Bartlett v. RSA Insurance Company, 2023 ONLAT 21-014829/AABS-PI

Licence Appeal Tribunal File Number: 21-014829/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:

William Bartlett

Applicant

and

RSA Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR:	**Tavlin Kaur**
APPEARANCES:	
For the Applicant:	Nicholas Kapelos, Counsel
For the Respondent:	Geoffrey Keating, Counsel l

Heard by way of written submissions

OVERVIEW

[1] William Bartlett, the applicant, was involved in an incident on February 10, 2019, and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016*) (the "*Schedule*"). The applicant was denied benefits by the respondent, Royal and Sun Alliance Insurance Company of Canada ("RSA") and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE

[2] The preliminary issue to be decided is whether the applicant was involved in an accident.

RESULT

[3] The applicant was not involved in an "accident" as defined in s. 3(1) of the *Schedule*.

ANALYSIS

Background

[4] On February 10, 2019, the applicant was exiting a dance studio. He had ordered a taxi to transport him back to his residence. The applicant exited the dance studio. He was escorted by an instructor at the dance studio. He walked onto the sidewalk and approached the street next to the curb where there was a snowbank. A narrow pathway had been cleared in the snowbank perpendicular to the street so that pedestrians could cross the street without having to climb over the snowbank. However, the pathway was not cleared to the surface of the sidewalk and there remained five to six inches of snow on the ground. The snowbank, itself, at its peak was up to the applicant's knees/thighs.

[5] The taxi driver pulled up beside the snowbank so that the front passenger door was immediately beside the pathway. The driver opened the passenger door. In order for the applicant to reach the passenger door, he stepped on the edge of the snowbank where there were six to eight inches. As the applicant was turning to get into the car, the applicant slipped and fell onto his back with his feet underneath the open door, hitting his head on the snowbank. The applicant was holding on to the back door to support himself as he walked around the door to get into the car when he fell.

Parties' positions

[6] The applicant submits that he was entering the taxi which was stopped for the purpose of the applicant entering the vehicle. This is an ordinary well-known use of an automobile and entering the vehicle directly caused his injuries.

[7] The respondent submits that the applicant simply having contact with the vehicle when he fell is not sufficient for the subject incident to constitute as an accident.

Was the incident an "accident"?

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

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

[10] 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.

[11] In *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII), the Ontario Court of Appeal confirmed the two-part test to determine whether an incident is an "accident" as follows:

a) Purpose test: did the incident arise out of the use or operation of an automobile? and

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

[12] The purpose test is a determination of whether the incident resulted from "the ordinary and well-known activities to which automobiles are put." See: *Greenhalgh v. ING Halifax Insurance Company*, (2004), 2004 CanLII 21045 (ONCA). Put another way, for what "purpose" was the vehicle being used at the time of the incident?

[13] The causation test then requires the adjudicator to determine if these "ordinary and well-known activities" were the direct cause of the applicant's impairments by focusing on the following considerations:

a. The "but for" consideration;

b. The "intervening act" consideration, which may be used to determine if some other event took place that cannot be said to be part of the ordinary course of use or operation of the vehicle; and,

c. When faced with a number of possible causes, the "dominant feature" consideration focuses on whether the ordinary and well-known activity is what "most directly caused the injury".

The Purpose Test

[14] 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.

The Causation Test

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

[15] Based on the facts and evidence before me, I find that the applicant would not have sustained these injuries "but for" his need to enter the vehicle. However, the "but for" test does not conclusively establish legal causation, the cause that attracts legal liability. As Laskin J.A. noted in *Chisholm v. Liberty Mutual Group, 2002 CanLII 45020 (ON CA)*("*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."

[16] Since the but for test does not conclusively establish legal causation, the analysis turns to a consideration of whether there was an intervening act that severs the chain of causation.

Was there an intervening cause?

[17] The applicant submits that there is no intervening act that breaks the chain of causation as slipping and falling when entering a vehicle is a reasonably foreseeable risk related to operating a vehicle. Pursuant to the Court's finding in *Chisholm*, a reasonably foreseeable risk related to the operation of a motor vehicle will not break the chain of causation. The applicant relies on *Duah v. Wawanesa Mutual Insurance Company*, 2021 CanLII 19484 (ON LAT) ("*Duah*") and *V.B. v Economical Insurance Company*, 2020 CanLII 87992 (ON LAT) ("*V.B*:") in support of his case.

[18] The respondent submits that slipping on a surface, such as ice or snow, constitutes an intervening act. It is the respondent's position that a majority of the Tribunal's decisions have held that an icy road surface constitutes an intervening act such that the slip and fall incident does not constitute an accident. The respondent asserts that that in the context of a slip and fall incident occurring on ice and/or snow while an individual is walking to/entering a vehicle, barring contact with the vehicle either causing the slip/fall or an injury, the ice/snow must be considered an intervening act such that the causation test is not satisfied. The respondent relies on *Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107 (CanLII) in support of their case.

[19] In *Duah*, the Tribunal found that the slip and fall was not a separate event. The applicant was walking towards his vehicle for the sole purpose of getting into it when he slipped and fell. In V.B., the Tribunal found that slipping and falling on ice was not an intervening act capable of breaking the chain of causation between the use or operation of the vehicle and the impairment. The *Duah* and *V.B.* decisions that the applicant relies on is not binding on me and were decided before *Porter*. Therefore, I decline to follow them as I do not find it to be persuasive. Instead, I prefer to follow the reasoning of the Divisional Court in *Porter*, which is binding on me.

[20] The applicant submits that *Harland-Bettany* provides a proper example of how the *Greenhalgh* analysis should be applied in this matter. I have reviewed this decision and the Tribunal found that the intervening act consideration was of limited use in that particular case. Rather, the Tribunal found the dominant feature consideration to be more helpful than intervening act consideration because it allows for a better incorporation of the "ordinary and well-known" activity of exiting into the analysis. This decision like any other decision from the Tribunal is not binding on me. Furthermore, I find this decision to be of limited assistance to this matter and decline to adopt the reasoning in it. Moreover, I find the intervening act consideration to be a useful tool to determine whether some other event took place that cannot be said to be part of the ordinary course of use or operation of the vehicle.

[21] I am persuaded by the respondent's position and find that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile. Rather, I find that the applicant's injuries were caused by an intervening cause: the snow on the ground. The snow caused him to slip and fall which led to his injuries, not the use or operation of the taxi. Although the taxi was physically near the snowbank, it did not cause the slip and fall. The snow and the resulting slip and fall occurred independently of the automobile's use or operation.

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

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

[23] The applicant submits that the dominant feature of the incident resulting in the applicant's injuries was the applicant being in the process of entering the taxi,

as the applicant slipped while his sole purpose was to enter an automobile being a common activity with respect to the use or operation of an automobile.

[24] The respondent submits that slipping 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.

[25] I find that the use or operation of the automobile was not the dominant feature of the applicant's injuries. The dominant feature that physically caused the applicant's injuries was the snow. The location of the vehicle was ancillary. Moreover, unlike Tribunal decisions, I am bound by the decision in *Porter* where the Court stated that direct causation requires more than the motor vehicle simply being the reason or destination for why the applicant was present at this location when the slip and fall occurred.

[26] In Seung *v Cooperators General Insurance Co*., 2023 CanLII 47510 (ON LAT), the Tribunal found that *Porter* does not stand for the proposition that all incidents involving snow, ice, or debris on the ground will fall outside the *Schedule*'s definition of an accident. While that may be the case, *Seung* does not specify the situations where *Porter* would apply. Moreover, it is not binding on me. It was decided on its own facts.

[27] In my view, *Porter* is analogous to the facts of this case, and I adopt the reasoning set out by the Court. As noted by the Court, direct causation requires more than the motor vehicle simply being the reason or destination for why the applicant was present at the location where the incident occurred. In my view, the use and operation of the car did not directly cause his injuries.

[28] Accordingly, 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.*

ORDER

[29] The applicant has not demonstrated the incident on February 10, 2019 constituted an "accident", as defined in s. 3(1) of the *Schedule*.

[30] The application is dismissed.

Released: November 14, 2023

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Tavlin Kaur
Adjudicator