COURT OF APPEAL FOR ONTARIO

CITATION: Martin v. 2064324 Ontario Inc. (Freeze Night Club), 2013 ONCA 19
DATE: 20130117
DOCKET: C54832

Cronk, Epstein and Pepall JJ.A.

BETWEEN

Paul Martin and Cecile Martin

Plaintiffs
(Respondents in Appeal)

and

2064324 Ontario Inc. c.o.b. as
Freeze Night Club, 2028260 Ontario Limited,
c.o.b. as Freeze Night Club,
John Doe, Robert Doe, 1078976 Ontario Inc.
and Certas Direct Insurance Company

Defendant
(Appellant in Appeal)

Ryan M. Naimark, for the appellant

Sergio Grillone, for the respondents

Heard: September 4, 2012

On appeal from the order of Justice Douglas K. Gray of the Superior Court of Justice, dated December 5, 2011, with reasons reported at 2011 ONSC 7145.

Cronk J.A.:

I. Introduction

[1] This appeal concerns the entitlement of the respondent, Paul Martin, to no-fault statutory accident benefits ("SABs") and indemnity for damages for personal

injuries from his automobile insurer, the appellant Certas Direct Insurance Company ("Certas").

[2] Mr. Martin alleges that as he was loading his car in a parking lot after leaving work at a Toronto night club, he was assaulted by two unknown assailants in a parking lot, driven a few blocks away in his own vehicle, further assaulted, and ultimately abandoned by his attackers. He alleges that he suffered ongoing injuries and loss of income as a result of the assaults. He claimed against Certas for SABs and indemnity under the unidentified, uninsured and underinsured coverage provisions of his motor vehicle liability insurance policy. Certas denied both claims.

[3] Mr. Martin eventually sued Certas and others in respect of his injuries. On a summary judgment motion brought by Certas, the motion judge declared that: (1) Mr. Martin is entitled to SABs because he was injured as a result of an "accident" within the meaning of s. 2(1) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* under O. Reg. 403/96 (the "1996 Schedule")[1] to the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act"); and (2) Mr. Martin's injuries arose "directly or indirectly from the use [or] operation of his

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[1] Throughout his reasons, the motion judge refers to the definition of "accident" set out in s. 3(1) of O. Reg. 34/10, which is identical to the predecessor definition of "accident" contained in the 1996 Schedule. However, O. Reg. 34/10 became effective on September 1, 2010, after the date of the incident involving Mr. Martin. The legislative definition of "accident" applicable in this case, therefore, is that contained in s. 2(1) of the 1996 Schedule.

automobile as contemplated in s. 239(1) of the [Act]", thus triggering the indemnity provisions of the Certas policy. Certas appeals both holdings.

[4] For the reasons that follow, I would allow the appeal in part.

II. Background Facts

(1) The Incident

[5] Mr. Martin is a part-time audio technician. At approximately 2:20 a.m. on April 23, 2005, as he was loading his car in a parking lot after finishing work at a Toronto night club, a man approached him and asked if he had any cigarettes. When Mr. Martin replied that he did not, the man pushed Mr. Martin up against his own vehicle. A second man approached Mr. Martin from behind and put what Mr. Martin believed to be a gun to the back of Mr. Martin's neck. The two assailants sprayed Mr. Martin with pepper spray, pushed him to the ground while they searched him for money and valuables, and eventually forced him into the trunk of his car.

[6] The assailants attempted to drive away in Mr. Martin's car, while Mr. Martin was still in the trunk. However, when they had difficulty working the car's standard transmission, they forced Mr. Martin into the front seat of the car, demanding that he assist them with shifting the gears. While Mr. Martin was doing so, one of the men continued to hit him on the back of the head.

[7] The two thugs then drove to another parking lot, forced Mr. Martin out of the car, and again assaulted him by pushing his head to the ground and kicking his chest and side. One of the two men also struck each of Mr. Martin's fingers, breaking them, with a blunt object.

[8] The perpetrators got back into Mr. Martin's car, leaving Mr. Martin on the ground, and drove off. As they were leaving, they drove over Mr. Martin's right foot. The car then stalled and the men got out of the vehicle, pepper-sprayed Mr. Martin again, and fled.

[9] After about 15 or 20 minutes, Mr. Martin found running water and was able to rinse the pepper spray from his eyes. When he noticed his car parked nearby, he drove to a hotel. The police and an ambulance were called, and Mr. Martin was taken to the hospital.

[10] Mr. Martin alleges that as a result of the assaults, he sustained numerous on-going injuries, including fractures to his hands, lacerations and contusions to his head (including a head injury when his head struck the trunk of his car), injuries to his right foot and right knee, torn muscles and tendons throughout his body and psychological harm, including depression and anxiety.

(2) Summary Judgment Motion

[11] Mr. Martin's car was insured by Certas under a standard motor vehicle liability insurance policy. After the assaults, Mr. Martin submitted claims to

Certas for SABs and for indemnity under the unidentified, uninsured and underinsured coverage provisions of the policy. As I have said, Certas denied both claims.

[12] Mr. Martin and his mother sued the owners of the night club, Mr. Martin's unidentified assailants and Certas. As against Certas, Mr. Martin claimed payment of various past, on-going and future SABs and indemnity under the Certas policy for damages arising from his injuries.

[13] Certas defended Mr. Martin's claims, denying: (1) that Mr. Martin was involved in an "accident" as defined under s. 2(1) of the 1996 Schedule; and (2) that Mr. Martin's injuries were caused by the use or operation of an automobile, within the meaning of s. 239(1)(a) of the Act.

[14] In November 2010, Certas moved for summary judgment in the form of an order dismissing the action as against it. The parties agreed that the record permitted a full appreciation of the evidence and the issues required to make dispositive findings by way of summary judgment, thus positioning the motion judge to determine Certas's motion on the merits, without the necessity of a trial: see *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, leave to appeal to S.C.C. granted, [2012] S.C.C.A. No. 48.

[15] By order dated December 5, 2011, the motion judge denied Certas's motion and granted declarations that Mr. Martin was injured as a result of an

"accident", as defined in the 1996 Schedule, and that his injuries arose "directly or indirectly from the use [or] operation of his automobile, as contemplated in s. 239(1)[a] of the [Act]".

III. Issues

[16] There are two issues on appeal:

(1) Did the motion judge err by holding that Mr. Martin was injured as a result of an "accident", as defined in the 1996 Schedule?

(2) Did the motion judge err by holding that Mr. Martin's injuries arose "directly or indirectly from the use [or] operation of his automobile", within the meaning of s. 239(1)(a) of the Act?

IV. Analysis

(1) Relevant Legislative Provisions

[17] At the time of the assaults on Mr. Martin, s. 2(1) of the 1996 Schedule defined the word "accident", in part, as "an incident in which the use or operation of an automobile *directly causes* an impairment" (emphasis added). The predecessor version of the 1996 Schedule contained a more expansive definition of "accident". Section 1 of the *Statutory Accident Benefits Schedule – Accidents after December 31, 1993 and before November 1, 1996*, O. Reg. 776/93, defined "accident" as "an incident in which, *directly or indirectly*, the use or operation of an automobile causes an impairment" (emphasis added). However, in 1996, this schedule was amended to delete the words "or indirectly".

[18] Section 239(1) of the Act deals with indemnity coverage under the standard form of motor vehicle liability insurance policy in use in Ontario. It provides:

> 239. (1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,
>
> (a) *arising from the ownership or directly or indirectly from the use or operation of any such automobile*; and
>
> (b) resulting from bodily injury to or the death of any person and damage to property.
>
> [Emphasis added.]

[19] Like the motion judge, I will first address whether the use or operation of an automobile "directly cause[d]" Mr. Martin's injuries, within the meaning of the word "accident" under the 1996 Schedule. As the motion judge observed, at para. 31, if liability for SABs under the 1996 Schedule is established, the insurer's coverage liability "must also be considered to have been established under [the broader language of s. 239(1)(a) of the Act]."

(2) Was Mr. Martin Injured as the Result of an "Accident"?

(a) Motion Judge's Ruling

[20] Certas argued before the motion judge that the assaults by the two unknown assailants, rather than the use or operation of an automobile, caused Mr. Martin's injuries. Certas asserted that because Mr. Martin therefore failed to demonstrate that his injuries resulted from an "accident" as defined in s. 2(1) of the 1996 Schedule, he was ineligible to receive SABs.

[21] Mr. Martin countered that to meet the definition of "accident" under the 1996 Schedule, it was necessary only to establish that an injury arose out of the use or operation of a motor vehicle. This test was met here, he claimed, since his own motor vehicle was used by his assailants during the course of continuing assaults: some of the assaults occurred inside the vehicle, the vehicle was a device that permitted the assaults to occur, and the vehicle was used directly to commit one of the assaults (the injury to Mr. Martin's right foot).

[22] The motion judge began his analysis with consideration of the Supreme Court's decision in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405. *Amos* involved a claim for SABs under a regulation to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, by a person who was attacked and shot through the window of his car by a gang of individuals who attempted to enter the car. The relevant regulation provided for no-fault benefits for injuries caused by an accident that "arises out of the ownership, use or operation of a vehicle".

[23] Under *Amos*, a two-part test applies to the determination whether an injury "arises out of the ownership, use or operation" of an automobile for the purpose of an insurer's statutory obligation to provide no-fault benefits to its own insured. In *Amos*, at para. 17, Major J. formulated this test as follows:

> 1. Did the accident result from the ordinary and well-known activities to which automobiles are put? [The 'purpose' branch of the test].
>
> 2. 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? [The 'causation' branch of the test].

[24] The motion judge held, at para. 49 of his reasons, that Mr. Martin had satisfied the purpose branch of the *Amos* test. This finding is unchallenged before this court. The central question, therefore, is whether Mr. Martin had also satisfied the causation requirement for the receipt of SABs.

[25] The motion judge reviewed several decisions of this court regarding the causation branch of the *Amos* test, including *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 and *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 O.R. (3d) 338, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 461.

[26] Citing the following passage from *Chisholm*, at para. 11, the motion judge correctly noted that the effect of the 1996 amendments to the predecessor

version of the 1996 Schedule, described above, was to narrow, and render more strict, the causation requirement for the receipt of SABs:

> The 1996 Schedule, which accompanied these statutory amendments, eliminated the word "indirectly" in the definition of accident. Now, as I have discussed, insured persons are entitled to accident benefits only if their impairment or injuries are directly caused by the use or operation of an automobile. Therefore, an insured person seeking accident benefits under the 1996 Schedule must meet a narrower or more stringent causation requirement. [Citation omitted.]

[27] In *Chisholm*, the plaintiff was rendered a paraplegic when an unknown assailant fired gunshots at his car. His claim against his automobile insurer for SABs was denied by his insurer on the basis that his injuries were not caused by an "accident" as defined under s. 2(1) of the 1996 Schedule. This court upheld the insurer's denial of SABs on the ground that the shooting constituted an intervening act, independent of the use or operation of the plaintiff's vehicle, that broke the chain of causation.

[28] *Greenhalgh* also concerned the entitlement of an injured insured to SABs under the 1996 Schedule. In that case, the plaintiff's vehicle became stuck on a country road on a cold winter night. The plaintiff set out on foot to reach nearby houses and became disoriented and lost. She suffered severe frostbite due to exposure to the elements, resulting in the amputation of her fingers and her legs below the knees.

[29] As in *Chisholm*, this court upheld the plaintiff's insurer's denial of the plaintiff's claim for SABs on the basis that the plaintiff was not involved in an "accident" within the meaning of the 1996 Schedule. This court held that the cause of the plaintiff's injuries – the weather – was unrelated to the use or operation of the plaintiff's vehicle. None of the numerous intervening occurrences between the time the plaintiff's car became stuck and the time she suffered her injuries could be considered a normal incident of the risk caused by the use or operation of her car. The use of the plaintiff's motor vehicle was ancillary to her injuries.

[30] The motion judge concluded that *Chisholm* and *Greenhalgh* are distinguishable on the facts from this case. He stated, at para. 46:

> This is not a case like *Chisholm*, where the injured party was merely sitting in his car and was shot by an outsider. Nor is it a case like *Greenhalgh*, where the car was merely a means of transportation to the site where the injured party got lost, and was ultimately injured some distance away from the car.

[31] In contrast, in the motion judge's view, Mr. Martin's vehicle was "part of the instrumentality through which the assaults were committed". He reasoned, at para. 46, as follows:

> [Mr. Martin] was shoved into the trunk of his car; he was forced to assist the driver of the car by shifting gears, while assaults were being committed; he was driven in his own car to another parking lot where the assaults were continued; and he was struck by his own car, and his foot was injured, before the assailants left.

[32] Relying on the decision of the Superior Court in *Downer v. Personal Insurance Co.*, 2011 ONSC 4980, 107 O.R. (3d) 65, the motion judge went on to hold, at paras. 51 and 54, that Mr. Martin's injuries were "directly connected to the use and operation of his vehicle" and, accordingly, his injuries occurred as a result of an "accident" within the meaning of the 1996 Schedule.

(b) Failure to Apply the Modified Causation Test

[33] Certas submits that the motion judge erred in his causation analysis because it was the assaults on Mr. Martin, and not the use or operation of his vehicle, that directly caused his alleged injuries. Consequently, Certas says, Mr. Martin was not injured as the result of an "accident" within the meaning of that term under s. 2(1) of the 1996 Schedule.

[34] With one exception, which I will address shortly, I agree with this submission. In my view, the motion judge's reasons suggest that he failed to appreciate that the *Amos* causation test does not apply to the interpretation of "accident" under the 1996 Schedule. Instead, a modified causation test applies, as established by the jurisprudence of this court. I say this for the following reasons.

[35] In *Chisholm*, at paras. 18 and 20, Laskin J.A. held:

> [18] Chisholm submits that the *Amos* test should apply to the interpretation of "accident" under the 1996 Schedule and that he meets this test. In my view, the

> *Amos* test does not apply, and even if it did, I am dubious whether Chisholm could satisfy it.
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> ...
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> [20] But the stringent causation requirement – "directly causes" – in the definition of accident under the 1996 Schedule means that the *Amos* test, or at least the causation part of that test, can no longer be used to interpret the definition. Indeed, Major J.'s reasons in *Amos* say as much. In setting out the causation part of the test, Major J. explicitly stated at para. 17 that the required nexus or causal relationship between a plaintiff's injuries and the ownership, use or operation of his or her car was "not necessarily a direct or proximate causal relationship".

[36] *Chisholm* also emphasizes that even if the use of an automobile may be said to be a cause of an insured's injuries, a later intervening event can break the chain of direct causation. Justice Laskin explained, at paras. 29 and 34:

> [29] Put differently, even accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. *An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car – if it is "part of the ordinary course of things".* See J.G. Fleming, The Law of Torts, 9th ed. (North Ryde, NSW: LBC Information Services, 1988) at p. 247. Gun shots from an unknown assailant can hardly be considered an intervening act in the "ordinary course of things". The gun shots were the direct cause of his impairment, not his use of his car.
>
> ....

> [34] [T]he dominant feature of Chisholm's claim is the gun shots. The use or operation of his car is at best ancillary.
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> [Emphasis added.]

[37] In *Greenhalgh*, this court adopted and clarified the *Chisholm* approach to causation. Justice Labrosse put it this way in *Greenhalgh*, at para. 36:

> [I]n my opinion, the *Chisholm* test, as it applies to this case, can best be set out in the form of two questions:
>
> 1. Was the use or operation of the vehicle a cause of the injuries?
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> 2. 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 injuries?

[38] In this case, I have considerable reservations as to whether even the first branch of this modified causation test is met. Although the motion judge concluded, at para. 46, that Mr. Martin's vehicle was "part of the instrumentality through which the assaults were committed", there is a strong argument that Mr. Martin's car was nothing more than the venue where many of the assaults occurred. For this reason, I doubt whether the use or operation of his vehicle was "a cause" of Mr. Martin's injuries.

[39] That said, in my view it is clear that the motion judge failed to address and apply the second branch of the modified causation test articulated in *Chisholm*

and *Greenhalgh*. With respect, this was an error. Consequently, I prefer to rest the disposition of this appeal on this ground.

[40] I find support for the conclusion that the motion judge erred by failing to come to grips with the second branch of the modified causation test in the recent decision of this court in *Downer v. Personal Insurance Co.*, 2012 ONCA 302, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 332. As in this case, *Downer* concerned whether an insured was entitled to SABs on the basis that he was injured in an "accident" within the meaning of s. 2(1) of the 1996 Schedule.

[41] In *Downer*, the plaintiff was assaulted by several unknown assailants while he was sitting in his car at a gas station. In the ensuing struggle with his assailants, the plaintiff managed to escape by putting his vehicle in gear and driving away. He believed that, in doing so, he may have run over one of his assailants as he left the gas station. He claimed psychological and physical injuries as a result of the incident and sought to recover SABs from his automobile insurer.

[42] The Superior Court judge held, at para. 15, that there was "a direct or proximate causal relationship between the plaintiff's injuries and the ownership, use or operation of his vehicle". He further held, at para. 21, that: the plaintiff's injuries were "caused by assailants whose purpose was to seize possession and control of his automobile from him"; the assault on the plaintiff was not random

but, rather, arose out of his ownership, use and operation of his vehicle; and, it was the " 'use or operation' of his own vehicle that put [the plaintiff] in harm's way". The Superior Court judge therefore ruled that the plaintiff's injuries were caused by an "accident" and that he was entitled to SABs from his insurer.

[43] In the case at bar, the motion judge viewed the facts in *Downer* as analogous to those in this case. He grounded his own conclusion that Mr. Martin's injuries were directly connected to the use and operation of his vehicle in the Superior Court judge's decision in *Downer*.

[44] However, the Superior Court judge's decision in *Downer* was reversed, in part, on appeal to this court. This court held that: (1) the Superior Court judge erred in law in his causation analysis by failing to apply the modified causation test outlined in *Greenhalgh*, in particular by failing to ask whether an intervening act outside the "ordinary course of things" resulted in the plaintiff's injuries; (2) the physical assault on the plaintiff did not constitute an "accident" under s. 2(1) of the 1996 Schedule; and (3) the plaintiff's alleged psychological injuries, which were said to have been caused by his belief that he may have run over one of his assailants as he fled the scene, if proven, may have been caused by an "accident".

[45] Justice LaForme, writing for a unanimous court in *Downer*, stated, at para. 39:

> Under the modified causation test from *Chisholm* and *Greenhalgh*, it is not enough to show that an automobile was the location of an injury inflicted by tortfeasors, or that the automobile was somehow involved in the incident giving rise to the injury. Rather, the use or operation of the automobile must have directly caused the injury.

[46] Justice LaForme went on to hold, at paras. 41, 43 and 49-50:

> [41] [T]he assault on the plaintiff as he sat in his car sorting his money cannot fairly be considered as a normal incident of the risk created by the use or operation of the car.
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> ...
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> [43] The governing appellate authority on the causation test for defining an "accident" under s. 2(1) of the [1996] Schedule makes it plain and obvious on the agreed facts that the plaintiff's injuries – insofar as they were caused by the assault – were not directly caused by the use or operation of his vehicle, but rather were caused by an intervening act in the form of an assault that cannot be said to have been part of the "ordinary course of things".
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> ....
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> [49] [In contrast] I agree that running over someone can fairly be considered as a normal incident of the risk created by the use or operation of a vehicle.
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> [50] Any resulting psychological impairment from such an incident could be "a direct consequence of the use or operation of his motor vehicle".

[47] In fairness to the motion judge in this case, this court's decision in *Downer* was released after the date of the motion judge's ruling on Certas's summary

judgment motion. Nonetheless, *Downer* compels the conclusion that the motion judge's causation analysis was fatally flawed.

[48] In particular, assuming that the use or operation of Mr. Martin's car was a cause of his injuries, the motion judge failed to address the second branch of the modified causation test. It required the motion judge to inquire whether an intervening act or acts, which were not part of the "ordinary course of things" or a "normal incident of the risk created by the use or operation of the car", resulted in Mr. Martin's injuries. If so, the use or operation of Mr. Martin's car could not be said to be "a direct cause" of his injuries within the meaning of s. 2(1) of the 1996 Schedule.

[49] The motion judge failed to undertake this critical inquiry. In doing so, he erred. It therefore falls to this court to apply the second branch of the modified causation test to the facts of this case.

(c) Application of the Second Branch of the Modified Causation Test

[50] In my opinion, with one exception that I will describe below, the use or operation of Mr. Martin's vehicle cannot be said to have directly caused his injuries.

[51] I begin with the initial assaults. On the facts asserted by Mr. Martin, the assaults commenced in the parking lot of the night club, as Mr. Martin was preparing to leave after work. At this point, the assaults consisted of Mr. Martin

being pushed up against his car, threatened with what he believed to be a weapon, pepper sprayed, pushed to the ground, and ultimately forced into the trunk of his car.

[52] I do not think that Mr. Martin's injuries from these assaults can fairly be said to have been directly caused by the use or operation of his car. Indeed, his car was not the dominant feature in these assaults at all. Rather, as in *Chisholm* and *Downer*, the assaults themselves, which were distinct acts independent from the use or operation of his vehicle, caused Mr. Martin's injuries.

[53] Nor do I view the head injury allegedly suffered by Mr. Martin when he was forced into the trunk of his car as falling into a different causal category. As this court's decision in *Downer* makes clear, at para. 39, under the modified causation test established by *Chisholm* and *Greenhalgh*, it is not enough to show that an automobile was somehow involved in the incident giving rise to the injury. Rather, "the use or operation" of the automobile must have directly caused the injury.

[54] Forcibly placing a person into the trunk of a car is not in the "ordinary course of things" associated with the use or operation of a vehicle. This forcible act is a form of assault, like the other assaults perpetrated on Mr. Martin when his assailants first approached him. Even if it could be said that the striking of Mr. Martin's head on the trunk of his car involved the "use" of the car, that use

was merely ancillary to the assaultive act of attempting to force him into the trunk of his vehicle, which directly caused the injury to Mr. Martin's head.

[55] Similarly, I regard the use or operation of Mr. Martin's vehicle as ancillary to the next round of assaults. The assailants repeatedly struck the back of Mr. Martin's head after he was forced into the front seat of his car to assist them in shifting the vehicle's gears. Any injuries sustained by Mr. Martin from these blows, in my view, cannot be considered a "normal incident of the risk created by the use or operation of the car". To paraphrase Laskin J.A.'s words in *Chisholm*, at para. 29, and Labrosse J.A.'s comments in *Greenhalgh*, at para. 36, quoted above, being hit about the head while being forced to operate the gears of a car can hardly be considered an intervening act in the ordinary course of things.

[56] That brings me to the final assaults at the second parking lot where, after being removed from his car, Mr. Martin was pushed, struck on the chest and side, and again pepper sprayed. In a further act of gratuitous violence, his fingers were broken with a blunt object and, it is said, his car was driven over his right foot by his fleeing assailants.

[57] All these senseless acts, except for the injury to Mr. Martin's foot, had nothing to do with the use or operation of Mr. Martin's car. These assaults, in my opinion, constituted intervening acts that cannot reasonably be said to be part of the "ordinary course of things" associated with the use or operation of Mr.

Martin's vehicle. In this sense, the use or operation of the vehicle was not, as a matter of law, "a direct cause" of the injuries suffered by Mr. Martin in the second parking lot.

[58] I reach a different conclusion, however, concerning the alleged injury to Mr. Martin's right foot.

[59] Based on the evidence before the motion judge, I think there is a strong argument that the injury sustained by Mr. Martin to his right foot was directly caused by the use or operation of his vehicle, that is, by an "accident" within the meaning of s. 2(1) of the 1996 Schedule. In contrast to Mr. Martin's other injuries, the direct cause of the injury to Mr. Martin's right foot was the operation of the car itself.

[60] On this record, it is unclear whether the mishap with Mr. Martin's foot was inadvertent or deliberate. If deliberate, it may be open to Certas to argue that this injury also constituted an intervening, intentional tort that falls outside the reach of the "ordinary course of things" associated with the use or operation of a vehicle. It may also be open to Certas to contend that the renewed theft of Mr. Martin's vehicle in the second parking lot was itself an intervening event that broke the chain of causation between the use or operation of the vehicle and the foot injury.

[61] There is, therefore, at the very least, a genuine issue requiring a trial to determine whether the injury to Mr. Martin's right foot was sustained in an "accident", in the sense contemplated by s. 2(1) of the 1996 Schedule. In respect of that injury and the SABs associated with it, I conclude that Certas is not entitled to summary judgment.

[62] Mr. Martin submits that if his SABs claim regarding his foot injury must proceed to trial on the basis that this injury may have been directly caused by the use or operation of his vehicle, he is fully entitled to all SABs claimed in respect of all his alleged injuries. As his counsel put it, "once in the SABs door", Mr. Martin is entitled to full SABs recovery.

[63] I would reject this submission. The definition of "accident" under s. 2(1) of the 1996 Schedule requires that the use or operation of an automobile "directly [cause] an impairment". On a plain reading of this provision, the causation requirement is focused on the specific impairment at issue. Thus, if only some of an insured's injuries are directly caused by the use or operation of an automobile, while others are not, only the "impairments" in the first causal category meet the causation requirement of the definition under s. 2(1). This court took this approach in *Downer* when it distinguished between the physical and psychological injuries allegedly suffered by the plaintiff in that case.

[64] I add this observation. I see no basis in this case to distinguish Mr. Martin's alleged physical injuries from his alleged psychological injuries. In *Downer*, the plaintiff's claim of psychological injuries was based on his belief that he drove over one of his assailants as he left the scene of the incident. These injuries, therefore, arguably were directly caused by the use and operation of his car. In contrast, the psychological injuries asserted by Mr. Martin allegedly resulted from the overall constellation of assaults that he was forced to endure. Unlike *Downer*, there is no suggestion that they were specifically triggered by the use or operation of his vehicle.

(d) Conclusion

[65] I conclude that, with the possible exception of the injury to his right foot, Mr. Martin's injuries were not caused by an "accident" within the meaning of s. 2(1) of the 1996 Schedule. I would therefore allow the appeal on this issue, and grant Certas summary judgment, dismissing Mr. Martin's SABs claims against it, save for those of his SABs claims that relate to the injury to his right foot.

(3) Did Mr. Martin's Injuries Arise "Directly or Indirectly from the Use or Operation of his Automobile"?

(a) Motion Judge's Ruling

[66] Because the motion judge concluded that all Mr. Martin's injuries were "directly connected to the use and operation of his vehicle", he found it unnecessary to address separately Mr. Martin's indemnity claim under s.

239(1)(a) of the Act. He said merely, at para. 53: "Since I have come to this conclusion on the SAB[s] claim, as noted earlier there is no doubt that Mr. Martin's claim under s. 239(1) of the [Act] can also be maintained."

[67] On the motion judge's SABs ruling, this conclusion was clearly correct. Because I have reached a different conclusion on Mr. Martin's entitlement to SABs, I turn now to his indemnity claim under s. 239(1)(a) of the Act.

(b) Discussion

[68] At the outset, I note that the 1996 amendments to the SABs schedules, which introduced the strict causation requirement reflected in the definition of "accident" under the 1996 Schedule, are irrelevant to Mr. Martin's indemnity claim. The legislature made no companion amendment to s. 239(1)(a) of the Act.[2] That provision continues to contemplate loss or damage "arising ... *directly or indirectly* from the use or operation of [an insured] automobile" (emphasis added).

[69] In *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46, [2007] 3 S.C.R. 373, the respondents were injured as they were driving on a highway when two individuals who were high on alcohol and drugs dropped a large boulder onto their car. The Supreme Court concluded that the respondents were not entitled to indemnification under s. 239(1) of the Act because the liability of

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[2] The phrase "directly or indirectly" was added to s. 239(1)(a) by the legislature in 1990. See: *An Act to amend certain Acts respecting Insurance*, S.O. 1990, c. 2, s. 64(1).

the tortfeasors did not arise directly or indirectly from the use or operation of the tortfeasors' car. Rather, the rock-throwing was an independent act that broke the chain of causation. Justice Binnie, at para. 25, emphasized that "for coverage to exist, there must be an unbroken chain of causation linking the conduct of the motorist *as a motorist* to the injuries in respect of which the claim is made" (emphasis added).

[70] In *Lumbermens Mutual Casualty Co. v. Herbison*, 2007 SCC 47, [2007] 3 S.C.R. 393, released concurrently with *Vytlingam*, a hunter stepped out of his truck, which he left running, and shot at a target that he mistakenly believed was a deer. The target, in fact, was a member of the shooter's hunting party. The Supreme Court held that the victim's injury did not arise directly or indirectly from the use or operation of the hunter's insured truck. Justice Binnie stressed, at para. 12, that the relevant inquiries were: (1) whether the tortfeasor used his "motor vehicle as a motor vehicle and not for some other purpose"; and (2) whether there was "an unbroken chain of causation linking the ... injuries to the use and operation of the ... vehicle which is shown to be more than simply fortuitous".

[71] In my opinion, the causation requirement contemplated by *Vytlingam* and *Herbison* is not met on the facts here. Aside from the injury to his right foot, Mr. Martin's injuries arose from the assaults inflicted upon him by his assailants, rather than from the conduct of his assailants "as motorists". The fact that some

of the assaults occurred in, while others occurred near, Mr. Martin's vehicle does not satisfy the casual connection envisaged by *Vytlingam* and *Herbison*. The involvement of Mr. Martin's car was merely ancillary or fortuitous to the injuries inflicted.

[72] The fact that some of the assaults on Mr. Martin took place when he was inside his vehicle is insufficient to trigger liability under s. 239(1)(a) of the Act. In *Russo v. John Doe*, 2009 ONCA 305, 95 O.R. (3d) 138, a plaintiff was injured when she was hit by a bullet fragment during a drive-by shooting. She sustained serious spinal injuries that rendered her paraplegic. The plaintiff sued the unidentified driver of the car and her own automobile insurer, pursuant to the Ontario Policy Change Form ("OPCF") 44R – Family Protection Coverage Endorsement to her motor vehicle liability insurance policy.

[73] The plaintiff's insurer defended the action, claiming that the plaintiff's injuries did not result "directly or indirectly from the ownership, use or operation" of an automobile, as required by the OPCF 44R Endorsement, but rather from an intervening, independent act – the shooting. The insurer's subsequent summary judgment motion was allowed, dismissing the plaintiff's claim for indemnity in respect of the damages she suffered.

[74] On appeal, this court held that the shooting was a distinct and intervening act that was independent from the use or operation of the vehicle. Justice Juriansz stated, at para. 34:

> Although the incident can indeed be characterized as a drive-by shooting, this characterization simply means that the vehicle "create[d] an opportunity in time and space for damage to be inflicted". [Citation omitted.]

[75] This reasoning is apposite in this case. Here, Mr. Martin's car served as the venue for some of the assaults inflicted upon him but, aside potentially from his foot injury, his vehicle was not the direct or indirect cause of his injuries.

[76] Nor does the fact that Mr. Martin's car was used to transport him during the assaults trigger Certas's liability under s. 239(1)(a). As Binnie J. put it in *Vytlingam*, at para. 35: "To suggest that any time a car is used to transport people to the scene of a tort or a crime is sufficient to engage 'inadequately insured motorist' coverage stretches the intended coverage until it snaps."

[77] Both *Chisholm* and *Russo* support the conclusion that Mr. Martin's vehicle was merely an incidental element to the assaults perpetrated by his attackers. Recall that the plaintiff in *Chisholm* was injured by a gunshot when he was driving his car; in *Russo*, the plaintiff was injured by a gunshot fired by a drive-by assailant. In both cases, this court held that the shootings were independent of the use or operation of an automobile and were intervening acts that broke the chain of causation.

[78] I note, finally, that s. 239(1)(a) of the Act constrains the types of risk against which an insurer may be expected to provide indemnification. In *Vytlingam*, Binnie J. stated, at para. 4: "Insurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured *and* insurer" (emphasis in original). In my view, an argument that Certas reasonably expected to provide indemnification for injuries arising from assaults that only incidentally involved an insured's vehicle stretches the coverage it agreed to provide precisely in the manner that the Supreme Court cautioned against in both *Herbison* and *Vytlingam*.

[79] Accordingly, I conclude that, with the possible exception of the alleged injury to Mr. Martin's right foot, Mr. Martin's injuries did not arise, directly or indirectly, from the use or operation of his vehicle, within the meaning of s. 239(1)(a) of the Act. Except, potentially, for losses or damages associated with his right foot injury, Mr. Martin's indemnification claim against Certas under s. 239(1)(a) of the Act must fail and Certas is entitled to summary judgment accordingly.

V. Disposition

[80] For the reasons given, I would allow the appeal in part, by setting aside paragraph one of the motion judge's December 5, 2011 order and substituting in its stead an order: (1) dismissing Mr. Martin's action against Certas save and

except for Mr. Martin's SABs and indemnification claims concerning the alleged injury to his right foot; and (2) declaring that a genuine issue requiring a trial exists with respect to those of Mr. Martin's claims relating to the injury to his right foot.

[81] Certas has been mainly, but not entirely, successful on this appeal. I would award it some of its costs of the appeal, fixed in the amount of $5,000, inclusive of disbursements and all applicable taxes. I would set aside the motion judge's costs award in favour of Mr. Martin and invite the parties' brief, written submissions concerning the costs of the motion before the motion judge. I would direct that Certas's written costs submissions be delivered to the Registrar of this court within 15 days from the date of release of this decision and that Mr. Martin's costs submissions be similarly delivered within 15 days thereafter.

Released: JAN 17 2013

"S.A.C"

"S.A. Cronk J.A."

"I agree P.J. Epstein J.A."

"I agree S.E. Pepall J.A."