# WHEN AN ACCIDENT IS REALLY AN ACCIDENT: AN UPDATE ON "USE AND OPERATION" OF AN AUTOMOBILE

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## INTRODUCTION

Section 2(1) of the *Statutory Accident Benefits Schedule* defines an "accident" as follows:

> *"Accident" means an incident in which the use or operation of an automobile* ***directly*** *causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device*

Prior to 1996, the term "accident" was defined in the two previous *Schedules* as an incident in which the use or the operation of a motor vehicle either "directly or indirectly" causes injury or impairment. The "direct or indirect" relationship between the use and operation of a motor vehicle and a resulting injury continues to apply in the tort context, as coverage is mandated in section 239(1) of the *Act* for loss or damage "arising from the ownership or directly or indirectly from the use or operation" of a covered automobile.

This paper focuses upon the more stringent definition contained in the *Statutory Accident Benefits Schedule*, and how decision makers have been approaching coverage issues where there is a dispute as to whether the injuries complained of result directly from an "accident," as defined at section 2(1).

Arbitrators and Judges of all levels have grappled with the issue of causation as it relates to automobile coverage. While consensus has emerged surrounding the legal analysis to be used in such situations, it remains the case that causation rulings are extremely fact driven. In the court context, appeals are common, often resulting in split decisions and vigorous dissents. Likewise, before the Financial Services Commission of Ontario there have been numerous successful appeals in "use and operation" cases. A surprising number of these have resulted in cases being referred back for a rehearing, on the grounds that the first Arbitrator correctly articulated the proper legal analysis to be followed, but misapplied the evidence[1].

[1] See for example ***Sohi and ING Insurance Company of Canada*** (FSCO A03-001125, July 15, 2004 and P04-00026, May 5, 2005), and ***Wootton and TTC Insurance Company Limited*** (FSCO A03-000002, January 15, 2004 and P04-00004, November 2, 2004)), and ***Gill and Certas Direct Insurance Company*** (FSCO A03-000634, August 26, 2004 and P04-00031, April 27, 2005)

As discussed by Arbitrator Sapin in the FSCO case of ***Umer v. Lloyds***[2], difficulties with these cases arise due to the complex nature of causation and the failure of the physical world to match simplistic legal definitions which presume a clear link between cause and effect. In discussing this difficulty, she cites the 1918 House of Lords ruling in ***Leyland Shipping Limited v. Norwich Union Fire Ins. Society:***

> *Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but - if this metaphysical topic has to be referred to - it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous meet; and the radiation from each point extends infinitely... Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the equalities of reality, predominance, efficiency.*

An overview of various authority on point indicates that while some consensus has emerged regarding the legal analysis which will be applied in accident benefits coverage cases, it remains the case that there is still little predictability in terms of outcome, given that no two fact scenarios will be identical.

## THE ANALYTICAL FRAMEWORK

In ***Amos v. Insurance Corporation of British Columbia***[3] the Supreme Court of Canada considered whether injuries resulting from a shooting which occurred while the insured was operating his vehicle arose "out of the ownership, use or operation of a vehicle" and therefore constituted an "accident" under the relevant definition. A two part test was articulated by the Court:

1. *Did the accident result from the ordinary and well-known activities to which automobiles are put?*

2. *Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?*

[2] ***Umer and Non-Marine Underwriters, Mbrs. Of Lloyd's*** (FSCO A02-000721, April 3, 2003)
[3] ***Amos v. Insurance Corp of British Columbia*** [1995] 3 S.C.R. 405 (S.C.C.)

Following the amendments to the *Schedule* in 1996, a stricter approach to accident benefits coverage in Ontario is now called for, meaning that the second part of the *Amos* test is no longer applicable. Since the Ontario Court of Appeal ruling in ***Chisholm v. Liberty Mutual***[4] the following analysis has been employed to determine whether there is a "direct" relationship between the use or operation of an automobile and the impairment complained of:

1. ***The Purpose Test*** *(as articulated in* ***Amos****):*

   *Did the accident result from the use or operation of a vehicle meaning the ordinary and well known uses to which vehicles are put?*

2. **The Causation Test**:

   Did the use or operation of the vehicle directly cause the impairments?

In refining the ***Amos*** causation test to reflect the narrow definition of accident in the post-1996 *Statutory Accident Benefits Schedule*, decision makers have considered the following factors:

*a.) The "but for" test;*
*b.) The "intervening cause" test; and*
*c.) The "dominant" feature test.*

The "purpose test" as enunciated in ***Amos*** has been acknowledged to be very broad, and to essentially act as a screen before focusing the more specific tests of causation. Before the Financial Services Commission, "use and operation" has been broadly interpreted to include activities beyond driving such as "getting into and out of an automobile, loading and unloading cargo, refueling, changing a tire, performing repairs and maintenance, or extricating a vehicle from ice and snow."(***CGU and Irving)***[5]

Within the causation analysis, the "but for" test has also been regarded as a fairly broad test. The fact that an injury would not have occurred "but for" the use or operation of a vehicle does not end the inquiry, but simply allows a decision maker to move along in the analysis to consider the intervening cause and dominant feature test.

The "intervening cause test" has been likened to a series of dominos falling: Did the topple of the first domino create a "perfect" chain of causation, or was there an

[4] ***Chisholm v. Liberty Mutual Group*** (2002), 217 D.L.R. (4th) (Ont. C.A.)
[5] ***CGU and Irving*** (FSCO P03-00022, November 29, 2004)

"intervening cause" which broke that chain and resulted in the outcome under consideration?(***Chisholm v. Liberty Mutual***)[6]

Consideration of the "intervening cause" test has largely removed assault cases from the ambit of automobile coverage, in applying the "direct" test of causation.

Finally, the "dominant" feature test has been described as a common sense approach. Is the use or operation of the motor vehicle the "dominant feature" of the incident or not? In applying this test, Director's Delegate Makepeace, in ***Seale v. Belair Insurance Company Inc.***[7] has described four further considerations - being the time, proximity, action and risk associated with the incident, in relation to the use and operation of a vehicle. These factors have been considered in subsequent cases before the Financial Services Commission and the Ontario Superior Court, including the first level decision in ***Greenhalgh v. ING***.

In the case of ***Greenhalgh* v. *ING*** the Court of Appeal provided further guidance in the application of the ***Chisholm*** test, and affirmed that the purpose test set out in ***Amos*** was still applicable under the restricted language of the current definition of "accident" in the *Schedule*. The "purpose" test was felt to be helpful in that "it is consistent with and gives effect to the intent and expectations of the parties", and "it circumscribes the proper scope of application of the legislation"[8]. In addressing the "causation" test, it was made clear that there can be more than one direct cause of injury. Secondly, an intervening act will not necessarily absolve an insurer of liability if that intervening act can fairly be considered a normal incident of the risk created by the use or operation of a vehicle. An intervening act outside of the "normal incident of the risk created by the use and operation of the car" will however break the chain of causation. In applying the ***Chisholm*** test to the facts in ***Greenhalgh***, Labrosse J.A. restated the "causation test" in the following two questions, again with reference to a "common sense" standard:

1. *Was the use or operation of the vehicle a cause of the injuries? and*

2. *If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"? In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?*

[6] ***Chisholm v. Liberty Mutual***, para 27.
[7] ***Seale v. Belair Insurance Company Inc.*** (FSCO P02-00005, January 28, 2003)
[8] ***Greenhalgh v. ING Halifax Insurance Company***, 72 O.R. (3d) 338 C.A. para 11.

Albeit with some refinement, it would therefore appear settled that the ***Chisholm*** test provides the appropriate legal framework for analyzing accident benefits coverage questions. This framework has allowed for some consensus to develop around certain types of cases, particularly those dealing with assault. However, there remains a high degree of unpredictability in what constitutes an accident in other fact situations.

## A REVIEW OF SELECTED CASES

### *Assault Cases*

Under the present definition of "accident" requiring a "direct" link between the use and operation of the vehicle and an injury, assault cases have usually been excluded. The appeal level decision in ***Kumar and Coachman***[9] (affirmed on judicial review, leave to O.C.A. dismissed, leave to appeal to S.C.C. dismissed) provides an overview of these various cases to that time, in concluding that an assault on a taxi driver was not an "accident" within the meaning of the *Schedule*. In that case, the Director's Delegate noted with approval the key considerations identified by the first level hearings arbitrator as follows:

> *1. That Mr. Kumar did not suffer any injuries apart from the injuries he suffered in the assault, and*
>
> *2. That the assault was part of an attempted robbery, not a dispute about the fare.*

In reviewing pre-1996 cases involving intentional assaults, it was noted that assault involving the victim being intentionally struck by an automobile would qualify as an "accident" under the *Statutory Accident Benefits Schedule*.

In this regard, the following excerpt from ***Lenti and Zurich***[10] (FSCO P98-00030, December 18, 1998) was cited with approval in ***Kumar***

> *Again, the key is that an automobile is being driven. Although it is an intentional act from the perspective of the assailants, the situation must be viewed from the perspective of the victim. Stated differently, being hit by an automobile is a risk that accident benefits are meant to cover.*

[9] ***Kumar and Coachman*** (FSCO P01-00026, August 9, 2002; [2004] O.J. No. 2494; [2004] O.J. No. 4421; and [2005] S.C.C.A. No. 195)
[10] ***Lenti and Zurich*** (FSCO P98-00030, December 18, 1998)

The FSCO decision in ***Kohli and State Farm***[11] (pre-dating the 1996 amendment in the definition of accident) is also informative. Mr. Kohli was attacked as he approached his vehicle in a parking garage. Apparently the attacker intended to steal his vehicle. Entitlement to accident benefits was not found given the arbitrator's finding that the car was not instrumental to the injury. The arbitrator also rejected the argument that the attacker's use of the car following the injury brought the incident within the scope of coverage by the *Statutory Accident Benefits Schedule*.

The arbitrator specifically addressed the application of ***Amos v. ICBC*** to this fact situation stating as follows:

> *In this case, I am not persuaded that the assailant's intention to steal a car can be used to satisfy the first part of the Amos test. Assaulting someone to get their keys is not "an ordinary and well known activity to which automobiles are put."*

This was the case notwithstanding that the claimant was in fact approaching the car at the time that the assault occurred.

However, it is clear even within the assault cases that there was some divergence in outcomes. A Superior Court ruling in ***Saharkhiz v. Lloyds Underwriters, Members of London***[12], the (pre-1996) definition of accident was felt to have been met in the situation where a taxi driver left his door open and engine running while he left his cab to discuss a dispute with some passengers. The dispute had arisen as a result of the commercial relationship between the passenger and driver. The passengers then attacked the driver. The court concluded that the cab was not merely the site of the attack, but rather, "The role of the taxi cab throughout the sequence of events is crucial", and there was "an unbroken line of causation...beginning with the ride in the taxi cab and ending with the assault." This ruling was upheld on appeal.

In ***Karshe and Lloyds***[13], an assault arising as a result of a dispute over a taxi fare which occurred outside of the taxi cab with no evidence as to whether or not the taxi engine continued to run, was found not to meet the test. Arbitrator Blackman stated as follows:

> *It can be said that the use or operation of Mr. Karshe's taxi cab provided the opportunity, the motive, the atmosphere of hostility and\or the emotional impetus for a train of events culminating in an injury being sustained and was, therefore, a pre-disposing, secondary or indirect cause of Mr. Karshe's impairment. However, with the legislative narrowing of the scope of coverage, that is not*

[11] ***Kohli and State Farm Mutual Insurance Company*** (FSCO A98-000146, June 16, 1999)
[12] ***Saharkhiz v. Lloyds Underwriters, Members of London***, 2000 CanU I 5719 (O.C.A.)
[13] ***Karshe and Non-Marine Underwriters, Mbrs. Of Lloyd's*** (FSCO A99-000855, December 14, 2000

> *sufficient. I find that Mr. Karshe's injuries were only sustained upon the intervention of a force starting and working actively from a new and independent source other than the automobile...*

In the cases of ***Sarkisan and Co-operators***[14] and ***Elensky and Royal & SunAlliance***[15]**,** the claimants were shot, one while performing maintenance on his vehicle, and the other while returning to his running vehicle having left it to ask for directions. The definition of accident was found to have been met in neither case. In the ***Elensky*** case, the arbitrator did not accept that the assailants intended to steal the truck, a finding that was not disturbed on appeal. In the appeal ruling, it is suggested that the assailant's motive may not have been conclusive in any event. The Director's Delegate stated,

> *In any event, even if the assailant's motivation provides the requisite causal connection under the "directly or indirectly" definition, the narrower SABS 1996 definition precludes that approach.*

Indeed, in the appeal rulings of ***Lombard and Liu***[16] and ***Swaby and Allstate***[17] car jacking scenarios were specifically considered and found not to be "accidents" within the meaning of the *Schedule* In ***Liu***, Director of Arbitrations Draper echoed Delegate Makepeace's comments in ***Elensky*** acknowledging that the question of whether the vehicle was in the process of being stolen was a legitimate factual issue, but he was not persuaded that it was determinative. He stated:

> *The question as to whether the use or operation of the automobile directly caused the impairment - was it an active, efficient cause that set in motion a train of events which brought about the impairment without the intervention of any source started and working actively from a new and independent source? as in* ***Chisholm***, ***Karshe, Kumar, Elensky and Swaby****, it was the assault, not the use or operation of the automobile (*that caused the impairment).

In ***Swaby***, the applicant had been injured during an attempted car jacking. In resisting the car jacking, he was attacked by the would-be car thief. His throat was cut and he was shot in the leg.

Again, this set of circumstances was found not to meet the definition of an accident under the current wording of that definition, although it was clarified that car jacking *per* se will

[14] ***Sarkisan v. Co-operator General Insurance Company*** (FSCO A99-000966, January 17, 2001)
[15] ***Elensky v. Royal & SunAlliance Insurance Company of Canada*** (FSCO A00-000720, May 31, 2001 and P01-00030, August 9, 2002)
[16] ***Lombard General Insurance Company of Canada and Liu*** (FSCO P02-00030, January 8, 2004)
[17] ***Swaby and Allstate Insurance Company of Canada*** (FSCO P03-00004, January 8, 2004)

not preclude entitlement to statutory accident benefits, if the car jacking results in an accident. In ***Swaby***, the Director of Arbitrations stated:

> *If Mr. Swaby had attempted to flee from the car jackers and crashed, injuring himself, he would have been entitled to accident benefits because his use or operation of the automobile - driving - directly caused his impairment. However, on the facts presented here, he falls outside the definition of "accident".*

In the Superior Court ruling in ***LaFond v. Allstate Insurance Company of Canada***[18]**,** the definition was not met in respect of injuries sustained as a result of an assault that the plaintiff described as occurring after he confronted another driver who had been driving erratically. Counsel for the plaintiff argued that "road rage" constituted a "normal incident to the risk created by the use or operation of a motor vehicle. This argument was rejected by Justice Lofchik who refused to "accept that our society has degenerated to the point where when one gets behind the wheel of an automobile, one expects to run the risk of being assaulted by another angry driver." Similarly, the Plaintiff's argument to the effect that he sustained some of his injuries when he fell, striking his head on the fender of his car were rejected on the grounds that the impact with the vehicle was not the "efficient, predominant or direct cause of any impairment."

The Court of Appeal ruling in ***Chisholm v. Liberty***, which forms the basis for our current understanding of the definition of "accident", involved a shooting. Mr. Chisholm was operating his car when an unknown assailant fired gunshots at him, resulting in catastrophic injury. The Court did not accept that the strict definition of accident, meaning an event that results "directly" from the use and operation of an automobile, was met in this case. Mr. Chisholm argued that "but for" the use and operation of his vehicle, he would not have been injured. The Court accepted that this was the case, but clarified that the "but for" test is exclusionary and does not in and of itself establish coverage. The shooting was an intervening event, taking the incident outside of the ambit of accident benefits coverage. Thus, subsequent to ***Amos*** the narrowing of the definition of "accident", gunshot cases have been excluded from coverage.

Similarly, the Appeal level FSCO ruling in ***CGU and Irving***[19] concluded (contrary to the determination of the hearing Arbitrator) that injuries sustained by a cyclist who was struck by a beer bottle thrown from a passing car did not result from an "accident." Director's Delegate Makepeace suggested that the incident would not even meet the purpose test in that, "The answer to the purpose test, if properly drawn, seems obvious: automobile insurance is not intended to cover injuries caused by intentionally throwing beer bottles (or other projectiles) from vehicles, moving or otherwise." She went on to

[18] ***LaFond v. Allstate Insurance Company of Canada***, Lofchik J., unreported Court File No 05-16678
[19] ***CGU Insurance Company of Canada and Irving*** (FSCO P03-00022, November 29, 2004)

state that she did not need to deal with this issue at length given that the incident did not meet the causation test on either an intervening cause or a dominant feature analysis.

Albeit in a different context, the case of ***Vytlingam et al. v. Farmer et al.***[20], currently before the Supreme Court of Canada, raises similar issues. Mr. Vytlingam suffered serious injuries when he was a passenger in a vehicle which was struck by a falling rock which had been thrown from an overpass. The issue before the Court in that case was whether the incident arose "directly or indirectly" from the use or operation of a motor vehicle on the part of the tort defendants who had used their truck to transport a boulder to the overpass before pushing it on to the highway below. Before the Court of Appeal, the majority held that both the purpose and the ***Amos*** causation test had been met in that the transportation of goods (the boulder) was an ordinary purpose to which vehicles are put, and further, the nexus between the car and the incident was not merely incidental or fortuitous. In a vigorous dissent, Juriansz J.A. concluded that neither the purpose nor the causation test was met, and further expressed concern surrounding the use of the "but for" test in this context, stating that "it is apparent that applying it in answering the second question of the Amos test would lead to findings of causal connection in limitless situations."[21] The matter was argued before the Supreme Court of Canada in December of 2006, with a ruling expected imminently.

Of interest, Mr. Vytlingam's accident benefits carrier did not dispute that an "accident" had occurred within the meaning of section 2(1) of the *Schedule*.

***Interrupted Journey***

***Greenhalgh v. ING*** highlights the challenges in analyzing "interrupted journey" cases. In that case, the insured had taken a wrong turn on a country road and had become stuck on ice when she tried to turn her car around. She attempted to use her cell phone to call for help, but the battery died. Therefore, she and her companion began to walk for help. Unfortunately, they became disoriented and walked for some hours before they were found. As a result of exposure to cold, the insured suffered frostbite which in turn resulted in the amputation of her fingers and of her legs below the knees.

The first level ruling in this case resulted in the conclusion that the definition of "accident" as set out in the *Schedule* was met in this case. On Appeal, however, this finding was overturned. While the Appeal Court accepted that the ***Amos*** test had been met, the facts of the case did not satisfy the more stringent test set out in ***Chisholm***. Specifically, it was felt that there were numerous intervening events between the time

[20] ***Vytlingam (Litigation Guardian of) v. Farmer*** 76 O.R. (3d) 1
[21] Para 73

that the Plaintiff's car became stuck and the time that she was found that were not "a normal incident of the risk created by the use or operation of the car", and as such, the "dominant feature" of her injuries was her exposure to the elements, rather than the use and operation of a vehicle.

By contrast, in ***Seale and Belair***, argued before the Financial Services Commission (and affirmed on Appeal), the definition of accident was found to have been met when Mrs. Seale suffered injuries after her vehicle became stuck on ice and then slid down a hill. While attempting to walk down the hill towards her vehicle, the insured fell on ice and broke her arm. The definition of "accident" was found to have been met in that instance. Throughout the incident, the insured maintained her intention to use her vehicle to return home. She did not abandon her car. The ice on the road was the operative force which caused her to lose control of her vehicle and to fall. The insured fell within a moment of leaving her car and in the same vicinity of the car. It was accepted that the slip and fall in these circumstances was a reasonable and foreseeable risk of motoring.

Similarly, in ***Shantz and Dominion of Canada General Insurance Company***[22] the definition was met where the insured person fell as she ran after her car which had slid down the ramp of a car park, after she had left the car running to use the key box. When she fell, no part of her body came into contact with the vehicle. The insurer submitted that stopping the car, using the key box, losing control of the car and then falling all constituted intervening events, breaking the chain of causation. The Arbitrator disagreed, finding that there was an unbroken chain of events beginning with the insured driving her car to the top of the ramp and ending with her falling to the ground, with the automobile playing an "instrumental role" in the events leading to her injuries.

In ***Saad and Federation Insurance Company of Canada***[23] the insured was found to have suffered an "accident" when he fell while returning to his car after having filled his tires.

In the first level hearing in ***Wootton v. TTC Insurance Company Ltd***[24]**,** a fall while the claimant was attempting to change buses constituted an "accident" even though there was a dispute between the parties as to where the claimant's body was in relation to the second bus when her injuries occurred. Arbitrator Wilson concluded:

> *I find, therefore, that an injury incurred as part of the direct transfer between the buses forms part of the bus trip and a disability arising from such an injury arises directly from the normal use or operation of a motor vehicle (the buses).*

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[22] ***Shantz and Dominion of Canada General Insurance Company*** (FSCO, A01-001147, May 13, 2002)
[23] ***Saad and Federation Insurance Company of Canada*** (FSCO P03-00017, January 8, 2004)
[24] ***Wooton v. TTC Insurance Company Ltd.*** (FSCO 103-00002, January 15, 2004 and P04-00004, November 2, 2004)

The Arbitrator's ruling in ***Wootton*** was reversed on appeal on the grounds that he had not dealt with the burden of proof properly, and had not been specific enough in his approach to the evidence. The Director's Delegate also stated that he had taken an overly broad approach to the definition of "accident" without specifically commenting on the passage above.

It is unclear whether these "interrupted journey" cases would be decided differently in light of the intervening authority from the Court of Appeal in ***Greenhalgh,*** given the ease with which each case can be distinguished from the others on the basis of its own particular facts.

### *End of the Journey?*

By contrast to the "interrupted journey" cases, injuries arising once the insured has reached his or her destination generally do not meet the definition of "accident" set out in the *Schedule*, unless an injury is sustained in the course of actually disembarking a vehicle.

In ***Mahadan and Co-operators General Insurance Company***[25], the insured person was found not to have suffered an "accident" after he got his foot stuck in a groove in the pavement in his parking lot after removing groceries from his car.

An injury resulting when an insured stepped away from his van and was struck by a passing bicycle did not constitute an accident.[26]

In ***Webb and Lombard General Insurance Company of Canada***[27], the insured had safely disembarked from her cab and was walking towards her hotel. Because of the fact that there was ice and snow on the roadway, and because of where the cab had stopped, she had to walk around the cab, and as she did so she slipped and fell. She was close enough to the cab to try and reach for the bumper to break her fall, but was not successful. Arbitrator Bujold accepted the insurer's submission that this was neither an "interrupted journey" nor a "disembarkment" case. The insured had exited the taxi and begun to walk away without incident. The Arbitrator agreed that "Lombard's position that the only logical place to draw the line in "end of journey" cases is at the point where a person has safely disembarked a vehicle and has begun to walk away, with no intention to return, has a certain attraction," however there was no particular authority for doing so. In the

[25] ***Mahadan and Co-operators General Insurance Company*** (FSCO A00-000489, March 15, 2001)
[26] ***Miko and York Fire Casualty Insurance Company*** (FSCO A02-000985, September 18, 2003)
[27] ***Webb and Lombard General Insurance Company of Canada*** (FSCO A06-001004, November 10, 2006)

particular facts of this case, the taxi itself was the obstacle to Ms. Webb safely reaching the front of her hotel, and was therefore more than incidentally involved in her injury. There was an uninterrupted chain of events leading to point of her fall. The Arbitrator went on to consider the factors of time (several seconds), proximity (within touching distance of the vehicle), activity (walking around the vehicle) and risk (ice near the vehicle), and concluded that these factors were sufficiently connected to the use and operation of the vehicle to bring Ms. Webb just within the ambit of coverage. He agreed that this case was "very close to the line," raising the question of whether coverage would follow if Ms. Webb had been a few steps or a few seconds further from the cab at the time of her fall.

The Arbitrator concluded:

> *There is merit in Lombard's arguments that "end of journey" cases should involve drawing brighter lines than have been drawn in "interrupted journey" cases. Lombard argues that the line should be drawn where the person has exited the vehicle and begun to walk away without an intention to return. Then, Lombard argues, the journey is truly over, and considerations of time and proximity, or unbroken links in the chain of causation connecting the use or operation of the vehicle to the ultimate peril or mechanism of injury, are irrelevant. This would bring "end of journey" cases more closely in line with cases that consider when use or operation begins. But that is not the current law, as I understand it...*

***Miscellany of Unusual Circumstances***

The first ruling dealing with the post 1996 definition of accident was in the case of ***Petrosoniak and Security National***[28]. In that case, the insured was injured when his bicycle struck an oil slick which the Arbitrator accepted had been deposited by a motor vehicle. The Arbitrator discussed the tightening of the definition of "accident" as follows:

> *As I understand the definition, a series of events can be the direct cause of an incident, as long as there is no intervening agency or act. Consequently, if an unbroken chain of events involving the use or operation of an automobile leads to an injury, the injury can be said to have been directly "caused" by the incident.*

In ***Gill and Certas***, the insured was injured in very unusual circumstances. He had been driving his car along the 401 in rush hour traffic, when he rolled out of his moving car, landing on the highway. He avoided being hit by oncoming traffic, running over to edge

[28] ***Petrosoniak and Security National*** (FSCO A98-00198, November 2, 1998)

of the highway and "catapulting" himself over the edge of the guardrail onto Bayview Avenue below, where he sustained significant injuries upon impact. The hearings Arbitrator accepted that these injuries were the result of an "accident", accepting that Mr. Gill had suffered a panic attack that was causally related to the use and operation of his automobile, which in turn triggered the behaviour leading to his injuries. On Appeal, the Director's Delegate concluded that the evidence did not support the conclusion that the insured had suffered a panic attack directly related to the use and operation of an automobile[29]. In any event, the hearings Arbitrator had not taken his analysis far enough in that he did not address whether an automobile had been the dominant feature of the jump that led to the injuries. While it is possible that the vehicles on the 401 caused Mr. Gill to jump from the highway, thus meeting the definition of "accident", this question was not considered and therefore the matter was sent back for a rehearing.

In ***Sohi and ING Insurance Company of Canada***[30], the insured was involved in an apparently minor motor vehicle accident. Some weeks later, he suffered severe burns when he attempted to commit suicide by dousing himself with gasoline and then setting fire to himself. The insured claimed that his suicide attempt was causally related to the motor vehicle accident, and sought statutory accident benefits. The insurer maintained that the suicide attempt was a "discrete event" and not directly related to the car accident. The hearings Arbitrator accepted that the suicide attempt was causally related to the motor vehicle accident and therefore brought Mr. Sohi within the coverage of the *Schedule*. On Appeal, the Director's Delegate accepted that a claimant could be eligible for accident benefits in respect of a suicide attempt due to accident related depression, but questioned whether the evidence supported that conclusion in the present case. The matter was sent back for a re-hearing.

In ***Umer and Lloyd's***, the insured applied for benefits as a result of burns he received while his taxi was being repaired. The vehicle had been placed on a hoist in a garage. The fuel tank was removed and a large quantity of gasoline was spilled as a result. A fire resulted when the gas came into contact with the pilot light of a hot water heater on the premises. Arbitrator Sapin found that the ***Chisholm*** test was met, in that there was an uninterrupted chain of events beginning with the repair of the applicant's car.

In ***Grewel and Dominion of Canada***[31] a car crashed into the insured's home. He was startled and injured himself when he ran upstairs to check on his children. The Arbitrator accepted that his injuries were the result of an "accident" based upon the following chain of events:

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[29] ***Certas Direct Insurance Company and Balvir Gill*** (Appeal P04-00031, April 27, 2005)
[30] ***Sohi and ING Insurance Company of Canada*** (FSCO A03-001125, July 15, 2004)
[31] ***Grewel and Dominion of Canada General Insurance Company*** (FSCO P02-00039, January 8, 2004)

- *the impact of the car colliding with the house* ***led to***
- *a loud noise and the Grewal home shaking* ***which led to***
- *Mr. Grewal panicking,* ***which led to***
- *Mr. Grewal running to see what had happened and to check on his young children,* ***which led to***
- *Mr. Grewal tripping, not as a result of any specific object, but implicitly, due to his panic and haste caused by the car accident,* ***which led to***
- *Mr. Grewal being injured.*

In ***Connors v. Kingsway General Insurance Company***[32], the insured was riding as a passenger in a taxi cab when she noticed a boy throwing a ball of ice at her window. She reacted by turning her head violently, spraining her neck. The ball of ice struck and shattered her window, but did not cause any direct injury to the Plaintiff. The Court dismissed her claim for statutory accident benefits, finding that the definition of "accident" was not met. The facts of this case brought it within the "general ambit" of assault cases, and not within the definition of an accident.

In ***Fu and Kingsway General Insurance Company***[33], the definition was met when the insured's vehicle was struck by falling debris, causing him to hit his head on the inside of his car.

In ***Herbison v. Lumbermens***[34] there was a dispute as to whether tort indemnification was available in respect of injuries occasioned when Mr. Herbison was accidentally shot in the course of a hunting expedition. It was argued that his injuries arose "directly or indirectly" as a result of the use or operation of an automobile. In this case, one of the members of the hunting party was required to take his pick up truck to the deer-hunting stand due to his physical disability. As he approached the stand, he thought he saw a deer. He stopped his vehicle, leaving it running with its' headlights illuminated, removed his gun from the truck and fired a shot, unfortunately striking Mr. Herbison. The Court of Appeal majority concluded that there was at least an indirect relationship between the defendant's use and operation of his vehicle and the shooting accident, permitting coverage to be accessed to address Mr. Herbison's tort damages. In a strong dissent, Cronk J.A. concluded that neither the purpose nor the causation test had been met in that:

> *The use of the Wolfe truck did not itself expose Mr. Herbison to danger or lead to his injuries. The situation of danger that resulted in his injuries was created by Mr. Wolfe's unrelated decisions to leave his vehicle, obtain and load his rifle, and use the rifle to shoot at a distant and poorly visible target. The accident occurred*

[32] ***Connors v. Kingsway General Insurance Company*** Court File No 04-12107, September 14, 2005
[33] ***Fu and Kingsway General Insurance Company*** (FSCO A04-000002, April 11, 2005)
[34] ***Herbison v. Lumbermens Mutual Casualty Co*** 2005 CanLii 33121 O.C.A.

> *as the result of these discrete and deliberate decisions - not as a result of the commonplace use of the truck for transportation.*[35]

The ***Herbison*** case was heard before the Supreme Court of Canada with a ruling anticipated imminently. Its' application in the accident benefits context is limited given that it deals with the broader "direct or indirect" test applicable in the tort context.

## CONCLUSION

As Director Draper stated in the FSCO Appeal ruling in ***Federation Insurance Company of Canada and Saad***[36], "This test is easily stated, but difficult to apply. Causation is an elusive concept." As such, we can expect to see more cases proceed to adjudication and appeal on this point, given the increasing emphasis on the "dominant purpose" or common sense approach to what constitutes an "accident" in the accident benefits context, and the seemingly endless ways in which "common sense" can be applied.

[35] Para 52
[36] ***Federation Insurance Company of Canada and Saad*** (FSCO P03-00017, January 8, 2004)