Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

Citation: Montesano v. Western Assurance Co., 2021 ONLAT 19-006780/AABS-PI

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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:

Angela Montesano

Applicant

and

Western Assurance Company

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Michael Ferrante, Paralegal

For the Respondent: Derek Greenside, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] On December 26, 2018, after smoking a cigarette, the applicant proceeded up her driveway towards her house. She tripped and fell forward, striking her face against the rear bumper of her parked SUV before falling to the ground. As a result, she sustained lacerations to her face and a septal deviation. She sought accident benefits from the respondent, Western Assurance, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010[1] ("*Schedule*").

[2] Western Assurance denied the applicant's claim for benefits and, after conducting an examination under oath ("EUO"), took the position that the incident did not constitute an "accident" under s. 3(1) of the *Schedule*. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUE IN DISPUTE

[3] The parties agree that the preliminary issue in dispute is as follows:

i. Do the applicant's injuries arise out of the use or operation of an automobile and meet the definition of an "accident" as defined by s. 3(1) of the *Schedule*?

RESULT

[4] The injuries sustained by the applicant on December 26, 2018 were as a result of an accident as defined by s. 3(1) of *Schedule*.

ANALYSIS

December 26, 2018

[5] Western Assurance conducted an EUO with the applicant on April 26, 2019. The applicant asserts that on the afternoon of December 26, 2018, she was smoking a cigarette outside of her home. She then walked up her driveway towards her home when she tripped and fell, slamming her face into the bumper of her vehicle and falling to the ground. As a result, she sustained lacerations to her face, neck pain and a septal deviation and submits that she continues to have vision issues. In addition to the applicant's testimony from the EUO, the incident and her injuries are described in her OCF-1, the records from William Osler Hospital from that day, the clinical notes and records of her family physician, Dr. Libman, as well as the records from other specialists that have treated her since.

[1] O. Reg. 34/10, as amended.

"Accident" framework

[6] Section 2(3) of the *Schedule* provides that the benefits set out in the regulation shall be provided in respect of "accidents." Section 3(1) defines an "accident" as "an incident in which the use or operation of an automobile directly causes an impairment [...]."

[7] In *Chisholm v. Liberty Mutual Group*[2], the Court of Appeal set out a two-part test for determining whether an incident qualifies as an "accident" under the *Schedule*, known as the "Purpose" test and the "Causation" test. The test was further refined by the Court in *Greenhalgh v. ING Halifax Insurance Company*[3] such that, in order to qualify as an "accident" under the *Schedule*, the insured must satisfy both branches of the modified test:

a. The Purpose Test: did the incident and injuries arise out of the ordinary and well-known activities for which automobiles are used? and,

b. The Causation Test:

   i. Did such use and operation of the automobile directly cause the impairment?

   ii. Was there an intervening act or acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"?

In that sense, the second prong of the Causation Test concerns whether it can be said that the use or operation of the vehicle was a "direct cause" of the applicant's injuries.[4] In *Greenhalgh*, the Court also addressed "but for", "intervening act" and "dominant feature" considerations to analyze the modified Causation Test.

Positions of the Parties

[8] On the facts, the applicant submits that the incident constitutes an accident. She asserts that the vehicle was parked in her driveway at the time, which satisfies the Purpose Test. She submits that she also meets the Causation Test because but for her SUV being parked in the driveway, she would not have struck her face; there were no intervening events to break the causal link resulting in her injuries; and the vehicle was the dominant feature of her injuries. She relies

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[2] 2002 CanLII 45020 (ON CA), at 17. ["*Chisholm*"].
[3] 2004 CanLII 21045 (ON CA), at 11. ["*Greenhalgh*"].
[4] *Downer v. The Personal Insurance Co.*, 2012 ONCA302.

primarily on *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 and the Tribunal case *D.S. v. TD Insurance Meloche Monnex*, 2017 CanLII 43837 (ON LAT) for support.

[9] In response, Western Assurance submits that the presence of the applicant's parked SUV, for an interval of at least 3.5 hours and with no intent to use the vehicle prior to her trip and fall, does not constitute use or operation to satisfy the Purpose Test where she was simply smoking a cigarette near her vehicle and incidentally tripped into it. Further, Western Assurance submits that the use and operation of her SUV was not the direct cause of her injury, but rather the condition of her patched driveway and a protruding water pipe caused her to trip and fall. Finally, it submits that the applicant's "end of journey" had occurred at least 3.5 hours before the incident and where she had no plans to use the vehicle again until December 27, there is no evidence to support a conclusion that the applicant's use or operation of her vehicle had been uninterrupted. It relies on the applicant's testimony at the EUO, her family physician's January 8, 2019 visit note stating that the applicant tripped on a water control pipe and three photographs evidencing the driveway patch and water pipe. Further, it cites to various Tribunal cases that have interpreted s. 3(1) of the *Schedule*.

Accident

[10] I agree with the applicant that she meets both the Purpose and Causation Tests articulated above and find that the incident that occurred on December 26, 2018 meets the definition of an accident under s. 3(1) of the *Schedule*.

[11] To begin, I agree with the applicant that there is no active use component to the purpose test. Indeed, in *Caughy* (the insured was playing with his daughter and collided with a parked motorcycle before falling into a parked truck and sustaining injuries), the Court of Appeal held that the vehicle can be parked because there is no requirement that the vehicle be in active use.[5] Similarly, in *D.S.* (insured was running at night, tripped over a wall curb and fell face first into a parked vehicle, sustaining significant injuries), the Tribunal found that a parked vehicle falls within the ordinary scope of use and operation. In my view, I agree that this is an ordinary and well-known use to which automobiles are put and see no reason to depart from these decisions. To this end, I find that the incident arose out of the ordinary and well-known activities for which automobiles are used.

[12] Western Assurance cited several cases to supports its contention that the "interruption" or "end of a journey" and the time and proximity of the applicant's

[5] *Caughy*, at para. 21.

injuries to the vehicle are relevant considerations for the Purpose Test here. However, while these arguments may have merit, I agree with the applicant that every one of the cases cited are easily distinguishable because none of the insured's injuries were caused by striking or even making contact with a vehicle, as is the case here: *Webb v. Lombard*[6] (insured slipped and fell after exiting a taxi on her way into a hotel); *17-000942 v. Aviva Insurance Canada*[7] (the applicant tripped over an uneven curb after being dropped off near her home); *16-004096 v. Intact Insurance Company*[8] (the applicant tripped over a pothole and fell to the ground while walking towards her car in a parking lot); *18-004362 v. Certas Home and Auto Insurance Company*[9] (a jogger slipped on ice while running through an intersection and no car was involved); *18-000468 v. Certas Direct Insurance Company*[10] (where the purpose test was met because the applicant had her hand on the door handle before slipping on ice next to her vehicle but did not meet the causation test because the ice was an intervening cause); and *B.Y. and TD Meloche Monnex*[11],*18-003463 v. Certas Home and Auto Insurance*[12] and *Khamis and Unifund Assurance Company*[13] (where all of the applicant's slipped and fell on ice in a parking lot after exiting a vehicle). Unlike the applicant here, none of the injuries suffered in these cases were caused by a vehicle.

[13] Meanwhile, and in contrast, I find it difficult to overlook that in both *Caughy* and *D.S.*—the two cases where the applicant's impairments were actually caused by falling into a parked vehicle—that the incident was found to satisfy both the Purpose and Causation tests and therefore met the definition of an accident. I find these cases persuasive rebuttals to all of Western Assurance's arguments because in both cases the vehicle was parked, the applicant tripped, and the injuries were directly caused by the impact with the vehicle. I am not persuaded that the applicant's journey or potential journey is relevant when there is a direct collision with a vehicle causing impairments. Similarly, on the case law provided, I am not persuaded that the cause of the trip and fall is a relevant consideration when there is no dispute that the applicant's impairments were caused by an impact with a parked vehicle.

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[6] 2007 Carswell ONT 6606 (FSCO).
[7] 2017 CanLII 62174 (ON LAT).
[8] 2017 CanLII 63622 (ON LAT).
[9] 2019 CanLII 27898 (ON LAT); 2019 CanLII 83587 (ON LAT Reconsideration).
[10] 2019 CanLII 22204 (ON LAT); 2019 CanLII 94132 (ON LAT Reconsideration).
[11] 2019 CanLII 27893 (ON LAT).
[12] 2019 CanLII 51302 (ON LAT).
[13] 2021 CanLII 19498 (ON LAT).

[14] To this end, I agree that the applicant meets the Causation Test because but for her vehicle being parked in the driveway, she would not have struck her face on the bumper when she fell. There is no intervening act or event from an independent source that breaks up the causal link between her trip and fall and her injuries. Similarly, there is seemingly no dispute that her impairments resulted from her striking her face against the rear bumper, so it is clear to me that the vehicle directly caused her injuries. In this sense, the rear bumper on which she struck her face was the dominant feature causing her injuries.

[15] While Western Assurance takes the position that "the condition of her driveway and/or the protruding water pipe was the cause of the applicant's fall and injuries", I find this position to be somewhat speculative. While I am alive to Dr. Libman's notation stating that the applicant tripped on a water control pipe, at the EUO, the applicant denied tripping on the water control pipe and the three photographs in evidence are not particularly assistive. Even if an uneven surface or a water pipe caused the applicant to trip, the fact remains that she then immediately fell face first into the rear bumper of the vehicle, the impact from which caused her impairments. So, it cannot be said that there was an intervening cause, that the vehicle did not directly cause her impairments or that the trip itself was somehow the cause of her injuries. In any case, neither of the motorcycle in *Caughy* nor the curb in *D.S.* were found to be intervening factors or the dominant cause of injury. Rather, the cause of the injuries was the fall into the parked vehicle, as is the case here, which meet the requirements for an accident.

ORDER

[16] The incident that occurred on December 26, 2018 constitutes an accident under s. 3(1) of the *Schedule*. The parties are directed to contact the Tribunal to schedule a case conference to determine how to proceed.

Date of Issue: June 24, 2021

Jesse A. Boyce, Vice Chair