Citation: Parviz v. Economical Insurance, 2023 ONLAT 22-009743/AABS-PI

Licence Appeal Tribunal File Number: 22-009743/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:

Reza Parviz

Applicant

and

Economical Insurance

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Applicant:	Ziv Tsimerman, Counsel Emma Vleming, Counsel
For the Respondent:	Laila Khalil, Counsel

Heard by way of written submissions

OVERVIEW

[1] Reza Parviz, the applicant, was involved in an incident on June 25, 2022, 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, Royal & Economical Insurance Company ("Economical) and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is whether the applicant is barred from advancing this LAT application because the applicant's injuries are not from an accident, pursuant to section 3(1) of the *Schedule*.

RESULT

[3] The applicant is barred because his injuries are not from an accident.

ANALYSIS

Background

[4] The applicant is an Uber driver. On June 25, 2022 at 3:00 a.m., the applicant's vehicle was stopped at the intersection of Lakeshore Blvd and Third Street. He was in the driver's seat of his vehicle waiting to pick up an Uber passenger. He cancelled the ride because the individual who booked the ride did not show up. He was waiting in his vehicle for the cancellation to be confirmed through the Uber app.

[5] As he was waiting, a man wearing a hoodie and a mask approached the vehicle with a large dog. It is alleged that the man was carrying a sharp, unidentified object in his hand. The man opened the applicant's door and released the dog on the applicant. The dog bit the applicant. The applicant was dragged out of the vehicle by the man. The man stole the vehicle and fled the scene.

[6] The applicant sustained physical and psychological impairments as a result of the incident. The applicant submits that this constitutes an accident under the *Schedule*.

[7] The respondent submits that the incident does not constitute an accident pursuant to section 3(1) of the *Schedule*.

Was the incident an "accident"?

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

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

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

[11] 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?

[12] 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?

[13] 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 the following considerations:

i. The "but for" consideration can act as a useful screen to eliminate irrelevant causes;

ii. The "intervening act" consideration 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,

iii. 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

[14] 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. As the applicant is an Uber driver, I find that stopping his vehicle to pick up and drop off a passenger was part of the ordinary use and

operation of an automobile. Similarly, sitting in his idle car waiting is an ordinary and well-known activity to which automobiles are put.

[15] However, I do not find that the applicant meets the second stage of the *Greenhalgh* framework.

The Causation Test

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

[16] I find that the applicant meets this ground under the causation test. He would not have been assaulted by the passenger but for the fact he was waiting in his car to pick up the passenger or, rather, waiting for the cancellation to go through. However, the "but for" test does not conclusively establish legal causation, the cause that attracts legal liability.

[17] As Laskin J.A. noted in *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." Legal entitlement to accident benefits "requires not just that the use or operation of the car be a cause of the injuries but that it be a direct cause."

Was there an intervening act?

[18] I find that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile. Rather, they were caused by an intervening act, which was the assault by the unidentified individual and his dog.

[19] The applicant submits that there is no question that a carjacking and the related assault constituted an intervening act. However, the applicant submits that the intervening act was a foreseeable risk related to operating an automobile in Toronto at 3:00 a.m. in downtown Toronto. The applicant asserts that his injuries were caused by the carjacking, which was a foreseeable risk. Therefore, the chain of causation was not broken.

[20] The respondent submits that the applicant was sitting in his car when he was assaulted by the attacker and dog. His physical injuries were not directly caused by the use or operation of his vehicle, but rather caused by an intervening act in the form of the physical assault and attack by the dog. These incidents cannot be said to be part of the ordinary course of the use or operation of the vehicle.

[21] The jurisprudence regarding assaults has been very clear that an assault is not considered to be an automobile accident because it severs the chain of causation. For example, in *Downer v. The Personal Insurance Co.,* 2012 ONCA 302, the Court of Appeal found the plaintiff's injuries were not directly caused by the use or operation of his vehicle, but rather were caused by an intervening act

in the form of an assault that cannot be said to have been part of the "ordinary course of things."

[22] Here, I find the use or operation of the automobile was not the direct cause of the applicant's injuries, but rather, the assault by the unidentified attacker and his dog was the cause. Accordingly, it cannot be said that the assault was part of the "ordinary course of things" or a "normal incident of the risk created by the use or operation of the car". Although the applicant's vehicle happened to be the location of the assault, it did not cause the impairment. The use or operation of the vehicle was ancillary to the assault.

[23] The applicant has submitted excerpts from the Toronto Police Services and CBC news as evidence of an increase in automobile theft. However, I am not persuaded that the average driver in Ontario expects to run the risk of being assaulted or bit by a dog while behind the wheel or that being assaulted or bit by a dog is a "normal incident of the risk" associated with driving or part of the "ordinary course of things" while operating a vehicle. Similar to the reasoning of Justice Lofchik in *LaFond v. Allstate Insurance Company of Canada*, 2006 CanLII 40104 (ON SC), I find it difficult to believe that our society has degenerated to such a point where this type of injury may be anticipated when operating a motor vehicle.

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

[24] I find that the use or operation of the automobile was not the dominant feature of the applicant's injuries.

[25] The applicant submits that the "dominant feature" of the incident was the use of the applicant's vehicle, as a car-jacking and related assault could not have occurred, by definition, without the use of a vehicle.

[26] The respondent submits that use or operation of the applicant's automobile was not the dominant feature of his injuries. The dominant feature of the subject incident that caused the injuries was the assault by the attacker and his dog.

[27] 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." I find this rationale applicable here, where it is clear that the dominant feature of the incident was the attack by the dog biting his left leg, which resulted in physical pain, as well as the assault being a traumatic event, which resulted in his psychological impairments.

[28] While not binding on me, I am persuaded by similar reasoning in *Sorouri v. Intact Insurance Company*, 2022 CanLII 92722 (ON LAT) where the Tribunal determined that the dominant feature of the incident was the assault, which is what directly caused the applicant's alleged injuries.

[29] Finally, the applicant did not provide any evidence that shows that the use or operation of the automobile was the dominant feature of the incident. Nor did the applicant provide any medical evidence that shows that the use or operation of the automobile caused his injuries. However, the respondent submitted medical evidence that shows that the applicant's complaints stem from where the dog bit his leg. Based on the medical evidence that is before the Tribunal, I find the applicant's injuries were caused by the assault and dog bite, which was the dominant feature of the incident which led to the applicant's impairments.

ORDER

[30] I find that the June 25, 2022 incident did not meet the two-part test to determine whether an incident is an "accident". Therefore, any impairments the applicant may have sustained as a result of the June 25, 2022 incident did not result from an "accident" as defined in section 3(1) of the *Schedule*.

[31] As a result, the applicant is not entitled to accident benefits.

[32] The application is dismissed.

Released: December 19, 2023

Tavlin Kaur
Adjudicator