When will a slip and fall incident occurring external to a motor vehicle constitute an "accident" as defined by the Statutory Accident Benefits Schedule?

While the question is fairly common, the answer is rarely simple.

The purpose of this article is to assist in answering this question.

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While it remains a grey area of law, a definitive trend emerges when we examine existing authority and decisions.

This trend can be used generate a roadmap to guide future decision-making processes.

In considering this question, we will review why it is important to consider, how "accident" has been defined by the *Schedule*, the test that has arisen from this definition, and how this test has been interpreted by the Financial Services Commission of Ontario and the Licence Appeal Tribunal in the context of slip and fall accidents.

Importance

For the purposes of this article, Claimants must be involved in an "accident", as defined by Section 3(1) of the *Schedule*, in order to receive accident benefits.

As a matter of practicality, insurers providing accident benefits are required to make a decision early on in the life of a claim as to whether they will accept an incident as an accident. Due to good faith obligations and the ever-present threat of a special award due to delay in the payment of benefits, it is imperative that such a decision be made quickly, decisively, and with solid support from relevant precedent.

The Definition

Section 3(1) of the Schedule defines "accident" as:

> *"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"*

Despite numerous changes to the *Schedule*, this definition has been in place since 1996.

The Test

Two foundational decisions – that of the Superior Court in *Amos v. Insurance Corporation of British Columbia*, 1995 CarswellBC 424, and of the Ontario Court of Appeal in *Greenhalgh v. ING Halifax Insurance Company*, 2004 CarswellOnt 3426, have considered the definition of accident. It is not necessary to examine them in extensive detail. What is important to note is that, through these decisions, the following two-part test has been formulated to determine whether an incident will constitute an accident for the purposes of the *Schedule*:

1. Was the use or operation of the vehicle a cause of the injuries? (*the purpose test*)
2. Was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"? Can it be said that the use or operation of the vehicle was a "direct cause" of the injuries? (*the causation test*)

Both questions must be answered in the affirmative in order for an incident to constitute an accident.

Decisions from the Financial Services Commission of Ontario

The issue of whether a slip and fall incident could constitute an accident has been considered in numerous FSCO decisions. Generally speaking, these decisions have held that if the slip and fall occurs external to a motor vehicle, the incident will not constitute an accident. This include scenarios where a Claimant has slipped and fallen on ice after exiting a taxi cab, slipped and fallen after exiting their vehicle for the purpose of filling it with gas, or slipped and fallen while walking through a parking lot to their vehicle.

There are, of course, several exceptions to the above noted general rule. FSCO decisions have found that the following slip and fall incidents occurring external to a motor vehicle did constitute accidents:

- Where a Claimant slipped and fell while running from her parked vehicle to a vehicle operated by her friends after it was involved in a motor vehicle accident;
- Where a Claimant slipped and fell while walking from one public transportation vehicle to another;
- Where a Claimant slipped and fell

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on a snow bank after disembarking a public transportation vehicle and taking two steps; and,

- Where a Claimant slipped and fell while running after his vehicle which was rolling downhill.

The above noted decisions suggest that insurers should pay close attention to scenarios involving emergency situations or public transportation.

One outlier FSCO decision is that of *Saad v. Federation Insurance Co. of Canada*, 2003 CarswellOnt 4299. This decision involved a Claimant who was attending at a Petro-Canada station to fill up on gas and to add air to his tires. After filling the tank and paying for the gas, the Claimant drove his vehicle to the area of the premises where the air hose was located. He parked the vehicle and exited it, with the motor still running. He filled the tires with air, returned the air hose, and walked back to the vehicle. While walking back, he slipped and fell on ice. At no point did he come into contact with the vehicle.

Arbitrator Killoran held that the incident constituted an accident. The decision was upheld on appeal by Director's Delegate Draper, who concluded that the icy pavement was a subsequent contributing cause

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which did not break the link in the chain of causation.

As can be seen, *Saad* runs contrary to the general rule established in other FSCO decisions. Perhaps in an attempt to rectify this discrepancy, *Saad* was subsequently distinguished. In the decision of *Newey v. Dominion of Canada General Insurance Co.*, 2016 CarswellOnt 8252, Arbitrator Musson concluded that an incident involving similar circumstances to that of *Saad* did not constitute an accident. Notably, Arbitrator Musson distinguished *Saad* on the basis that, in the matter before him, the Claimant's vehicle was not running at the time that the slip and fall incident occurred. While the issue has not been tested further, *Saad* would appear to stand for a somewhat bizarre exception to the general rule – namely that an otherwise non-accident slip and fall incident will constitute an accident if a Claimant's motor vehicle is running at the time the incident occurs.

Decisions from the Licence Appeal Tribunal

LAT decisions have, by and large, adopted the general rule established by FSCO that a slip and fall incident occurring external to a motor vehicle will not constitute an accident. The decision of *18-000468 v Certas Direct Insurance Company*, 2019 CarswellOnt 16236 provides a good example. This decision involved a Claimant who slipped and fell while holding the door handle on her vehicle. Despite the Claimant's arguments that she was in the process of boarding her vehicle at the time she slipped and fell, Adjudicator Fricot found that the incident did not constitute an accident. The decision was upheld on reconsideration, which, it

should be noted, was also heard by Adjudicator Fricot.

LAT decisions do outline a very important exception to the general rule – namely that, in cases where a Claimant impacts a vehicle at some point while slipping and falling, and where this impact results in impairment, the incident will constitute an accident. This was illustrated in the decision of *16-000131 v TD Insurance Meloche Monex*, 2017 CarswellOnt 10835. The decision involved a Claimant who tripped and fell headfirst into a parked vehicle while running down a street. Adjudicator Makhamra concluded that the incident constituted an accident, primarily on the basis that the vehicle directly caused the Claimant's impairment.

The recent LAT decision of *GR vs. Economical Mutual Insurance Company*, 2019 ONLAT 18-010779/AABS bears mention. This matter involved a Claimant who tripped and fell while clearing snow off of his vehicle. The Claimant did not make direct contact with the vehicle when he fell. The decision does not specify whether the vehicle's engine was running. Adjudicator Grant held that the incident constituted an accident for the purposes of the *Schedule*, noting specifically that, but for the Applicant clearing snow off of the vehicle, he would not have slipped and fallen on snow.

Conclusions

In reviewing the *Schedule* definition of "accident", the resulting test, and the decisions interpreting this test, a definitive trend emerges. Specifically, that slip and fall incidents occurring external to a vehicle will not constitute an accident for the purpose of the *Schedule*. There are several important exceptions to this general rule, and, in analyzing in the issue, the following should always be considered:

- Was there an emergency situation?
- Was public transportation involved?
- Was the engine of the Claimant's motor vehicle running?
- Did the Claimant come into contact with the vehicle? Did this result in impairment?
- Was the Claimant clearing snow off the vehicle? Did this snow cause them to fall?

While the LAT has not considered all of the above noted scenarios, based on FSCO precedent, we can expect that their applicability will be tested in the future.

In closing, while the question of when a slip and fall incident occurring external to a motor vehicle will constitute an "accident" for the purpose of the *Statutory Accident Benefits Schedule* remains difficult to answer, it is my hope that this article will provide helpful guidance to your future decision-making process.

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