Citation: Li v. Economical Insurance Company 2024 ONLAT 23-009664/AABS-PI

Licence Appeal Tribunal File Number: 23-009664/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:

Yun Hao Li

Applicant

and

Economical Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Ulana Pahuta**

APPEARANCES:

For the Applicant: Emma Vleming, Counsel
Ziv Tsimerman, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Yun Hao Li, the applicant, was involved in an incident on January 19, 2023 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the "Schedule")*. The applicant was denied certain benefits by Economical Insurance Company, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is:

i. Was the applicant involved in an "accident" pursuant to s. 3(1) of the *Schedule*?

RESULT

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

BACKGROUND

[4] The parties are in agreement as to the majority of facts surrounding the incident on January 19, 2023. Both parties agree that the applicant is a self-employed auto mechanic and owned and operated the auto-shop where the incident took place. The applicant had WSIB coverage for his employees, but this policy did not extend to him as the owner of the shop. The applicant's personal vehicle was insured by the respondent, but was not involved in the incident.

[5] The night before the incident a customer called stating that his vehicle, which had been repaired earlier that day, was leaking oil. The applicant instructed the customer to have the vehicle towed to the garage that night. The following morning the applicant attended the garage to inspect the vehicle. He lifted the hood and saw nothing wrong. The vehicle was then raised approximately two meters off the ground, using a hoist machine. The applicant submits that the keys remained in the ignition and the vehicle remained in neutral, although it does not appear that the vehicle was running.

[6] The applicant stepped underneath the vehicle to further inspect it but within seconds, the car started to drop. The applicant was struck by the car as it fell from the hoist.

[7] The respondent argues that the January 19, 2023 incident was not an "accident" as defined in s. 3(1) of the *Schedule*.

ANALYSIS

Law

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

[9] 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, despite this preliminary issue being raised by the respondent.

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

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?

[11] 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 CanLII 21045 (ONCA). Put another way, for what "purpose" was the vehicle being used at the time of the incident?

[12] 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:

i. The "but for" consideration;

ii. 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,

iii. 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".

Was the incident an "accident"?

[13] I find that the applicant has not established that the incident that occurred on January 19, 2023 was an "accident" as defined in s. 3(1) of the *Schedule*.

Purpose Test

[14] The respondent submits that the applicant has not satisfied the purpose test, arguing that standing underneath a vehicle is not an ordinary and well known activity to which automobiles are normally put. It further argues that inspection related to planned vehicular maintenance is different from inspection for running repairs, and that such planned maintenance is not considered an ordinary and well-known activity.

[15] It relies on the FSCO decision *Olesiuk and Kingsway* (2011) (FSCO A10-002609) where a claimant was injured while doing bodywork on his vehicle, to argue that when one is repairing a vehicle, he or she is not "using" the vehicle. The respondent further cites *M.R. v. Wawanesa Insurance*, 2020 CanLII 69922 (ONLAT) where the Tribunal held that planned repairs, such as switching winter tires to summer tires did not to constitute use or operation of a vehicle.

[16] I find that the applicant has satisfied the purpose test. The subject incident involved inspecting the vehicle for repairs. I agree with the applicant that the recent decision *Northbridge General Insurance Corp. v. Jevco Insurance*, 2024 ONSC 1520 (CanLII) expressly holds that having an automobile repaired is within the ordinary and well-known activities to which automobiles are used. Further, although the respondent relies on *Olesiuk* and *M.R.* which cite the fact that that the vehicles were not in "use" during the repair or had been disabled with the wheels off, the Court in *Northbridge* held that with respect to the purpose test, the vehicle does not have to be operational and no active component is required.

[17] The respondent also makes the distinction between "planned maintenance" and "running repairs", arguing that planned maintenance does not meet the purpose test. Although I am not persuaded that this distinction is determinative, I agree with the applicant that the present circumstances are akin to a running repair. The vehicle was brought to the garage because it was leaking fluids following maintenance. The applicant was inspecting the leak in order to repair it. As such it is comparable to the examples cited in *M.R.,* such as repairing a blown tire, gassing up, or topping up fluids. Further, I note that the Tribunal confirmed in *Fehr v. Intact Ins. Co*., 2022 CanLII 14951 (ONLAT) that performing maintenance on a vehicle is one of the ordinary and well-known activities to which automobiles are put.

[18] As such, I find that the purpose test has been met.

Causation Test

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

[19] The respondent submits that there was no "use and operation" of the vehicle and as such, the "but for" test is not met. On my review of the evidence, I find that the applicant has met this branch of the causation test. "But for" the applicant inspecting the vehicle by standing underneath it, he would not have sustained his injuries.

[20] However, the "but for" test does not conclusively establish legal causation. As Laskin J.A. noted in *Chisholm v. Liberty Mutual Group,* 2002 CanLII 45020 (ON CA), the purpose of the "but for" test of causation is an exclusionary test which serves to "eliminate from consideration factually irrelevant causes […] the but for test does not conclusively establish legal causation." As such, the next step in the analysis turns to whether there was an intervening act that severs the chain of causation.

Was there an intervening cause?

[21] I find that the malfunctioning of the hoist was an intervening act, independent of the vehicle's use or operation, which broke the chain of causation.

[22] The applicant submits that while the hoist giving way is ultimately what caused his injuries, it all flowed from his inspection and maintenance of the vehicle. He argues that the hoist was actually being used on the vehicle for the inspection and that the inspection could not have been conducted without the hoist. As such, he contends that the facts in the present case are most similar to those in *Fehr,* where the claimant used a ladder to inspect the top of his truck. The ladder slipping, leading to his injuries, was not determined to be an intervening act.

[23] The respondent argues that a malfunctioning device used in conjunction with a vehicle is an intervening act sufficient to break the chain of causation. It cites *M.B. v. Certas Direct Insurance Company*, 2019 CanLII 130372 (ONLAT) where a claimant was injured when a tire popped on a dolly being used to load a fridge into a trailer. It was held that even though loading a trailer was a use and operation of the vehicle, the malfunctioning dolly broke the chain of causation.

[24] The applicant does not dispute that the hoist malfunctioned. In his Examination Under Oath he stated that he thought that the quality of the screws in the hoist

was the reason why the car fell. Although the applicant cites the Tribunal decision *Fehr* and argues that the failure of the hoist is akin to a ladder slipping, I find that the circumstances of this case are more akin to the malfunctioning dolly in *M.B.* I agree with the respondent that in *Fehr* the Tribunal expressly noted that there was no evidence of the failure of the ladder, stating "while there is no dispute that the applicant's ladder slipped away, there is no indication that the ladder malfunctioned…" In my view, the slipping of a ladder was distinguished from its malfunction.

[25] While the Tribunal in *Fehr* held that the slipping of a ladder was not outside the normal course of things, I do not find that the same can be said about the mechanical failure of the hoist. In the present case, deficient screws were believed to cause the hoist to malfunction. As per *Chisholm*, I do not see this as a normal incident of risk created by the inspection of the vehicle. I agree with the respondent that while in *Fehr* the slipping of a ladder may be a foreseeable risk when using the ladder to inspect a roof of a truck, the same cannot be said about a mechanical defect in the hoist itself.

Was the use or operation of the vehicle the dominant feature of the incident and the resulting injuries?

[26] I find that the use or operation of the vehicle was not the dominant feature of the incident.

[27] Pursuant to *Greenhalgh*, the "dominant feature" consideration requires a determination as to what element of an incident is "the aspect of the situation that most directly caused the injuries." The applicant submits that in the present case there is more than one dominant cause of the accident. He relies on *Fehr* to argue that it was the "series of events" that started with his inspection of the vehicle which was the direct cause of his impairments, satisfying the dominant feature test.

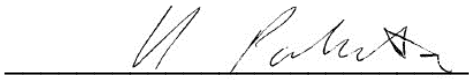
[28] I do not agree with the applicant that the inspection or use or operation of the vehicle is the direct cause of his injuries. Rather, the direct or dominant cause of the incident was the mechanical failure of the hoist. I agree with the respondent that had the hoist not broken, the incident would not have occurred. In my view, this is not an instance where there were multiple dominant features or a domino effect which began with the applicant inspecting the vehicle. The mechanical failure of the hoist was what most directly caused the applicant's injuries.

CONCLUSION AND ORDER

[29] The applicant has not established that the incident that took place on January 19, 2023 was an “accident”, as defined in s. 3(1) of the *Schedule*.

[30] The application is dismissed.

Released: May 1, 2024



Ulana Pahuta
Adjudicator