

**LICENCE APPEAL  
TRIBUNAL**

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

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**

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



**Citation: D.D. vs. Lambton Mutual Insurance Company, 2019 ONLAT 18-001597/AABS**

**Date: June 13, 2019**

**File Number: 18-001597/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:

**D.D.**

**Applicant**

**and**

**Lambton Mutual Insurance Company**

**Respondent**

**DECISION**

**VICE CHAIR:**

**DAWN J. KERSHAW**

**APPEARANCES:**

For the Appellant:

Karen Hulan, Counsel

For the Respondent:

Sonia S. Fabiani, Counsel

**HEARD: In Writing**

**December 7, 2018**

## REASONS FOR DECISION

### OVERVIEW

- [1] On April 11, 2017, the applicant's husband, Mr. D., was taken in a wheelchair transit van to a hospital for dialysis. When disembarking, the lift was not elevated and Mr. D's wheelchair fell backwards out of the van and tipped, causing him to hit his head and back on the pavement.
- [2] Mr. D. was taken to the emergency room. He had back pain and was concussed. After the fall, he refused dialysis and as a result died on April 20, 2017.
- [3] The applicant is Mr. D's wife [D.D.]. She seeks funeral and death benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). Her claims were denied by the respondent and she submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal") for dispute resolution.
- [4] Both parties agree that the operation of the motor vehicle was a cause of the accident.

### ISSUE

- [5] The question to be determined in this written hearing is the causation test, specifically, whether Mr. D's death was directly caused by the accident. If so, then the applicant is entitled to funeral expenses and death benefits.

### FINDING

- [6] I find that Mr. D's death was directly caused by the accident, and the applicant therefore is entitled to funeral expenses and death benefits for the following reasons.

### THE LEGISLATION – “ACCIDENT”

- [7] Sections 26(1) and 27(1) of the *Schedule* provide for death and funeral benefits as follows:

#### Death benefit

- 26. (1) The insurer shall pay a death benefit in respect of an insured person who dies as result of an accident,
  - (a) within 180 days after the accident; or

- (b) within 156 weeks after the accident, if during that period the insured person was continuously disabled as a result of the accident.

#### Funeral benefit

27. (1) The insurer shall pay a funeral benefit in respect of an insured person who dies as a result of an accident.

- [8] Section 3 of the Schedule defines “accident” as follows:

“accident means an incident in which the use or operation of an automobile directly causes an impairment [...]”

- [9] In considering whether Mr. D’s death was caused directly by the accident, the parties agree that the question to be determined is whether it would have occurred “but for” the use of the motor vehicle.

- [10] I first turn to the facts in this case.

#### FACTS

- [11] Mr. D. was 72 when he died, and had a lengthy history of medical issues. He had been receiving dialysis three times a week in Sarnia since 2005 because of end stage renal disease caused by diabetes. He had a leg amputated in each of 2009 and 2014. His past medical history also included peripheral vascular disease; hypertension; obesity; previous cardiac arrest secondary to infective endocarditis; chronic obstructive pulmonary disease; deep vein thrombosis in 2005; upper GI bleeds in 2005 and 2015 secondary to peptic ulcer disease; atrial fibrillation; septic shock in July 2015; and, MRSA bacteremia in April 2016.
- [12] On March 27, 2017, he was found to have a dialysis line infection and therefore had to travel to London to get his dialysis until the infection cleared. The day of the accident, April 11, 2017, was his last day to have dialysis in London. He was then to resume dialysis in Sarnia. Instead, he was admitted to hospital after the fall.
- [13] After the fall from the transit van, the hospital clinical notes and records (“CNR”) set out the following relevant facts:

Apr 11/17	Nausea, vomiting, hypertension, headaches; + back pain, present prior to fall but [increased]; came for dialysis after but due to continued pain, nausea dialysis was stopped; headache after head trauma; likely concussion; [dialysis] not tolerated well [due to] back pain, low BP & nausea
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Apr 11/17 He wanted to [word?] dialysis [because] of pain

Apr 12/17 Concussion; complains of back pain;

Apr 13/17 [patient] in ++ back pain; agreeable to dialysis today; [later in the day] complaints of 8/10 back pain; Unsure if he can tolerate dialysis; back pain; Tylenol, 2 mg hydromorph

Apr 14/17 Chronic [hemodialysis] patient admitted fall from wheelchair/head injury; No acute issues but ++ pain

Apr 14/17 Pain control is paramount; if pain is controlled, he would continue dialysis; [increase hydromorphone](add contin);

Apr 15/17 Back pain not improved since yesterday; having difficulty breathing

Apr 16/17 Still [complaints of] diffuse pain all over

Apr 17/17 Active issues 1. Pain; wishes to stop dialysis

[14] On April 12, 2017, the clinical notes show that Mr. D spoke to the nursing staff about thinking about his mortality since the passing of a close friend a week and a half prior. He stated he hoped his considerable and debilitating pain could be managed and he could be discharged home. He stated his wish to remain in his home as long as he could with his symptoms being managed conservatively.

[15] On the same date, the notes show that Mr. D also talked about how his health continued to fail in the past year leaving him with a minimal quality of life. He expressed frustration and resignation that his health was going to continue to fail, and expressed that he was tired of this. He complained of pain in his back and shoulders, but stated it had improved since the fall. He expected to return home and continue with his current level of functioning though he saw no positive changes in his life moving forward.

[16] On April 18, 2017, Mr. D talked to Dr. Burke in the hospital about end of life measures. Her notes from that conversation state that Mr. D felt that the fall from the van was “the straw that broke the camel’s back”. He indicated his thinking had changed since this event. He admitted the intensity of his back pain

was overshadowing all else and described it as “over the roof”. He wanted to be given morphine and permitted to die. He also voiced his frustration that he could not be the man he felt he should be and could not provide for and protect his family. He stated he could not expect his wife to look after him.

- [17] Mr. D’s children and wife provided affidavit evidence in which they stated that before the fall, Mr. D had never expressed any desire to end dialysis; had a catheter inserted in March 2017 rather than end dialysis then; found joy in family, friends and his farm; frequently visited his children and grandchildren; visited with fellow farmers and friends at fast food restaurants; continued engaging in financial aspects and managing of the farm when he could no longer physically farm; attended farming auctions in 2016 with his son and intended to attend more in 2017; bought a truck in 2016 and researched how to adapt it to his physical needs; in the months before he fell, talked about modifying a golf cart so that he could move around the farm and visit neighbours more easily.
- [18] After the fall, Mr. D received dialysis at least three times (for one hour on April 11; April 13; and April 15) before refusing on April 18, 2017. He died two days later on April 20, 2017. It is not clear from the medical records whether Mr. D also had dialysis on April 14 as he had indicated he would do so only if his pain was controlled, and it appears his pain was not controlled.
- [19] I turn now to the determination of whether, in light of these facts, Mr. D’s death was directly caused by the accident.

## ANALYSIS

### Causation Test

#### i. Would the incident have occurred “but for” the use or operation of the vehicle?

- [20] The parties agree that the “but for” test is the proper test to apply when determining whether Mr. D’s death was directly caused by the accident.<sup>1</sup>
- [21] The applicant argues that the “but for” argument will only fail if the accident was not a contributing factor to the death. The applicant submits that the accident does not have to be the only cause of the death, and if the accident set a chain of actions into motion that led to the death, then the death is a direct result of the accident. Specifically, the applicant argues in this case that the accident set into motion Mr. D’s pain, which resulted in his refusing dialysis, which in turn resulted in his death.

<sup>1</sup> See: *Chisolm v. Liberty Mutual Group*, (2002) 60 O.R. (3d) 776 (ON CA); *Greenhalgh v. ING Halifax Co.*, (2004) O.J. No. 3485 (ON CA); *Economical Mutual Insurance Co. v. Caughy*, 2016 ONCA 22

- [22] The respondent on the other hand argues that the fall did not trigger a chain of events leading to Mr. D's death; that although he had some complaints of back pain and possibly a concussion, his pain was noted to have improved after the fall; that he would not have died if he had continued his dialysis; and that he did not die from his pain. The respondent argues that Mr. D, in light of his belief that he had no quality of life, chose to end his life by suicide.
- [23] I agree with the applicant that Mr. D's death resulted ultimately because of his pain from the fall from the transport van, which in turn led him to refuse dialysis. The fall does not have to be the only cause of the death, and it can be the result of a chain of events<sup>2</sup> precipitated by the accident, in this case the fall. My reasons are set out, below.
- [24] I do not accept the respondent's argument that Mr. D chose to commit suicide, nor do I accept that his death was too remote from the fall.
- [25] While Mr. D's quality of life had deteriorated gradually and he spoke about that on April 12, 2017, he also said at the same time that he expected to go home. He also talked about mortality and contemplating the end of his life following a friend's death, but in the same conversation again said he hoped that his pain could be managed and he could be discharged home. In addition, these thoughts offending his life occurred after his fall from the vehicle. There does not appear to have been any evidence of any suicidal thoughts prior to the fall. Therefore, I find that Mr. D's death was not caused by his deteriorating quality of life (absent the fall), nor the death of his friend.
- [26] In addition, while the respondent pointed to an improvement in Mr. D's pain as of April 12, 2017 as evidence that it was not his pain that caused his death, this was the only occasion on which there was any reference to his pain improving. It is clear from the hospital records that Mr. D was in pain from the time of the fall and that he had little relief. He had 8/10 back pain on April 13; ++ pain on April 14 and said if his pain was controlled, he would continue dialysis; his pain did not improve on April 15; and on April 16, he reported diffuse pain. It is of particular note that Mr. D referred to the fall as being the "straw that broke the camel's back". He refused dialysis on April 18 and died on April 20. Given that Mr. D had said he would continue dialysis if his pain was controlled, I find that he refused dialysis because of his pain from the fall, which was not controlled.
- [27] As a result, I find on a balance of probabilities that the fall was a direct cause of Mr. D's death, and that the decision not to undergo dialysis was not an intervening act, but part of a continuous chain of events. The trajectory of events that followed the fall, including pain and it being the reason Mr. D felt he could not continue dialysis as his pain was so severe that he could not tolerate it, was

<sup>2</sup> See for e.g., *Andre v. ING Insurance Company of Canada*, FSCO A05-000513; see also: *16-001535 v. Wawanesa Mutual Insurance Company*, 2017 CanLII 69453; *ING Insurance Company v. Sohi*, FSCO Appeal P04-00026 (May 5, 2005) at pp. 10-11

in the range of what one could reasonably expect would occur as a result of the fall. Mr. D continued to have an expectation that he would return home, and he intended to continue dialysis if his pain was controlled. It appears from the medical records that his pain was not well-controlled<sup>3</sup> and it affected his ability to undergo dialysis. As a result, I find that the fall, which caused his uncontrolled pain directly caused his death because as a result of it, he refused dialysis.

## CONCLUSION

[28] For the above reasons, I order the respondent to pay the applicant:

- i. funeral expenses in the sum of \$3,162.10;
- ii. death benefits in the sum of \$25,000.00; and
- iii. interest on any overdue amounts of funeral and death benefits in accordance with the *Schedule*.

**Released: June 13, 2019**

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**Dawn J. Kershaw**  
**Vice Chair**

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<sup>3</sup> See Dr. Koivu's April 18, 2017 clinical note at Tab 8 of the Applicant's Submissions