Citation: Young v. Cumis General Insurance Company 2021, ONLAT 20-002837/AABS

Released Date:09/15/21
File Number: 20-002837/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:

Ruthann Young

Applicant

And

Cumis General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Sandeep Johal, Vice Chair**

APPEARANCES:

For the Applicant: Alicia L. Tymec, Counsel

For the Respondent: Spencer Wong, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The incident in question occurred on October 9, 2019 where the applicant was injured and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*).

[2] This case revolves around whether or not the applicant was involved in an "accident" as defined under the *Schedule.* The applicant fell and fractured her ankle after stepping into a construction area where there was a narrow gravel strip, adjacent to where the vehicle was parked at the dealership.

[3] The applicant applied for medical benefits and expenses that were denied by the respondent as the respondent submits the applicant was not involved in an "accident". The applicant disagreed with that decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

ISSUES TO BE DECIDED

[4] The parties agree that the preliminary issue in dispute is as follows:

a. Whether the applicant was involved in an "accident" as that term is defined in s. 3(1) of the *Schedule*?

RESULT

[5] For the reasons outlined below, I find that the incident that occurred on October 9, 2019 was not an "accident" as defined in s. 3(1) of the *Schedule*. The application for accident benefits is dismissed.

ANALYSIS

The Incident

[6] The applicant attended at a vehicle dealership with her husband to pick up their new van. After receiving the keys, the applicant exited the front entrance of the dealership and walked towards the van which was parked at the front of the dealership, adjacent to the sidewalk.[2] There was an unmarked strip of gravel, which according to the applicant was 8-10 inches in width between the sidewalk and the paved surface of the parking lot.[3]

[7] As the applicant was attempting to open the van's driver's side sliding door, she stepped from the sidewalk onto the gravel strip and as she did so, her

[1] O. Reg. 34/10.
[2] Affidavit of Ruthann Young dated October 9, 2020 at para. 4 .
[3] Affidavit of Ruthann Young dated October 9, 2020 at para. 7.

foot bent, and she fell to her knees. As the applicant was falling, she grabbed the inside of the driver's side door.

[8] The applicant was transported to the hospital by ambulance and an x-ray revealed a fracture to her right ankle.

Legal Framework

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

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

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

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

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

[11] The applicant relies upon the Supreme Court of Canada case of *Amos v. Insurance Corp. of British Columbia*,[5] in support of her position of the two-part test to interpret s. 3(1) of the *Schedule*. (1) did the accident result from the ordinary and well-known activities to which automobiles are put? and (2) is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the applicant's injuries and the ownership, use or operation of the vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

[12] The respondent submits that the Ontario Court of Appeal in the *Greenhalgh* case redeveloped the two-part test for determining whether an incident qualified as an accident following the amendments to the *Schedule* in 1996. These amendments adopted a narrower interpretation of the term "accident" and required causation to be "direct". As a result, the respondent submits that the applicant's reliance on the *Amos* test is incorrect.

[13] I agree with the respondent. Labrosse, J.A. in *Greenhalgh* stated as follows:

> I agree with Laskin J.A. that the *Amos* causation test does not apply to the 1996 legislation whereby the legislature clearly shortened the link between the use of an automobile and the occurring impairment. The parties, in the present case, were

[4] *Chisholm* v. *Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ONCA) ("*Chisholm*"); see also: *Greenhalgh* v. *ING-Halifax Insurance Company,* 2004 CanLII 21045 (ONCA) at para. 11 ("*Greenhalgh*")

[5] 1995 CanLII 66 (SCC) ("*Amos*")

> therefore correct to proceed on the basis that in order to succeed, the insured must meet the purpose test set out in *Amos* and the Causation test as set out in *Chisholm*.[6]

[14] As a result, I find that the correct legal test to determine whether an incident qualifies as an accident are those from the Ontario Court of Appeal cases of *Chisholm* and *Greenhalgh* and are binding on the Tribunal.

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

[15] The applicant submits that the Court of Appeal in *Economical Mutual Insurance Company* v. *Caughy*[7] held that, parking is an ordinary and well-known activity to which vehicles are put[8] and that there is no "active use" requirement".[9]

[16] The respondent submits the purpose test is not made out as the applicant was only walking towards the parked vehicle and that neither a parked vehicle nor an intention to use that vehicle assists the applicant with satisfying the purpose test.

[17] I do not agree with the respondent, dealing only with the purpose test, it is clear from *Caughy* that parking is an ordinary and well-known activity to which vehicles are put and there is no active use requirement. As a result, I find that the vehicle was parked and despite not being actively used, that still satisfies the purpose test. I find that this branch of the test is met by the applicant.

[18] However, the applicant must still meet the second part of the test in order to be found to have been involved in an "accident", which I will now address.

Causation Test

[19] In considering the causation test, there are three aspects to consider:

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

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

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[6] *Greenhalgh* at para. 32.
[7] 2016 ONCA 226
[8] *ibid,* at para. 17
[9] *ibid,* at para. 21

c. whether the use or operation of the motor vehicle was a dominant feature of the incident.[10]

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

[20] I find that the applicant satisfies the "but for" test as the location of the van is where her injuries were sustained, however the use or operation of the van was not the direct cause of her injuries.

[21] The applicant submits she was attempting to open the driver's side sliding door of the van when she fell and that she grabbed the inside of the vehicle's door as she was falling. According to the applicant, "but for" the presence of the vehicle at its precise location, she would have stepped over the gravel rather than into it.

[22] The applicant relies upon several cases where it was found to be an "accident" due to the vehicle being used in the ordinary and well-known use.

a. *Economical Mutual Insurance Company v. Whipple* ("*Whipple*"),[11] where it was held that a person who was injured using a stripper pole in a luxury limousine coach was in an "accident" as the limo bus was advertised as a party vehicle that included the stripper pole.

b. *Charbonneau v. Intact Insurance Company* ("*Charbonneau*"),[12] where the applicant was "car surfing" where a person rides on the top of the car or a moving vehicle. It was held that the Mr. Charbonneau was using the vehicle for its normal purpose of transportation as car surfing was a commonplace enough activity that the legislature thought fit to criminalize it as an offence under the *Highway Traffic Act.* While reckless and dangerous, it is not more abnormal use of a vehicle than other reckless and dangerous uses such as texting while driving.

c. *Intact Insurance v. Lanziner-Brackett* ("*Lanziner-Brackett*"),[13] where a person who approached a car and told the driver that he could not park in that spot proceeded to open the vehicle door and bumped the respondent. The door opened again a second time hitting the respondent more forcefully. The injuries were deemed to be as a result of an "accident".

d. *Clementina Pinarreta and ING Insurance Company of Canada* (FSCO: A04-001734) ("*Clementina*") where it held to be an "accident" where the claimant was descending from the bus when she slipped and fell on snow which had piled up at the bus stop. The use or operation of the vehicle,

[10] *Greenhalgh* at para. 12.
[11] 2012 ONSC 2612 CanLII
[12] 2018 ONSC 5660 CanLII
[13] 2018 ONSC 6546

namely getting off the bus was the direct cause of uninterrupted chain of events.

[23] After a review of the case law the applicant relies upon, I find that they are distinguishable and not helpful in the current matter. In *Whipple* the pole was a part of the vehicle and the applicant's injuries were as a direct result of the falling within the vehicle, that is not the situation in the present case, where the applicant was within the vicinity of the van but her injuries were not from the applicant falling into the vehicle. In *Charbonneau,* the vehicle was being used and "car surfing" was considered to be using the vehicle for transportation (albeit recklessly and dangerously) and it was considered to be a normal use of the vehicle. In contrast to the present case, the applicant was not touching the vehicle or being transported at the time of her fall. In *Lanziner-Brackett*, the applicant's injuries were as a result of the vehicle door being opened and hitting her and then a further assault afterward. Those are not the facts of the present case. Lastly, the case of *Clementina*, the claimant was descending from the bus and she fell on snow as she disembarked the vehicle, which is an ordinary and well known use of a vehicle, and getting off the bus was the direct cause of uninterrupted chain of events. That is not the situation in the present case, and I find it distinguished on that basis.

[24] The respondent takes the position that the applicant was not using the vehicle at the time of her trip and fall, and the location of the van did not cause the applicant to step into the construction area. Furthermore, the respondent submits that the incident would not have occurred "but for" the presence of the unmarked construction area and that the construction area was an intervening cause.

[25] The applicant was not using the vehicle at the time, she was "attempting" to open the door, however, she was not holding the door handle or opening the sliding door at the time she fell and nor was she attempting to enter into the vehicle. In my view, "but for" the location of the parked vehicle, it may have brought her to the location of where she fell and injured herself, however it was not the use or operation of the vehicle that caused her injuries.

[26] As a result, I find that the applicant has satisfied the "but for" portion of the causation test as the parked van brought her to the location of where she fell and injured herself. However, the applicant must satisfy all three portions of the causation test as outlined in paragraph 19 above and I find that the applicant has not done so.

Was there an intervening cause that cannot be said to be part of the ordinary course of the use or operation of the vehicle?

[27] For the following reasons, I find that there was an intervening cause that falls outside the normal risk associated with the use and operation of the vehicle.

The applicant stepping on the gravel construction area was an intervening act and independent from the use or operation of the vehicle.

[28] The applicant submits that there was no intervening act as there was an uninterrupted, temporal and physical chain of events which led to her injuries and furthermore, the applicant was in the process of opening the vehicle door when she came into contact with the vehicle when she fell. According to the applicant, the presence of gravel cannot be said to be outside of the "ordinary course of things".

[29] The respondent submits that numerous Financial Services Commission of Ontario (FSCO) cases and Tribunal cases have held that a trip and fall on uneven pavement or a pothole, or a slip and fall on ice, are considered to be intervening acts such that the causation test cannot be met.[14] In *B.Y. v TD Insurance* it was held that the applicant had not been in an "accident" where she slipped on ice after exiting her parked vehicle. She was touching the car door as she fell, and it was held that the vehicle itself did not cause her injuries and proximity to the vehicle was not enough. The ice was found to be an intervening act and was independent of the use of the vehicle.

[30] In *RM v. Certas Direct Insurance Company*,[15] the applicant unlocked her car and had her hand on the vehicle when she slipped and fell on ice. It was held that the ice was the intervening cause and there was no evidence that the applicant putting her hand on the driver's side door handle in any way caused or contributed to her fall.

[31] In *KB v. Intact Insurance Company,*[16] the applicant tripped and fell near her parked car as result of a pothole. It was held that tripping over a pothole was not a reasonable risk associated with motoring and that the pothole was an intervening act and the cause of her injuries.

[32] I agree with the respondent and the case law it relies upon. In my view, stepping onto gravel and falling was the intervening act and the cause of the applicant's injuries. Although the applicant submits, she came into contact with the door as she fell, that would be merely incidental and was not the cause of the injury. Her fractured ankle was a direct result of stepping onto the gravel and as a result, I find that to be the intervening cause of her injuries.

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[14] *Nickerson v Security National Company*, 2012 A11-001753 (FSCO) at pgs. 5-6; *Banos v Jevco insurance Company*, 2015 A14-001846 (FSCO) at pg. 7; *KB v Intact Ins. Co*., 2017 CanLII 63622 (ON LAT) at paras 18-23; *SB v Aviva Ins. Co*.; 2019 CanLII 22211 (ON LAT) at paras 35-40; *DM v. Certas Inc. Co*., 2018 CanLII 76693 (ON LAT) at para. 29*; CS v Certas Home and Auto Insurance*, 2019 CanLII 51302 (ON LAT) at para. 21; *IS v Aviva Ins. Co*.; 2017 CanLII 62174 (ON LAT) at paras 29-31 and *BY v. TD Insurance Meloche Monnex*, 2019 CanLII (ON LAT) at paras. 22-23.

[15] 2019 CanLII 22204 (ON LAT) at paras 29, 30.

[16] 2017 CanLII 63622 (ON LAT) at para. 22.

Was the use or operation of the vehicle the dominant feature of the incident?

[33] I find that the use or operation of the vehicle was not the dominant feature of this incident but rather the unmarked construction or gravel area was.

[34] The applicant submits that the use or operation of the vehicle was a "direct cause" but not necessarily the only cause of the applicant's injuries and therefore the causation test is met.

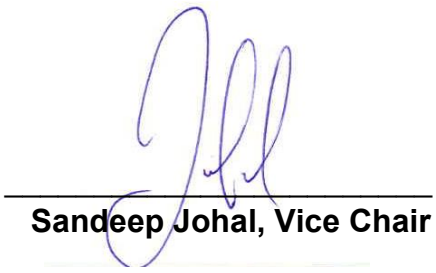
[35] The respondent submits that the vehicle was merely the location of the injury or that the vehicle was involved in some peripheral or incidental way. Furthermore, according to the respondent, the use or operation of the vehicle must be the dominant feature of the incident and it was not in the present case.

[36] I agree with the respondent, I find that the applicant's injuries were not as a result of the use or operation of the vehicle and the vehicle was not the dominant feature of this incident. It is insufficient to establish direct causation by merely stating the accident took place near the vehicle or that she would not have been injured if the vehicle was not parked where it was. In my view, that would be insufficient to establish direct causation or that the vehicle's use or operation was the dominant feature.

ORDER

[37] For the reasons outlined above, I find that the incident that occurred on October 9, 2019 was not an "accident" as defined in s. 3(1) of the *Schedule*. The application for accident benefits is dismissed.

Date of Issue: September 15, 2021



Sandeep Johal, Vice Chair