LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Citation: P.H. vs. Aviva Insurance Company of Canada, 2020 ONLAT 18-010205/AABS

Released Date: 06/30/2020
File Number: 18-010205/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:

P. H.

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION AND ORDER

ADJUDICATOR: **Rupinder Hans**

APPEARANCES:

For the Applicant: Steven Arie Glowinsky, Counsel

For the Respondent: Cara L. Boddy, Counsel

Heard by way of written submissions.

OVERVIEW

[1] On November 14, 2016, the applicant was injured when she stepped onto her back patio to investigate the cause of a collision she had just heard and felt, which she later learned was caused by a motor vehicle. A motor vehicle had struck her house's back patio causing the patio to detach from the house. At the time, she was unaware that the back patio had detached, and when she stepped onto the patio, she fell though the space between her house and patio.

[2] The respondent took the position that the circumstances of the loss did not fall under the definition of an "accident" as defined by section 3(1) of the *Schedule*, and denied benefits sought by the applicant pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*").

[3] The applicant appealed to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal"), pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act"). A case conference was held, and the parties were unable to resolve the issues in dispute. A written preliminary hearing was scheduled to determine whether the incident is an "accident" as defined by the *Schedule*.

[4] A review of the evidence and submissions forms the basis for this preliminary issue decision.

I. PRELIMINARY ISSUE

[5] Was the applicant injured in an accident, as defined in section 3 of the *Schedule,* on November 14, 2016?

II. RESULT

[6] I find that the incident meets the definition of an "accident" as defined in section 3(1) of the *Schedule.*

III. DISCUSSION

A. <u>The Facts</u>

[7] The parties have submitted an agreed statement of facts, which I have relied upon in the decision. The relevant facts are set forth below.

[8] On November 14, 2016, the applicant was at home at about 3:00 o'clock in the afternoon. At approximately the same time, a gentlemen who was employed by

Enterprise Rent-a-Car (“Enterprise”) was cleaning a white Dodge Durango (the “Durango”) owned by Enterprise. This event was occurring in the general vicinity of the applicant’s residence.

[9] During the course of vacuuming the Durango, the vehicle started to move forward, and the gentlemen entered into the Durango, which started to pick up speed. He attempted to hit the brakes to slow down the Durango, but instead accidently hit the gas pedal. The result was that the Durango came into contact with a parked and unoccupied vehicle, then drove off the roadway and collided with the back patio of the applicant’s residence.

[10] The force of the impact caused significant damage to the back patio of the applicant’s house, resulting in the patio detaching from the house.

[11] The applicant did not observe the contact between the Durango and her back patio. She did, however, hear a loud noise and felt her house shake. Shortly after hearing and feeling the collision between the Durango and her back patio, the applicant decided to investigate. She approached the doors to her back patio, and opened the doors stepping out onto the back patio. She did not know that the patio had detached. When the applicant stepped onto the back patio, she fell through the space between the house and the patio that resulted from the impact of the Durango to the back patio. She fell 37 inches to the ground.

[12] She sustained various injuries as a result of this fall, including a right ankle fracture. She received medical attention for these injuries.

[13] Prior to the fall, the applicant was not an occupant of the Durango, nor did she come into contact with either the Durango or the unoccupied parked vehicle.

B. The Law

[14] In order to qualify for benefits under the *Schedule*, a person must be an insured person who was involved in an “accident.”

[15] Section 3(1) of the *Schedule* defines an “accident” as follows:

> An incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

[16] The two-part test to determine whether the applicant was involved in an accident was originally set out by the Supreme Court of Canada in *Amos v. Insurance Corporation of British Columbia*, (1995) 3 S.C.R. 405:

i. The purpose test: did the accident result from the ordinary and well-known activities to which automobiles are put?

ii. The causation test: is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

[17] In *Amos*, a direct or proximate causal relationship is not necessarily required between the injuries and the ownership or use or operation of a vehicle.

[18] Since *Amos*, while the purpose test has remained relatively constant, the case law has evolved with regards to the causation test. More specifically, the decisions in *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), *Downer v. The Personal Insurance Company*, 2012 ONCA 302, and *Economical Mutual v. Caughy*, 2015 ONSC 3251 (SCJ), have all framed the causation test more narrowly.

[19] In addition, section 3(1) of the *Schedule* requires a direct cause between the insured's injury and the use and/or operation of a vehicle.

[20] At this time, and as set forth in *Greenhalgh,* and reiterated in *Downer*, the causation test requires two questions to be answered:

i. Was the use or operation of the vehicle a cause of the injuries?

ii. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things?" In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the applicant's injuries.

[21] Finally, the applicant has the onus of establishing that her injuries were the result of an "accident."

C. Analysis

[22] Based upon the totality of the evidence presented, I find that the applicant has met her burden and established that the incident was an "accident" as defined in section 3(1) of the *Schedule*. Based upon a balance of probabilities, she has met both the purpose test and the causation test. My reasoning is below.

i. The Purpose Test

[23] The respondent asserts that the applicant cannot satisfy the purpose test and the proper question to ask is: "Is steering a runaway vehicle into a back patio an ordinary and well-known use of an automobile?" The respondent states that the answer to this question is "no." The respondent further submits that an incident where a person who slips and falls as a result of a damaged patio is not the kind of incident that would be in the reasonable contemplation of an automobile insurer when underwriting the risks associated with automobile use. It is a "non-ordinary or extraordinary" event and thus it should not attract automobile coverage. I do not agree. I believe the respondent defines the test too narrowly.

[24] Instead, as set forth in *Amos*, I believe that correct question is: "did the accident result from the ordinary and well-known activities to which automobiles are put." The applicant asserts, and I agree, that the motorist operating the Durango was in the process of operating a motor vehicle. Perhaps he was operating the motor vehicle in a negligent manner but, nonetheless, he was operating a motor vehicle. Operating a motor vehicle is an ordinary and well-known activity to which automobiles are put. I find that the applicant has met her burden and satisfied the purpose test.

[25] I do not find persuasive the FSCO cases cited by the respondent, *Irving v CGU Insurance Co.* (FSCO, Appeal, P03-00022, November 29, 2004) and *Intact Insurance Company v. Roberts* (FSCO, Appeal, P16-00009, March 15, 2017). They are both factually distinguishable and involve a cyclist being struck by a beer bottle thrown by a driver of a pickup truck and a claimant using the box and tailgate of a pickup truck to run and jump into a lake doing "cannonballs" when he was injured. In this case, the accident resulted from the operation of a vehicle.

[26] I find that the applicant has met the purpose test.

ii. The Causation Test

[27] I find that the applicant has met the causation test. I disagree with the respondent's assertion that any relationship between the applicant's injuries and

the use of the vehicle were indirect. I note that the space between the applicant's back patio and her house that she fell through existed due to the use and operation of a motor vehicle. For the reasons set forth below, I find that there was a direct causal link between the use and operation of the vehicle and the applicant's injuries.

[28] With regards to the test for causation, both parties rely upon *Greenhalgh v. ING Halifax Insurance Co.*, which provides the following considerations as guidance in determining whether or not the causation test is met:

i. The "but for" test.

ii. The "intervening act" consideration. An intervening cause that may serve to break the link of causation where the intervening events cannot be said to be part of the ordinary course of use or operation of the automobile.

iii. The "dominant feature" consideration. Was the use or operation of the automobile the dominant feature of the incident?

[29] The respondent concedes that the but for test is satisfied in this case.

[30] However, the respondent argues that the applicant is unable to satisfy the intervening act consideration. The respondent's arguments include that the use of the vehicle ended prior to the injury; the applicant did not come into contact with the vehicle prior to the injury-causing event; she did not witness the vehicle coming into contact with the back patio; and there is a temporal distance between the end of the use of the vehicle and the alleged injuries. The respondent submits that the incident does not meet the causation test as a common-sense approach of the facts of this case lead to the conclusion that an automobile was not a direct cause of the applicant's injuries.

[31] I disagree and find that the evidence before the Tribunal establishes that the automobile was a direct cause of the applicant's injuries and there was no intervening act. I note that the space between the applicant's back patio and her house, threw which she fell, existed as a direct result of the vehicle colliding with the back patio of her residence. Further, there is no requirement that the injury occur while the insured has physical contact with the vehicle or that it can only occur while the vehicle is in active use. I find that her injuries were a direct result of the use of a motor vehicle which impacted her residence's back patio, leading her to hear a loud noise and feel her house shake, leading her to investigate and fall. I agree with the applicant that this was an unbroken chain of events involving

the use or operation of an automobile leading to an injury. I find there is no break in the link of causation.

[32] The respondent relies upon a slip and fail case, specifically, *S.B. v. Aviva Insurance Company* (18-003869/AABS, February 19, 2019). I note that the evidence before the Tribunal does not establish a slip and fall. Instead, the applicant fell through the space between the house and patio. I do not find *S.B.* persuasive.

[33] The respondent further relies upon *Dominion of Canada General Insurance v. Prest* [2013] O.J. No. 18, in which the claimant had parked his vehicle in a parking spot at his residence in order to wash it. He exited his car and walked to the end of his car, tripping over a concrete curb that stuck out from the wall of the parking garage. The Court found that the use of the car had ended without injury being suffered and that, when the claimant tripped over the curb, this was a new intervening act, even though he was still touching the car at the time he tripped. The respondent posits that the applicant similarly tripped and fell after the use of the car had come to an end and that no injuries had been suffered by her at the time the vehicle had come to a stop.

[34] Again, I note that the agreed statement of facts makes no mention of the applicant tripping, or slipping, or her feet becoming entangled in something. Instead, “she approached the doors to her back patio and opened the doors stepped out onto the back patio” and “when she stepped onto the back patio, she fell through the space between the house and patio that resulted from the impact of the Durango to the back patio.” Even if I were to find that she slipped or tripped, which I do not, I still would not find that this was sufficient to constitute an intervening act given the unbroken chain of events present in this matter.

[35] Further, with regards to the respondent’s submission that the time lapse in the instant matter was significant as the car had come to a stop when it hit the back patio and the applicant’s fall occurred after the use of the car had ceased. I note that the agreed upon facts do not advise on the exact timing and, instead, state that “shortly after hearing and feeling the collision between the Dodge Durango and her back patio” she decided to go investigate. The wording would suggest that her investigation occurred “shortly after” she heard and felt the collision. I am not convinced that a significant amount of time had lapsed.

[36] The respondent further relies upon *Shah v. Primmum Insurance Co.*, [2015] O.F.S.C.D. No. 250, in which the claimant, Mr. Shah, fell and injured himself while running down the stairs in his house in order to get to his son who lay on the street after being struck by a car. Mr. Shah’s other son had awoken his

sleeping father. The respondent states that, despite the fact that the claimant learned of the accident only a minute after its occurrence, and was hurt as a result of his reaction, the incident was found not to be an accident as the connection between the slip and fall and the operation of the vehicle was not direct enough. This case is distinguishable. As noted by the Court, Mr. Shah did not see or hear or feel the impact and knew nothing of the accident until he heard about it from his son. This fact alone, the Court found, made the causal connection indirect. By contrast, in the instant case, the applicant heard and felt the collision and decided to investigate.

[37] More analogous, in my view, is *Grewal and Dominion of Canada General Insurance Company*, FSCO A03-000750. In that case, Mr. Grewal was in his house when he heard a loud noise and felt his home shake. Unbeknownst to Mr. Grewal, a motorist had mistakenly driven her vehicle into the left side of the garage of Mr. Grewal's home, causing damage to the house. He became concerned, ran from his bedroom towards the stairs and, in his rush, he tripped and slid towards the bannister before falling down the stairs. The finding was that the car hitting his house directly caused Mr. Grewal's subsequent injury and there was no intervening act. This entire sequence of events was one incident.

[38] With regards to the dominant feature, *Greenhalgh*, states that "in some cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the accident; if not, the link between the use and operation and the impairment may be too remote to be called 'direct.'" In this case, I find that the use and operation of the car was the dominant feature of the incident that caused the applicant to fall and sustain injuries. The vehicle caused an unbroken chain of events.

[39] I do not accept the respondent's argument that the dominant feature of the applicant's injuries was her slip and fall on the patio. I note that the injuries that the applicant sustained are a direct result of the vehicle hitting her house and detaching the patio. The vehicle cannot be said to be ancillary to her injuries.

[40] Similarly, I do not find convincing the respondent's assertion that the applicant would likely not have fallen had she looked at her surroundings prior to stepping out on the patio, and her failure to do so was the primary cause of her injury. In my view, to consider the dominant feature as a slip and fall or her failure to look at her surroundings to the exclusion of the vehicle is inconsistent with the facts. I find that the vehicle is the dominant feature, and its use and operation is what caused the injuries. I find direct causation is satisfied.

[41] For the reasons stated above, I find that the applicant has met her burden and established that the incident on November 14, 2016 was an “accident” as defined in section 3(1) of the *Schedule*.

IV. ORDER

[42] I order the following:

i. The applicant was in an accident as defined by section 3(1) of the *Schedule*.

ii. If the parties are not able to resolve the substantive issues in dispute within 30 days of receiving this decision, the applicant shall advise the Tribunal and seek to schedule a case conference.

Released: June 30, 2020

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Rupinder Hans
Adjudicator