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Licence Appeal Tribunal

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Ontario

Date: 2017-06-16
Tribunal File Number: 16-000131/AABS
Case Name: 16-000131 v TD Insurance Meloche Monex

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

Between:

D. S.

Applicant

and

TD Insurance Meloche Monex

Respondent

DECISION ON A PRELIMINARY ISSUE

Adjudicator: **Samia Makhamra**

For the Applicant: **Ryan Murray, counsel**

For the Respondent: **Sandy Williams, counsel**

HEARD by way of a Teleconference hearing, on October 19, 2016. Written closing submissions were received November 2, 2016.

Overview

1. This is a decision on whether the applicant was involved in an "accident" that is defined in section 3 (1) of the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the *Schedule*).

2. The applicant was running down a street in the early hours of September 28, 2015, when he tripped and, he maintains, fell headfirst into a parked vehicle, suffering catastrophic injuries. He submitted an application for statutory accident benefits to the respondent.

3. The respondent denied accident benefits to the applicant on the basis that he was not in an "accident" that is defined in the *Schedule*. The respondent maintains that the applicant tripped and fell *towards* a parked vehicle, and that this incident was not directly caused by the use or operation of an automobile.

4. The issue before the Tribunal is whether the circumstances of the applicant's incident constitute an "accident" as defined in the *Schedule*.

Decision:

5. For the reasons that follow, I find that the applicant was involved in an "accident" as defined in s. 3(1) of the *Schedule*, when he fell and struck a parked motor vehicle suffering catastrophic injuries.

Issue:

6. Under s. 3(1) of the *Schedule* an "accident" is defined as:

> "…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."

7. In *Amos v. Insurance Corporation of British Columbia*[1] *(Amos), the* leading case on the interpretation of the meaning of "accident" under the *Schedule*, the Supreme Court of Canada set out a two-part test for determining whether an insured person was involved in an "accident" as defined in the *Schedule* and thus entitled to statutory no-fault accident benefits:

- The purpose test: did the accident result from the ordinary and well-known activities to which automobiles are put?
- The causation test: was there some causal relationship between the applicant's injuries and the ownership, use or operation of the vehicle, or was it merely incidental or fortuitous?

8. Since *Amos,* the causation test has been modified to satisfy the strict wording of the *Schedule* that the injuries must be "directly" caused by the use or operation of a motor vehicle. In *Chisholm v. Liberty Mutual Insurance Group*[2] *(Chisholm)* the Ontario Court of Appeal adopted the following definition of direct cause found in Black's Law Dictionary (4th Ed.): "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 independent source".

9. In *Greenhalgh v. ING Halifax Insurance* Co.[3] (*Greenhalgh*) the Ontario Court of Appeal reviewed the case law and determined that in order to satisfy the definition of an "accident" under the *Schedule* an insured must meet the purpose test as set out in *Amos* and the causation test as set out in *Chisholm*. The Court set out the following modified two-branch causation test:

- Was the use or operation of the vehicle a cause of the injuries?

[1] *Amos v. Insurance Corporation of British Columbia,* [1995] 3 S.C.R. 405 (SCC).
[2] *Chisholm v. Liberty Mutual Insurance Group*, 2002 CarswellOnt 2652, [2002] O.J. No. 3135, at para. 2.
[3] *Greenhalgh v. ING Halifax Insurance* Co., 2004 CarswellOnt 3426, [2004] O.J. No. 3485, at para. 36.

- 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?

10. The respondent submits the applicant does not meet either test, because “falling towards” a vehicle cannot be considered an ordinary, well-known activity for an automobile, nor can it be said that in this case that the parked vehicle was a direct cause of the applicant’s injuries. The applicant maintains that the vehicle he struck that evening was parked, and parking is an ordinary well-known use for an automobile. He further submits that the parked vehicle directly caused his injuries.

11. For the reasons explained in this decision, I agree with the applicant, and find that he met his onus of proving that his injuries were the result of an “accident” as defined by the *Schedule*.

Evidence and Analysis:

12. The parties presented written and oral submissions, an agreed statement of facts, a joint book of documents, and photographs of the driveway and the parked vehicle taken the night of the incident. The applicant submitted his own statement, a statement from a friend who was with him the night of the incident, Mr. R. A., as well as an expert opinion report by a biomechanical engineer, Dr. R. Parkinson. The expert analyzed the probability that the impact of the applicant’s face and head with the vehicle directly caused the injuries sustained to his face, spine and spinal cord. Mr. A. and Dr. Parkinson testified at the hearing. The parties relied on a number of leading court and arbitration decisions in support of their respective positions.

13. Certain facts are not in dispute. The applicant was at a friend’s house, Mr. A.’s, the evening of September 27, 2015. On September 28, 2015, at approximately 12:20

a.m., the applicant left Mr. A.'s house and began running in a southwestern direction down the hill. He ran onto the lawn of a private property towards a low wall of stone edging blocks, which separated two private properties. As he was running, he tripped over the stone blocks, lost his balance and fell head first towards a Honda sedan parked on the driveway.

14. The applicant sustained catastrophic injuries as a result of this incident. Some of his impairments include severe paralysis throughout his body below his armpits; complete loss of function in his legs; inability to ambulate; complete loss of bowel and bladder control; difficulty swallowing; and bedsores. The injuries he sustained include fractured spine at the C5 level, fractured T to L1, multiple right rib fractures; nasal bone fractures with soft tissue swelling; nasal septum fracture; and lacerations of the forehead.

15. The parties disagree on whether the applicant made contact with the parked vehicle. The applicant has no recollection of the incident, and his friends did not see it. With no eyewitnesses, the respondent maintains that there is no evidence that the applicant struck the vehicle.

16. Therefore, to determine whether the incident in question constitutes an “accident” under the *Schedule*, I must address the following three questions:

i. Did the applicant make contact with the parked vehicle?
ii. Does the incident satisfy the purpose test?
iii. Does the incident satisfy the causation test?

i. Did the applicant make contact with the parked vehicle?

17. I find, on the balance of probabilities, that the applicant did make contact with the parked vehicle. I base this finding on the evidence surrounding the incident that evening including the testimony of Mr. A and the conclusion of the biomechanical analysis conducted by Dr. Parkinson. Therefore, I find that the injuries could not be explained by mere contact with the ground and that the applicant made contact with the vehicle that caused his injuries.

18. Mr. A. submitted an affidavit and testified at the hearing. Mr. A. did not see the applicant trip and fall, but he heard a distinct “thump” impact from the street, which to him sounded like someone making impact with a vehicle. He heard a friend call and ran to where the call came from. He saw the applicant lying face up, very close to a parked vehicle; the applicant was gurgling and choking, spraying a liquid from his mouth onto Mr. A’s hand. The general occurrence report from the police briefly describes the events of that night and states that Mr. A and another friend called 911 when they realized how badly the applicant was hurt. Police, Fire and paramedics attended.

19. The biomechanical analysis of the expert report was based on the medical documentation of the injuries and on the application of known biomechanical principles. In addition, the analysis considered the potential for the applicant to have sustained the same injuries if he had fallen to the ground without striking the vehicle, as well as the effects of alcohol consumption, as the applicant had been drinking that night.

20. Dr. Parkinson determined that based on the known mechanisms of spinal fracture, one could conclude that the spinal injuries are consistent with the applicant falling and striking the parked vehicle with his face. In addition, Dr. Parkinson opined that the injuries the applicant sustained were not consistent with falling to the ground. Based on the evidence, the injuries could not have been caused by contact with the ground, and given that there is no other explanation before me, I find that on a balance of probabilities that his injuries were caused by contact with the vehicle.

21. The respondent advanced the following to dispute the applicant’s evidence in this regard:

- there was no medical expert to confirm that the injuries were caused by the impact with the vehicle;

- Dr. Parkinson's estimation of the applicant's running speed is inaccurate[4]; on cross-examination he said that it was a "rough estimate", and that the study he relied upon involved subjects who were younger than the applicant and were wearing biomechanically neutral running shoes, essentially faster than the applicant;
- the photographs taken the night of the incident show a white absorbent material scattered about the driveway, making it impossible to identify where the applicant initially made contact; and
- Mr. A.'s ability or expertise to distinguish the sound he heard that night as the sound of someone making impact with a vehicle is not reliable.

22. I address each of the respondent's concerns in the next paragraphs.

23. I accept that Dr. Parkinson is an expert who is qualified to speak to the mechanism of the injuries. His expertise as a witness was not challenged. Further, I note that the respondent did not produce a medical expert or any kind of expert at all, to refute Dr. Parkinson's evidence and findings, despite being given the opportunity to do so.

24. But is there a need or reason for a medical expert, as the respondent argues? I do not believe so. When Dr. Parkinson prepared his report, there was already a lengthy list of available medical and radiological reports he reviewed; these formed the basis of his conclusions. In other words, I am satisfied that Dr. Parkinson already had the available medical information to assess the mechanism of the injuries, and that his review of this documentation was an integral part of his conclusions.

25. Specifically, Dr. Parkinson reviewed the following: records from the emergency department of the two hospitals where the applicant was treated, as well as several other medical and radiology reports from September 2015, the night of the incident, to March 2016. Dr. Parkinson explicitly identified the medical records that were of

[4] Dr. Parkinson estimated the applicant's running speed to obtain a reasonable estimate of the speed at which his face would have struck the vehicle. The estimated running speed was based on a study of male subjects during distance running.

assistance to the biomechanical assessment. These are: the ambulance call report, paramedic service, September 28, 2015; emergency report, the Regional Health Centre, September 28, 2015; CT Scan, head and cervical spine, September 28, 2015; operative summary, Hospital, September 28, 2015; MRI, cervical spine, September 28, 2015; CT scan, head, face, carotid arteries, and spine, September 28, 2015; and CT scan, cervical spine, October 4, 2015.

26. In addition to the available medical records, Dr. Parkinson reviewed the general occurrence report from the police services, as well as fifteen color photographs of the driveway taken the night of the incident.

27. Regarding the running speed, I accept that it may not be accurate. However, given the documented facial injuries, I am persuaded that while it was a "rough estimate", the estimated running speed was sufficient to support the findings in Dr. Parkinson's report for the following reasons.

28. First, I note that Dr. Parkinson stated in his report that the estimated speed may have been lower than the actual speed because the applicant was running downhill, unlike the subjects in the study he relied upon. Second, with an estimated running speed of 3.34m/s, the estimated velocity at which the applicant's face would have struck the vehicle fell within the *known range*[5] for facial fracture; the range being between 2.24 and 3.1 m/s [emphasis added]. Third, and most importantly, Dr. Parkinson found that the injuries the applicant sustained to the top of his head and the fractured maxillary and nasal bones are consistent with blunt force trauma as when someone hits a vehicle.

29. There is no evidence before me regarding the white absorbent material that appears on the photographs, or whether it played any role in identifying the location of the applicant's first (physical) contact with the vehicle or any other object, when he fell.

[5] Dr. Parkinson explained that the running speed estimated at 3.34m/s provided a reasonable estimate of the speed at which the applicant's face would have struck the vehicle. He then looked at a study on the tolerance of face to impact, which found that facial fractures began to occur at an impact velocity between 2.24m/s and 3.31m/s. The study involved 15 cadaveric skulls that were exposed to drop-tests at impact velocities ranging from 2.0m/s to 6.9m/s.

The evidence before me is that Dr. Parkinson used the photographs to estimate the distance between the curbstone and the vehicle, which was determined to be about 3 meters[6].

30. I find that the applicant did make contact with the parked vehicle in this incident and his injuries were as a result of him hitting the vehicle.

31. Next, I deal with the second question in this decision, the purpose test.

ii. The Purpose Test

32. The purpose test asks whether the incident resulted from the ordinary use or operation of the vehicle. In this case, the vehicle was parked on the driveway. The applicant fell and struck the parked vehicle. As confirmed by the Ontario Court of Appeal in *Economical Mutual Insurance Co. v. Caughy*[7] *(Caughy)*, parking is a well-known use or activity of a vehicle.

33. In *Caughy,* the insured was playing tag with his daughter when he collided with a parked motorcycle then fell face first into a parked truck suffering serious spinal cord injuries. The issue on appeal was whether the incident satisfied the purpose test.

34. The function of the purpose test is to limit coverage only to ordinary uses of a motor vehicle. Unusual or aberrant uses will not be covered. In *Vytlingam (Litigation Guardian of)* v. *Farmer*[8] the Supreme Court of Canada illustrated what the *Amos* purpose test excludes such as using " a car as a diving platform … or retiring a disabled truck to a barn to store dynamite (which explodes), or negligently using the truck as a permanent prop to shore up a drive shed (which collapses, injuring someone)… In none

[6] The expert report explained the estimation of the distance as follows: the width of the Honda Accord was assumed to be 1.85 metres, according to the specifications of a 2013-2015 Honda Accord. The distance from the front side of the retaining wall, to the driver's side rear wheel was estimated to be just over 1.5 times the width of the vehicle (about 3 meters).

[7] *Economical Mutual Insurance Co. v. Caughy*, 2016 ONCA 226.

[8] *Vytlingam (Litigation Guardian of)* v. *Farmer,* 2007 SCC 46, at para. 19.

of these cases could it be said that the motor vehicle was being used as a motor vehicle. That is the sort of aberrant situation that the *Amos* purpose test excludes, and nothing more."

35. In *Caughy*, in the Court was clear that parking a vehicle is not an aberrant use: "Parking a vehicle is not aberrant to its use as a vehicle. A vehicle is designed to be parked. Indeed, it is safe to say that most vehicles are parked the [sic] most of the time"[9].

36. The respondent submitted that the incident does not satisfy the purpose test as "falling towards" a car is not an ordinary activity to which a vehicle is put; the applicant was not using the car, nor was the car being used for motoring purposes. Further, the respondent argues that the legislation is not meant to cover every possible use to which a vehicle is put.

37. The respondent's argument is, in my view, a misunderstanding of the incident and the purpose test and runs contrary to the finding in *Caughy*. It presumes that the applicant must be using the vehicle in order to satisfy the test. That is not what the Court in *Caughy* said was the issue to be determined; the issue is whether the incident resulted from the ordinary well-known activities for a vehicle. In this case, like in *Caughy*, the vehicle was parked, and the applicant's impact with the vehicle as it was parked, is what resulted in the incident.

38. The respondent raised *Savard* v. *Royal & Sun Alliance Company of Canada*[10] to support their submission that the parked vehicle was an inanimate object, and only ancillary to the incident. In Savard, the insured was working underneath a hoisted vehicle, removing the engine in the course of stripping the vehicle for parts, when the vehicle fell on the insured and injured him. It was found that the activity of deliberate conversion of an operable vehicle into its parts was essentially the destruction of the vehicle as a vehicle. As the car had lost its purpose and character of being a car, it did

[9] *Caughy,* at para. 17.
[10] *Savard* v. *Royal & Sun Alliance Company of Canada*, 2012 ONSC 715.

not meet the purpose test. This case is not only easily distinguishable - the parked car in this case had not lost its character and purpose - but also it was decided before *Caughy* in an inferior Court.

39. The respondent also argues that it is not foreseeable by insurers and the public that a stranger, who trespasses on private property, could be injured through a parked car and pursues indemnification through no-fault insurance. The respondent submits that the public policy message would be that failing to comply with private landowner rights is part of the ordinary course of things and would be rewarded with access to private automobile insurance. I do not accept this argument. Foreseeability may be relevant to the question of tort and negligence but it is not a factor within Ontario's statutory no-fault insurance regime. Issues with respect to foreseeability in particular or negligence in general are not a factor in the purpose test under no-fault insurance.

40. I find the incident in this case satisfies the purpose test.

41. Further, does it matter that the applicant in this case collided with a parked vehicle as opposed to tripping over a parked vehicle as in *Caughy*? I find it does not for the purposes of the purpose test. The Court in *Caughy* noted that there was no 'active use component' to the purpose test. But I examine this in more detail in the causation aspect of the test.

iii. The Causation test

42. In order to find an "accident" as defined in the *Schedule*, the evidence must show a clear causal link between the use or operation of the vehicle and the impairment. In applying the modified causation test, and the causation principles as set out in *Greenhalgh* below, I find there was a direct causal link between the parked vehicle and the applicant's injuries.

43. As stated earlier, in the modified causation test the insured must first establish that the use or operation of an automobile was a cause of the injuries. If that is established, the insured must then satisfy that there was no intervening act(s) that

resulted in the injuries that cannot be said to be part of the course of the "ordinary course of things". The question is whether it can be said that the use or operation of the vehicle was a "direct cause" of the injuries[11].

Was the use or operation of the vehicle a "direct cause" of the injuries?

44. The first question of the causation test asks whether the use or operation of the vehicle is a cause of the injuries. This part of the causation test is met. As stated earlier, based on the evidence, the injuries could not have been caused by contact with the ground, and given that there is no other explanation before me, I find that on a balance of probabilities that his injuries were caused by contact with the vehicle. Two excerpts from the report of Dr. Parkinson were particularly helpful in illustrating how the injuries were consistent with the applicant making contact with the parked vehicle. I include them in the two paragraphs below:

- Dr. Parkinson concluded that the applicant had to have hit the rim of the wheel with his face to suffer the documented injuries to his face: "As the applicant was running at the time of his fall, his momentum would have resulted in his body initially continuing forward when his head/face struck the parked car, until this forward motion was arrested by the forces generated within his body. The injuries sustained are consistent with those observed in diving, wherein the diver strikes the bottom of a pool, with the momentum of the body causing significant spinal loading as the head is initially slowed on impact with the pool bottom."

- Regarding the fractures the applicant suffered to his spine, the expert determined that the location and nature of the injuries are consistent with a compression-extension injury. Dr. Parkinson explained that …"this occurs when the spine is being extended, as when a person is looking up, at the same time the spine is compressed when the head is driven towards the body. The extension of the spine causes the posterior bony elements of the spine to come closer to one

[11] *Greenhalgh,* at para. 36.

> another, increasing contact between the vertebrae. Combining this extension motion with a simultaneous compressive force would result in posterior element fractures of the cervical spine. This spinal compression-extension injury would result when the applicant struck the parked vehicle with his face, as his neck would have been in an extended position at the time of impact."

Principles of direct causation

45. The principles of direct causation as articulated in *Greenhalgh* and applied to the facts of this case confirm direct causation as required in the *Schedule.* These are the "but for", the intervening act, and the dominant feature principles. While the "but for" principle assists with screening out factors that made no difference to the outcome, I find direct causation in applying the intervening act and the dominant feature principles.

46. The applicant submitted that the incident met the causation test. He submitted that the impact with the vehicle is the dominant feature, and that there was no intervening act or event between his tripping, falling and striking the vehicle.

47. The respondent submitted that the car is simply the location of the incident and not a direct cause of the injury because it did not exert any positive force on the applicant. Further, the respondent submitted that the car was a stationary object that was in the path of the trip and fall, and that the trip and fall was the cause rather than the use and operation of the vehicle.

48. I note that the applicant also argued material contribution, an argument the respondent disputes. I find the applicant's position that causation is satisfied when applying the intervening act and dominant feature principles is the correct one. My analysis and reasons are set out in the next paragraphs.

<u>The "but for" principle</u>

49. The "but for" principle assists in screening factual causes of impairment, but does not provide a legal basis for causation. As stated in *Chisholm*, its purpose is to eliminate from consideration factually irrelevant causes. *Chisholm* clarifies that the legal

entitlement to benefits depends on the facts meeting the direct causation test; and the unbroken chain of events between the use or operation of the vehicle and the impairment. In this case, the curbstone, the trip and fall, and the vehicle can all be said to be factual causes of the applicant's injuries: but for the curbstone, but for the trip and fall, but for the parked vehicle. They all satisfy the "but for" principle. In this case the 'but for" principle alone does not assist in answering the direct causation question.

The intervening act principle

50. The intervening act principle asks if there was a perfect chain of causation, or whether there was there an "intervening cause" which broke that chain and resulted in the outcome under consideration.

51. The respondent argued that the trip and fall is an intervening act that set in motion a chain of events, hence directly causing the incident, to the exclusion of the parked vehicle. I disagree. The events of the incident are the applicant was running, he tripped and fell into the parked vehicle, and was injured. There were no injuries prior to the involvement of the vehicle. And while the chain of events began with running, or while the applicant was running, I consider that tripping was a precipitating event that is not separate from the chain of causation that ultimately led to the injuries once impact with the parked vehicle occurred. In addition, once the vehicle was engaged in its ordinary use, it caused the injuries, and there was no intervening act from a new independent source that caused the injuries. In applying the definition of direct cause according to Black's Law dictionary, there was a coherent (unbroken) chain of events, and there was no intervening act independent of the vehicle's use or operation, or between the time of the involvement of the vehicle and when the applicant suffered his injuries.

52. In *Chisholm,* the Ontario Court of Appeal explained direct causation as "when one thinks of direct causation one thinks of something knocking over the first in a row of blocks after which the rest falls down without the assistance of any other act."[12]

[12] *Chisholm,* at para. 27.

Chisholm is an assault case where the insured was rendered a paraplegic when an unknown assailant fired shots at his car. The Ontario Court of Appeal found that the injuries were caused by the drive-by shooting rather than from the use or operation of a motor vehicle. In my view, in applying the causation principle as in *Chisholm*, the chain of causation in this case remains unbroken. Unlike in *Chisholm*, the injuries in this case were caused by the use of the vehicle.

53. The respondent argued against direct causation because in this case the incident began without the involvement of the parked vehicle; it began with the applicant tripping. The respondent suggested that this case is analogous to cases where the injuries occurred after the involvement of the vehicle had ended, and failed to meet the causation test: In *Dominion of Canada General Insurance Co* v. *Prest*[13], the insured tripped and fell after leaving his vehicle. In *Mahadan* v. *Co-operator's General Insurance Company* [14], the insured injured his foot in a groove cut into the pavement after leaving the vehicle. In *Webb v. Lombard General Insurance Inc*.,[15] the arbitrator on appeal found that Ms. Webb's trip and fall on an icy road was a new intervening act that started after she disembarked from a taxi. However, these cases can be distinguished because, contrary to the case at hand, the physical injuries the insured(s) sustained were not from contact with the vehicle.

54. While not binding on this Tribunal, I find *Petrosoniak and Security National Insurance Company*[16] (*Petrosoniak*) a helpful case in applying this consideration. The insured in *Petrosoniak* fell off his bicycle when it slid on a wet patch of pavement. The fluid that caused the bicycle to slide was found to have originated from a vehicle. The arbitrator acknowledged that the fluid fell onto the roadway and not directly onto the insured, but determined that it did not constitute an intervening act working actively from a new and independent source. The arbitrator concluded that "as the sole cause of the applicant's injuries in this case was the existence of the oily substance on the

[13] *Dominion of Canada General Insurance Co* v. *Prest*, 2013 ONSC 92.
[14] *Mahadan* v. *Co-operator's General Insurance Company*, 2001 CarswellOnt 6129, [2001] O.F.S.C.I.D. No. 40.
[15] *Webb v. Lombard General Insurance Inc*., 2007 CarswellOnt 6606, (FSCO Appeal P06-00038, October 5, 2007).
[16] *Petrosoniak and Security National Insurance Company*, 1998 CarswellOnt 6227, (FSCO A98-000198, November 2, 1998).

pavement"[17] it satisfied the direct causation requirement". Using the *Petrosoniak* analysis in this case, one can conclude that given that the collision with the parked vehicle was the direct cause of the applicant's injuries, the direct causal requirement is met.

55. In the alternative, if it is found that the impact with the vehicle resulted in a new intervening cause or act, the applicant argued that the injuries he sustained would still entitle him to no-fault accident benefits as in *Martin v. 2064324 Ontario Inc.*[18] (*Martin*). In *Martin,* the insured was assaulted several times by two assailants in a parking lot and in his vehicle. The assailants then drove over the insured's foot before fleeing the scene. The Ontario Court of Appeal held that the assault itself was not an "accident" because the vehicle was found to be the venue for the assault and the direct cause. However, the Court also held that when the assailants ran over the insured's foot with his motor vehicle, this injury arose from the use or operation of a motor vehicle.

56. I do not find that the impact with the vehicle was a new intervening act. In my view, given my finding that the injuries were caused by the impact with the vehicle, the next relevant question that needs to be answered is whether the vehicle was in its ordinary use. Given my finding that the parked vehicle was in its ordinary use as a motor vehicle, and was not simply an inanimate object, the injuries that are attributed to it would entitle the applicant to no-fault insurance benefits.

The dominant feature principle

57. In *Greenhalgh*, the Ontario Court of Appeal suggested 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". A factor is a "dominant feature" where it is the aspect of the situation that most directly caused the injuries"[19]. In this case, the dominant

[17] *Petrosoniak,* at page 8.
[18] *Martin v. 2064324 Ontario Inc.,* 2013 ONCA 19.
[19] *Greenhalgh,* at para. 49.

feature of the applicant's injuries is the impact with the vehicle. Hence, the dominant feature is the vehicle.

58. The respondent submitted that the dominant feature of the incident is the running and tripping which led to the injuries. Because Dr. Parkinson stated in his report that the injuries happened as the applicant struck the vehicle "during his fall", the respondent argued that Dr. Parkinson's choice of the word "during" indicates that the fall was the dominant feature because it was an ongoing process. The respondent further submitted that there is no dispute that the vehicle did not cause the applicant to fall and/or become involved in an "accident". Rather, it argued, the cause of his fall is the direct result of "trespassing and negligently running down a hill while intoxicated and tripping over a stone obstruction". In addition, as the trip happened before any involvement of the car, there is no "accident" because the use and operation of the car had never started.

59. I do not accept the respondent's argument. The injuries the applicant sustained are a direct result of the impact with the vehicle. Because impact with the parked vehicle directly caused the injuries to the face, spine and spinal cord, to the exclusion of any other factor, the vehicle was not simply ancillary to the injuries, or the location of the incident. Therefore, to consider the dominant feature as the trip and fall to the exclusion of the vehicle leads to a finding that is inconsistent with the facts. In my view, the vehicle is the dominant feature, and given its use as a parked vehicle is what caused the injuries, direct causation is satisfied.

60. The respondent drew a parallel between *Caughy* and this case. In *Caughy*, Justice Nightingale identified the motorcycle as the dominant feature – the insured was injured when he tripped over a motorcycle and struck a parked truck. The respondent then suggested that by replacing the curbstone in this case with the motorcycle in *Caughy*, one must conclude that the curbstone is the dominant feature. The respondent goes on to argue that the analysis in *Caughy* is salient to this case as both the "Application Judge and the Court of Appeal affirmed that tripping over the inanimate object, which was a motorcycle, was the dominant feature of the incident. Comparing *Caughy* with this case, tripping over the curbstone would be the dominant feature. As

the curb stone is not a motor vehicle, this tribunal must reach the opposite conclusion to *Caughy*."

61. I disagree. The motorcycle in *Caughy* was found to meet the purpose test. It was not an inanimate object as the respondent argues. The courts were clear; the parked motorcycle satisfied the purpose test and was a motor vehicle for the purposes of the *Schedule*. In fact, in my view, the only scenario where the respondent's argument would work is if indeed the motorcycle in *Caughy* was an inanimate object like the curbstone in this case. However, it also would mean that the motorcycle was not a motor vehicle and Mr. *Caughy* would not be entitled to accident benefits. But that is in direct opposition to what the courts found in *Caughy*.

62. The relevance of *Caughy* is not that it provides a sequence of events wherein the motor vehicles involved led to catastrophic injuries. The issue on appeal in *Caughy* was the purpose test. In light of *Caughy*, the parked vehicle was in its ordinary use, and leads me to find that the purpose test has been met. As stated earlier, I find that on the totality of the evidence before me, the applicant's injuries were caused by contact with the vehicle.

63. Further, I note that this is not the first time a person who collides with a parked vehicle is found to be involved in an "accident" under the *Schedule*[20]. In *Ash* v. *Wawanesa Mutual Insurance* Co.[21], an insured riding his bicycle was entitled to accident benefits when he hit a trailer attached to an automobile parked on the same side of the road. Similarly, in *DiMarco* v. *Chubb Insurance Company of Canada*,[22] it was held that a parked vehicle partially obstructing a pedestrian sidewalk involved the use or operation of that vehicle for the purposes of the *Schedule* when a cyclist riding on the sidewalk collided with it sustaining injuries.

[20] *Caughy*, at para 15.
[21] *Ash* v. *Wawanesa Mutual Insurance* Co., 2006 CarswellOnt 5051, [2006] O.F.S.C.D. No. 131.
[22] *DiMarco* v. *Chubb Insurance Company of Canada,* 2012 CarswellOnt 1946, [2012] O.F.S.C.D. No. 19.

64. Lastly, the respondent raises a public policy concern given that the applicant was trespassing on private property when the incident took place. I note that the question before this Tribunal is the applicant's entitlement to no-fault insurance benefits; the analysis and findings in this decision apply strictly to the unique facts of the case. Not every incident with a vehicle that is parked will necessarily be an "accident".

Conclusion:

65. Having regard to the evidence in this case, the parked vehicle was in its ordinary use as a motor vehicle, and it directly caused the applicant's injuries. Both the purpose and the causation tests are met. Consequently, I find that the applicant was injured as a result of an "accident" as defined in s. 3(1) of the *Schedule.*

Date of Release: June 16, 2017

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Samia Makhamra,
Member