



Citation: Xu v. Motor Vehicle Accident Claims Fund (MVACF), 2022 ONLAT 20-001234/AABS – PI

Licence Appeal Tribunal File Number: 20-001234/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:

Xin Ni Xu

Applicant

and

Motor Vehicle Accident Claims Fund (MVACF)

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Thérèse Reilly

APPEARANCES:

For the Applicant: Xin Ni Xu, Applicant
Sareena Samra, Counsel

For the Respondent: Todd Wasserman, Counsel
Drew Higginbotham, Counsel, Observer

Interpreter: Alex Wy (Mandarin)

Court Reporter: Denese Gerginova

Heard by Videoconference: November 29, 2021

BACKGROUND

- [1] The applicant was injured in a motor accident in Toronto, in Ontario on May 21, 2017 and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").¹
- [2] The applicant travelled to Ontario from China on April 16, 2019. She claims she came to Ontario as a visitor with the intention of making Ontario her permanent home. The applicant was injured when struck by a vehicle as a pedestrian. She obtained the name of the driver of the vehicle that struck her but no information was obtained about the vehicle, owner or insurance coverage.² The applicant applied for accident benefits from the Motor Vehicle Accident Claims Fund ("MVACF"). She maintains that at the time of the accident she had rented living accommodations and completed an English language course. The applicant claims she was ordinarily resident in Ontario at the time of the accident and is thus entitled to claim accident benefits from the MVACF pursuant to section 25 of the Motor Vehicle Accident Claims Act (the "Act").³
- [3] The respondent denies the applicant was ordinarily resident in Ontario at the time of the accident. It maintains the applicant was a visitor at the time of the accident. It submits it is not required to pay any accident benefits under section 25 of the Act to a person who does not reside in Ontario. The purpose of the Act it claims is to compensate those who suffer damages where there is no automobile insurance coverage in place in Ontario. The Act applies only to those who are ordinarily resident in Ontario at the time of the accident and excludes casual or transitory visitors. It claims the applicant was not an ordinary resident for the purposes of the Act, and thus has no entitlement to a claim for benefits under the MVACF.
- [4] The preliminary issue for my consideration is whether the applicant is entitled to claim benefits from the MVACF under section 25 of the Act. The hearing proceeded by video conference. The applicant was the sole witness at the hearing.

ISSUE

- [5] The preliminary issue is:

Whether the applicant is entitled to accident benefits from the MVACF

¹ Ontario Regulation 34/10 as amended.

² Self-Reporting Collision Report, tab E-2, applicant document brief.

³ RSO 1990, c M.41.

pursuant to section 25 of the Motor Vehicle Accident Claim Act?

RESULT

- [6] The applicant is not entitled to any accident benefits from the MVACF pursuant to section 25 of the Act, as she was not ordinarily resident in Ontario at the time of the accident.

SECTION 25(1) – MOTOR VEHICLE ACCIDENT CLAIMS ACT (THE “ACT”)

- [7] Section 25(1) of the Act reads as follows:

25. (1) The Minister shall not pay out of the Fund any amount in favour of a person who ordinarily resides in a jurisdiction outside Ontario unless that jurisdiction provides persons who ordinarily reside in Ontario with recourse of a substantially similar character to that provided by this Act. 2002, c. 22, s. 147.

(4) For the purpose of this section, residence shall be determined as of the date of the motor vehicle accident as a result of which the payment out of the Fund is claimed.

- [8] The applicant submitted a claim to the respondent seeking accident benefits under the Act. The respondent in its denials letters of October 4, 2019, and November 29, 2019⁴ advised the applicant that:
- a. The Act establishes the Motor Vehicle Accident Claims Fund as the “payor” of last resort available to Ontario residents who do not have recourse to an insurer.
 - b. The applicant is a visitor who is not allowed to be employed and had not been employed for the last 4 months.
 - c. The applicant was in Ontario on a visitor’s visa.
 - d. The applicant was not ordinarily resident in Ontario and not entitled to any accident benefits under the Act.
 - e. The respondent wrote that it believed that China does not provide recourse of a substantially similar character as set out in section 25 of the Act.

⁴ Letters to the applicant dated October 4, 2019 and dated November 29, 2019, tab 16, respondent’s document brief.

- [9] The legislative history of section 25(1) of the Act is set out in the Court of Appeal decision *Silva v John Doe*⁵ where the court states that section 25(1) "reflects a legislative intention to avoid unnecessary payments out of the Fund" ... and it "contemplates payments to non-Ontario residents only in limited circumstances". Payment to those persons are permitted only in a jurisdiction that provides ordinary residents with reciprocal benefits, that is "with recourse of a substantially similar character to that provided by the Act". The applicant did not present any evidence that this exception applies to her.

THE APPLICANT'S EVIDENCE AT THE HEARING

- [10] The applicant testified she currently lives in China and gave evidence from China. She stated her current address is in China where she lives with her mother. She is a 2016 graduate from a university in China with a degree in Business and English.
- [11] The applicant came to Canada as a visitor on two occasions in 2019. She travelled to Canada on a Chinese passport⁶ with a visitor visa⁷ which she testified allows her to visit for six months at a time. Although the visa was issued in 2018 and expires in 2024, she testified that she is required to return to China within 6 months of arrival.
- [12] The first visit was to Ontario on February 4, 2019 where the applicant stayed in hotel accommodations for 4 nights. At the time of her visit, she testified that she was working full time in China. She came here to see the environment. She visited a number of attractions including Seneca College. She had purchased a round trip return ticket and returned to China after her visit.
- [13] The second visit to Canada was on April 16, 2019. The applicant testified she purchased a one way ticket to Canada and planned to stay here for a long time. She testified she quit her job in China because she was planning to do studies overseas. She is not married. She testified she did not have a boyfriend in China. Her mother initially was not happy with her plan to come to Canada but ultimately her mother supported her decision. Her mother provided financial support for her while here in Canada. The applicant's intention was to come to Canada to study.
- [14] The applicant stayed initially in a hotel and then found a room to rent with a family in Markham, Ontario. She paid around \$500 to \$600 per month for the room. The room was fully furnished. She made a few purchases which included a

⁵ *Silva v John Doe*, 2016 ONCA 700 (CanLii) at para 23.

⁶ Exhibit 1, Tab E1, applicant document brief.

⁷ Exhibit 2, Tab E1, applicant document brief.

cell phone plan, the internet and a laptop computer. She moved to this address in May 2019 and was living there at the time of the accident.

- [15] The applicant testified she has no family in Canada and she met a number of friends including a boyfriend during her English language studies at the English School of Canada. She stated she was in a relationship with her boyfriend for 1 to 2 months.
- [16] The applicant testified that her stay in Canada was from April 16, 2019 to September 30, 2019. She had planned to study an early childhood education program but has not enrolled in this program and despite her intentions, did not enroll in any professional study course during her time here in Ontario. She completed the English language course here in Ontario at the English School of Canada. The applicant enrolled in the program and began her studies on June 24, 2019 and completed the course in September 2019.⁸ The documentary evidence indicates the address the applicant provided on the application to study English was her address in China. The applicant stated that the tuition was paid for by her mother and totalled \$4,800. The program provides a score for language ability. The applicant stated you must establish English language proficiency to be able to do other studies. The applicant had planned to complete another test but was not able to do so as the accident interrupted her plans.
- [17] When asked why she returned to China at the end of September 2019, the applicant stated she had completed the English language course in Toronto which was a prerequisite to take a professional study course. The applicant stated an agent (she did not identify who the agent is and did not confirm if that related to her Visa) she consulted told her before she made the return trip to China that she did not have enough time to do further studies. The applicant testified that she returned to China in September 2019 because her visa was nearing expiry. She returned to China with the intention to return to Canada. At the examination under oath (the "EUO")⁹ the applicant stated she had to return to China as her mother was selling a property and she was needed in China to sign documents.
- [18] After her return to China, the applicant testified she cancelled her telephone cell plan. Emails were introduced into evidence to establish that the applicant

⁸ Transcript English School of Canada, letter of acceptance, tab 12 and transcript, tab 14, applicant document brief.

⁹ Exhibit 7, EUO, transcript of the EUO dated January 28, 2021, tab 20, respondent document brief.

continued her contact at Seneca College about further studies.¹⁰ Despite the few emails exchanged, she did not enrol in a course at Seneca.

- [19] The applicant stated her mother wanted her to stay in China before making any further arrangements. The applicant was planning to come back in 2020 but no tickets were booked and when the COVID pandemic arrived, this meant she could not leave China.

THE RESPONDENT'S EVIDENCE AT THE HEARING

- [20] The respondent questioned the applicant about her intentions to stay in Ontario. The applicant provided a written statement to the insurer after the accident. In her signed statement dated August 26, 2019,¹¹ the applicant wrote:

I'm a visitor to Canada. I'm not allowed to be employed in Canada. I have not been employed for the last four months since I came to Canada. I am a visitor to Canada. I was worried I had to pay for an ambulance. I did purchase travel insurance before came to Canada it expired one week prior to the motor vehicle accident.

- [21] The applicant agreed during questioning by the respondent that she considered herself a visitor. Despite her claim that she came to Ontario as a visitor with the intention of making Ontario her permanent home, she admitted in testimony and in her signed statement that she considered herself a visitor.
- [22] In her statement of August 26, 2019 the applicant stated that she was living in a room in Markham; she was not allowed to be employed in Canada; she intended to apply for a student Visa when her English language studies were completed.
- [23] The respondent also questioned the applicant about the acceptance letter¹² for her English language studies. The applicant was asked why the address noted on the form was an address in China. The applicant explained on cross examination that she had been asked to provide her previous address.
- [24] During cross examination the applicant confirmed:
- a. She had medical benefits in China when she was working but these would have stopped as she quit her job before coming to Canada.

¹⁰ Exhibit 4 emails with Seneca College, tab E 6, applicant document brief.

¹¹ Exhibit 5, Consent and Statement, dated August 26, 2019, tab 9, respondent document brief.

¹² Exhibit 3, Acceptance letter, tab 12, respondent document brief.

- b. She paid taxes on income in China but not in Canada. She had no income while in Canada.
- c. She does not have a Canadian social insurance number (SIN) nor did she take any steps to get a SIN.
- d. She did not apply for a student visa.
- e. She had no Canadian bank account. Her mother sent money via an internet service called WeChat.
- f. She had no assets here in Canada.
- g. She had rented a car for one day on June 20, 2019 to June 21, 2019 and purchased insurance, Smart Overseas Driver Travel Insurance, which was issued out of China.¹³ She indicated a Chinese address on the application form.
- h. She had no Ontario driver's license. She has a driver's license in China with insurance issued in China to her mother. She was insured under her mother's insurance.

[25] After her return to China in September 2019, the applicant testified she subsequently travelled to visit the United States and Thailand. Her trip to Thailand was in November 2019 and she returned to China in December 2019.

THE APPLICANT'S ARGUMENTS

[26] The applicant maintains she is a resident as she came to Canada with the intention to move and stay here. She argues that the facts of this appeal are similar and not distinguishable from the facts in the Supreme Court of Canada case of *Thomson v. Minister of National Revenue* case.¹⁴

[27] The applicant refers to the *Thomson* case which is starting point on the issue of residency. In *Thomson*, the court stated at page 224:

The expression "**ordinarily resident**" ... is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or

¹³ Exhibit 6, Smart Travel Overseas Insurance, dated June 20, 2019, tab 14, applicant document brief.

¹⁴ *Thomson v. Minister of National Revenue*, 1946 CanLII (SCC), [1946] SCR 209 ("*Thomson*"), page 224, respondent book of authorities, tab 6.

occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

[28] The Court stated the following legal test to determine “resident”

A person may be a resident whether they live in a place permanently, temporarily or ordinarily reside in a place. Residency “a matter of the degree to which a person in mind and fact settled into or maintains or centralized his ordinary mode of living with its accessories in social relations, interest and conveniences at or in the place in question.”¹⁵

[29] Although the *Thomson* case is a tax case, the legal test described above has been applied in cases and Tribunal decisions that involve the issue of residency in the context of accident benefits. These are discussed below.

THE RESPONDENT’S ARGUMENTS

[30] The respondent maintains the test to determine if a person is “ordinarily resident” for the purposes of a claim under section 25(1) of the Act involves a number of elements and a review of activities and factors to determine ordinary residence. The respondent referred to a number of cases and Tribunal decisions that have addressed the legal test to determine if one is resident in Ontario. These are in addition to the *Thomson* case and are described below. The criteria includes:

1. what ties are there to the country?
2. what are the banking and financial arrangements?
3. is the person receiving mail at their address?
4. what roots have been set down?
5. what ties are there to the community?
6. what is the intention of the resident?

[31] The respondent states that intention by itself is not sufficient to establish an Ontario residency.¹⁶ It is one of several factors to be taken into consideration. The respondent submits the applicant is not ordinarily resident in Ontario. In her written statement to the insurer the applicant admitted she was a visitor during

¹⁵ *Thomson*, page 225.

¹⁶ *Schevchuk v Motor Vehicle Accident Claims Funds*, [2009] O.F.S.C.D. No. 30, paragraph 34.

her time in Canada. She completed the English language course and immediately returned to China when it was completed.

- [32] The respondent in its closing submissions referred to the *Cruz*¹⁷ case, a FSCO decision where the Director's delegate indicated that "residency involves an element of permanency that must outweigh the temporary". The evidence established in *Cruz* that the applicant had no intention to remain in Ontario or make Ontario a permanent home. She was a Mexican citizen, who arrived in Ontario after her employer agreed to pay her to study English after which she would return to Mexico to head a new department. She was found not to be a resident of Ontario. This Tribunal is not bound by a FSCO decision, however, the *Cruz* case illustrates that intention is only one of many factors to be considered.
- [33] The respondent also referred to the *GK*¹⁸ decision, in which this Tribunal considered if the applicant was a resident of Ontario and entitled to accident benefits under the *Schedule*. The decision was upheld on reconsideration. The Tribunal looked at a number of factors. The evidence established that although the applicant went to work in Alberta on a temporary basis, his intention was to remain in Ontario. He was found to be a resident of Ontario. The Tribunal looked at the applicant's social relationships in Ontario, he had an Ontario cell phone, continued to pay rent in Ontario and returned to Ontario immediately after he was discharged from the hospital in Alberta. The Tribunal applied the legal test set out in *Thomson* and was satisfied that the applicant did not intend to permanently stay in Alberta and as such he met the Ontario residency test requirement of the *Schedule*.¹⁹
- [34] The respondent referred to the *Young*²⁰ case where the plaintiff was injured in a single motor vehicle accident in New Mexico. The court found the plaintiff was not ordinarily resident outside of Ontario when the accident took place. The court looked at the connection between New Mexico and Ontario. In the *Young* case, the plaintiff went back and forth to New Mexico from Ontario. She had a permanent address in Toronto. Most of her belongings were in Toronto. Her mail was sent to her address in Ontario. The court found she had no intention of giving up her residence in Ontario while she pursued her studies in New Mexico.

¹⁷ *Cruz v. Royal & Sun Alliance Insurance Company of Canada* (2003), O.F.S.C.I.D. No. 150, Appeal P01-00032 ("*Cruz*"), tab 9, respondent document brief.

¹⁸ *GK v Security National Insurance Company*, 2017 CanLII 33677 (ON LAT) ("*GK*"), and *GK v Security National Insurance Company*, 2017 CanLII 81584 (ON LAT) (Reconsideration Decision), tabs 7 and 8, respondent document brief.

¹⁹ *GK*, at paragraph 24.

²⁰ *Young v Ontario (Minister of Finance)*, 2003 CanLII 23640 (ONCA) ("*Young*"), tab 2, respondent document brief.

She also had a family doctor in Ontario and used her Ontario address to renew her passport. The respondent maintains the *Young* case is very different from the evidence here. The respondent maintains the applicant's ties are mostly to China. She had limited possessions here in Ontario and no Canadian bank account.

- [35] The respondent also referred to the *Parkes*²¹ case in which a Jamaican citizen, who worked as a farm labourer in Ontario on temporary work permits for 3 years from June until December and returned to Jamaica each December, was found to be "ordinarily resident" in Ontario at the time of the accident. Although on temporary work permits, the Court held that the plaintiff's residence was of a sufficiently permanent nature that he was at the time of the accident ordinarily resident in Ontario. The litigant had a bank account in the province, he paid Canadian taxes, he received mail at his Ontario address, made friends and visited family in Toronto.

ANALYSIS

- [36] I find the legal test to determine ordinarily resident is as set out in the *Thomson* case. The legal test was applied in the *GK* decision and the *Parkes* case in which the issue of residency was considered by the Ontario Court of Justice in the context of residency under the Act.
- [37] Based on the totality of evidence and the legal test from the *Thomson* case and as applied in the *Parkes* case and *GK* decision I find that the applicant has not established that she is ordinarily resident in Ontario at the time of the accident.
- [38] I find that unlike the litigant in the *Parkes* case, and the applicant in *GK*, in this appeal, the applicant's residence was not of a sufficiently permanent nature that she was ordinarily resident in Ontario. She came here as a visitor and rented accommodations for approximately 5 months and returned to China when her English language studies were completed. In total she stayed in Ontario under 6 months. The applicant admitted that she did not register for any professional program and after her return to China, she travelled to other countries but not to Canada nor to Ontario. Nor did she present any evidence that after her return to China she planned to return to Ontario.
- [39] Moreover, consistent with the approach in the *Thomson*, *Parkes* and *GK* cases, when one looks at a number of factors and elements, it demonstrates that the applicant's finances consisted of a Chinese credit card and a Chinese bank

²¹ *Parkes v. Heiberg*, 1992 CarswellOnt 3426 (OCJ (Gen.Div.)), tab 5, respondent document brief.

account with financial support from her mother who provided funds from China. The applicant earned no Canadian income. She did not apply for or have a Canadian SIN card. The applicant had no family here and only a few friends she met during school. Her relationship with her boyfriend was brief. The English course had not started at the time of the motor vehicle accident. It started the next month in June 2019.

- [40] Other factors that indicate the applicant's residence was not of a sufficiently permanent nature such that she was at the time of the accident ordinarily resident in Ontario are as follows:
- a. on completion of her English language studies, she gave up her living accommodations she rented and did not secure any other residence,
 - b. she returned to China a few weeks after completing her English studies,
 - c. she took no further steps to establish permanent residency here,
 - d. she travelled after her return to China to other countries and places but not to Ontario,
 - e. she listed her address in China on her application form for school.
- [41] I find the most important factor is the applicant admitted she was a visitor and stated such in her signed written statement. The applicant also stated she had returned to Ontario in April 2019 with the intention of pursuing studies but the accident interrupted those plans, which is similar to the facts in the *Cruz* decision. After her return to China in September 2019, there is no evidence of any action to support her stated intention to return to Ontario and permanently reside here. The evidence suggests the opposite. She had some contact with Seneca College in 2020 via email but no steps were taken to get a student visa or pursue professional studies here. In the EUO she testified that she returned to China as her mother was selling property and she needed her signature for the transaction.
- [42] I find the written statement the applicant provided to the insurer after the accident is very persuasive evidence that the applicant was in Ontario as a visitor. The applicant had no possessions other than what she brought with her when she travelled to Ontario and a few select items she purchased here. She gave up her furnished room and stayed with a friend until her return to China at the end of September 2019.

[43] Like the *GK* decision, other factors do not support an intention to reside here in Ontario. For example, the applicant did not seek an Ontario driver's license. She had a telephone cell plan here in Ontario but cancelled it on her return to China. She had few ties to the local community, in that her friends were limited to those she met while in school for the English language training.

CONCLUSION

[44] I find based on the totality of the evidence the applicant is not ordinarily resident in Ontario for the purposes of section 25 of the Act and as such she is not entitled to any benefits under the Motor Vehicle Accident Claims Fund.

Released: February 25, 2022

**Thérèse Reilly
Adjudicator**