CITATION: Davis v. Aviva General Insurance Co., 2024 ONSC 3054
DIVISIONAL COURT FILE NO.: DC-22-160
DATE: 20240531

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Emery and Schabas JJ.

BETWEEN:	
CARRIE-ANNE DAVIS Appellant	*Daniel J. Fife* and *Rachel Andrews*, for the Appellant
– **and** –	
AVIVA GENERAL INSURANCE COMPANY and the LICENCE APPEAL TRIBUNAL Respondents	*Geoffrey L. Keating*, for the Respondent Aviva General Insurance Company *Douglas W. Lee*, for the Respondent Licence Appeal Tribunal
	Heard: at Hamilton on November 1, 2023

REASONS ON APPEAL

EMERY J.

[1] The appellant, Carrie-Anne Davis, was injured when she slipped and fell on black ice in a parking lot on November 22, 2017. At the time, she was walking towards her car with her key fob in her hand to open the door and to drive herself home.

[2] Ms. Davis applied for accident benefits from her insurer, Aviva General Insurance Company ("Aviva"). Aviva accepted her claim and paid some, but not all her benefits over the

next three and a half years. Ms. Davis therefore made an application to the Licence Appeal Tribunal (the "LAT") to dispute the benefits that Aviva had denied.

[3] Prior to the written hearing on the substantive issues of her claim, Aviva brought a motion to challenge whether Ms. Davis had been injured in an "accident" within the meaning of s. 3(1) of the *Statutory Accidents Benefit Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the "*SABS*") as a "preliminary issue".

[4] On September 2, 2021. Vice Chair Maedel granted Aviva's motion to allow the LAT to consider the preliminary issue.

[5] On May 18, 2022, Adjudicator Kaur rendered a decision on that preliminary issue. Adjudicator Kaur found that Ms. Davis had not been injured in an "accident" within the meaning of s. 3(1) of the *SABS*. When Ms. Davis requested a reconsideration of that finding, Adjudicator Kaur upheld her initial decision on August 2, 2022. As a result, the application Ms. Davis had brought asking the LAT to enforce her accident benefit claim was dismissed, and Aviva terminated the payments of accident benefits to her.

[6] Ms. Davis appeals the decision of Vice Chair Maedel and the two decisions of Adjudicator Kaur. Section 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12 (the "*LATA"*) permits the appeal of a decision of the LAT to the Divisional Court, but only on a question of law.

[7] Ms. Davis raises two questions of law. The first is whether the LAT applied procedural fairness properly when it permitted Aviva to raise that issue after three and half years of accepting the claim. The second question asks whether the LAT correctly found that she was not injured in an "accident" within the statutory meaning of that term.

[8] As a remedy, Ms. Davis asks that the three decisions be set aside, and that her application to the LAT be reinstated.

Factual background

The Accident and the Injury

[9] On November 22, 2017, Ms. Davis was one step away from her parked car when she slipped and fell on some black ice. She held an intelligent access key in her hand and had reached out to unlock the driver's door when she slipped. Ms. Davis attempted to catch herself before falling and landing on her left shoulder and side. Her body came to rest with her left leg under the car by the left front wheel.

[10] Ms. Davis suffered an injury to her left shoulder for which she had surgery on May 6, 2019. She also suffered from persistent headaches, blurred vision, neck pain, left shoulder pain, left hand numbness, soreness to her chest and left hip and leg pain since the accident occurred, among other physical, emotional and psychological impairments.

[11] As Aviva was the first party insurer, Ms. Davis made a claim for accident benefits under her policy. This claim was accepted by Aviva in January 2019 and Aviva paid certain accident benefits to Ms. Davis arising from this accident, while denying others.

The Application to LAT

[12] Ms. Davis made an application to the LAT on May 19, 2020 to dispute the payment of various benefits that Aviva had denied. The first Case Conference in the application was scheduled for September 29, 2020.

[13] On July 7, 2020, the Case Conference was adjourned as Aviva's representative was not available. The Case Conference was rescheduled for December 11, 2020. On December 1. 2020, Aviva filed its Case Conference Summary Form. Of the various issues it put in dispute on that Form, Aviva did not identify any preliminary issue to address at the upcoming Case Conference.

[14] The Case Conference was adjourned at the LAT's request to March 2, 2021. Aviva did not file an amended Case Conference Summary Form prior to the rescheduled Case Conference. Ms. Davis continued to receive treatment and incurred a further $12,760 for treatment during this time.

[15] On March 2, 2021, the Case Conference was held with Adjudicator Hines and he released his Case Conference Report and Order on March 4, 2021. In that Report and Order, Adjudicator Hines set out what issues had been withdrawn, those that had been resolved and ordered that all remaining issues would proceed to a written hearing scheduled for August 30, 2021. He also set a schedule for the disclosure of items not previously disclosed by June 30, 2021, and for the exchange of submissions for the hearing.

[16] Notably, no other issues were raised or addressed at the Case Conference.

The Preliminary Issue is Raised

[17] On July 13, 2021, Aviva brought a motion for the determination of whether Ms. Davis had been injured in an "accident" as a preliminary issue and requested an adjournment of the written hearing at the end of August and associated deadlines. Upon the filing of the Aviva motion, the LAT issued a Notice of Motion Hearing to set the hearing date of the motion on August 4, 2021. Ms. Davis had until July 29, 2021 to serve her responding materials.

[18] The motion was adjourned to September 2, 2021, on consent.

[19] Vice Chair Maedel released his Motion Order on September 16, 2021, in which Aviva's motion to have for the preliminary issue addressed was granted. Vice Chair Maedel set November 8, 2021 as the hearing date for the written preliminary issue. This was subsequently rescheduled of March 31, 2022.

[20] The written hearing on the substantive issues of the application was rescheduled for July 29, 2022 to make way for the determination of the preliminary issue.

[21] Adjudicator Kaur issued her decision on the preliminary issue on May 18, 2022. In the decision, Adjudicator Kaur found that Ms. Davis had not demonstrated that her fall on November 22, 2017 constituted an "accident" as defined in s. 3(1) of the *SABS*, and dismissed her application entirely.

[22] Ms. Davis requested a reconsideration of the decision made by Adjudicator Kaur pursuant to r. 18.2 of the LAT's *Common Rules of Practice and Procedure*.[1]. In her request for reconsideration, Ms. Davis alleged that the tribunal had violated the rules of natural justice and procedural fairness when it granted Aviva's motion to raise the issue of whether she had been injured in an "accident" almost five years before. She also alleged that the LAT had made a significant error of law by failing to properly apply the causation test set out in the jurisprudence and by failing to apply the law to the facts.

[23] On August 2, 2022, Adjudicator Kaur dismissed the request for reconsideration. Ms. Davis states that she did not receive the reconsideration dismissal until October 20, 2022.

[24] As of July 22, 2021, Aviva had paid a total of $26,593.37 in medical and rehabilitation benefits to Ms. Davis or on her behalf. An additional $48,476.42 of benefits has been denied and remains in dispute because of the decisions under appeal.

The decisions below

Vice Chair Maedel

[25] On granting Aviva's motion for the LAT to consider the preliminary issue after coverage had been accepted, Vice Chair Maedel remarked that the timing of the motion was somewhat concerning. He observed that Aviva was certainly permitted to raise preliminary issues throughout the adjudication of the matter, and prior to the commencement of the substantive hearing. He further observed that despite this right, Aviva had not raised this preliminary issue until almost 14 months had passed since the initial application had been filed. This motion was brought just prior to the deadline for Ms. Davis to file written submissions on the substantive issues.

[26] Vice Chair Maedel went on to state that he was not persuaded that the timing of this preliminary issue rises to the level of an abuse of process as submitted by Ms. Davis. He ventured that the argument would have more merit had submissions on the substantive issues been provided by both parties and the totality of the evidence had been before the adjudicator.

[27] In making his ruling, Vice Chair Maedel stated that he was alive to the fact the accident had occurred in November 2017, and that the five-year window for medical and rehabilitation

[1] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017).*

benefits would expire in November 2022. However, he was confident that the preliminary issue could be heard on an expedited basis to permit adjudication on the substantive issues, if necessary, prior to November 2022.

[28] Finally, Vice Chair Maedel held that the determining factor for his ruling was procedural fairness pursuant to r. 3.1(a) of the *Common Rules of Practice and Procedure*. He stated that, despite the late introduction of the preliminary issue, it would be procedurally unfair to deprive the respondent of raising the issue. He then proceeded to set a timetable for the exchange of submissions and evidence for the hearing of the preliminary issue in writing on November 8, 2021.

Motion Decision of Adjudicator Kaur

[29] Adjudicator Kaur heard the preliminary issue in writing and released her decision on May 18, 2022. After identifying that s. 3(1) of the *SABS* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment", Adjudicator Kaur proceeded to find that Ms. Davis was not involved in an accident as that term is defined in the *SABS*.

[30] In her Reasons for Decision and Order, Adjudicator Kaur reviewed the two-part test applied by the Court of Appeal in *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.), at para. 17, *Greenhalgh v. ING Halifax Insurance Co.* (2004). 72 O.R. (3d) 338 (C.A.), at para. 10, leave to appeal refused, [2004] S.C.C.A No. 461, and *Economical Mutual Insurance Co. v. Caughy*, 2016 ONCA 226, 130 O.R. (3d) 508, at para. 10. She identified the first of those parts as the purpose test: did the incident arise out of the use or operation of an automobile? This part of the test involves a determination of whether the incident involved the "ordinary and well-known activities to which automobiles are put." Aviva conceded on the hearing that this incident satisfied the purpose test.

[31] The second part of the test is the causation test: did the use or operation of an automobile directly cause the impairment for which benefits are claimed? At this stage of the test, Adjudicator Kaur recognized that she was to determine if these "ordinary and well-known activities" were the direct cause of the impairments. Following *Chisholm* and *Greenhalgh*, an adjudicator was required to determine if the incident would have occurred under the following circumstances:

a. "but for" the use or operation of the automobile;
b. whether there was an "intervening act" that could not be said to be part of the ordinary course of the use or operation of the automobile; and
c. whether the use or operation of the automobile was the dominant feature.

[32] Adjudicator Kaur found that the "but for" test did not establish legal causation to attract legal liability. She held that the proximity of the applicant to the automobile when the injury allegedly occurred is not determinative of causation where there are other factors that cannot be screened out. Legal entitlement to accident benefits requires that the use or operation of the automobile not only be a cause of the injuries, but that it be the direct cause.

[33] Similarly, Adjudicator Kaur found that Ms. Davis' injuries were not a consequence that was directly caused by the use or operation of the automobile. Adjudicator Kaur found that the injuries sustained by Ms. Davis had been caused by an intervening cause, being the ice on the ground. It was the ice that initiated the slip and fall that led to her injuries; it was not the use or operation of the car that caused the fall. The adjudicator found that the ice on the ground was therefore an independent intervening event that broke the chain of events.

[34] Finally, in looking at whether the use or operation of the car was a dominant feature behind the cause of Ms. Davis' injuries, Adjudicator Kaur applied the dominant feature analysis considered in *Greenhalgh*. The adjudicator cited the decision of this court in *Porter v. Aviva Insurance Co. of Canada*, 2021 ONSC 3107 (Div. Ct.). In *Porter*, the court held that the injuries sustained by the appellant who had slipped and fallen on the ice of her parents' driveway while walking toward a stationary automobile operated by the rideshare Lyft service could not be said to be directly caused through the use or operation of that automobile. The court in *Porter* held that more was required than just the car being the reason why the appellant was at the location where the incident occurred.

[35] Adjudicator Kaur found *Porter* to be authority to find on the preliminary issue that the use or operation of the automobile was not the dominant feature of the injuries in this case. Adjudicator Kaur did not agree with Ms. Davis' submissions in reply that *Porter* is distinguishable because, first, the appellant in that case had not yet begun the process of entering the vehicle, and second, she would have to walk around the automobile to begin the process of entering it. In contrast, Ms. Davis submitted that she was close to her automobile. She had the key fob for electronic entry in her hand and had her arm extended to activate it. She submitted that her arm and hand were engaged in the act of unlocking the door to enter the car and to drive home.

[36] Adjudicator Kaur was not persuaded that the matter before her was different than the facts in *Porter*. She did not find that the proximity of Ms. Davis to the car or the use of her key fob to unlock it demonstrates that she was engaged in the use or operation of the car. While Adjudicator Kaur agreed that Ms. Davis was in the parking lot for the sole purpose of entering the car to drive it, the direct cause of her injuries was not related to the intended entry of it. Her injuries were caused by the ice on the parking lot, and it was the ice that was the dominant feature of this incident.

[37] Based on the facts of the case before her and the applicable authorities, Adjudicator Kaur could not conclude the use or operation of an automobile directly caused Ms. Davis' injuries. Therefore, the incident did not meet the definition of an "accident".

Reconsideration by Adjudicator Kaur

[38] Adjudicator Kaur heard the request for reconsideration and dismissed that request for reasons given in the Reconsideration Decision dated August 2, 2021. After reviewing the requirements for a request to reconsider a decision of the LAT under r. 18 of the *Common Rules of Practice and Procedure*, she observed that the threshold for reconsideration under r. 18.2 is high.

[39] The adjudicator went on to find that Ms. Davis had made the request for reconsideration to ask the LAT to re-weigh or to reconsider evidence, or to relitigate its position. Adjudicator Kaur also rejected her assertion that the LAT had made significant errors of law. She rejected Ms. Davis' submission that the LAT violated the rules of natural justice and procedural fairness by allowing the motion for the hearing of the preliminary issue.

Positions of the Parties

Carrie-Anne Davis

[40] Ms. Davis takes the position that Vice Chair Maedel ought to have dismissed the motion brought by Aviva on July 13, 2021. She states that it was procedurally unfair to raise the preliminary issue of whether she was injured in an accident caused directly from the use or operation of her motor vehicle under s. 3(1) of the *SABS* three years after Aviva had accepted her claim. Before Aviva made that motion, it had paid $26,593.37 in medical and rehabilitation benefits.

[41] As of July 13, 2021, there was approximately one year and four months left on Ms. Davis' five-year limit to access medical and rehabilitation benefits.

[42] Ms. Davis had incurred a further $12,760 in treatments prior to the third Case Conference when Adjudicator Hines made his Report and Order. The substantive issues had already been narrowed and defined in that Report and Order. By the time Aviva brought its motion, the parties were within the timetable fixed to exchange documents for the written hearing.

[43] In making his decision to allow the preliminary issue to proceed, Vice Chair Maedel acknowledged that the "timing of this motion [was] somewhat concerning" but then found that "it would be procedurally unfair to deprive the respondent of raising this issue." He did not appropriately consider how Ms. Davis might be deprived of fairness beyond stating that the timing did not amount to an abuse of process. In making his decision for these reasons, Ms. Davis submits Vice Chair Maedel made an error of law.

[44] On the second ground of appeal, Ms. Davis states that Adjudicator Kaur committed an error of law when she found there to be no causation between her injury and the direct use or operation of her automobile. Ms. Davis bases her position on the assertion that Adjudicator Kaur did not apply the correct legal test to the facts when she found that Ms. Davis's injuries were not caused in an accident within the meaning of that term under s. 3(1) of the *SABS*.

[45] Ms. Davis asks this court to reverse the Order of Vice Chair Maedel allowing the LAT to determine the preliminary issue in the first place, or in the alternative to set aside the finding of Adjudicator Kaur on the preliminary issue and to find that she was injured in an accident under the *SABS*. In either respect, Ms. Davis asks this court to reinstate her application to the LAT in order that she be placed in the same position she was in before Aviva raised the preliminary issue.

Aviva

[46] Aviva takes the opposite position on both grounds of appeal. On the ground that Vice Chair Maedel erred at law by allowing Aviva to seek a determination on the preliminary issue, Aviva takes the position that the LAT is at liberty to make a determination of its jurisdiction at any time. This ability allows the LAT to consider whether there is a legal basis to hear a dispute arising between an applicant and an insurer from an accident that meets the statutory definition of that term.

[47] On the alternative ground, Aviva takes the position that Adjudicator Kaur did not err at law by finding Ms. Davis was not injured in an accident under the *SABS*, and that the LAT made its finding under the correct principles, properly applied. Aviva therefore asks this court to dismiss the appeal under either ground.

[48] The LAT appeared through counsel on the appeal. The LAT takes no position except that it would ask the court to order the application of Ms. Davis back to the LAT for adjudication if the appeal is allowed.

Standard of review

[49] Under s. 11(6) of the *LATA*, an appeal from a decision of the LAT relating to a matter under the *Insurance Act*, R.S.O. 1990, c. I.8 is to the Divisional Court, but only on a question of law.

[50] The standard of review on an appeal limited to questions of law is one of correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37; *Madore v. Intact Insurance Co.*, 2023 ONSC 11 (Div. Ct.), at para. 23.

[51] Questions of law are generally questions about whether the correct legal test was applied, or an approach prescribed by statute was followed. In contrast, questions of fact are questions about what actually took place between the parties. Questions of mixed fact and law are questions which involve applying a legal standard to a set of facts: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at para. 43*; Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35.

[52] This court had an opportunity to further expand on what constitutes a question of law on a statutory appeal in *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 (Div. Ct.), aff'd 2022 ONCA 446, reversed on other grounds, 2024 SCC 8, 489 D.L.R. (4th) 191. In that case, Kristjanson J. of this court explained as follows, at para. 28:

> [28] On a statutory appeal limited to questions of law alone, the court considers whether the decision-maker correctly identified and interpreted the governing law or legal standard relevant to the facts found by the decision-maker. There are limited circumstances in which findings of fact, or the administrative decision-maker's assessment of evidence, may give rise to an error of law alone for the purposes of appeal. If the adjudicator ignored items of evidence that the law required him or her to consider in making the decision, then the adjudicator erred in law: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997

> CanLII 385(SCC), [1997] 1 S.C.R. 748 at para. 41. Challenges to the sufficiency or weight of evidence supporting a finding of fact do not give rise to a question of law. An error in law or legal principle made during the fact-finding exercise, however, can give rise to an extricable question of law. A "misapprehension" of the evidence does not constitute an error of law unless the failure is based on a wrong legal principle: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25 and 29. It is an error of law to make a finding of fact on a material point where the factual finding is based solely on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference (*Johannson v. Saskatchewan Government Insurance*, 2019 SKCA 52 at paras. 24-25).

[53] The appeal turns on whether the LAT applied the correct law in respect to each issue, or otherwise made an error of law on applying the relevant test.

Analysis

Equitable powers of the LAT

[54] The court must determine whether the appropriate level of procedural fairness was given in the circumstances where it is an issue on appeal: *Warren v. Ontario (Licence Appeal Tribunal)*, 2022 ONSC 3741 (Div. Ct), at para. 4.

[55] Owing to the volume of cases flowing through the LAT for adjudication and the myriad of issues raised in those applications, each appeal of a decision must turn on its own record. On this ground of appeal, Ms. Davis takes the position that Aviva's acceptance of her application for benefits and conferencing those benefits that had been denied over two years later without reference to whether she had been injured in an "accident" raised a form of estoppel. Ms. Davis is effectively arguing that time is on her side. She is arguing that the LAT has equitable powers it should have used to deny Aviva's motion, and that its failure to use those powers was an error of law.

[56] This submission fails for two reasons. The first is that the LAT has jurisdiction to determine whether a claim properly qualifies for an applicant to require an insurer to pay accident benefits under the *SABS* at any time. This applies to determinations of entitlement, the nature of the accident benefits claimed and the legal obligation to pay particularly described claims made under an applicable motor vehicle policy. How the Vice Chair Maedel would have decided had he turned his mind to an estoppel argument is not known.

[57] The second reason is more involved. At the time the appeal was heard, counsel advised the panel that the appeal of the LAT decision in *Harland-Bettany v. Aviva Insurance Canada*, 2022 CanLII 78879 (Ont. L.A.T.) had been appealed. In *Harland-Bettany*, the facts were similar yet distinct from this case in that the applicant had slipped and fallen when exiting from her motor vehicle. Aviva had also raised the preliminary issue of whether the applicant had been injured in an "accident" in the LAT application, but at the conference level.

[58] Adjudicator Craig Mazerolle found that Aviva had not raised the preliminary issue in a timely fashion, and that it missed the opportunity to challenge whether the incident constituted an "accident" under the *SABS*. He went on to find that, even if he ignored the timeliness of the preliminary issue, he found the incident constituted an "accident."

[59] Aviva appealed the LAT's decision on the preliminary issue of the timing to bring it forward for adjudication. In *Aviva Insurance Canada v. Harland-Bettany*, 2023 ONSC 3395 (Div. Ct), the appeal was dismissed for want of jurisdiction. Relying on the decision of Swinton J. in *Penney v. The Co-operators General Insurance Co.*, 2022 ONSC 3874, 25 C.C.L.I. (6th) 305, (Div. Ct.), the Divisional Court concluded that it has no jurisdiction to hear an appeal of an interlocutory decision of the LAT.

[60] The court in *Harland-Bettany* reviewed earlier authorities in support of its finding that discouraged fragmented or the bifurcation of issues in regulatory proceedings: see *Grewal v. Peel Mutual Insurance Co.*, 2022 ONSC 4082 (Div. Ct.); *Law Society of Upper Canada v. Piersanti*, 2018 ONSC 640 (Div. Ct.), at para. 16. Such fragmentation should be discouraged as the appeal of interlocutory issues alone would cause delay to the parties and consume valuable judicial resources.

[61] The court then considered authority where a decision also contains an order that disposes of the claim: *Delic v. Enrietti-Zoppo*, 2022 ONSC 1627 (Div. Ct.), at para. 7. To determine if a decision is interlocutory in nature, the court must look at whether it finally disposes of the substantive issues in the underlying application made to the LAT. Where the decision contains a decision of finality to the dispute, the court will find jurisdiction to hear an appeal that is properly brought. The Court in *Harland-Bettany* underscored the basis for finding jurisdiction at that stage in the following terms, at para. 15:

> [15] This does not mean that Aviva has no right to appeal the preliminary issue decision. The Court will have jurisdiction to hear this issue following the final determination of the underlying matters currently before the LAT. At that time, all appeal rights can be exercised together, thereby avoiding fragmentation, delay and the risk of duplicate or contradictory evidentiary findings. This is the most just and efficient way of proceeding.

[62] While the LAT made an interlocutory determination by allowing the Aviva motion in this case, the Court on this appeal has jurisdiction to review that decision because it is grounded on the final order made by Adjudicator Kaur. The decision-making sequence is also different enough from the facts in *Harland-Bettany* as the finding of the LAT on the "accident" issue is under appeal to allow a fresh review of the procedural decision.

[63] The Supreme Court established in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th), at para. 27 that procedural fairness is a question of law. The characteristics of procedural fairness are non-exhaustive. Those characteristics serve as the hallmarks of procedural fairness were identified by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-27 as follows:

a. The nature of the decision being made, and the process followed in making it;
b. The nature of the statutory scheme and the terms of the statute pursuant to which that body operates;
c. The importance of the decision to the individual affected;
d. The legitimate expectations of the person challenging the decision; and
e. The choices of procedure made by the deciding body itself.

[64] Traditionally, the LAT has been reticent to wield equitable powers to fulfill its mandate under s. 280(1) of the *Insurance Act* when resolving disputes over statutory accident benefits. That may have changed with the decision of the LAT in *Botbyl v. Heartland Farm Mutual Inc*., 2023 CanLII 72662 (Ont. L.A.T.), released on August 2, 2023. In *Botbyl*, Adjudicator Brian Norris was asked to decide whether the LAT could, and should, grant relief from forfeiture because the applicant failed to file an application for enhanced accident benefits coverage as he believed he had.

[65] Adjudicator Norris reached this conclusion on the basis that the *SABS* does not prohibit or preclude the LAT from exercising this power. This reasoning was augmented by his observation that the Supreme Court held as early as 2002 in *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] S.C.R. 129, that one of the main objectives of the *SABS* is to provide consumer protection. In *Botbyl*, Adjudicator Norris agreed with the submission of the applicant that permitting the LAT to grant equitable relief is consistent with that objective.

[66] There is persuasive authority for me to find that an adjudicator has the discretion to exercise equitable powers where it is just to do so on an application. These powers are available to ensure procedural fairness, in keeping with the objectives set out for administrative decision-makers in *Baker*.

[67] Despite my finding that the LAT has equitable powers, however, I am of the view that Vice Chair Maedel did not exercise his discretion unreasonably. He put his mind to the timing of Aviva's motion to raise the preliminary issue while the parties were exchanging materials on the substantive hearing, calling it "concerning." However, he determined that doing so did not rise to the point of being an abuse of process. The Vice Chair found the abuse of process argument would have more merit had the motion been brought by Aviva after all submissions were filed and the totality of the evidence had been given.

[68] By weighing the facts before him on the nature and timing of Aviva's motion, Vice Chair Maedel conducted a balancing of interests to allow Aviva to raise the preliminary issue. He concluded that his objective was to make a ruling that provided procedural fairness under the rules that apply to the LAT. In other words, he made the decision using the powers available to him at law. It just was not the conclusion Ms. Davis wanted him to reach.

[69] As a result, this ground of appeal is dismissed.

Causation

[70] I now turn to the second ground of appeal that is based on the decision made Adjudicator Kaur on causation as a question of law.

[71] The view that the *SABS* should be considered as consumer legislation and therefore applied for the benefit of the consumer is as prevalent now as it was when *Smith v. Co-operators* was decided in 2002. It has been held consistently that the *SABS* must be interpreted generously as legislation that is remedial in nature. In keeping with the direction from the Court of Appeal in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, 148 O.R. (3d) 438, at para. 42, leave to appeal refused, [2020] S.C.C.A. No. 7, the definition of "accident" under the *SABS* must be interpreted in a manner consistent with the substantive objective of reducing economic dislocation and hardship to victims of a motor vehicle accident.

[72] In 2002, the Court of Appeal reformulated the test for accident benefits coverage available to a claimant in *Chisholm* after the definition of "accident" in the standard automobile policy changed in 1996. In *Chisholm*, the plaintiff had been injured when he had been shot while in his car by an unknown assailant. He was insured for accident benefits under a policy written by the Liberty Mutual Group for rehabilitation and other statutory benefits if injured in an accident within the meaning of that term.

[73] Liberty Mutual brought a motion to determine a legal question before trial under r. 21.01(1) as the insurer. The motions judge held that the plaintiff had not been injured in an accident involving the direct use or operation of an automobile within the meaning of the term "accident" as defined under the *SABS*, but by the gunshot. Laskin J.A. wrote the following on behalf of the court at paras. 29 and 30:

> [29] Put differently, even accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car -- if it is "part of the ordinary course of things". See J.G. Fleming, The Law of Torts, 9th ed. (North Ryde, NSW: LBC Information Services, 1988) at p. 247. Gun shots from an unknown assailant can hardly be considered an intervening act in the "ordinary course of things". The gun shots were the direct cause of his impairment, not his use of his car.

[74] The Court of Appeal followed *Chisholm* with *Greenhalgh* two years later. The facts in *Greenhalgh* involved a young woman whose car had become stuck down a country road on a cold winter's night. The young woman had left her car to walk back to some farmhouses she had seen earlier in her travels to seek help. While walking back in search of a farmhouse, she had become disoriented in the darkness and had strayed off the road. After nine or ten hours of wandering, the young woman had fallen into an ice-covered river and had lost her boots. As a result, she suffered severe frostbite that caused the loss of her fingers and amputation of her legs below her knees. The young woman claimed accident benefits from her insurer.

[75] The Court of Appeal in *Greenhalgh* took the opportunity to explain that the “direct cause” in the amended *SABS* after 1996 shortened the link between the use or operation of an automobile and the occurrence of the impairment. The underpinnings of this test was formulated by Laskin J.A. in *Chisholm* when he stated at paragraph 24:

> [24] That brings me to Chisholm's final submission, a submission that, in my view, goes to the heart of this appeal because it focuses on the meaning of "directly causes". Chisholm submits that the use or operation of his car is a direct cause of his injuries because he would not have been wounded unless he had been confined in his car. In substance, Chisholm contends that the direct cause requirement can be satisfied by the "but for" test of causation. But for being in his car he would not have been injured. I do not accept this submission.

[76] The case of *North Waterloo Farmers Mutual Insurance Co. v. Samad*, 2018 ONSC 2143 (Div. Ct.) was an application for judicial review of a decision of the (former) Financial Services Commission of Ontario regarding accident benefits coverage to the insured party. Justice Thorburn, writing at the time as a judge of the Divisional Court, neatly summarized the considerations to apply on the causation test:

> [12] What will amount to direct causation will depend on the circumstances. However, some of the following considerations may provide useful guidance in ascertaining whether or not it has been established in a given case:
>
> (a) The “but for” test can act as a useful screen;
>
> (b) In some cases, the presence of intervening causes may serve to break the link of causation where the intervening events cannot be said to be part of the ordinary course of use or operation of the automobile; and
>
> (c) In other cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident; if not, it may be that the link between the use or operation and the impairment is too remote to be called “direct”. (*Greenhalgh* paras 11 and 12)

[77] The insured party in *North Waterloo Farmers* had exited his vehicle and had walked around it to the passenger side of the vehicle to close the rear door. He had his hand on the sliding door when he was shoved, slipped on the icy surface where he was standing and fell into a ditch. He made a claim for accident benefits, which was upheld by FSCO and the Divisional Court. At para. 13 in *North Waterloo Farmers*, Justice Thorburn states that:

> [13] There may be more than one direct cause; it is not necessary that all of the causes be part of the use or operation of the automobile.

[78] A flexible approach must be taken for finding whether the use or operation of an automobile is a direct cause of an impairment to establish entitlement to accident benefits. An

example of this flexibility was shown by the Divisional Court in *Madore*. In that case, the applicant had suffered grievous injuries from falling off the roof of his holiday trailer in the course of cleaning it. The trailer was attached to the applicant's motor vehicle at all material times.

[79] The applicant subsequently claimed accident benefits from his insurer. On the standard wording of the statutory coverage for accident benefits, the Divisional Court ruled that the LAT had erred at law when it had rejected the claim for being outside the scope of the use or operation of a motor vehicle. The Divisional Court held that this accident had occurred within the definition of the term "accident" under the policy.

[80] As Justice Stewart wrote in *Madore*, "the link to be drawn therefore is between the "use and operation" of the automobile and the "impairment". The applicant in *Madore* did not need to show a direct physical connection between the cause of the injury and an automobile to establish that he was injured in an "accident.".

[81] Whether Ms. Davis was injured in an incident which was an "accident" within the meaning of s. 3(1) of the *SABS* is a question of law as it requires the proper interpretation and application of the correct legal test to the facts. In my view, Adjudicator Kaur's conclusion on the application of the law to the facts was an error of law because she failed to find on the most recent authorities that Ms. Davis was injured during the direct use of her automobile. It is undisputed that she was holding the electronic key fob to open the car door, if she had not already done so, to enter the car and to operate it. This is an ordinary and well-known use to which an automobile is put.

[82] The black ice Ms. Davis slipped on was fortuitous, but not an intervening cause or event. This case is similar on the facts to the decision of the LAT in *Seung v. Cooperators General Insurance Co.,* 2023 CanLII 47510 (Ont. L.A.T.), where the applicant had fallen and injured himself while loading his lunch bag into the trunk of his vehicle. He was neither walking towards, nor entering the vehicle to operate it at the time of the incident but he was still found to be injured in an "accident". *Seung* was decided just five months before the appeal was heard, and to be fair to Adjudicator Kaur, approximately 18 months after the LAT decision under appeal.

[83] I agree with the adjudicator in *Seung* that the "slipped on ice" cases are divided into two camps. However, where there is a distinguishing fact from a slip and a fall like the injury in *Porter* and a series of events that connects the direct use of the car to the injury, ice will not have played the dominant role or served as an intervening event. This view is supported by the Divisional Court in *North Waterloo Farmers* as reasonable on judicial review and correct in law under the principles in *Madore.*

[84] Ms. Davis had the electronic key fob in her hand to open and enter her car, which is a part of the use of a motor vehicle. She was so proximate to completing that entry that her leg came to rest under the front wheel on the driver's side. Referring to the reasoning in *Seung*, the presence of the key fob was a fact that supported the finding that the use of the car was the direct cause of her fall, not the ice beneath her feet.

[85] On a correct application of the law, I would determine on this record that Ms. Davis sustained the impairment for which she applied for accident benefits from Aviva in an "accident" within the meaning of the *SABS*.

[86] In making that determination, this court would be exercising its authority on appeal to make any order or decision that ought to have been made by the tribunal appealed from: *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 134(1). I recognize that when an appellate court allows an appeal, it generally remits the matter back to the tribunal for a rehearing, rather than determine the issue itself: see *Pourshian v. Walt Disney Co.*, 2021 ONSC 4840 (Div. Ct.), at para. 38. However, in this case, I consider it appropriate for this court to determine this limited issue. I am satisfied that the record before this court is sufficient to permit this determination to be made. The fact that Aviva first raised the accident issue more than two years after accepting Ms. Davis' claim is an important consideration in favour of doing so. I see no special advantage in remitting this issue back to the LAT for determination.

Conclusion

[87] Accordingly, I would allow the appeal. The decisions of Adjudicator Kaur dated May 18, 2022 and August 2, 2022 are set aside, and the application made by Ms. Davis to the LAT is reinstated. This court further orders that the application of Carrie-Anne Davis is remitted back to the LAT for the determination of the substantive issues conferenced by Adjudicator Hine. I would further order and that the balance of the time remaining for her to claim accident benefits for the five years following the accident is restored, effective July 13, 2021.

[88] The parties entered a costs agreement in which Aviva agreed to pay the costs of the appeal, if Ms. Davis was successful, in the amount of $17,500 inclusive of HST and disbursements. I would so order.

_____
Emery J.

I agree: _____
Lococo J.

I agree: _____
Schabas J.

Date: May 31, 2024

CITATION: Davis v. Aviva General Insurance Co., 2024 ONSC 3054
DIVISIONAL COURT FILE NO.: DC-22-160
DATE: 20240531

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lococo, Emery and Schabas JJ.

BETWEEN:

CARRIE-ANNE DAVIS

Appellant

– **and** –

AVIVA GENERAL INSURANCE COMPANY and the LICNECE APPEAL TRIBUNAL

Respondents

REASONS ON APPEAL

EMERY J.

Date of Release: May 31, 2024