



Citation: Amare v. Economical Insurance Company, 2021 ONLAT 19-004635/AABS

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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:

Addisalem Amare

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Abel G. Mamed, Counsel

For the Respondent: Jonathan Schrieder, Counsel

Court Reporter: Athavan Jeya

HEARD by videoconference: September 25 and October 15, 2020, followed by written submissions

OVERVIEW

- [1] Addisalem Amare (“the Applicant”) was involved in an incident on April 9, 2018 and sought benefits from Economical Insurance Company (“the Respondent”) pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "*Schedule*"). The Respondent refused to accept that the Applicant was injured as a result of an automobile accident and denied the Applicant’s entitlement to benefits. The Applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.

PRELIMINARY ISSUE

- [2] Was the Applicant involved in an accident as defined by the *Schedule*?

RESULT

- [3] I find that the accident was staged for the Applicant’s benefit. Staged accidents are excluded from the “accident” definition. Thus, the Applicant was not involved in an accident and his application is dismissed.

BACKGROUND

- [4] The narrative surrounding the subject incident, as presented by the Applicant, is remarkable. He submits that he was driving on a 400 series highway in Eastern Ontario when, without warning, the Samsung S7 mobile phone in his pants pocket spontaneously exploded. According to his submissions, he then pulled over to the side of the highway and was injured when he hit his head while hastily exiting the vehicle following the spontaneous explosion of his phone.
- [5] The Respondent submits that the Applicant is not credible and concludes that no accident occurred or that the accident was staged for the benefit of the Applicant. It further submits in the alternative, that if an accident did in fact occur, it was the exploding mobile phone which caused the Applicant’s injuries.

THE SPONTANEOUS MOBILE PHONE EXPLOSION

- [6] I must first address the incident with the Applicant’s mobile phone. It is a unique circumstance and was central to much of the parties’ submissions and warrants attention.
- [7] The Respondent submits that I should not accept the Applicant’s narrative. It submits that the mobile phone exploded as a result of the Applicant, or some other person, tampering with it.

- [8] Both parties had the phone analyzed to determine the cause of the damage. In addition, the phone manufacturer, Samsung, analyzed the phone. All three produced reports with findings about the cause of the damage. A representative of Samsung testified at the hearing.

Investigation Results

- [9] The Applicant's report concluded that overheating and overpressure inside the battery resulted in the explosion/venting of the battery, causing a fire. This was because the copper layers exposed on the damaged battery were slightly discoloured, indicating overheating within the battery. The Applicant's report continued by stating that the discolouration indicated a potential short circuit condition within the battery likely resulted in overheating.
- [10] The Respondent's report concluded that the damage to the battery is likely the result of impact damage to the case, creating a failure of the battery pack at a location corresponding to the case damage. It found no damaged electronic components in the phone and no observable burn damage around where the battery was installed. It also found that the battery connector and circuit board were undamaged and the foil on the inside of the battery was not consumed by the failure.
- [11] Samsung's report concluded that a thermal event occurred while the phone was disassembled. It found that the rear glass and pieces of the inner housing of the device were removed at the time of the incident because those items showed no thermal damage on examination. The Samsung representative testified that he agreed that their report findings were similar to the Respondent's report. He also testified that he disagreed with the findings in the Applicant's report because Samsung's analysis found no "battery runaway". Battery runaway is a failure within the battery, usually caused by overheating, whereby a plastic separation inside the battery is damaged and permits the anode and cathode to touch, which causes further overheating. The witness testified that this thermal event is not as a result of battery runaway because, to him, the battery was clearly punctured. However, I am mindful that the witness is not an expert, and he gave no reason why he came to that conclusion. The Samsung report makes no such finding. In any event, the witness said that the Samsung findings and the findings in the Respondent's report led to the same conclusion, with the only difference being how the battery was impacted.
- [12] The Applicant submits that I should not accept the evidence from the Samsung's representative. Further, the Applicant suggests that the witness contradicted himself when he testified. He highlights that the witness stated that the back

cover had to be removed to remove the missing inner pieces but also noted that the impact to the battery likely occurred when the back cover was being removed. The witness testified that this is because that back cover has no screws and would have likely been removed by way of knife, screwdriver, or similar object. To me, the reports from the Respondent and Samsung are not impeached by this. The parties agreed that the witness was a fact witness and not an expert witness. Therefore, his personal opinion on the events causing the battery failure holds no weight.

[13] Upon review of the reports and on a balance of probabilities, I find insufficient evidence to show that the Applicant's mobile phone spontaneously exploded in his pocket while driving. Rather, I am compelled by the Respondent's and Samsung's reports that found that the inner hardware was removed from the phone, indicating that it was tampered with. The absence of damage to the electronic components and connections is suggestive that the malfunction originated from the damaged area of the battery, rather than from spontaneous overheating, as suggested in the Applicant's report.

[14] While my finding is likely of interest to the parties and Samsung, it alone does not preclude a finding that the Applicant was involved in an accident as defined by the *Schedule*. Instead, my finding impacts the Applicant's credibility whereby it contradicts the fundamental component of the Applicant's submissions about the incident. To me, this contradiction holds a considerable amount of negative weight when determining the Applicant's credibility. I will come back to this later in my decision.

“ACCIDENT” ANALYSIS

[15] Pursuant to section 3(1) of the *Schedule*, an accident is defined as an incident where the use or operation of a vehicle directly caused an impairment. There is a two-part test to determine whether an accident occurred: whether the use or operation of an automobile was involved in the incident, i.e., “the purpose test;” and, if so, whether such use or operation directly caused the claimant's injuries, i.e., “the direct cause test”¹.

¹ *Amos v. Insurance Corp. of British Columbia*, 1995 CanLII 66 [SCC]; [1995] 3 S.C.R. 405; *Chisholm v. Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ON CA), 2002 CarswellOnt 2652, [2002] O.J. No. 3135; and *Greenhalgh v. ING Halifax Insurance Co.*, 2004 CanLII 21045 (ON CA), 2004 CarswellOnt 3426, [2004] O.J. No. 3135

THE PURPOSE TEST

- [16] The purpose test is not in dispute for this matter. The Respondent acknowledges that, “if the Applicant’s narrative is believed, he would be considered to have been operating a vehicle in a way in which it would ordinarily be used.”
- [17] At issue is whether the incident occurred as the Applicant presents and, if it did, does it meet the direct cause test.

THE DIRECT CAUSE TEST

- [18] The direct cause test asks whether the use or operation of the vehicle directly caused the Applicant’s injuries and queries whether any intervening event broke the chain of causation.
- [19] The Applicant submits that he sustained an impairment when he struck his head while exiting the vehicle and that exiting the vehicle was the dominant cause of his impairments. To him, the spontaneous explosion of his mobile phone preceded, rather than intervened, with the use of the vehicle. He submits that following the explosion, he brought the vehicle to a stop, parked it, and struck his head while exiting the vehicle.
- [20] The Respondent submits that if the Applicant’s account of the incident is accepted, the vehicle provided only the location for the incident and that the incident was caused by a clear intervening act: the exploding mobile phone. It submits that the mobile phone exploding could have occurred at any point prior to, or subsequent to, his use of the vehicle and there is no evidence showing that the vehicle directly caused the phone explosion.
- [21] I find that the incident meets the direct cause test, subject to my analysis of the Applicant’s credibility and account of the events. The Applicant claims that he was injured when he hit his head while exiting the vehicle and not from the spontaneously exploding mobile phone. The incident with the mobile phone, as outlined by the Applicant, only caused his haste while exiting the vehicle. It was the vehicle, the Applicant striking his head on it, that was the direct cause of the injuries claimed by the Applicant.
- [22] Indeed, if the incident occurred as the Applicant submits, it meets the direct cause test. However, remaining at issue is whether the incident occurred as the Applicant alleges. To me, there is sufficient evidence to doubt the Applicant’s credibility, and the Applicant has failed to provide evidence available to him to remedy this. As a result, I draw an adverse inference that the evidence would be

detrimental to the Applicant's claim. For the following reasons, I find that the Applicant lacks credibility and find that the incident was staged for the benefit of the Applicant.

CREDIBILITY and STAGED ACCIDENT

- [23] A staged accident is an incident where an accident is created for the purpose of profit. The Tribunal has determined,² and I agree, that a staged accident is an intentional act that is contrary to public policy and s. 118 of the *Insurance Act*, RSO 1990, c I.8, and such an act is excluded from the definition of "accident".
- [24] As noted above, the Respondent alleges that the accident is staged or did not occur as the Applicant suggests. It submits that the inconsistencies in the Applicant's narrative, lack of corroborating evidence, and contradicting engineering reports all diminish the Applicant's credibility. It submits that the absence of evidence from witnesses, and failure to produce relevant evidence, when taken together with the inconsistent narrative, tip the balance of probability in favour of a determination that the accident was staged in order to benefit the Applicant.
- [25] In reply, the Applicant submits that there is no evidence that suggests or corroborates the Respondent's allegation of a staged accident. He submits that the narrative of events, OPP Reports, medical records, and surveillance conducted by the Respondent contradict the allegations that the accident was staged. With respect to his credibility, he submits that his account of the incident has been consistent when recounting it and notes that insurer examination reports, visits to doctors, his communications with Samsung, and during an examination under oath support this position.
- [26] I agree with the Applicant that the surveillance report and video casts little doubt on his credibility. The only probative information in the report and video is that the Applicant ambulated without a cane during surveillance on one day and with one on a different day. This evidence was not tested by cross-examination during the hearing and is insufficient to make any determination on the Applicant or his condition and is not enough to question the Applicant's credibility.
- [27] However, the Applicant's inconsistent accounts of the incident and his injuries throughout the other evidence give rise to a legitimate question about his credibility and whether the incident occurred as he alleges, or if at all.

² *M.D. v. Intact Insurance Company*, 2017 CanLII 87155 (ON LAT)

Inconsistent Narrative

- [28] The Applicant included an account of the incident in a civil proceeding against Samsung on April 6, 2020. In those pleadings, he states that the incident caused his “pants and leg(s) to be burned” and that he struck his head on the upper frame of the driver’s side door while attempting to “exit the vehicle to remove the phone from his person and stop the burning.” Whereas, for this application, the Applicant’s submissions make no mention of any burns, and his only injury claim is related to striking his head. While I acknowledge that the pleadings in a lawsuit are not facts found to be proven true in court, they are assertions coming from the Applicant, and I note the inconsistencies in the narrative put forward by the Applicant.
- [29] In an email to Samsung on April 12, 2018, three days following the incident, the Applicant reported no injuries at all and that his bank card shielded his skin from burning. He makes no mention of any damage to his vehicle in the email.
- [30] In a follow-up email to Samsung on April 17, 2018, the Applicant requested compensation for unbearable neck pain and damage to his mobile phone, and his vehicle’s bumper and tires.
- [31] The Applicant went to a family physician on April 19, 2018. Clinical notes and records (“CNRs”) from that visit state that he reported that his mobile phone exploded while driving and “in trying to get it out of his pocket he banged head on roof of car.” There is no record of vomiting or headache complaints.
- [32] In his report to the OPP on April 20, 2018, 11 days following the incident, the Applicant reported that he “did not report the incident at the time as he did not suffer any injuries” but noted that his neck was now sore from when he hit his head while exiting the vehicle. While he made no reports of vomiting at the scene or thereafter, the Applicant reported to the OPP that his vehicle’s bumper fell off during the incident and was repaired on the side of the road.
- [33] The Applicant returned to his family physician on April 26, 2018. In the entry for that visit, it notes that the Applicant jumped up and hit his head on the roof of his car in the incident. During that visit, the Applicant complained of a headache, poor concentration, and nausea. In addition, he reports that he recently sustained a lower back injury at work.
- [34] The Applicant met with Dr. A. Wong, neurologist, on May 9, 2018. The account of the incident in the CNRs from that visit is that the Applicant hit his head while trying to push the roof of the car off to escape. A follow-up letter, from Dr. Wong

to the Applicant's family physician, noted that the Applicant complained of severe headaches, nausea, vomiting, dizziness, and blurred vision.

- [35] The Applicant applied for Ontario Works on July 12, 2018 and claimed that he was involved in a car accident and that his employer was unable to accommodate him. That Ontario Works application notes that the Applicant claimed that "his phone exploded inside his friend's car that he was driving and (the Applicant) jumped out of moving car resulting in a concussion and whiplash."
- [36] Prior to that application, the Applicant gave a written statement to the Respondent, dated June 4, 2018. In it, he stated that once he pulled over, he "immediately removed" his seat belt to jump out of the car. He also stated that he was trying to get out of the car and hit his head on the roof because there was a fire in his pocket. He stated that he was vomiting due to the blow to the head, and that he drove home following the incident, several hours away, making only two or three pit stops. He also stated that has been unable to drive since the incident.
- [37] In his examination under oath ("EUO") on October 5, 2018, the Applicant testified that the phone exploded, and the car filled with smoke, that he could not immediately stop the car. When he did stop the car, he could not immediately exit the vehicle because his seat belt was stuck and when he became unstuck, he hit his head on the roof of the vehicle. Later in the EUO, he testified that he hit his head and neck and vomited immediately after exiting the vehicle. He also testified that he pulled the phone out of his car and threw it while he was opening the door. He also stated that he called the OPP at a highway-side gas station and fast-food establishment but later in the EUO said that he did not call police or an ambulance because he had only a headache.
- [38] During the EUO, he testified that the burn on his leg was examined during his first visit to his family physician, noted earlier. But the CNRs only show that he complained of neck pain during that visit. There is no mention of any burn injury.
- [39] Despite all the information before me, I am unable to conclude what occurred during the incident. I do not know if the Applicant hit his head on the roof of the car or the doorframe. I do not know if it occurred because the Applicant jumped up in his seat or because he was exiting the vehicle. I do not know when the Applicant removed the phone from his pocket or how it was removed from the vehicle. I do not know if the Applicant vomited at the scene of the incident or not. I do not know if the Applicant sustained a burn injury as a result of the incident and I do not know if he contacted police immediately after the incident or days later. Issues like these listed, taken individually, would have little impact on the

Applicant's credibility. However, the totality of the issues, combined with the investigative report results on the Applicant's phone, causes the Applicant's claims to warrant additional scrutiny.

- [40] In addition to the inconsistent reporting of the incident, the Applicant has a history of misrepresenting his address. During his EUO and in his June 4, 2018 written statement, the Applicant reported that he has lived at his current address for five years. However, his driver's licence, claims forms and other declarations state that he resides at a different address. When asked about this discrepancy during the EUO, he said that the address on his driver's licence and claims forms is a prior address and he uses it because that is what he remembers. He also stated that he lived with his common-law partner at the prior address. Yet, his application for Ontario Works includes a letter dated July 1, 2018 from a person who claims that the Applicant is a roommate of his, at the prior address, and lists the other residents but does not include the Applicant's common-law partner. At first glance, it may seem immaterial to this dispute. However, when taken together with the inconsistent reporting of the incident, it shows that the Applicant has misrepresented material facts in the past.
- [41] To me, the numerous inconsistencies in the Applicant's narrative of the incident, as evidenced throughout the documents before me, raise legitimate concerns about his credibility. In addition, two forensic reports found that the thermal incident with the Applicant's mobile phone was caused by tampering, further discrediting his account of the incident.

Failure to Call Material Witnesses and Evidence

- [42] The Applicant's inconsistent narrative is enough to require additional evidence to corroborate his account of the incident. He has corroborating evidence and witness testimony available to him that should support his account of the incident, but he refused to produce them. This is damaging to his credibility.
- [43] The Applicant produced no witnesses to corroborate his account of the events. According to the Applicant, his common-law partner was in the vehicle with him at the time of the incident, but he never called her as a witness and provided no compelling evidence from her.³

³ The Applicant submitted a short Affidavit from his common-law partner with his reply submissions, after the Respondent made responding submissions. The Respondent objected to including the document and moved to exclude it because it was new evidence that was previously undisclosed and ought to have been submitted with initial submissions. The Tribunal agreed with the Respondent and the document was omitted.

- [44] Likewise, the Applicant provides no evidence from his friend whom he was allegedly visiting for a wedding. The Applicant submits that he has fallen out-of-contact with the friend, that he provided the friend's last-known contact information to the Respondent and that the Respondent could have contacted the friend had it wanted another account of the Applicant's whereabouts.
- [45] The Respondent submits that I should draw an adverse inference from the Applicant's failure to produce his common-law partner. It submits that she can corroborate the events and her absence in this proceeding indicates that the evidence would be unfavourable to the Applicant. I agree.
- [46] I draw an adverse inference from the Applicant's refusal to produce corroborating evidence and failure to call a key eyewitness of the incident, inferring that it would be detrimental to his case if produced. As a result, I find that the narrative put forward by the Applicant is not as he suggests and, instead, was done so for his own benefit. As a result, the Applicant is not entitled to accident benefits pursuant to section 118 of the *Insurance Act*.
- [47] As noted previously, it is the Applicant's burden to prove that the accident occurred, and it is not up to the Respondent to provide witnesses for him to corroborate his remarkable account of the events. There is no reason why the Applicant never produced his only first-hand witness. His common-law partner was always with him during the incident and could testify about his location and recollection of the incident. Instead, the issues surrounding the incident, as listed above, are left unanswered.
- [48] Further, the Respondent requested mobile phone records for the purpose of the hearing, but the Applicant never produced them nor showed efforts to produce them.⁴ Mobile phone records have been produced in other Tribunal matters and were used to corroborate the location and timing of incidents.⁵ Here, mobile phone records could be used to confirm the location of the Applicant and his common-law partner at the time of the incident.
- [49] The Applicant claims an elaborate incident occurred whereby his mobile phone spontaneously exploded in his pocket, which lead to him striking his head while hastily exiting the vehicle. Yet, the preferred forensic reports found that the mobile phone was tampered with, and the Applicant's narrative of the incident has been inconsistently reported in the evidence. The various issues in the Applicant's narrative of the incident, the failure to produce evidence and a

⁴ Specifically, it was the mobile phone records of the Applicant and his common-law partner.

⁵ *Z.J. vs Wawanese Mutual Insurance Company*, 2020 CanLII 12711 (ON LAT)

material witness to corroborate the narrative and the adverse inference drawn, are fatal to his credibility and, ultimately, his claim.

- [50] Taken together, I conclude that the Applicant has misrepresented his account of the incident for his benefit and thus, I consider the incident to be a staged accident, disqualifying him from claiming entitlement to the benefits claimed.

CONCLUSION

- [51] The incident described by the Applicant meets the definition of an accident. However, the inconsistencies in the Applicant's claim and the adverse inference drawn from his refusal to provide relevant evidence and call his common law partner – the only eyewitness to the events – cause me to conclude that, on a balance of probabilities, the accident was staged for the Applicant's benefit.
- [52] Staged accidents are excluded from the "accident" definition. Thus, the Applicant is not entitled to the benefits claimed.
- [53] The Application is dismissed.

Date of Issue: October 12, 2022



Brian Norris, Adjudicator