Citation: Rathbone v. Co-operators General Insurance Company, 2023 ONLAT 22-009104/AABS- PI

Licence Appeal Tribunal File Number: 22-009104/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:

Jeffrey T. Rathbone

Applicant

and

Co-operators General Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR:	**Tavlin Kaur**
APPEARANCES:	
For the Applicant:	Jeffrey Rathbone, Applicant Michael Switzer, Counsel
For the Respondent:	Nathalie Rosenthall, Counsel
HEARD:	**By way of written submissions**

OVERVIEW

[1] Jeffrey Rathbone, the applicant, was involved in an incident on August 17, 2021 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (including amendments effective June 1, 2016) (the "*Schedule*"). The applicant was denied benefits by the respondent, Co-operators General Insurance Company ("Co-operators"), and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUES IN DISPUTE

[2] The preliminary issues to be decided are:

i. Whether the incident involving the applicant constitutes an accident under section 3(1) of the *Schedule?*

ii. Is the applicant barred from proceeding to a hearing on the substantive issues in dispute because the applicant submitted a late Application for Accident Benefits (OCF-1), and has not provided a reasonable explanation for the late submission?[1]

RESULT

[3] The applicant was not involved in an accident.

[4] The applicant is barred from proceeding with his application because he did not comply with the prescribed timelines in the *Schedule*.

ANALYSIS

Background

[5] On August 17, 2021, the applicant was stopped at a drive-thru window at Tim Hortons. His vehicle was still in drive mode. He transferred the first coffee cup

[1] I note that the issue ii is listed in the Case Conference Report and Order as whether the applicant barred from proceeding to a hearing on the substantive issues in dispute because the applicant submitted a late Application for Accident Benefits (OCF-1), and has not provided a reasonable explanation for the late submission?

However, based on the parties' submissions, it became clear that the actual issue in dispute is whether the applicant barred from proceeding to a hearing as they failed to notify the respondent of the circumstances giving rise to a claim for benefits no later than the seventh day after the circumstances arose or as soon as practicable after that day. As such, I have adjudicated this particular issue.

without incident. However, as he was transferring the second coffee cup, the lid came off and the upper brim of the cup collapsed inward. The coffee spilled over the sides of the cup and onto his lap and groin area. He reacted and dropped the remainder of the coffee onto his lap. He was unable to exit his vehicle because he was belted and because of the position of his vehicle in the drive-thru.

[6] He left the drive-thru and parked his car. He removed the seatbelt and proceeded to remove his clothing. He received first aid from the restaurant employees. He went home and immersed himself into a cold-water bath. He then went to the ER at Arnproir Hospital and was treated for his injuries.

[7] The applicant submits that he was involved in an accident and that he has a reasonable explanation for the delay in submitting his application.

[8] The respondent submits that the applicant was not involved in an accident and that he should be barred for submitting a late application.

Was the incident an "accident"?

[9] For the following reasons, I find that the applicant was not involved in an "accident" as defined by s. 3(1) of the *Schedule*.

[10] Section 3(1) of the *Schedule* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment".

[11] The onus is on the applicant to establish on a balance of probabilities that the use or operation of an automobile directly caused her injuries.

[12] In *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII), the Ontario Court of Appeal confirmed the two-part test to determine whether an incident is an "accident" as follows:

a. Purpose test: did the incident arise out of the use or operation of an automobile? and

b. Causation test: did the use or operation of an automobile directly cause the impairment?

[13] The purpose test is a determination of whether the incident resulted from "the ordinary and well-known activities to which automobiles are put" *See*: *Greenhalgh v. ING Halifax Insurance Company*, (2004), 2004 CanLII 21045

(ONCA). Put another way, for what "purpose" was the vehicle being used at the time of the incident?

[14] The causation test then requires the adjudicator to determine if these "ordinary and well-known activities" were the direct cause of the applicant's impairments by focusing on satisfying the following considerations in sequential order:

a. The "but for" consideration;

b. The "intervening act" consideration, which may be used to determine if some other event took place that cannot be said to be part of the ordinary course of use or operation of the vehicle; and,

c. Finally, when faced with a number of possible causes, the "dominant feature" consideration focuses on whether the ordinary and well-known activity is what "most directly caused the injury".

The Purpose Test

[15] The respondent concedes that the use of a vehicle in the drive-through of a restaurant satisfies the purpose test. I am satisfied on a balance of probabilities that the purpose test has been met because the incident arose out of the ordinary and well-known activities for which automobiles are put.

The Causation Test

Would the alleged injuries have occurred "but for" the use or operation of the automobile?

[16] The applicant submits that incident occurred solely because of the use and operation of the motor vehicle to stop at the drive-thru lane while restrained by a seatbelt, as was the case in *Dittmann v Aviva Insurance Company* 2016 ONSC 6429 ("*Dittmann*").

[17] The respondent submits that the applicant's injuries do not satisfy the causation test as the use and operation of his vehicle did not directly cause the impairment.

[18] I find that but for the use of the vehicle, the applicant would not have sustained these injuries. Similar to *Dittmann*, but for the use of the vehicle, he would not have been in the drive-through lane, would not have received the coffee while in a seated position, would not have been transferring the coffee cup to the cup holder across his body, and would not have had the coffee spill on his lap and groin area. Moreover, but for him being seated and restrained by a lap and

shoulder harness, he may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on him.

[19] However, the "but for" test does not conclusively establish legal causation, the cause that attracts legal liability. As Laskin J.A. noted in *Chisholm v. Liberty Mutual Group,* 2002 CanLII 45020 (ON CA) ("*Chisholm*") the purpose of the "but for" test of causation is an exclusionary test which serves to "eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome […] the but for test does not conclusively establish legal causation."

[20] Since the but for test does not conclusively establish legal causation, the analysis turns to a consideration of whether there was an intervening act that severs the chain.

Was there an intervening cause?

[21] The applicant submits there was no intervening act that would absolve the respondent of liability. The applicant is relying on *Dittmann*, which was affirmed by the Court of Appeal in *Dittmann v. Aviva Insurance Company of Canada*, 2017 ONCA 617 (ON CA).

[22] The respondent submits that there was a intervening act, which is the improperly placed lid. The respondent is relying on *M.P. v Allstate Insurance Company of Canada*, 2020 CanLII 30398 (ON LAT) ("*M.P.*") in support of its position.

[23] In *Dittmann*, the applicant went through the McDonald's Restaurant drive-through to purchase a coffee. She ordered her coffee and then pulled alongside the drive-through window where she paid for and was handed her coffee. The car was running at the time. She transferred the cup of coffee across her body to the vehicle's cup holder while holding it by its lid. During this process, the cup released from the lid. As a result, the coffee spilled all over the applicant's thighs. The applicant was seated in the vehicle and had her lap and shoulder harness on, which prevented her from taking any evasive action to avoid the spill or lessen the amount of coffee that spilled on her.

[24] At paragraph 16, the Superior Court of Justice found that:

> In the case before me the automobile was being used to allow the Plaintiff to acquire a hot beverage at a drive-through window of a fast-food restaurant. That the beverage might inadvertently spill is a normal incident of the risk created by that use. Accordingly, it cannot be said to

> have been outside the "ordinary course of things" as would be the case with such intervening acts as a drive-through attendant deliberately throwing hot coffee on the claimant or the claimant falling ill due to impurities in the coffee that was served. Such intervening acts would not be a normal incident of the risk created by the use of the car and would effectively break the chain of causation.

[25] The Court of Appeal affirmed this decision and found that there was no intervening act. The respondent sought leave to appeal to the Supreme Court of Canada. The application for leave to appeal was dismissed (*Aviva Insurance Company of Canada v. Erin Dittmann,* 2018 CanLII 12956 (SCC)).

[26] In my view, the facts of this case are distinguishable form *Dittmann*. At the EUO, the applicant stated that, "Due to the lid not securely installed, the liquid spilled out, which caused me to -- to -- reactionary -- to drop the cup." The lid not being secured properly was mentioned a couple of times by the applicant. However, in his reply submissions, he refers to the fact that the applicant's legal representative in *M.P*. to the restaurant which states the lid was not properly secured because they properly train their staff. The applicant states that, "No such position has been raised by the applicant in this case." I find this to be contradictory because it is something that was raised at the EUO.

[27] I agree with the distinction made by the Tribunal in *M.P.* regarding the fact that the *Dittmann* decision does not mention the lid being improperly secured to the cup or that a restaurant employee was negligent in the securing of the lid. I also take that to mean these were not an issue in the *Dittmann* case.

[28] In my view, the fact that the lid was not secured properly was the intervening act that caused the injuries and broke the chain of causation. I find that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile. Rather, I find that his injuries resulted from an intervening cause, which was the improperly secured lid that caused the coffee to spill onto him.

Was the use or operation of the automobile a dominant feature of the applicant's injuries?

[29] As described in *Greenhalgh*, the "dominant feature" consideration requires an adjudicator to determine what element of an incident is "the aspect of the situation that most directly caused the injuries." For instance, in *Greenhalgh*, the incident involved the insured person suffering from severe frostbite after getting her vehicle stuck on a country road. In dismissing the claim of an "accident"

Justice Labrosse found, that "the 'dominant feature' of the insured's injuries could be best characterized as exposure with the elements, and that the use of the motor vehicle was ancillary to that injury."

[30] The applicant did not provide clear submissions on whether the use or operation of the vehicle was a dominant feature of his injuries.

[31] The respondent submits that the lid was a dominant feature that brought about the applicant's injuries and that without said lid, the applicant would not have dropped the cup.

[32] I find that the use or operation of the automobile was not the dominant feature of the applicant's injuries. The dominant feature that caused the applicant's injuries was the improperly placed lid, which resulted in the coffee spilling on the applicant. It is trite law that direct causation requires more than the motor vehicle simply being the reason or destination for why the applicant was present at this location where the incident occurred (*Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107).

[33] In my view, the applicant's injuries were not as a result of any uninterrupted chain of events without the assistance of any other act or intervention of any other force. The direct cause was the improperly placed lid. If the lid had been placed properly on the cup, then the coffee would not have spilled in his lap and groin area. This broke the chain of events from his ordinary use of the vehicle. In my opinion, the improperly placed lid was an intervening act that took place and was the direct cause of the applicant's injuries. The vehicle was not the dominant feature of this incident, rather the improperly placed lid was.

[34] Accordingly, I cannot conclude the use or operation of an automobile directly caused the applicant's injuries. Thus, this incident does not meet the definition of an "accident" as per s. 3(1) of the *Schedule.*

ISSUE #2

[35] Even if I am wrong about finding that the applicant was not involved in an accident, I would find that he is barred because he did not with the prescribed timelines in the *Schedule*.

Relevant Legislation

[36] Pursuant to section 32(1) of the *Schedule*, a person who intends to apply for statutory accident benefits shall notify the insurer of their intention no later than

the seventh day after the circumstances that give rise to the entitlement to the benefit, or as soon as practicable after.

[37] Once an insurer receives notice of an applicant's intention to apply for statutory accident benefits, the insurer must provide the applicant with the appropriate OCF-1 forms, a written explanation of the benefits available, information to assist the person in applying for benefits and information on the election relating to the specified benefits, as required by section 32(2). Pursuant to section 32(5) of the *Schedule*, the applicant must then submit a completed and signed application for benefits to the respondent within 30 days after receiving the forms.

[38] I note that section 34 of the *Schedule* states that "a person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation." The interpretation of "reasonable explanation" is guided by *Horvath and Allstate Insurance Company of Canada*, FSCO A02-000482, June 9, 2003, and was more recently reiterated in *K.H. vs Northbridge*, 2019 CanLII 101613 (ON LAT). The guiding principles are summarized as follows:

1. An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.

2. The onus is on the insured person to establish a "reasonable explanation."

3. Ignorance of the law alone is not a "reasonable explanation."

4. The test for "reasonable explanation" is both a subjective and objective test that should take account of both personal characteristics and a "reasonable person" standard.

5. The lack of prejudice to the insurer does not make an explanation automatically reasonable.

6. An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the claimant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.

[39] The applicant testified at the EUO that he sought legal advice in September 2021. However, the respondent was notified of the accident when it received the OCF-1 on March 21, 2022. The applicant submits that the reason for the delay is primarily due to the circumstances of the incident. The reason for the delay provided at the EUO was:

> Well, the -- you know, it kind of goes back to, you know, I had -- I understand it happened within a vehicle, but my -- my first mind or my first reaction was not that this could be anything that could be covered under my car insurance policy. So, it was really just until I had those conversations with Michael about the possibility this -- you know, accident benefits being covered through car insurance and that there was a bit of precedent that that had happened. That's what kind of triggered the –- the application at that point.

[40] The applicant submits that "it was not until the applicant received a legal opinion that he discovered that he could apply for accident benefits as a result of the incident. As such, as soon as he received this opinion, the applicant proceeded to arrange for the submission of an OCF-1 to initiate the claim process. As such, due to these unusual circumstances, in the position of the applicant that this explanation is credible and worthy of belief."

[41] I do not find this explanation credible or worthy of belief. The applicant had retained experienced legal counsel within weeks of the incident. It is unclear why it took almost seven months to notify the respondent. The *Dittmann* decision was released years ago and was not a new development. In my view, the applicant's explanation for the delay is not reasonable. As such, I find that the applicant did not notify the respondent within the timelines prescribed under the *Schedule* or provide a reasonable explanation for failing to do so.

[42] While I agree that the *Schedule* is consumer protection legislation, it is the applicant's responsibility to comply with the procedural requirements for making an accident benefits claim. In my view, the applicant did not comply with the timelines set out in section 32 of the *Schedule* nor did he provide a reasonable explanation under section 34.

[43] As I have determined that the applicant failed to provide a reasonable explanation for the delay in notifying the respondent regarding the circumstances that gave rise to the entitlement to the benefit, I find that it is unnecessary to consider the issue of whether the OCF-1 was submitted in accordance with section 32(5) of the *Schedule*.

ORDER

[44] The applicant has not demonstrated the incident on August 17, 2021 constituted an "accident", as defined in s. 3(1) of the *Schedule*.

[45] The application is dismissed.

Released: July 4, 2023

Tavlin Kaur
Adjudicator