained the garden each year until 1992. He redrywalled and painted the ceilings in her living and diningroom in August and September 1990. He played with her children and participated in sports like baseball. He has not done this since the accident.

40 The Applicant's psychiatrist, Dr. Michael Brennagh, testified. He stated that in 1985 he diagnosed the Applicant as suffering from an endogenous depressive illness. This illness is a physiological disorder arising from a chemical disturbance in the brain. Dr. Brennagh testified that he considered that since 1985 the Applicant had been disabled from returning to teaching or any meaningful employment due to his psychiatric illness. By May 1987, he had formed the opinion that the Applicant would be permanently disabled.

41 Dr. Brennagh testified that since April 1988 the Applicant's illness has been reasonably well controlled with medication. The psychiatrist started the Applicant at 600 mg per day of lithium carbonate in May 1988. In January 1989, that dosage was increased to 900 mg per day. In May 1989, when the psychiatrist analyzed the Applicant's blood, he found that the lithium level was 0.7 mEq/L, within the therapeutic range. Subsequent tests in June 1990 and in February 1991 showed the lithium levels to be 0.74 and 0.61 mEq/L, within the therapeutic range. When he last analyzed the Applicant's blood in June 1992, he found that the level was low, at 0.23.

42 The psychiatrist testified that in his opinion the Applicant could not stand the stress of daily work to earn a living. Although medications now control his illness, such stress would cause him to go out of control. The psychiatrist expressed the view that the Applicant's feeling of energy and his opinion that he could write a book and be published, write screenplays and do investigative reporting, were symptomatic of the illness from which the Applicant suffers.

43 The psychiatrist indicated that at no time did he feel that the Applicant was incapable of attending to his personal hygiene, driving a car, taking a bus, travelling to Florida, or attending church.

Submissions:

44 The Applicant's counsel submitted the evidence shows that the T.T.C. bus suddenly braked causing an accident on October 3, 1990. This accident injured the Applicant. His physical condition was attested to by his wife and daughter. The expert reports of Dr. Kachooie and Dr. Wong confirm that the Applicant suffered from a restriction of motion of his neck.

45 The Applicant's counsel submitted that by March 1992 the Applicant felt he was able to perform his usual tasks, like rowing, library research, gardening, and playing with his grandchildren. The Applicant's counsel submitted that, in this case, the arbitrator should consider restriction from activities one enjoys doing. It is not a question of the Applicant's ability to wash or dress himself that the arbitrator should take into account in this case. The Applicant's counsel submitted that the Applicant is a thin-skulled plaintiff who must be accepted as he was found; he was someone who was more vulnerable to injury when he was hurt on October 3, 1990. The injury affected his lifestyle until March 1992.

46 The Applicant's counsel submitted that there was no evidence of fraud. The evidence with respect to the plate-glass window incident on July 24, 1989 is that the symptoms from that injury had largely resolved by October 1989. This was confirmed by a written report from the chiropractor, Dr. Gotlib. The Applicant's counsel submitted that Dr. Kachooie's report stated that he found the Applicant to be an "honest and credible patient", and his opinion did not change after reviewing the photographs from the Insurer's investigator.

47 The Insurer's counsel submitted that this is a case under the *No-Fault Benefits Schedule*, not a case about general damages. The Insurer's solicitor submitted that there was no accident, no slide or skid, and no witnesses to say that the Applicant ever fell to the floor. He submitted that the bus driver testified he never saw the Applicant on the floor.

48 In the alternative, if an accident recurred, the Insurer's counsel submitted that there was no injury. The Applicant was fit to drive on his own to Florida. He suffered from a case of Bell's palsy or shingles in December 1990 and this condition affected his vision and speech, not the incident on the T.T.C. bus.

49 The Insurer's counsel submitted that the definition of essential tasks encompasses personal hygiene, mobility, ability to shop, go to church, and the like, but "essential tasks" does not include everything that one wants to do. The

Insurer's counsel submitted that, without exception, Dr. Brennagh stated that the Applicant could perform his essential tasks in February of 1991 "with pain".

50 The Insurer's counsel submitted that a fraud had been deliberately practised upon the Insurer. The Applicant told no one at Royal Insurance that he was going to Florida and disappeared from November of 1990 until March 1991. The Insurer submitted that in this case the costs should follow the event, and only one counsel fee should be allowed.

Findings:

51 In this arbitration, the insurer contended that no accident occurred and no injury was sustained by the Applicant. The *No-fault Benefits Schedule* defines the term "accident" in section 2:

> "accident" means an incident in which the use or operation of an automobile causes, directly or indirectly, physical, psychological or mental injury or causes damage to any prosthesis, denture, prescription eyewear, hearing aid or other medical or dental device;

52 There is no dispute that a T.T.C. bus qualifies as an "automobile" under the *Insurance Act*. I accept the evidence of the Applicant and the operator, Clinvern Bent, that an incident occurred on October 3, 1990 in which the operation of an automobile directly caused physical injury to the Applicant.

53 In order to receive further weekly income benefits in this case, the Applicant must prove, on a balance of probabilities, that after June 4, 1991 his disability falls within the definition of section 13(1) of the *No-Fault Benefits Schedule*. Section 13(1) states as follows:

> (1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident, a weekly benefit during the period in which the insured person suffers substantial inability to perform the essential tasks in which he or she would normally engage if he or she meets the qualifications set out in subsection (2).

54 At the time of this accident on October 3, 1990, the Applicant was a retired person, aged 59. I accept his evidence that, although he was retired, he was physically active and able to carry out a wide range of activities, from rowing to renovating. I find that after the accident, for a period of months, the Applicant was unable to resume such a lifestyle.

55 I further find that the Applicant suffers from a depressive illness, which his psychiatrist testified, has been reasonably well controlled with medication since April 1988. I accept Dr. Brennagh's opinion that the Applicant often has feelings of energy and optimism about his capabilities, which are symptomatic of the illness from which he suffers.

56 The Applicant's wife and daughter testified at the arbitration hearing. It was Mrs. Hunt's testimony that she felt that in the summer of 1991 her husband's symptoms began to diminish. The Applicant described his pattern of activity between February 1991 and October 1991. Despite the fact that he engaged in some physiotherapy and swimming activity during this time, the Applicant was, in most respects, able to carry on with his ordinary daily life. He testified that he was able to continue with Bible study and prayer, to go to church, go for walks, to drive, to travel and to attend to his normal personal hygiene, eat and sleep.

57 I find that the Applicant has not proved that the accident of October 3, 1990 caused him injuries that prevented him from engaging in his essential tasks between June 1991 and March 1992. The Applicant testified that, in his opinion, his essential tasks should be defined as the ability to "accommodate myself to the desires of the time". In my view, this is too wide a definition of "essential tasks". As Arbitrator Susan Naylor stated in the decision *Norman Downs v. Allstate Insurance Company of Canada* (O.I.C. File No. A-000064):

> In order to establish entitlement to weekly benefits under s. 13, an applicant must prove, on the balance of probabilities, that, for the period for which benefits are claimed, the applicant is disabled as a result of the effects

> of his or her injuries, to the degree required by the terms of the section. The limitation may be physical, mental or psychological in nature.
>
> Pain and suffering which is experienced as a result of injuries sustained in an automobile accident are not, per se, compensable under section 13, unless the experience of pain causes an insured to be substantially disabled, within the meaning of the section.
>
> To establish entitlement to weekly benefits, evidence must be adduced that the effects of the injury, to some significant extent, prevent an applicant from carrying out the necessary and key tasks that were normally performed before the accident. It requires an individualised inquiry into the circumstances of the particular applicant, in order to identify the activities of daily living prior to the accident and compare them with the post-accident activities.

58 In the case of this Applicant, the evidence shows that from June 1991 he was no longer inhibited in a great many of the daily activities that he carried out prior to the accident of October 3, 1990. He went for short walks, drove his car, attended church activities, continued in his personal devotional activities, ate, slept, and cared for his personal hygiene needs. Only minor residual disability remained. He was not able to row or renovate, but these were not "necessary and key tasks that were normally performed before the accident".

59 The Applicant testified that he had many ambitions once he retired: he considered engaging in new full-time employment, taking up golf, getting back to boxing, writing articles, books and screenplays. He has not been able to do these things since the accident of October 1990. He attributes his failure to pursue these ideas to the accident. I have accepted the evidence of Dr. Brennagh that the optimistic ambitions of the Applicant are symptomatic of his depressive illness, which predates the accident, and is in no way causally related to it.

60 The Insurer claimed the Applicant deliberately defrauded it in this matter and should repay benefits paid to him previously. I accept the evidence of the Applicant (including the medical reports filed by him) that, until June 4, 1991, he was unable to perform the essential tasks in which he would normally engage. I accept the evidence of the Applicant that he was not hiding from the Insurer in Florida during the winter 1990-91, but was carrying out his usual practice of wintering in a warmer climate. The allegation of fraud has not been made out. The Applicant will not repay any benefits paid to him previously.

Expenses:

61 The Applicant seeks an award of the expenses he has incurred in this arbitration. An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

> The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

62 The prescribed expenses and amounts are set out in Schedule 1 of the Dispute Resolution Practice Code and in Ontario Regulation 275/90 "Schedule".

63 In the *McCormick vs. Economical Mutual Insurance Company* case (O.I.C. No. A-000139), Arbitrator Susan Naylor made the following comments about expenses, with which I agree:

> The discretion to award expenses should be exercised, having regard to the intent and purpose of the legislative scheme. The arbitration process has been established under the Insurance Act, as amended, in order to facilitate applicants' access to relatively inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits. The discretion to award expenses should be exercised in accordance with this objective, having regard to the individual circumstances of each case.

> Accordingly, it is appropriate to award an applicant his or her expenses, unless, in the circumstances of the particular case, it is determined that the application for appointment of an arbitrator was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

64 The Applicant is entitled to his expenses as set out in Schedule 1 of the Dispute Resolution Practice Code. In the event that the parties cannot agree as to the total amount of expenses, I remain seized of this matter and a party may apply for assessment of the expenses before me.

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