Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Duncan v. The Co-operators General Insurance Company, 2021 ONLAT 19-014310/AABS

Released Date: 02/22/2021
File Number: 19-014310/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c I.8, in relation to statutory accident benefits.

Between:

Ken Duncan

Applicant

and

The Co-operators General Insurance Company

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Bozena Kordasiewicz, Counsel

For the Respondent: Eric Grossman, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

[1] Ken Duncan, the applicant, was injured on January 10, 2018 when he sustained a left knee torn meniscus, a posterior root tear and a patellar tendon pathology that ultimately required surgical intervention.

[2] As a result of his injuries, Mr. Duncan sought accident benefits from The Co-operators General Insurance Company ("The Co-operators"), the respondent, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*.[1]

[3] A case conference was held on May 14, 2020 and The Co-operators raised the preliminary issue of whether or not Mr. Duncan's injuries arose as a result of an accident as defined in the *Schedule*. As a result, the matter proceeded to a written preliminary issue hearing.

PRELIMINARY ISSUE

[4] The following preliminary issue is to be decided:

(i) Was Mr. Duncan involved in an "accident" as defined by s. 3(1) of the *Schedule*?

RESULT

[5] I find that Mr. Duncan was not involved in an "accident" as defined in s. 3(1) of the *Schedule*.

FACTS

[6] The facts were provided by way of a signed statement from Mr. Duncan[2] dated July 31, 2018 and are not in dispute between the parties.

[7] On January 10, 2018, Mr. Duncan, along with his friend, drove a borrowed Dodge minivan to pick up furniture from a Leon's Furniture Warehouse in Owen Sound ("Leon's"). Upon arrival, they pulled into the Leon's paved and plowed parking lot that Mr. Duncan described as "very slippery."[3]

[8] Mr. Duncan exited the minivan and began walking toward the "man-door" of the Leon's shipping and receiving office. After Mr. Duncan exited the vehicle, his

[1] O. Reg. 34/10 (the "*Schedule*").
[2] Preliminary Issue Hearing Submissions of the Applicant, tab 1.
[3] *Ibid*. at page 2.

friend proceeded to drive the minivan towards the shipping and receiving loading dock/doors which were around the corner of the Leon's building.

[9] As Mr. Duncan's friend was backing up the vehicle towards the loading dock/doors, Mr. Duncan slipped and fell on ice in the parking lot. At the time of his fall, Mr. Duncan was "completely out of the Dodge minivan and had walked approximately 10 feet from the vehicle."[4]

[10] When Mr. Duncan's friend saw Mr. Duncan fall, he put the vehicle into park and went to assist Mr. Duncan. Mr. Duncan's friend helped Mr. Duncan to stand up but it took three or four tries for him to return to his feet because the parking lot was "very slippery."[5] Once the two made it to the Leon's shipping and receiving office, they told an office worker that something needed to be done about the parking lot.

[11] Mr. Duncan and his friend proceeded to pick up Mr. Duncan's furniture and, while doing so, saw a Leon's employee scraping and salting the area of the parking lot where Mr. Duncan fell.

[12] Mr. Duncan submitted an Application for Accident Benefits ("OCF-1") to The Co-operators dated May 15, 2018. Following receipt of Mr. Duncan's July 31, 2018 signed statement, The Co-operators denied Mr. Duncan's claim for accident benefits on August 22, 2018 on the basis that Mr. Duncan's impairments did not arise as a result of an "accident" as defined by the *Schedule*.[6] The Co-operators maintained this position in additional correspondences to Mr. Duncan dated November 4, 2019, November 25, 2019 and January 24, 2020.[7]

ANALYSIS

[13] The Ontario Court of Appeal established the following two-part test to determine whether an incident is an "accident" for the purposes of the *Schedule*:[8]

(i) Purpose test: did the incident arise out of the use or operation of an automobile, and

(ii) Causation test: did the use or operation of an automobile directly cause the impairment.

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[4] *Ibid*.
[5] *Ibid*.
[6] Preliminary Issue Hearing Submissions of the Respondent, tab 5.
[7] Preliminary Issue Hearing Submissions of the Respondent, tabs 6, 10 and 11.
[8] *Chisholm v. Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ONCA), at para. 18 ("*Chisholm*").

[14] If it can be established that the use or operation of an automobile was the cause of the injuries, then the applicant must establish that there was "no intervening act(s) that resulted in the injuries that cannot be said to be part of the course of the 'ordinary course of things.'"[9] The question is whether it can be said that the use or operation of the automobile was a "direct cause" of the injuries."[10]

[15] For the reasons that follow, I find that Mr. Duncan has failed to satisfy both the purpose test and the causation test and, therefore, his January 10, 2018 slip and fall is not an "accident" for the purposes of the *Schedule*.

Did Mr. Duncan's injuries arise out of the use or operation of an automobile (the purpose test)?

[16] I find that Mr. Duncan had completed his use and operation of the minivan prior to his slip and fall. Mr. Duncan had completely exited the minivan and began a new task of walking for 10 feet away from the vehicle and towards the Leon's shipping and receiving "man-door" before falling on the ice.

[17] I do not agree with Mr. Duncan's submissions that the entire process of picking up furniture from Leon's constituted one incident. The fact that Mr. Duncan's friend was still operating the vehicle at the time of Mr. Duncan's fall does not determine when Mr. Duncan's use of the vehicle ended. As stated above, Mr. Duncan's fall happened during a new event for him, which was his journey from the minivan to the Leon's shipping and receiving "man-door" which was at least 10 feet away from the vehicle. Mr. Duncan's slip and fall occurred during this part of his journey.

[18] I have also reviewed the case law provided by the parties and find that the decisions relied upon by Mr. Duncan are distinguishable. For example, Mr. Duncan relied upon the Tribunal's decision in *K.P. v. Aviva General Insurance*[11] and the Financial Services Commission of Ontario ("FSCO") decision of *Eccleston v. Guarantee Company of North America*[12] for the proposition that there is no need to be in contact with a vehicle and the vehicle need not be in active use to meet the purpose test. In both cases, the vehicle involved was far closer to the applicant than 10 feet away. For instance, the applicant's body after falling on the roadway came to rest *under* the front bumper of an approaching bus in *Eccleston*. Further, the approaching bus was found to play a role in the

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[9] *Greenhalgh v. ING Halifax Insurance Company*, 2004 CanLII 21045 (ONCA), ("*Greenhalgh*") at para 36; *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII), ("*Caughy*") at para 14.
[10] *Caughy* at para. 14.
[11] 2020 CanLII 35505 (ON LAT) ("*K.P. v. Aviva*").
[12] FSCO A04 000759 ("*Eccleston*").

applicant's injuries as it intimidated the applicant prior to her slip and fall. Here, there is no such suggestion that the minivan was approaching Mr. Duncan or that Mr. Duncan was intimidated by the moving vehicle.

[19] In addition to the applicant being within reaching distance of the vehicle when she fell and sustained injuries in *K.P. v. Aviva*, the applicant in that matter was also beginning to enter a vehicle. Therefore, *K.P. v. Aviva* is also distinguishable because Mr. Duncan was not entering the minivan and was rather walking away from it when he slipped and fell on the ice in the parking lot.

[20] I find that the facts in this matter are more akin to those in *E.C. v. Aviva Insurance Company*[13] and *17-000942 v Aviva Insurance Canada*[14] which were relied upon by The Co-operators. In *E.C. v. Aviva*, the applicant was outside of her vehicle, went to her trunk, removed items from the truck, closed the truck and fell as she stepped away from the vehicle.[15] In this decision, the Tribunal found that the applicant's use of the vehicle ended upon her retrieving items from the trunk and closing it as the applicant started a new task of walking from the vehicle to her workplace on a slippery sidewalk.[16]

[21] Similarly, in *17-000942*, the applicant had exited a vehicle, closed the door and taken three to four steps towards her residence when she tripped over an uneven curb and sustained injuries.[17] In this decision, the Tribunal found that the applicant's journey in the vehicle ended when she disembarked the vehicle and that an intervening act caused her injuries.[18]

[22] I agree with The Co-operators that Mr. Duncan's slip and fall in this matter is more analogous to *E.C. v. Aviva* and *17-000942* as Mr. Duncan had exited the minivan, stepped away from the vehicle by a far greater distance than the applicants in both *E.C. v. Aviva* and *17-000942* and started a new task of walking from the minivan to the Leon's shipping and receiving "man door." I also agree with The Co-operators that the only role that the minivan played in Mr. Duncan's injuries, which is similar to the decision in *17-000942*, was that it brought him to the Leon's parking lot where he fell.[19]

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[13] 2019 CanLII 110088 (ON LAT) ("*E.C. v. Aviva*").
[14] 2017 CanLII 62174 (ON LAT) ("*17-000942*").
[15] *Supra* note 13 at paras. 17 and 21.
[16] *Ibid*. at paras. 21 and 23.
[17] *Supra* note 14 at para. 7.
[18] *Ibid*. at para. 22.
[19] *Ibid*. at paras. 25-26.

[23] For all of these reasons, I find that Mr. Duncan has failed to satisfy the purpose test as his slip and fall in the Leon's parking lot did not arise out of the use or operation of the minivan.

Did the use or operation of an automobile directly cause Mr. Duncan's impairment (the causation test)?

[24] Even if I am wrong in my finding that Mr. Duncan's January 10, 2018 incident did not meet the purpose test, I also find that the incident is not an "accident" as Mr. Duncan has not satisfied the causation test.

[25] Within the causation test, the following three-point analysis has been set out by the Ontario Court of Appeal:[20]

(i) whether the incident would have occurred "but for" the use or operation of the automobile;

(ii) whether there was an intervening act that cannot be said to be part of the ordinary course of the use or operation of the automobile; and

(iii) whether the use or operation of the automobile was the dominant feature.

[26] I find that Mr. Duncan has failed to satisfy the causation test such that the use and operation of the minivan did not directly cause Mr. Duncan's impairments because there was an intervening act that occurred in this matter – namely, Mr. Duncan's slip and fall on the icy parking lot.

The Intervening Act

[27] To satisfy the intervening act consideration of the three-part analysis of the causation test, an applicant must establish that there was an unbroken chain of events involving the use or operation of a vehicle that led to their injuries. Where an intervening act falls outside the normal risk associated with the use and operation of a vehicle, it will break the chain of causation.

[28] I find that there was a broken chain of causation in this matter between the use and operation of the minivan and Mr. Duncan's injuries. On the evidence, Mr. Duncan had walked 10 feet away from the minivan and an intervening act occurred, namely slipping and falling on the icy parking lot, which resulted in Mr. Duncan's injuries. In this matter, there was a separation in both distance and

[20] *Chisholm*, *Greenhalgh* at paras. 33-35.

time from Mr. Duncan exiting the minivan and his subsequent slip and fall which was outside the normal risk associated with the use and operation of a vehicle.

[29] I am also not persuaded by Mr. Duncan's submission that the chain of causation is not broken because he had no choice but to disembark his vehicle regardless of the weather and walk across the Leon's parking lot in order to access the shipping and receiving office.[21] In addition to providing no evidence to support his submission, as submissions are not evidence, the decisions that Mr. Duncan has relied upon to support this position are distinguishable.[22] In *Pinarreta*, the applicant was getting off of a bus by placing her feet onto a snow bank present at the bus stop when she slipped and fell.[23] In *Mariano*, the applicant fell after having to disembark from a bus at a location other than the usual bus stop due to an illegally parked vehicle.[24] In both decisions the snow bank and the illegally parked vehicle were found to be external conditions rather than an intervening act and, as the applicants' injuries in both matters were found to be within the realm of risks associated with motoring and, in particular, with the use of a public transit, an "accident" was found to have occurred in both matters.

[30] I find that *Pinarreta* and *Mariano* are both distinguishable because both decisions involved the use of a bus and not a personal vehicle and there is no evidence that Mr. Duncan was compelled to exit the minivan in any particular location in the parking lot. *Pinarreta* is also distinguishable as the arbitrator in that matter found that even if the snowbank contributed in some way to the applicant's injuries that the act of disembarking the bus also caused her to slip and fall.[25] There is no evidence in this matter that the minivan contributed in any way to Mr. Duncan's fall or to his injuries.

[31] Mr. Duncan has also not provided any decisions that support his submission that the icy conditions of the Leon's parking lot constituted a normal risk for the time of year during which he slipped and fell.[26] This position is contrary to a number of decisions of the Tribunal, and its predecessor FSCO, that The Co-operators have referred to in its submissions which have found that a slip and fall on ice or slush is an intervening event that precludes the causation test from being met.[27]

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[21] Preliminary Issue Hearing Submissions of the Applicant, paras. 9 and 15.
[22] *Eccleston*, which was distinguished in paragraph [18] above; *Pinarreta v. Ing Insurance*, FSCO A04 B 001734 ("*Pinarreta*"); and *Mariano v. TTC Insurance Company Limited*, FSCO A 05 002112 ("*Mariano*").
[23] *Pinarreta* at paras. 1, 6 and 12.
[24] *Mariano* at paras. 5, 27 and 28.
[25] *Pinarreta* at para. 19.
[26] Preliminary Issue Hearing Submissions of the Applicant, para. 17.
[27] As referenced by The Co-operators, see: *18-000468 v. Certas Direct Insurance Company,* 2019 CanLII 22204 (ON LAT) at para. 30; *17-000180 v. Certas Direct Insurance Company,* 2018 CanLII 76693 (ON LAT) at paras. 2, 28-29, 38, and 40; *Nickerson v. Security National Insurance*

[32] My finding that Mr. Duncan failed to satisfy the causation test is also supported by the following evidence:

(i) the clinical notes and records ("CNRs") of Mr. Duncan's family physician, Dr. Fred Veensra, show that Mr. Duncan first saw Dr. Veensra after the January 10, 2018 incident on February 12, 2018. Dr. Veensra's February 12, 2018 CNR entry noted that Mr. Duncan had fallen on ice and injured his left knee over a month ago. There was no mention of a vehicle or of an automobile accident in this CNR entry;

(ii) Dr. Veensra's CNRs show that he referred Mr. Duncan to Dr. Jan Henning, orthopaedic surgeon, on March 31, 2018. This referral note stated that Mr. Duncan "slipped on the ice in the parking lot at Leon's." Again, there was no mention of a vehicle or of an automobile accident in this referral note;

(iii) On April 20, 2018, Mr. Duncan was assessed by Dr. Henning. Dr. Henning's clinic note to Dr. Veensra stated that Mr. Duncan, "slipped on ice in January of 2018"[28] with no reference to a vehicle or an automobile accident;

(iv) Dr. Veensra completed a Disability Certificate ("OCF-3") dated May 15, 2018 which clearly stated on page 4, "*was not an MVC* [*sic*] he slipped on ice and ? [*sic*] twisted his feet picking up a dresser (*my emphasis added*);" and

(v) Most significant, Mr. Duncan has commenced a claim against the owners and occupiers of the Leon's premises for damages. The September 10, 2019 Statement of Claim described the January 10, 2018 incident as a slip and fall on ice that caused Mr. Duncan to land on his knees.[29] The claim also alleged that Mr. Duncan's injuries were caused *solely* as a result of the negligence and/or a breach of the *Occupiers Liability Act*[30] by the named defendants for, among other things, knowingly permitting ice and snow to exist in the parking lot and not as a result of any use of a vehicle or of an automobile accident.

[33] For all of the reasons set out above, I find that the use and operation of the minivan were not the direct cause of Mr. Duncan's impairments as there was an

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Co./Monnex Insurance Mgmt. Inc., [2012] O.F.S.C.D. No. 154 (FSCO) at paras. 1 and 6; and *18-001537 v. TD Insurance Meloche Manney,* 2019 CanLII 27893 (ON LAT) at para. 23.

[28] Preliminary Issue Hearing Submissions of the Respondent, tab 9.

[29] Preliminary Issue Hearing Submissions of the Respondent, tab 7.

[30] R.S.O. 1990, c. O.2.

intervening act of Mr. Duncan walking across the icy parking lot that is not part of the ordinary course of the use or operation of the minivan.

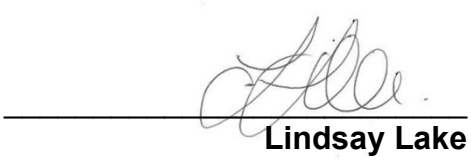
CONCLUSION

[34] Based on the totality of evidence before me, Mr. Duncan has failed to meet both the purpose and the causation tests. As a result, I find that Mr. Duncan was not involved in an "accident" as defined under section 3(1) of *the Schedule*.

ORDER

[35] As a result of my finding above, Mr. Duncan's application is dismissed.

Released: February 22, 2021



Lindsay Lake
Adjudicator