LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: **Ben Yehudaiff vs. TD Insurance Meloche Monnex, 2019** ONLAT **18-001537/AABS**

Date: March 7, 2019
File Number: 18-001537/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:

Ben Yehudaiff

Appellant(s)

and

TD Insurance Meloche Monnex

Respondent

DECISION

PANEL: **Dawn J. Kershaw, Vice Chair**

APPEARANCES:

For the Applicant: Ben Yehudaiff

For the Respondent: Tessie Kalogeras

HEARD: **In Writing on: October 29, 2018**

REASONS FOR DECISION

OVERVIEW

[1] On January 17, 2017, the applicant drove to the hospital, parked and exited his car, slipped on black ice and broke his leg. He sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule") .The applicant was denied certain benefits by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The question to be determined in this written hearing is whether this was an "accident" as defined by section 3 of the Schedule.

THE LEGISLATION – "ACCIDENT"

[3] Section 3 of the Schedule defines "accident" as follows:

> accident means an incident in which the use or operation of an automobile directly causes an impairment […]

[4] The parties agree that the case law has established a two-part test to determine whether an incident constitutes an accident[1]. These are:

a. the purpose test: did the incident arise out of the use or operation of a motor vehicle; and

b. the causation test: did the use or operation of a motor vehicle directly cause the impairment.

[5] In considering the causation test, there are three aspects to consider, as follows:

a. whether the incident would have occurred "but for" the use or operation of the motor vehicle;

b. whether there was an intervening cause that cannot be said to be part of the ordinary course of the use or operation of the motor vehicle; and

c. whether the use or operation of the motor vehicle was a dominant feature of the incident.

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[1] *Chisholm* v. *Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ONCA); see also: *Greenhaigh* v. *ING-Halifax Insurance Company,* 2004 CarswellOnt 3426 (ONCA) at para. 10

[6] I first turn to the facts in this case.

FACTS

[7] The parties disagree on the details of the applicant's fall on the ice. There have been at least three occasions when the applicant related details of what happened. The first time was to hospital security after he had his CT scan. He was interviewed by hospital security as he waited at the emergency room. He said he parked, exited his vehicle and fell beside his vehicle. He could not say what side of his body hit the ground, but later said he fell sideways.

[8] The applicant was also examined under oath on April 26, 2017. The applicant said he parked his car, opened the door, stepped out, closed the door and as he took his first step, there was black ice and he fell. Later in the examination under oath he said he shut the door, held the handle and took the first step and lost his balance. He said he did not try to hold onto the car, and when he lost his balance, he fell. Further on in the examination under oath, the applicant said he was touching the car, closing the door and took the first step while touching the door and fell. He said the car was next to him when he fell between it and the railing that was on the driver's side of the vehicle. Finally, toward the end of the examination under oath when asked to clarify details, the applicant said he closed the door of the car and took the first step and that is when it [the fall] happened.

[9] I turn now to the determination of whether in light of these facts this constitutes an "accident".

ANALYSIS

Did the incident arise out of the use or operation of a motor vehicle (the purpose test)?

[10] The applicant submitted that the Court in *Economical Mutual Insurance Company* v. *Caughy*[2] ("Caughy") held that, in the case where a person parked his car and then tripped over a motorcycle: "parking a vehicle is not aberrant to its use as a vehicle; that most vehicles are parked most of the time; parking is an ordinary and well-known activity to which vehicles are put[3] and that there is no "active use" requirement"[4]. The applicant submits in this case that shutting the door with his hand after he parked his car was part of his use of the vehicle,

[2] 2016 ONCA 226
[3] *ibid,* at para. 17
[4] *ibid,* at para. 21

and in any case it does not matter that the engine was shut off because there is no "active use" requirement.

[11] The applicant also relied on the Tribunal's statement that section 3 of the Schedule creates a presumption that an applicant is entitled to benefits unless the applicant's behaviour was so abnormal that it could not have been contemplated by the legislative drafters[5]. He submits that parking his car was normal behaviour and he has satisfied the purpose test.

[12] The respondent submits the applicant does not satisfy the purpose test because the engine was turned off, he was walking away from the vehicle when he fell and his vehicle served no function or purpose because it was parked when he fell.

[13] I find that the applicant satisfies the purpose test. I agree with the applicant and the Court of Appeal that parking the car was an ordinary and well-known activity to which vehicles are put. This is further supported by the Tribunal's finding that to be denied benefits the use had to be the result of the ordinary and well-known activities to which an automobile is put, which I find it was. I turn now to the second part of the test, which is the causation test.

Causation Test

i. Would the incident have occurred "but for" the use or operation of the vehicle?

[14] The applicant takes the position that "but for" the use or operation of his vehicle, this incident would not have occurred. The respondent on the other hand takes the position that "but for" the black ice, the applicant would not have fallen.

[15] The applicant submits that given that the Court of Appeal concluded that parking is an ordinary part of the use or operation of a vehicle that the applicant entering the parking lot, parking the car and closing the door and trying to walk away was an unbroken chain of events.

[16] I agree with the applicant that in this case, but for the use or operation of his vehicle, which includes parking it, this incident would not have occurred. Therefore, the applicant satisfies the first part of the causation test. I turn now to the second factor.

ii. Was there an intervening cause?

[5] *I.S.* and *Intact Insurance Company*, 2017 CanLII 69443 ("*IS*")

[17] The question is whether the black ice was an intervening cause. The applicant submits it is not and relies on a FSCO decision, *Mariano and TTC Insurance Company*[6] in which that applicant disembarked a bus, took two steps and tripped over a raised hump of asphalt. The arbitrator held that the act of disembarking set off an unbroken chain of events that led to the applicant's fall. The arbitrator referred in that case in part to *Chisholm* v. *Liberty Mutual*[7] in which the Court of Appeal held that there can be more than one direct cause of the applicant's injuries, though one of the direct causes must be the use or operation of the vehicle.

[18] The respondent argues conversely that the black ice is an intervening cause of the applicant's injuries, and that the cases of *I.S.* (see footnote 5) and *K.B. and Intact Insurance Company*[8] support its position that the applicant's fall did not arise out of the use or operation of a vehicle. The applicant argues that this case differs from those because the applicant still had his hand on the door handle and was still active in the use of the vehicle, whereas in the other cases, the applicants were away from the vehicle.

[19] In *K.B.,* the applicant had been away from her vehicle for a couple of hours and was returning to it. In *I.S*., the applicant left the vehicle and was about four steps away when she fell in a pothole. The Tribunal held that tripping in a pothole was not a reasonable risk associated with the use of a vehicle, and there was a broken chain of causation. It also relied on the fact that the applicant had not made contact with the vehicle.

[20] The respondent further relies on *Webb* v. *Lombard General Insurance Co of Canada*[9] in which an applicant exited a cab, walked around the back of it, slipped on ice, attempted to grab the bumper to break her fall and made contact with the vehicle. The arbitrator stated that the need to walk around a parked or stationary vehicle was not enough to make it an accident within the meaning of the *Schedule.*

[21] Finally, the respondent also relies on a Tribunal decision that a slip and fall on slush next to the rear side passenger door of a parked vehicle does not satisfy the definition of an accident[10].

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[6] FSCO A0-5002112
[7] 60 O.R. (3d) 776; [2002] O.J. No. 3135
[8] 2017 CanLII 63622
[9] 6606 CarswellOnt 2007
[10] *D.M.* v. *Certas Insurance Company,* LAT 17-000180/AABS, January 30, 2018.

[22] In this case, despite the applicant's submission, his evidence about whether he was touching the vehicle when he fell was equivocal, though it was clear that he did not make contact with the vehicle as he fell. In addition it was not the vehicle that caused his injury, as it was in *D.S.* v. *TD Insurance Meloche Monex*[11] where the applicant's injuries were caused by a fall into a parked vehicle or as in *Caughy* where the applicant tripped over a motorcycle in a campground[12].

[23] In this case, even if the applicant was touching the vehicle, I find that the black ice was an intervening cause. As the Tribunal held in *K.B.,* proximity to the vehicle is not enough. Similar to what the Tribunal held in *K.B.*, I find that the ice was an intervening cause of the applicant's injuries, and they were not caused by the use or operation of his vehicle.

[24] In reaching this conclusion, I recognize that there are factual differences between this case and *K.B.* in that in *K.B.*, unlike in this case, the applicant had been away from her vehicle for a couple of hours. In this case the applicant had just exited his car, but his engine was off and his door was shut.

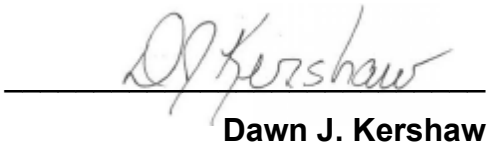
[25] In reaching my conclusion, I have relied primarily on the *Chisholm* case in which the Court of Appeal stated that the event that caused the injury must be an intervening act in the ordinary course of things, and if the intervening act is independent of the use of the vehicle, then there is not an unbroken chain of events. I have also considered the *Greenhalgh* v. *ING Halifax Insurance Co.*[13] In that case, the Court of Appeal stated that the use of the car had ended and what caused the injuries was the weather, much like in the present case. In this case, I find that the slip and fall on ice was an intervening act and the use or operation of the vehicle was not a direct cause of the applicant's injuries. As such, the applicant's claim fails as I find that this was not an "accident" as defined in the *Schedule*.

[11] 2017 CanLII
[12] See footnote 2.
[13] Above at footnote 1.

CONCLUSION

[26] For the above reasons, the application is dismissed.

Released: March 19, 2019



Dawn J. Kershaw
Vice Chair