Citation: Harland-Bettany v. Aviva Insurance Canada, 2022 ONLAT 21-005099/AABS - M

Licence Appeal Tribunal File Number: 21-005099/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Julie-Ellyn Harland-Bettany

Applicant

and

Aviva Insurance Canada

Respondent

MOTION DECISION

ADJUDICATOR: **Craig Mazerolle**

Written Submissions:

For the Applicant: Sherilyn Pickering, Counsel

For the Respondent: Geoffrey Keating, Counsel

Date of Order: **August 24, 2022**

BACKGROUND

[1] This decision concerns the preliminary issue raised by the respondent in the Notice of Motion filed on January 24, 2022:

> Whether the incident that occurred on February 5, 2017 was an "accident" as defined in s. 3(1) of the *Statutory Accident Benefits Schedule* (the "*Schedule*")[1]?

[2] A determination that an incident constitutes an "accident" will entitle the insured person to receive accident benefits from the insurer.

[3] Subsection 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".

[4] For the following reasons, I find that the respondent did not raise this preliminary issue in a timely manner. As such, I find the respondent cannot now challenge whether the incident was an "accident". Regardless, the incident is an "accident", pursuant to s. 3(1) of the *Schedule*.

INCIDENT

[5] The following account of the incident was provided by the applicant in an affidavit sworn on March 4, 2022.

[6] On the morning of February 5, 2017, the applicant drove to a cemetery with the intention of visiting her father's gravesite. This cemetery does not have specified parking spaces. Rather, visitors "are expected to park on the roadway near the grave and then walk from there." The network of private roads in the cemetery are narrow, and there is only about "a foot or two on either side." According to the applicant, "there were no areas that were not covered in snow" in the cemetery on that day.

[7] After parking near her father's gravesite, the applicant opened the door and began to get out of her vehicle. According to her affidavit, the following actions took place:

> I swiveled to get out of my seat to approximately ninety degrees from the steering wheel, place my right foot on the ground, and

[1] *Effective September 1, 2010*, O. Reg. 34/10.

> started to push up and out to exit the vehicle. As I pushed up, my body was bent at the knees and at the buttocks with my torso on an angle as I was moving from sitting to standing. My right hand was holding onto the door. As I pushed up, I slipped and fell. I never made it into a full upright position with both feet on the ground…
>
> […]
>
> Because of the angle and motion of exiting the vehicle, I landed on my low back, with my neck and back of my skull subsequently hitting the ground. I also hit my right hand on the inside of the car door.
>
> […]
>
> The car door was still open as I had not closed it yet.

[8] On February 8, 2017, the applicant completed an Application for Accident Benefits ("OCF-1"). She provided the following description of the incident to the respondent: "I attempted to exit my vehicle. I stepped out with one foot. As I attempted to step out with the other foot, I slipped… and fell."

TIMING OF PRELIMINARY ISSUE

[9] Both parties agree that this incident involved "ordinary and well-known activities to which automobiles are put". The parties' main disagreement is, therefore, over whether this activity was the direct cause of the applicant's impairments. Briefly, the respondent contended case law has found similar incidents have not been defined as an "accident", while the applicant argued the act of exiting her vehicle significantly impacted her fall.

[10] A further issue was raised by the applicant in her responding submissions over the timing of the preliminary issue. Despite its decision to pay benefits for several years after the incident, the applicant claimed the respondent did not raise this preliminary issue until the parties attended a case conference on September 29, 2021. The applicant argued too much time has passed for the respondent to now challenge whether the incident was an "accident".

[11] The respondent did not address this argument in its reply submissions, but it predicted this argument in an earlier submission by citing *C.S. v. Certas Home and Auto Insurance* ("*C.S.*").[2]

[12] The Tribunal asked for further written submissions from the parties based on this section of the applicant's submissions. The Tribunal also asked the parties whether s. 32 of the *Schedule* played any role in the dispute. It is the provision that addresses the steps insurers and individuals must follow when first applying for accident benefits.

[13] The respondent stated that this provision plays no role in the preliminary issue at hand, because s. 32 "does not address the definition of 'accident'". The respondent then submitted that arguments about timing "effectively amount to an argument of estoppel", yet the Tribunal has found it does not have the ability to grant this remedy.[3] Additionally, even if the Tribunal could apply this remedy, the respondent submitted that the Tribunal cannot "create insurance coverage where none otherwise exists." Finally, the respondent contended that the applicant has received a windfall from its decision to pay benefits, and there is nothing untoward about waiting several years to challenge whether an incident constitutes an "accident": see *Davis v. Aviva General Insurance Company* ("*Davis*").[4]

[14] The applicant highlighted the prejudice that she believes the respondent's delay has caused her, namely incurring the expense of catastrophic impairment assessments. The applicant also submitted that the Tribunal does have the ability to grant equitable remedies, including estoppel.

[15] I find the respondent did not raise this preliminary issue in a timely fashion, such that it has missed its opportunity to challenge whether the incident constituted an "accident" under the *Schedule*.

Section 32 and Applications for Accident Benefits

[16] There is no express provision in the *Schedule* that defines the time period for when an insurer can raise a concern about whether an incident is, in fact, an "accident". Yet, s. 32 of the *Schedule* defines the process that individuals and insurers must follow when first applying for accident benefits. This section also

[2] 2019 CanLII 51302 (ON LAT).
[3] *B.A. v. Economical Insurance Company*, 2021 CanLII 37842 (ON LAT).
[4] 2022 CanLII 45273 (ON LAT).

dictates the responsibilities an insurer has after receiving an application. Of particular note, ss. 32(5) – (8) provides:

> (5) The applicant shall submit a completed and signed application for benefits to the insurer within 30 days after receiving the application form.
>
> (6) If an insurer receives an incomplete or unsigned application, the insurer shall notify the applicant within 10 business days after receiving the application and shall advise the applicant of the missing information that is required or that the applicant's signature is missing, as appropriate.
>
> (7) The insurer shall not give a notice under subsection (6) unless,
>
> > (a) the insurer, after a reasonable review of the incomplete application, is unable to determine, without the missing information, whether a benefit is payable; or
> >
> > (b) the application has not been signed by the applicant.
>
> (8) If subsection (6) applies in respect of an incomplete application, no benefit is payable before the applicant provides the missing information or signs the application, as the case may be.

[17] In short, an individual involved in an accident must complete an application for accident benefits within 30 days of receiving an application form from an insurer. Upon receipt, the insurer has 10 business days to review the application and potentially inform the applicant that something in the application is missing. Section 32(7) also states that (unless the deficiency is a missing signature), the insurer must first conduct "a reasonable review of the incomplete application" before alerting the applicant that "without the missing information" it cannot determine "whether a benefit is payable". No benefit is payable pending a request for more information (or a signature) under s. 32(7).

[18] I highlight these provisions, because they provide a means for ensuring the timely receipt and adjusting of an initial application for accident benefits. They also specify what an insurer must do to remedy deficiencies it finds in an application, with a corresponding penalty if an applicant fails to comply.

[19] I will add that s. 34 is a remedial provision that allows a "person" who has missed a deadline under this Part of the *Schedule* to continue disputing a benefit.[5] I do not find this provision applies to insurers. There is a clear distinction between a "person" and an "insurer" in this Part of the *Schedule*, e.g., 32(1) states [emphasis added]: "A ***person*** who intends to apply for one or more benefits described in this Regulation shall notify the ***insurer***…".

Applying Section 32 to the Present Case

[20] The applicant applied for accident benefits within days of the incident. The description of the incident in her OCF-1 (dated February 8, 2017) mirrors the description she later provided in her March 2022 affidavit. On March 10, 2017, the respondent sent a letter to the applicant informing her of the accident benefits she was eligible to apply for at that time, including medical benefits and a non-earner benefit.

[21] According to s. 32, the period between the receipt of the OCF-1 and the release of this correspondence was when the respondent was required to determine if there was something missing in the application that left it unable to determine "whether a benefit is payable". Yet, despite its current contention that the incident is not an "accident", it never asked the applicant to provide further information, documents, etc. about the incident to determine if an "accident" had taken place. It could also have asked the applicant to attend an Examination Under Oath ("EUO") to find out more information about the incident.

[22] Instead, by relying on the description of the incident in her OCF-1, the respondent accepted the applicant was entitled to accident benefits. The respondent continued to pay the applicant these benefits for several years, all without any indication that it had reservations about whether this incident met the definition of an "accident".

[23] In fact, the applicant filed an application with the Tribunal to contest some of the respondent's denials on November 8, 2018, and—despite the application remaining before the Tribunal until October 2019—there was again no indication that the respondent had any issue over whether the incident was an "accident".

[24] There is an ongoing obligation on an insurer to continually adjust an insured person's claim, such that new information may come to light that alters the insurer's previous understanding of the "accident". For instance, an insurer could

[5] "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."

obtain information from an EUO that raises questions about an applicant's description of the "accident". Or, an applicant's varying descriptions of the "accident" to assessors may elicit concerns about the veracity of the OCF-1. These are all possible events, yet, in the present case, there is no indication of what changed between the respondent's acceptance of the incident as an "accident" in March 2017, and the case conference in September 2021. Instead, the incident described in the OCF-1 mirrors the applicant's description of the incident in her March 2022 affidavit.

[25] Again, there is no limitation period for when an insurer must raise concerns over whether an incident constitutes an "accident". Yet, the mandatory language of s. 32 cannot be swept aside, especially when there is no indication of what has altered an insurer's understanding of the incident in question. What is more, the respondent has accepted the applicant's claim for accident benefits for several years—a period that included an application to the Tribunal in 2018.

[26] As noted by the applicant, the *Schedule* is consumer protection legislation. This mandate would be imperiled if an insurer could disregard its obligations under s. 32, and then raise questions about an applicant's application years later. There are also concerns about procedural fairness, as delaying the adjudication of this fundamental question means evidence about the incident will deteriorate over time. All these factors lean in favour of finding this preliminary issue is untimely.

Respondent's Arguments

[27] Turning to its submissions, I do not find the respondent's arguments alter my analysis.

[28] First, I accept the fact that s. 3 is the operative provision in the *Schedule* for determining whether an incident constitutes an "accident". At the same time, this definition does not remove an insurer's obligations under s. 32. If anything, s. 3 provides a basis for understanding what "missing information" an insurer may need to ask for under s. 32(6) to assess the purported "accident" described in an OCF-1.

[29] Second, it is not necessary to determine whether the applicant's request amounts to a form of estoppel, nor is it an appropriate case to comment on whether the Tribunal has the ability to grant equitable remedies. Section 32 is a mandatory provision, and—similar to other breaches of the *Schedule*—there must be a corresponding remedy that upholds the consumer protection mandate. There is no need to engage equity in this analysis.

[30] For the respondent's concern about creating "insurance coverage where none otherwise exists", I will note that there are situations where benefits may be paid even when an insured person does not have access to particular pocket of funding. Most notably, s. 38(11)1 restricts an insurer's ability to rely on the *Minor Injury Guideline* when it has not complied with the notice provisions under ss. 38(8) and (9). Put simply, due to an insurer's breach of its procedural obligations, an insured person may access funding that would be otherwise unavailable.

[31] Finally, I do not accept the respondent's reliance on *Davis* and *C.S*. In *Davis*, there is no indication that the adjudicator considered the timing of the preliminary issue. Then, while the adjudicator in *C.S.* did speak to the timing of the issue, this case relied on whether estoppel could be engaged by the Tribunal. As noted above, I do not find this analysis is relevant to this case. Rather, the key determination is what role s. 32 plays in the initial adjusting of the claim.

[32] As a final note, my ruling does not deprive the respondent of the ability to raise other defenses related to the initial application for benefits, e.g., if evidence of material misrepresentation about the incident comes to light. However, in the present circumstances, I find the respondent had the opportunity to challenge whether the incident was an "accident", but it did not do so in a timely manner.

DEFINING AN "ACCIDENT"

[33] Even if I ignore the timing of the preliminary issue, I find the incident constitutes an "accident" under the *Schedule*.

[34] The Court of Appeal for Ontario's seminal decision in *Greenhalgh v. ING Halifax Insurance Co.* ("*Greenhalgh*")[6] provides a two-part framework that adjudicators should consider when making this determination:

a. Did the incident arise out of the use or operation of an automobile?

b. Did this activity directly cause the impairment?[7]

[35] The first stage (known as the "purpose stage") asks whether the incident involves "the ordinary and well-known activities to which automobiles are put".[8] Put another way, for what "purpose" was the vehicle being used for at the time of the

[6] 2004 CanLII 21045 (ON CA).
[7] *Ibid*, at para. 10.
[8] *Ibid*, at para. 11.

incident? As noted above, both parties agree this stage of the framework is satisfied. I find the applicant was exiting her vehicle at the time of the incident.

[36] The second stage (known as the "causation stage") requires the adjudicator to determine if these "ordinary and well-known activities" were the direct cause of the impairments. There is no mechanistic means of conducting this analysis, but the case law generally focuses on the following considerations:[9]

- The "but for" consideration screens out trivial acts and events that could not be a possible cause of the impairments;
- The "intervening act" consideration asks the adjudicator to determine if some other event took place that can better explain the cause of the impairments; and,
- Finally, when faced with a number of possible causes, the "dominant feature" consideration focuses on whether the ordinary and well-known activity at issue is what "most directly caused the injury".

[37] Again, there is no mechanistic analysis at play, such that meeting a certain number of considerations will render an event to be an "accident". Instead, these tools are meant to be used in a common-sense fashion to allow a decision-maker to effectively analyze the facts at issue. Further, I am not bound by the Tribunal case law before me, as these cases are highly fact-specific.

Parties' Submissions

[38] The respondent challenged the claim that the incident was an "accident" by citing case law that has found similar circumstances do not meet the definition under s. 3(1) of the *Schedule*. Briefly, these cases have used the "intervening act" and "dominant feature" considerations to find that slip-and-falls caused by icy conditions do not meet the definition of an "accident". The facts of these cases, in the respondent's words, "are functionally analogous to the present matter". The respondent also submitted that almost all of the medical records state the applicant did not strike the vehicle during her fall.

[39] The applicant disputed the respondent's position by claiming that this analysis is highly fact-specific. While it may highlight similar cases involving ice, these cases miss a key aspect of the incident, i.e., the applicant had no choice but to exit her vehicle at the location where she did. According to her submissions, she "had to park her vehicle along that narrow roadway, exit onto the snow, then walk to the

[9] *Ibid*, at paras. 37 – 49.

nearby grass." The act of exiting her vehicle was ongoing, and it contributed to her fall.

[40] In its reply, the respondent added that there is no evidence to support the applicant's assertion that she had to park her vehicle where she did in the cemetery.

Analysis

[41] First, I am satisfied that the low threshold of "but for" has been met, as the incident would not have happened "but for" the applicant's act of exiting the vehicle.

[42] Then, while the respondent argued that the ice was an "intervening act" that disconnected "the ordinary and well-known" activity from the fall, I am satisfied that this consideration is of limited use in this case. For instance, if this logic was applied to highway driving, could it not be said that a driver spinning out of control on an icy freeway was not involved in an "accident"? Pushed further, could it not be said that a driver who loses control of their vehicle while pulling into an icy parking space was not involved in an "accident"? These hypothetical interpretations would be absurd, so I am not persuaded that this consideration is the best tool to understand this kind of incident.

[43] Instead, I find the "dominant feature" consideration is the most helpful. As described in *Greenhalgh*, this consideration requires an adjudicator to determine "the aspect of the situation that most directly caused the injuries."[10] In *Greenhalgh*, the incident involved the insured person suffering from severe frostbite after getting her car stuck on a country road. Justice Labrosse found, *inter alia*, that "the 'dominant feature' of the insured's injuries could be best characterized as exposure to the elements, and that the use of the motor vehicle was ancillary to that injury."[11]

[44] In the present circumstances, I am satisfied that both the ice and "the ordinary and well-known" activity of exiting a vehicle were the equally dominant features of the incident. Not only is there a greater proximity between the applicant and her vehicle than in many of the cases cited by the respondent[12], but I find the presence of her vehicle was not "ancillary" to the incident. Put another way, when I consider the applicant's account of the incident in her affidavit, I cannot say that

[10] *Greenhalgh*, at para. 49.
[11] *Ibid*.
[12] *C.S.* at para. 7; *B.Y. v. TD Insurance Meloche Monnex*, 2019 CanLII 27893 (ON LAT), at para. 8; *Oram v. Aviva General Insurance*, 2022 CanLII 4527 (ON LAT), at para. 16.

it would have transpired in the same way had it not been for both the ice and the ongoing exit from the vehicle:

> I swiveled to get out of my seat to approximately ninety degrees from the steering wheel, place my right foot on the ground, and started to push up and out to exit the vehicle. As I pushed up, my body was bent at the knees and at the buttocks with my torso on an angle as I was moving from sitting to standing. My right hand was holding onto the door. As I pushed up, I slipped and fell. I never made it into a full upright position with both feet on the ground…

[45] This is not a case where the applicant was approaching her vehicle and then fell, nor is it a situation where a part of her body happened to be touching the vehicle at the time, e.g., *R.M. v. Certas Direct Insurance Company*[13] and *Porter v. Aviva Insurance Company of Canada*.[14] Rather, I find the applicant's twisting movement during the ongoing exit acted in conjunction with the ice to create the circumstances that led to this incident, and, by extension, her injuries.

[46] By making this finding, I do not accept the reasoning in *Mahoney v. Co-operators General Insurance*.[15] This case involved a similar fall to the present incident, i.e., the applicant was exiting her vehicle in an icy motel parking lot. I depart with the reasoning in this case though, because I find the analysis does not accurately capture the scope of the "the ordinary and well-known" activity [emphasis added]:

> The fact that she was transported to an icy parking lot in her automobile and slipped on the ice upon exiting the vehicle does not make the incident part of the ordinary course of the use or operation of the automobile. ***The applicant's ordinary and regular use of her automobile ended once she started to exit it. The automobile itself was not the cause of the injury.*** The applicant's body did not strike the vehicle as she fell.[16]

First, I do not accept that the "ordinary and regular use" of an automobile ends once one has "started to exit" the vehicle. There is an ongoing activity that is not over until an individual has completed the exit. Second, the key determination for the causation stage is not whether the vehicle "itself was… the cause of the injury", but whether the activity or activities described in the purpose stage directly caused the impairments. In a similar vein, I find the dispute over whether

[13] 2019 CanLII 22204 (ON LAT).
[14] 2021 ONSC 3107 (Div. Ct.) (CanLII), at para. 6.
[15] 2020 CanLII 106434 (ON LAT).
[16] *Ibid*, at para. 22.

the applicant struck the vehicle during the fall is largely moot, because it is again the activity (not the vehicle itself) that is the proper focus of this determination.

[47] I also find the reasoning in *Khamis v. Unifund Assurance Company*[17] to be of limited assistance. In this case, the applicant was in the process of exiting the vehicle when he slipped on icy ground. Relying on the "intervening act" consideration, the adjudicator denied the incident was an "accident".

[48] Once again, I find the "dominant feature" consideration allows for a better incorporation of the "ordinary and well-known" activity of exiting into the analysis. Put simply, the "dominant feature" consideration does not focus solely on whether ice contributed to the fall, but it goes on to allow for a comparative weighing of the different features at play in the given incident.

[49] Ice clearly plays a role in all of these incidents. However, this finding alone does not end the analysis in the *Greenhalgh* framework. By considering the "ordinary and well-known activities" established in the purpose stage, I find this analysis must go further to determine how these activities may have also contributed to the incident. By stopping the analytical exercise with the finding that the ice contributed to the injuries, the adjudicator does not allow for the possibility that a number of other factors may be at play. This ability to account for and weigh different causes is the underlying value of the "dominant feature" consideration.

[50] Therefore, in the present case, I am satisfied that, while the ice played a role in the incident, so too did the ongoing activity of exiting the vehicle. Together, these factors were both the dominant features of the incident, and they, together, led to the applicant's injuries. In light of the consumer protection mandate, I find it may be necessary to consider more than one dominant feature. Returning to the description from *Greenhalgh*, the "dominant feature" consideration looks for "the aspect of the situation that most directly caused the injuries". I cannot say whether the ice or the exit "most directly caused the injuries". In light of this ambiguity, the consumer protection mandate directs adjudicators to accept the interpretation that best meets the remedial nature of the *Schedule*.

[51] With this principle and findings in mind, I am not satisfied that the remedial nature of the Schedule would be upheld if this ambiguity allowed for a situation where coverage was denied. Rather, in a case where both aspects equally contributed to the incident and, by extension, the injuries, the most appropriate interpretation is that both the ice and the activity of exiting the vehicle are the dominant

[17] 2021 CanLII 19498 (ON LAT).

features. With this finding, I am then satisfied that the incident is an “accident” within the meaning of the Schedule.

ORDER

[52] The respondent did not raise the preliminary issue in a timely fashion.

[53] The incident on February 5, 2017 constitutes an “accident” under the *Schedule*.

Released: August 24, 2022

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Craig Mazerolle
Adjudicator