COURT FILE NO.: 05-16678
DATE: 20061130

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JEAN-GUY LaFOND	)	**R. Hooper, and K. Buffett, counsel on behalf of the Plaintiff/Respondent**
Plaintiff/Respondent	)	
	)	
- and -	)	
	)	
ALLSTATE INSURANCE COMPANY OF CANADA	)	**E.K. Grossman, counsel on behalf of the Defendant/Applicant**
Defendant/Applicant	)	
	)	
	)	
	)	**HEARD: November 24, 2006 (at Hamilton)**
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	)	

LOFCHIK J.

[1] The defendant seeks a declaration as a matter of law pursuant to Rule 21 of the ***Rules of Civil Procedure***, that the plaintiff's claim is barred as the incident giving rise to the plaintiff's action on December 8, 2002 was not an *"accident"* as defined in s. 2(1) of the Statutory Accident Benefit Schedule – Accidents on or after November 1, 1996, O. Reg. 403/96 to the ***Insurance Act***, R.S.O. 1990, c. I-8 as amended (*"the Schedule"*).

[2] Entitlement to statutory accident benefits is established by section 268(1) of the ***Insurance Act*** which states:

> *Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.*

[3] The current Schedule governing claims for Statutory Accident Benefits is Ont. Reg. 403/96: ***Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996***. Benefits claimable under the Schedule, such as weekly income replacement benefits, medical benefits, rehabilitation benefits and attended care benefits require an insurer to pay the benefit to an insured person *"who sustains an impairment as a result of an accident"*.

[4] The plaintiff's entitlement to statutory benefits under the Schedule depends on whether the facts giving rise to the injuries satisfy the definition of *"accident"* in s. 2(1) of the Schedule. That section reads 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.*

[5] The defendant, Allstate, was at all material times the insurer of the plaintiff's automobile.

[6] On December 8, 2002 at approximately 9:00 p.m. the plaintiff was involved in an incident with one James Roksa and one Scott Roksa. As a result of this incident, the plaintiff claims he sustained personal injuries.

[7] The injuries and impairments of the plaintiff arise from a physical altercation in a driveway after the plaintiff and the Roksa's encountered each other on the road in two separate automobiles.

[8] The encounter resulted in what the plaintiff considered was erratic driving by the other driver. When he saw the other vehicle pull into the driveway of a person whom he knew, he pulled in behind the other vehicle and exited his vehicle, confronting the other driver in the driveway. The confrontation led to the plaintiff being severely beaten and suffering injuries and impairments, which result in this claim.

[9] The plaintiff issued a Statement of Claim on February 17, 2005 naming the Allstate Insurance Company of Canada as the

only defendant. The plaintiff is claiming, among other things, entitlement to $1,000,000.00 in damages and requesting a Declaration that he is entitled to statutory accident benefits under a policy of insurance issued by Allstate.

[10] Allstate filed a Statement of Defence denying the plaintiff's claim for statutory accident benefits.

[11] Paragraph 4 of the Statement of Defence reads:

> *Allstate states that the injuries were caused by an assault perpetrated by two men, the assault constituted an intervening act and was the direct cause of the plaintiff's injuries, rather than the use or operation of an automobile.*

[12] The question to be decided on this motion is whether the incident in which the plaintiff was involved on December 8, 2002, giving rise to his injuries and impairments was an *"accident"* as defined in s. 2.1 of the Schedule.

[13] I have reviewed the decisions of the Court of Appeal in ***Chisholm v. Liberty Mutual Group***, 2002, 60 O.R. (3d) 776, ***Greenhalgh v. ING Halifax*** [2004] O.J. No. 3485 as well as the decision of Crane J., in ***Connors v. Kingsway General Insurance*** [2005] O.J. No. 4294 (Ont. S.C.J.) being all of the Ontario Court decisions subsequent to the change of wording of the

definition of the term *“accident”* in 1996, that I have been referred to. Those cases all analyze the legislative history of the relevant provision and the effect of changing the wording in the definition of *“accident”* from *“directly or indirectly the use or operation of an automobile causes an impairment”* to *“the use or operation of an automobile directly causes an impairment”*. I do not intend to repeat the analysis contained in those Reasons. Suffice it to say that insured persons claiming benefit under the 1996 Schedule must meet a narrower, more stringent causation requirement as authorized by the Legislature.

[14] I have not been referred to a single court decision or arbitration decision subsequent to the 1996 amendment that has held an assault on the plaintiff to be an *“accident”* within the meaning of the Schedule. I have been referred to some cases which, even applying the *“directly or indirectly”* causation test, have held that an assault is an intervening act between the use or operation of the vehicle and the injury and not an *“accident”* within the meaning of the Schedule.

[15] The claimant must meet the causation test set out in the ***Chisholm*** Ontario Court of Appeal decision. That test could best be set out in the form of two questions: 1. Was the use or

operation of the vehicle a cause of the injuries? 2. If the use or operation of a vehicle was the cause of the injuries, was there an intervening act or acts that resulted in the injuries that cannot be said to be part of *"the ordinary course of things"*? (See ***Greenhalgh v. ING,*** *supra*.)

[16] 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 automobile – if it is *"part of the ordinary course of things"*. Counsel for the plaintiff argues that given the prevalence of road rage, this type of behaviour is a normal incident to the risk created by the use or operation of a motor vehicle and so is part of *"the ordinary course of things"*. I do not 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.

[17] I prefer to adopt the analysis of Crane J. in ***Conners,*** *supra,* leading to the conclusion that the act of the assailant is the dominant feature of causation, whether that act be a random throwing of a piece of ice at a motor vehicle in which the plaintiff is a passenger or the throwing of a punch at the person of the plaintiff after he exits his vehicle. In both

cases the use or operation of a motor vehicle may be incidental or ancillary to the incident but it cannot be said to be the direct cause of the injury.

[18] The test discussed in ***Greenhalgh v. ING Halifax,*** *supra,* is that one should look to *"the aspect of the situation that most directly caused the injuries"* (para. 49).

[19] A similar test is found in ***Chisholm*** to the effect that the true nature of the claim, the dominant feature, must be the use or operation of an automobile.

[20] In my view, the Legislature, under the 1996 amendment under review in this motion, did not intend automobile insurance to indemnify victims of physical assaults, notwithstanding that the assault may have occurred to a victim while engaged in the use of an automobile.

[21] Plaintiff's counsel argues that the plaintiff testified on Discovery that after being assaulted he fell and struck his head on the fender of his own vehicle. It is common ground that he was repeatedly kicked while on the ground after falling. In my view it cannot be said that any injury caused while falling was caused directly by the use or operation of an automobile. Any injury so incurred is ancillary to being knocked

unconscious by an assault and falling as a result. That is, the plaintiff falling against the automobile may have contributed to the degree of injury but, in my view, it was not the efficient, predominant or direct cause of any impairment.

[22] I am not persuaded that there was a direct causal relationship between the use or operation of an automobile and the plaintiff's injuries. While the use of the automobile may have led to the injuries, it cannot be said to have caused the injuries.

[23] The intervening result cannot be considered *"a normal risk created by the use or operation of an automobile"*, or in other words, the use or operation of the automobile cannot be said to be a *"direct cause"* of the injuries. The intervening assaults support the conclusion that the automobile here was not a direct cause of the injuries or impairment.

[24] It is not enough to show that an automobile was merely the location of the injury or that the automobile was involved in some peripheral way. The use or operation of the automobile must have caused the injury.

[25] In conclusion, I am of the view that the plaintiff's injuries resulted from an assault and did not arise directly out

of the ownership, use or operation of a motor vehicle. The fact that the use or operation of a motor vehicle may have precipitated or motivated the confrontation, was not a sufficient connection to enable one to say that the plaintiff's injuries were the result of an accident within the Statutory Accident Benefits Schedule of the plaintiff's policy.

[26] In the result an Order will issue dismissing the plaintiff's action against the defendant with costs of the defendant fixed in the amount of $6,500.00 plus disbursements and G.S.T.

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LOFCHIK J.

Released: November 30, 2006

COURT FILE NO.: 05-166778
DATE: 20061130

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEAN-GUY LaFOND

Plaintiff/Respondent

- and –

ALLSTATE INSURANCE COMPANY OF CANADA

Defendant/Applicant

REASONS FOR JUDGMENT

LOFCHIK J.

TRL/sh

Released: November 30, 2006