

**Tribunals Ontario
Safety, Licensing Appeals and
Standards Division**

77 Wellesley Street West, Box 250
Toronto ON M7A 1N3
Tel: 1-844-242-0608
Fax: 416-327-6379
Website: www.slsto-tsapno.gov.on.ca

**Tribunaux décisionnels Ontario
Division de la sécurité des appels en matière
de permis et des normes**

77 rue Wellesley Ouest, Boîte no 250
Toronto ON M7A 1N3
Tél. : 1-844-242-0608
Télec. : 416-327-6379
Site Web : www.slsto-tsapno.gov.on.ca



Ontario

RECONSIDERATION DECISION

Before: Chloe Lester

Date: July 16, 2019

File: 17-002922/AABS

Case Name: M.S. and Certas Home and Auto Insurance Company

Written Submissions by:

For the Applicant: Samia Alam, Counsel

For the Respondent: Hooman Zadegan, Counsel

OVERVIEW

- [1] The applicant, the insured, filed an application for dispute resolution to the Licence Appeal Tribunal (the “Tribunal”) for benefits and to determine the issue of whether the incident was considered an accident.
- [2] A preliminary issue hearing was scheduled, heard in writing and determined the incident was not an accident. The Tribunal found that the applicant had not met the purpose or the causation test.
- [3] The applicant requests a reconsideration of the decision in accordance with section 18.2 (b) and (d) of *The Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017)* (“Rules”). They claim the adjudicator made a serious error of law and fact and there is recent case law from Divisional Court that would have affected the result of the decision had it been considered. The applicant requests the adjudicator’s decision be overturned.
- [4] The respondent argues that no error has been made by the adjudicator and he considered the purpose and causation test appropriately.
- [5] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

- [6] The applicant’s Request for Reconsideration is dismissed.

BACKGROUND

- [7] The Tribunal’s decision frames the incident in this way:
 - a. MS was the driver of a rented taxi cab when the incident occurred.
 - b. MS picked up three passengers and drove them to their destination, a townhouse complex.
 - c. All but one of the passengers left the taxi and walked away from it. One of them, (“X”) stepped out and indicated to MS that he had no money to pay the taxi fare. X invited MS to follow him home to collect his fare.
 - d. MS followed X into a laneway. X then attacked MS, beating him and leaving him on the ground.

- e. The nature and extent of MS's injuries are uncontested, as is the fact that they were inflicted by X and not caused by anything else.

LEGAL TEST

- [8] The grounds for a Request for Reconsideration are contained in Rule 18 of the Rules. A Request for Reconsideration will not be granted unless one or more of the grounds have been met. More specifically, the applicant argues that the Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision.
- [9] The applicant argues the adjudicator made the following errors:
 - a. First, the Tribunal failed to properly consider the applicant's affidavit and the chain of events that led to the purpose test not being met. There is also a recent Divisional Court case that was not available at the time of the hearing, that would affect the result of this decision.
 - b. Second, the Tribunal failed to outline the three-prong causation test.
- [10] An accident is defined as "an incident in which the use of an automobile directly causes an impairment." To define an accident, the applicant must satisfy both the purpose and causation test.
 - a. The purpose test: Did the incident arise out of the ordinary and well-known activities for which automobiles are used?
 - b. The causation test: Did such use and operation of an automobile directly cause the impairment? 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"? In applying the causation test the adjudicator must undertake a three-prong assessment, the "but for", intervening cause and dominant feature test.

ANALYSIS

Did the Tribunal make a significant error of law or fact such that the Tribunal would likely have reached a different decision?

- [11] The applicant claims the Tribunal made an error in fact and/or law can be summarized in the following way:
 - a. By summarizing the affidavit in 5 bullet points the adjudicator failed to acknowledge other relevant facts in the applicant's affidavit describing the chain of events.

- b. The adjudicator found the applicant was engaged in an ordinary use and operation of a taxi when he was picking up, transporting and dropping off his passengers. However, the applicant argues the adjudicator should have stopped his analysis there. Instead the adjudicator continued to analyze the events of that night, leading up to the assault and determined that those subsequent acts resulted in the incident not meeting the definition of accident.
- c. The adjudicator erred when he relied on double hearsay and unsworn statements of individuals who had no involvement in the matter.
- d. The adjudicator erred in failing to outline the three-prongs under the causation test: the “But for”, intervening cause and dominant feature test.
- e. A new decision from Divisional Court, *North Waterloo v. Samad*¹, was released after the Tribunal’s decision that affects the outcome.

[12] Firstly, although the adjudicator summarized the applicant’s lengthy affidavit in just 5 bullet points it did not alter the recounting of the events. The applicant’s affidavit focused on his feelings regarding safety, descriptions relating to his job, details of the assault and how his life has changed after the incident. The respondent argues many of the details in the affidavit were irrelevant to the dispute. I agree. Many of the details contained in the affidavit, while significant to the applicant, were inconsequential for determining whether the incident met the definition of accident. Reasons must be read together with the record and the outcome. I find the adjudicator did consider the relevant facts in their entirety. Also, details surrounding the incident were contemplated in paragraph 21 of the adjudicator’s decision despite not being listed in the background.

[13] Secondly, the adjudicator did not err by contemplating the entire series of events that began with an ordinary use and operation of a vehicle and ended with the assault of the taxi cab driver. For an incident to be defined as an accident the incident must directly cause the impairment. Therefore, had the adjudicator stopped his analysis after determining the applicant had been engaged in the ordinary use of a taxi cab which included dropping off passengers, the applicant would not have sustained an impairment. The impairment was not caused until the applicant stepped out of his car and followed the passenger down a laneway. To determine whether the incident caused an impairment the adjudicator would have to contemplate all events leading up to and including what caused the

¹ *North Waterloo Farmers Mutual Insurance Co. v. Samad*, 2018 ONSC 2143

injury. The applicant sites numerous cases² to support their position of what are ordinary and well-known activities of a vehicle. The decisions do not change the fact that the entire incident must be considered in determining the purpose test.

- [14] Thirdly, if the applicant wanted to take issue with some specific evidence submitted within the written submissions, they should have done so in advance of the decision. In this case the applicant takes issue with evidence he describes as double hearsay and unsworn statements. The applicant could have filed a motion to strike evidence. That being said, an adjudicator has the latitude in a Tribunal to consider evidence that would not necessarily be accepted within the courts. The adjudicator held that the newspaper article and statement housed within the article was a factor in his decision, but it was not the only factor. The adjudicator was not persuaded that the entire incident was in the ordinary use of a taxi cab and it was the applicant's onus to prove this point. Also, both the causation and purpose test must be met for an incident to be defined as an accident and they were not.
- [15] Fourthly, the applicant submits that the "but for" test is used for exclusionary purposes and the adjudicator failed in not outlining this part of the test. I agree. *Chisholm v. Liberty Mutual*³ is clear the use of the "but for" test is "to eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome." The test does not establish legal causation. So even though the adjudicator did not conduct an analysis on the "but for" test, the decision reasoned why the applicant did not meet the causation test because the impairments were not a direct cause of the use and operation of the vehicle. The adjudicator found that the chain of causation was broken, and the dominant feature of the impairments were as a result of the assault. So even though the adjudicator did not specifically refer to the "but for" test, I find it doesn't change the result. Both the purpose and causation test need to be met for an incident to be considered an accident. The "but for" test is only one part of the bigger causation test. The applicant failed the other parts of the causation test, and therefore the incident cannot be considered an accident.
- [16] Lastly, the applicant argues that recent case law from Divisional Court in *North Waterloo v. Samad* endorsed that the "direct cause" of the impairment does not mean the motor vehicle needs to be the only cause or even the most immediate. The respondent argues this case can be differentiated from this matter. I agree.

² *Economical Mutual Insurance v. Caughy*, 2016 ONCA 226, *Amos v. Insurance Corp. of British Columbia, Kasman and Security National Insurance Co.* (FSCO A12-007175, October 2, 2014), 16-000131 v. *TD Insurance Meloche Monex*, 2017 CanLII 43837 (ON LAT)

³ *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.)

In the Divisional Court case the applicant was a taxi driver that was assaulted in his vehicle. When the assailants left the vehicle, the door remained open and while the applicant attempted to close the door he slipped and fell on ice. The courts confirmed the decision from the Financial Services Commission of Ontario that the chain of events did not have an intervening act. The impairments were a result of a number of incidents which included the use and operation of the vehicle. In this case, the adjudicator held that the chain of events was broken when the applicant walked away from his vehicle and down a laneway. He was not in his vehicle when the assault occurred and that the use and operation of the vehicle did not directly cause the impairments. There was also only 1 direct cause of his injuries, not multiple like in the case of *North Waterloo v. Samad*.

- [17] Even if, the purpose test was met by arguing that payment of fares is an ordinary use of operating a taxi, even if it takes place away from the vehicle. The applicant would fail on the causation test. Again, the use and operation of the vehicle was not a direct cause of his injuries, it was the assault.

CONCLUSION

- [18] Although the adjudicator did not consider the “but for” test in his analysis, the error would not have led to a different result. The applicant did not meet the purpose or causation test. For the reasons noted above, I dismiss the applicant’s Request for Reconsideration.

Chloe Lester
Vice-Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: July 16, 2019