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: Carol Brodie vs. Intact Insurance Company, 2020 ONLAT 18-011003/AABS

Released: 05/27/2020
File Number: 18-011003/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:

Carol Brodie

Applicant

and

Intact Insurance Company

Respondent

DECISION [AND ORDER]

ADJUDICATOR: Poeme Manigat

APPEARANCES:

Counsel for the Applicant: John A. Tamming, Counsel

Counsel for the Respondent: Patrick M. Baker, Counsel

Heard: By way of written submissions

OVERVIEW

[1] The applicant, CB, was involved in an incident that occurred on January 15, 2017 when she was shoveling her parking spot, which led to her physical injuries.

[2] The applicant applied for automobile accident benefits under the *Schedule*[1]. The respondent denied payment of the benefits on the basis that the incident did not fall under the definition of an "accident" as defined by section 3(1) of the *Schedule*. Specifically, the respondent stated that the applicant was not involved in an accident, the applicant did not come into contact with any objects or vehicles when she fell, and therefore the incident did not meet the definition of an "accident" in the *Schedule*.

[3] The applicant appealed the denial of benefits to the Tribunal.[2]

RESULT

[4] I find the applicant is not entitled to accident benefits. The injuries she sustained on January 15, 2017 were not from an "accident" as defined in section 3(1) of the *Schedule*.

BACKGROUND

[5] On January 15, 2017, the applicant went outside between 1:00 p.m. and 2:00 p.m. to shovel her parking spot. The applicant entered her vehicle, reversed it in the throughway and turned off the vehicle's ignition. The applicant exited the vehicle and removed her shovel from the vehicle. The applicant shoveled her parking spot and about half way through, she decided to get salt to throw onto her parking spot. As the applicant walked towards the trunk of her vehicle, where the salt was stored, she fell on her back. This fall caused the applicant to suffer injuries to her back, including herniated disc affecting L1, L2, L3 and L4.

THE LAW

[6] To be eligible for benefits under the *Schedule*, the applicant must prove the incident meets the definition of an accident in subsection 3(1) of the *Schedule.* An accident is defined as:

> "an incident in which the use or operation of an automobile directly causes an impairment …"

[7] The applicant relies on the Supreme Court of Canada *Amos v. Insurance Corporation of British Columbia ("Amos")*[3] decision. That is the leading case on the interpretation of the meaning of an "accident" under the *Schedule*. In *Amos*, the

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[1] *Statutory Accident Benefits Schedule -Effective September 1, 2010* (the "*Schedule*")
[2] Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal")
[3] *Briton Amos v. Insurance Corporation of British Columbia*, 1995 3 R.C.S. *"Amos"*

Supreme Court of Canada set out a two-part test for determining whether an insured person was involved in an "accident" as defined in the *Schedule* and thus entitled to statutory no-fault accident benefits:

a. The purpose test: did the accident result from the ordinary and well-known activities to which automobiles are put?

b. The causation test: was there some causal relationship between the applicant's injuries and the ownership, use or operation of the vehicle, or was it merely incidental or fortuitous?

[8] The applicant has the onus[4] to satisfy the purpose and causation test.

[9] Since *Amos,* the causation test has been modified to satisfy the strict wording of the *Schedule* that the injuries must be "directly" caused by the use or operation of a motor vehicle. In *Chisholm v. Liberty Mutual Insurance Group* ("*Chisholm*") the Ontario Court of Appeal adopted the following definition of direct cause found in Black's Law Dictionary (4th Ed.): "The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new independent source".

[10] In *Greenhalgh v. ING Halifax Insurance Co.* ("*Greenhalgh*"), the Ontario Court of Appeal reviewed the case law and determined that in order to satisfy the definition of an "accident" under the *Schedule*, an insured must meet the purpose test as set out in *Amos* and the causation test as stated in *Chisholm*.

[11] This test was adopted and amended to meet the *Schedule*'s current and more narrow definition.[5] The applicant must now satisfy the following questions:

a. Purpose test:

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

b. Causation test:

    i. Was the use or operation of the vehicle a cause of the injuries?

    ii. If the use or operation of the 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

[4] *Scarlett v. Belair Insurance Company*, 2013 CarswellOnt 17362, [2013] O.F.S.C.D. no. 227, *Martin et al. v. 2064324 Ontario Inc*. c.o.b. as Freeze Night Club et al 2013 ONCA 19

[5] *Chisholm v. Liberty Mutual Group*, (2002) 60 O.R. (3d) 776 (ON CA), *Greenhalgh v. ING Halifax Co.* (2004) O.J. No. 3485 (ON CA) "*Greenhalgh*", *Economical Mutual Insurance Company v. Caughy* 2016 ONCA 226, *Downer v. The Personal Insurance Company* 2012 ONCA 302, Martin et al. v. 2064324 Ontario Inc. c.o.b. as Freeze Night Club et al 2013 ONCA 19

"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 applicant's injuries?

[12] In establishing the causation test, the case law considers additional questions to aid in defining whether the incident meets the causation test. For example, the "but for" test used to screen out inconsequential details that could not have accounted for the injuries and the "dominant feature" test used for determining the dominant cause of the injuries.

POSITIONS OF THE PARTIES

[13] The applicant argued that she met the purpose and causation tests set out in *Amos*. The respondent disagreed and stated that the applicant did not meet the purpose and causation tests.

PURPOSE TEST

[14] The applicant submitted that her apartment complex required residents to move their vehicles from assigned parking space to allow winter maintenance, which entails residents cleaning off their vehicles and then moving the car back to its assigned parking spot.

[15] The applicant argued that in order to use her vehicle, she had to park at her apartment complex and abide by their rules. The applicant further argued that in order to follow those rules, she had to go out after a snow fall and shovel her parking spot.

[16] The applicant relies on *Saad* v. *Federation Insurance Co. of Canada*[6] [2003] O.F.S.C.I.D. No. 68 ("*Saad*") to argue that the purpose test was met. The applicant submitted that she had an obligation to maintain her parking space. The applicant submitted that her operation of the vehicle was conditional upon the maintenance of the motor vehicle and the area surrounding it. The applicant argued that her purpose of being in the parking lot at the time of the injury was to maintain her vehicle and its parking space, which satisfies the purpose test.

[17] The applicant also relies on *Economical Mutual Insurance Company* v. *Caughy* ("*Economical*") to argue that the car does not have to be driven to satisfy the purpose test. In *Economical,* the applicant injured himself over a motorcycle that was parked in a walk area.

[18] The applicant submitted that she would not have fallen and injured her spine 'but for' the fact that she was outside to maintain her vehicle and parking spot. The applicant further submitted that if her vehicle was taken out of the scenario, the accident could not have occurred.

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[6] *Saad v. Federation Insurance Co. of Canada* [2003] O.F.S.C.I.D. No. 68

[19] The respondent argued that the incident did not occur while the applicant was cleaning off her vehicle. The respondent submitted that at the time of the fall, the applicant was engaged in a home maintenance activity (snow removal from a driveway/parking space) as opposed to an ordinary and well-known activity to which automobiles are put.

[20] The respondent argued that the act of clearing snow from a driveway or parking space is not directly related to an ordinary and well-known motoring purpose. The respondent submitted that shoveling an empty parking space or driveway has nothing to do with the operation of a vehicle. The respondent submitted that any motoring purpose engaged in by the applicant ended when she turned off the engine of the vehicle.

[21] The respondent submitted that it is not sufficient to link the use or operation of a vehicle to an incident merely because the applicant was walking towards a parked vehicle.

[22] The respondent also argued that the applicant did not strike any automobile when she fell, which is a key distinction from the *Economical* decision. The respondent argued that the applicant's vehicle did not play an active role in the incident, because the applicant did not make contact with any vehicle when she fell.

[23] The respondent submitted that the applicant does not satisfy the purpose test and that the dominant feature of the incident is the applicant's snow removal activity. The respondent submitted that the presence of the applicant's vehicle was incidental as there is no connection to the ordinary and well-known use of a motor vehicle with the activities the applicant was engaged in.

CAUSATION TEST

[24] The applicant argued that the only reason that she was outside on January 15, 2017 was to maintain her vehicle and its parking spot. The applicant argued that it was a chain of events that occurred simultaneously that led to her fall and that there were no intervening acts that led her away from carrying out the maintenance of her vehicle and parking space.

[25] The applicant submitted that similar to the *Economical* decision, the ignition of the vehicle was not turned on. The applicant also stated that the storage of salt and a shovel in a vehicle for the ordinary use of maintaining a vehicle and its parking space fall within the reasonable and well-known operation of an automobile.

[26] The applicant relies on *L.L. v Intact Insurance Company*, 2019 CanLII 18331 ON LAT and *North Waterloo Farmers Mutual Insurance Co. v. Samad,* 2018 ONSC where in both decisions, the applicant was assaulted by another person and it was found that it was an accident pursuant to section 3(1) of the *Schedule*.

[27] The applicant submitted that she would not have fallen and injured her spine 'but for' the fact that she was outside to maintain her vehicle and its parking spot. The

applicant further stated that if her vehicle was taken out of the scenario, the accident could not have occurred.

[28] The respondent argued that the applicant does not meet the causation test and that ice is an intervening cause in this case.

[29] The respondent rejects the proposition that the applicant's injuries are a direct result of the use and operation of her vehicle. The respondent takes the view that the presence of ice was an intervening cause that led to the applicant's slip and fall.

[30] The respondent argued that the dominant feature of this incident is not the use or operation of the vehicle, but rather snow removal. The respondent stated at the time of the applicant's slip and fall, she was about halfway through her snow removal task, and was retrieving road salt to further that purpose. The respondent further submitted that the applicant's use and operation of her vehicle ended after she had reversed the vehicle, exited and begun shoveling the parking spot.

ANALYSIS

[31] The question becomes whether the incident that occurred on January 15, 2017 meets the purpose and causation test that the incident can be referred to as an accident.

[32] It is important in interpreting the definition of accident to remember that the definition of an accident has been amended over time and has become more stringent to limit the number of claims that can qualify as an accident.[7] Therefore, when interpreting the definition of an accident I must consider the limited scope of the definition of an "accident".

The purpose test: Did the accident result from the ordinary and well-known activities to which automobiles are put?

[33] The applicant argued that in order to use her vehicle, she had to park at her apartment complex and abide by their rules, which required her to go out after a snow fall and shovel her parking spot. The applicant submitted that she satisfies the purpose test, because the only reason she was out that day was to maintain her vehicle and parking spot.

[34] I find that maintaining your vehicle by removing the snow from it is part of the ordinary and well-known activities which automobiles are put. However, shoveling an empty parking spot is not part of the ordinary and well-known activities which automobiles are put. The apartment complex rules cannot be used to expand the scope of the well-known activities to which automobiles are put. Therefore,

[7] *Economical Mutual Insurance Co. v Caughly*, 2016 ONCA 226

although the apartment complex requires its tenants to maintain their parking spot, it does not necessarily result in a well-known activity to which automobiles are put.

[35] At the time of the applicant's fall, she was not close to her vehicle. The applicant made no contact with the vehicle when falling. As well, the applicant admitted that she had no intention to go out with her vehicle when she went out on January 15, 2017. The applicant went out that day to clean her vehicle and her parking spot. Once the applicant reversed her vehicle, turned off the ignition and moved away from the vehicle to begin shoveling her parking spot, she was not operating her vehicle or doing any activity directly related to the operation of her vehicle.

[36] In reviewing the numerous case law provided by the respondent, the applicant was not driving, parking, entering, exiting, loading or unloading the vehicle. These examples of ordinary and well-known activities to which automobiles are put are not any of the scenarios the applicant was involved in. She slipped and fell when she was cleaning an empty parking spot and did not even hit any vehicle when falling. Therefore, I cannot find the applicant's incident could meet the purpose test by being in the vicinity of her vehicle that she had finished cleaning.

[37] Based on the above reasons, I find that the applicant's incident does not meet the purpose test. The purpose of the applicant being outside on January 15, 2017 was to maintain her vehicle and her parking spot. As stated earlier, the incident occurred when she was shoveling her parking spot, which is not an activity directly related to the operation of her vehicle.

Causation test: Was the use or operation of the vehicle a cause of the injuries? Was there an intervening act? Can it be said that the use or operation of the vehicle was a "direct cause" of the applicant's injuries?

[38] The applicant argued that it was a chain of events that occurred simultaneously that led to her fall and that there were no intervening acts that led her away from carrying out the maintenance of her vehicle and parking space. I am not persuaded by the applicant's argument that it was a chain of events that occurred simultaneously that led to her fall. The event that led to the applicant's fall is the shoveling of her parking spot, which is a separate activity away from her vehicle. The applicant did not have to shovel her parking spot in order to operate her vehicle, which is evidenced by her being able to reverse the vehicle before exiting it and proceeding to shovel her parking spot. In addition, the events did not occur simultaneously. Rather it was a series of events that the applicant was engaged in and the last event that she was involved in was the shoveling of her parking spot which led to her fall as a result of the slippery road condition.

[39] The evidence before me does not support the applicant's assertion that there were no intervening acts that led her away from carrying out the maintenance of her vehicle and parking space. At the time of the incident, the applicant was not maintaining her vehicle, she was maintaining her parking spot. While maintaining her parking space, the ice was an intervening factor that caused the applicant to

slip, fall and injure her back. At the time of her fall, the applicant was not involved in a direct use and operation of her vehicle. The facts in the *Economical* decision are distinguishable and do not support the applicant's position. In *Economical*, although the ignition of the vehicle was turned off, the vehicle and motorcycle were a direct cause of the accident in that case. Furthermore, the applicant in that case tripped over one vehicle and struck the other while falling. In the present case, the applicant did not hit, trip, strike or even touch anything while falling. This is a clear distinction that cannot be understated.

[40] Also, the applicant does not meet the dominant feature part of the test. In *Greenhalgh*, the Ontario Court of Appeal suggested that "in some cases, it may be useful to ask if the use or operation of the automobile was the dominant feature of the accident; if not, the link between the use and operation and the impairment may be too remote to be called "direct". A factor is a "dominant feature" where it is the aspect of the situation that most directly caused the injuries."

[41] In this case, the use and operation of the vehicle was not the dominant feature of the accident. The slip and fall did not occur as a result of the direct use and operation of the vehicle.

[42] For an incident to be determined as an accident, the use and operation must directly cause the impairment. It is not simply being in the vicinity of a vehicle that deems an incident an accident, but it is the use and operation of a vehicle has a direct causal connection to the impairments. In this case, the use and operation of the vehicle would be considered ancillary to the impairments, as in the case of the *Greenhalgh* decision, and it was the slippery road condition that was the dominant feature of the impairments, not the vehicle.

[43] The incident does not meet the causation test.

CONCLUSION

[44] Overall, the applicant has not been able to prove on the balance of probabilities that she meets the purpose and causation test. The incident cannot be referred to as an accident and therefore the applicant is not entitled to accident benefits.

ORDER

[45] I order that the application be dismissed.

Released: May 27, 2020

Poeme Manigat
Adjudicator