A FLASH AT NEAR LIGHT SPEED

What is an "Accident"? Update on Recent Trends

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This paper will focus on The License Appeal Tribunal's interpretation of the statutory provisions relating to the definition of an accident.

Statutory Provisions

The Insurer's liability for payment of statutory accident benefits, resulting from an accident occurrence is derived from Part VI of the *Insurance Act*., R.S.O.1990, C. 1.8., ("The Act").

Pursuant to Section 268. (1) of the *Act* every contract evidenced by a liability policy shall be deemed to provide for the statutory accident benefits set out in the *Statutory Accident Benefit Schedule*, ("*SABS*"), subject to the terms, conditions, provisions, exclusions and limits set out in the relevant schedule.

SABS provides a definition of accident as an incident in which the **use and 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.

The terms "use and operation" and "directly causes" are not defined in the relevant legislation and we therefore rely on case law for guidance in their application.

However, Section 224 of the *Act* defines an automobile as follows:

"automobile" includes,

(a) A motor vehicle required under any Act to be insured under a motor vehicle policy, and
(b) A vehicle prescribed by regulation to be an automobile.

A. Use and Operation of an Automobile

A two part test is applied to determine whether the circumstance of an incident meets the definition of an accident. The first part of the test, (purpose test), requires an analysis of whether the incident resulted from the ordinary and well-known activities, to which automobiles are put.

Reference: *Amos* v. *Insurance Corp. of British Columbia*, (1195 Can LII 66 (SCC), [1995] 3 S.C.R. 405).

Purpose test – "Car Surfing is engrained in our Culture"

***I.C.* and *Intact Insurance Company*, October 19, 2017**

The Applicant sustained injuries when she fell off of the rear bumper of a moving vehicle. She was engaging in the activity known as "car surfing". The Applicant suffered severe injuries, including a significant head injury.

The adjudicator found that the Applicant was using the vehicle for entertainment purposes but that the Applicant's use of the vehicle was primarily for transportation, from point A to point B. We were not privy to evidence led as to whether the entertainment aspect outweighed the intent to be transported from one location to another.

In her application of the purpose test the Adjudicator commented that the schedule does not use qualifying words such as “aberrant”, “abnormal” or “offbeat” in the definition of an accident in section 3. The Adjudicator did not reference or acknowledge that the Supreme Court has incorporated an analysis of these terms in determining the ordinary and well known activities to which vehicles are put.

Reference: *Citadel General Assurance Co.* v. *Vytlingam* [2007] SCC46 (Can LII), per Justice Binnie.

Instead, the adjudicator relied on references in the *Highway Traffic Act*, which in effect make the activity of car surfing an offence. The adjudicator found that car surfing is engrained in our culture and that while illegal, it is not any more aberrant, abnormal or off-beat than speeding or texting while driving, which all do not disentitle a person to accident benefits. The adjudicator found that **the accident was a result of the ordinary and well-known activities, to which automobiles are put.**

The decision suggests that as long as a vehicle is in motion, (moving) that the purpose test will be met. The decision is in keeping with the Court in the Vytlingaman decision which essentially rules that the act of a vehicle being “driven” meets the purpose test: The aberrant act of diving off the platform, for example was only aberrant because the vehicle’s use and operation was not in keeping with that of a motorist.

The analysis is a departure from that of the Court of Appeal in *Economical* and *McCaughty*, which ruled that there is no **active use component** in the purpose test. (In the McCaughty case, the Applicant claimed benefits as a result of injuries he sustained from tripping on **a parked** motorbike).

Purpose Test! - Exclude Causation Issues

K.B.* and *Intact insurance Company

This case analyzes both the purpose test and the causation test.

The Applicant tripped in a pothole and fell in a parking lot at SkyZone while walking towards the vehicle with her keys in hand. She sustained a rotator cuff injury.

The adjudicator attempted to analyse the purpose test and even suggested that she may have got it wrong. [At paragraph 18 “If I am wrong in applying the purpose test…].

In her **analysis of the purpose test**, the adjudicator found that the fact of whether the Applicant had made *direct contact* with the vehicle was a determinative factor. The adjudicator commented on cases dealing with situations involving *intervening factors*. The adjudicator remarked that the

arbitrators had determined that the only *causal link* the motor vehicles had to the incidents, was the fact that they transported the insured to the location where the incidents occurred.

The writer respectfully suggests that the adjudicator may have strayed beyond the scope of analysis required for the purpose test. The factors listed in the preceding paragraph relate to the analysis under the causation test and not the purpose test, a test which only seeks to determine the purpose for which the vehicle was being used.

The Applicant's direct contact with the vehicle is not a determinative factor in deciding whether the vehicle's use and operation was consistent with the ordinary and well known use, to which vehicles are put. The adjudicator acknowledged that, as in the *McCaughty* case, a parked vehicle could meet the requirements of the purpose test. However, the adjudicator went on to reason that the Applicant in that, and similar cases, had made direct contact with the parked vehicle. In the writer's opinion whether or not the Applicant came into direct contact with the vehicle is a factor that is considered under the causation branch of the analysis. A similar criticism applies to the adjudicator's application of the factors relating to the intervening cause and causal link of the vehicle to the injuries sustained. Clearly the adjudicator overlooked the comments of Justice Hourigan of the Ontario Court of Appeal in the *McCaughty* case when he stated that the purpose test is not designed to determine whether a vehicle is involved in an accident.

As an aside, in the writer's opinion, an analysis of whether the Applicant met the statutory requirements of being an occupant, pursuant to section 224 of the *Insurance Act* may have been more fruitful. Such an analysis could perhaps have brought the adjudicator back on track to acknowledging that an individual does not have to be in direct contact with a vehicle to be determined an occupant, for the purposes of being entitled to accident benefits. Arguably, that section 3 of the *SABS* does not require the Applicant to be in direct contact with the vehicle, only that the **use and operation** of the vehicle **directly** causes impairment.

When the adjudicator reached her analysis of the causation test, the only remaining analysis was that of the dominant test and the aspect of time and proximity. Aspects of "The But For" test and "intervening cause" had already been dealt with under the branch of the purpose test. The adjudicator found that the Applicant had been away for a couple of hours, the activity she was engaging in was walking towards her parked car and that although she was close in proximity to the parked car when she fell, it was not enough to meet the test.

B. Direct Cause of an Accident

The causation test requires us to question whether the use and operation of the vehicle was a "direct cause" of the Applicant's injuries. The insured must establish that the use and operation of an automobile was the cause of the Applicant's injuries. Then, if the use and operation was the cause of

the Applicant's injuries, was there an intervening act (s) that resulted in the injuries that cannot be said to be part of the "ordinary course of things".

The courts have adopted a three prong test to assist in this determination: the "But For Test"; the "Intervening Act Test" and the "Dominant Feature" test.

Reference: *Greenhalgh* v *ING Halifax Insurance Company* (2004), 2004 CanLii 21045 (ONCA), leave to appeal refused.

Reference: *Chrisholm* v. *Liberty Mutual Group*, 2002 CanLii 45020 (ONCA).

The "But For" Test

***Applicant by her Litigation Guardian* and *Aviva*, July 31, 2017**

This case analyzes both the purpose test and the causation test.

The driver of a school bus left the insured, a 7 year old, wheel chair confined, special needs girl, suffering from cerebral palsy and quadriplegia, abandoned on a school bus, for approximately two hours. The driver picked the child up from her house, but instead of driving her to school, drove to his house, locked the bus and drove away in his personal vehicle. The child sustained psychological and mental injuries and impairment, as a direct result of the abandonment and applied for accident benefits.

The adjudicator rejected the Insurer's argument that the Applicant had not met the requirements of the purpose test, as the act of abandonment did not fall within the parameters of transporting disabled children to, and from, school. The adjudicator determined that the bus was being used in its ordinary and well known activity of transporting disabled children. The use of the school bus ended when the child was unbuckled from her seat, unloaded in the wheelchair out of the bus, which had not happened in this case.

With respect to the causation aspect of the claim, the adjudicator confirmed that the "but for test" does not on its own conclusively establish legal causation. A further analysis is required to establish whether the accident arose as a direct consequence of the **use** of the vehicle in its ordinary and well known activity. The adjudicator reasoned that as accidents can occur during the loading and unloading, then it follows that accidents can occur during the reverse, in this case the failure to unload.

In our opinion, whereas this reasoning may apply for cases dealing with unloading, it does not necessarily apply to cases with loading, as the act of use and operation of the vehicle could be deemed not to have commenced.

The adjudicator however, found the Applicant's psychological condition was triggered earlier, as soon as the bus left its regular route and this condition was exacerbated by being left on the bus. According to the adjudicator, there was an unbroken causal connection between the use of the vehicle and the injuries suffered by the Applicant.

Intervening Act Test

The Applicant must prove that there were no intervening act(s) that resulted in the injuries that cannot be said to be part of the "ordinary course of things".

***R.D.* and *Wawanesa Mutual Insurance Company*, September 28, 2017**

The insured was involved in a head on collision, a result of which the airbags deployed and the vehicle rolled over. The insured suffered a heart attack a short time after, in an auto repair shop and died within an hour of reaching hospital. The Coroner confirmed that death was as a result of Atherosclerotic Coronary Artery Disease, ("CAD"). The insured's family argued that the death was as a direct cause of the accident, which triggered the underlying and asymptomatic CAD.

The adjudicator applied the prongs of the test that the courts have previously used: "The But For Test", the" Intervening Cause" and the "Dominant Feature" test.

Under the "but for" prong of the test, the adjudicator outlined the preferred medical evidence. The adjudicator rejected the evidence that the insured would have inevitably suffered from a cardiac event, independent of the motor vehicle accident. The adjudicator found that stress from the accident could cause the insured death and determined that the accident directly caused the trigger that initiated the cascade of events, ending in his death.

Under the "intervening cause" prong of the test, the adjudicator reviewed the case law and distinguished the subject situation from that in which the insured suffered a heart attack while driving. The adjudicator also referred to definition of "direct cause" as provided by Black's Law Dictionary:

- The active, efficient cause that sets in motion a train of events, which brings about a result, without the intervention of any force started and working actively from a new and independent source.

The adjudicator found that there was no intervening event that broke the chain of causation.

The adjudicator acknowledged that the "dominant feature" prong of the test, also needed to be addressed and given the parties positions, the adjudicator found that the use and operation of the vehicle was directly responsible for the death of the insured.

Intervening Act

I.S. **and** ***Aviva Insurance Canada*****, September 14, 2017**

The Applicant was a passenger who disembarked from a vehicle in front of her building residence. The Applicant closed the car door, took three to four steps and tripped over an uneven curb. She sustained injuries to her right wrist, fingers, shoulder and back.

The adjudicator applied the Chrisholm and Greenhalgh causation test and stated that it was not sufficient to link the direct cause of the injury to the vehicle involved, merely because it had brought her to the location of the accident. The use and operation of the vehicle must have directly caused the injury. If the chain of causation is broken by an intervening act, it cannot be said that the use or operation of the vehicle was the direct cause of the injuries.

The adjudicator found that the 'but for" test is in itself insufficient to establish direct causation. So, but for the fact that the Applicant was dropped off by a vehicle, she would never have tripped and fallen on the curb, is in itself insufficient to establish direct causation.

The adjudicator found that the Applicant's journey from the vehicle had ended and then she was injured by an intervening act, the uneven curb.

The adjudicator made a point of stating that the FSCO decisions were not binding. However he relied on *Lombard General Insurance Company of Canada* and *Diane Webb* (FSCO Appeal: P06-00038); and *Mahadan* v. *Co-operators General Insurance Company* (FSCO: A00-000489).

The adjudicator found that there was a broken chain of causation between the use and operation of the vehicle and the injuries sustained. The Applicant did not slip and fall immediately upon disembarking; there was an intervening act of tripping on the uneven curb, which resulted in the Applicant's injuries. The adjudicator applied the proximal and temporal test and found that there was a separation in distance and time from the disembarkation from the vehicle and the subsequent slip and fall.

The adjudicator added that the "location" use and operation of the vehicle were not the direct cause of the accident.

C. Automobile

There can be no accident unless the vehicle is "an automobile". LAT has held that a golf cart and a dirt bike are not automobiles under the specific circumstances.

Golf Cart

***S.C.L.* and *State Farm Mutual Automobile Insurance Company*, March 28, 2017.**

The Applicant was struck by a golf cart on the driveway of the golf course, as the golf cart was travelling down a corridor between the club house and a shed. The Applicant sustained injury to his knee and wrist and claimed accident benefits from his Insurer.
The questions to be decided at a Preliminary Issue Hearing was whether the golf cart was properly considered an automobile, this being a precondition within the term "accident" in section 3 of the Schedule.

The resolution of the issue turns on whether the golf cart required insurance at the time of the accident.

The test as set out in *Grummett* v. *Federation Insurance co. of Canada, 1999 CanLii 15103 (ONSC),* and considered whether:

1. The vehicle is an "automobile in ordinary parlance? If not, then,
2. Is the vehicle defined as an "automobile" in the policy? If not, then,
3. Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

As numbers one and two were irrelevant, the only question to be addressed was whether golf carts fall within any enlarged definition of "automobile", in any relevant statute. Pursuant to the definition of section 224 of the *Insurance Act*, (supra), to be considered an automobile, the golf cart would require to be covered under a motor vehicle policy.

As a golf cart can be considered a motor vehicle under the *Insurance Act*, section 1 (1) and the *Highway Traffic Act as a* vehicle propelled or driven otherwise than by muscular power, it would be required to have insurance if driving on a Highway, which by definition includes a common and public driveway. However, the location of the incident was on private property intended for limited use by the population of golf course patrons and employees. The golf cart did not require insurance when it struck the Applicant on the driveway and was not considered an automobile under the Insurance Act.

ATV

***J.T.* and *Aviva*, July 14, 2017**

The Applicant was injured in an all-terrain vehicle, while he was a guest at a rural property. He sustained serious injury and the Insurer paid benefits for 11 months and then terminated benefits, on the basis that the claim did not meet the definition of accident because the ATV is not an automobile under the Schedule.

The adjudicator applied the Grummet test, (supra), and rejected arguments under the second branch: of whether the vehicle is defined as an "automobile" in the policy. Whereas the owner of the vehicle could add a newly acquired vehicle to an existing policy 14 days retroactively after acquiring ownership, there was not sufficient proof that the relevant family owned the vehicle at the material time.

The issue therefore revolved around the question of whether the ATV fell within any enlarged definition of "automobile" in any relevant statute. The ATV met the definition of an off-road vehicle, which pursuant to the Off-Road Vehicles Act, is required to be insured when operated, except when driven on land occupied by the owner of the off-road vehicle. As the ATV was being operated on lands owned by the owner of the ATV, it was not required to be insured. The adjudicator found that the ATV was not an automobile for the purposes of the relevant legislation and therefore the incident was not an accident, within the meaning of the Schedule.

Motorcycle

***B.M.* and *Aviva Insurance Canada*, October 13, 2017**

The Applicant, a minor, was riding a 2009 Honda motorcycle at a privately owned and operated training and racing facility when he was injured. The motorcycle was designed, manufactured and sold for close course competitions only. The question arose as whether the motorbike was an automobile.

The adjudicator applied the three prong test as applied in the Gummett case, (supra), and focused the analysis on the third prong of the test, of whether the vehicle falls within any enlarged definition of an automobile in any relevant statute.

The adjudicator referred to the definition of automobile in section 224 of the *Insurance Act* and also to *The Compulsory Automobile Insurance Act*, which is applicable to vehicles driven on highways and the *Off Road Vehicle Act*, applicable to vehicles driven off of highways. The parties agreed that the land on which the motorbike was being operated was not occupied by the owner of the motorcycle.

The motorcycle did not fall into the category of those vehicles exempted from the requirement to be insured and it was necessary to determine whether it therefore fell in the exemption of “a closed course competition”. The adjudicator was called upon to apply rules of statutory interpretation in deciding whether the exemption for insurance applied to races only and no other activities on the track. The Adjudicator found that a strict interpretation of the term “competition” would produce an absurd result, cause confusion and not further the purpose of ORVA. The adjudicator applied a broad interpretation of the term “competition” and stated that “it does not flow that the same vehicle, driven by the same driver, on the same course is not covered under the same term, solely because it was not a “race”.