LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Citation: **C.C. vs. Intact Insurance Company, 2019** ONLAT **18-003343/AABS**

Tribunal File Numbers: 18-003343/AABS
18-001607/AABS

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

Between:

C.C.

Appellant

and

Intact Insurance Company

Respondent

R.C.

Appellant

and

Economical Insurance Company

Respondent

PRELIMINARY ISSUE DECISION AND ORDER

VICE CHAIR: **Susan Mather**

APPEARANCES:

For the Appellant, C.C.:	Roelf Swart, Counsel
For the Appellant, R.C.:	Siona Sullivan, Counsel
For the Respondent, Intact Insurance:	Doug Wallace, Counsel
For the Respondent, Economical Insurance:	Gerald George, Counsel

HEARD: **In Writing: December 3, 2018**

REASONS FOR PRELIMINARY ISSUE DECISION AND ORDER

OVERVIEW

[1] The applicants are brothers who suffered serious life threatening burns as a result of an explosion and a fire that occurred on January 16, 2016. The explosion and fire happened while the applicants were working on changing the fuel pump of a 1998 Monte Carlo car in the garage at R.C.'s ("R") home.

[2] R and C. C. ("C") made applications for benefits pursuant to the Statutory Accident Benefits Schedule- - *Effective September 1, 2010 (the "Schedule")* through their own automobile insurers, respectively Intact Insurance (Intact) and Economical Insurance (Economical).

[3] The *Schedule*[1] provides that the benefits set out therein shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010.[2]

[4] Both Intact and Economical denied the applicants' claims for benefits on the basis that their injuries were not the result of an accident within the meaning of the *Schedule.*[3]

[5] The applicants disagree. At the case conferences held on August 10, 2018 the parties agreed to have the preliminary issue of whether they are entitled to claim accident benefits under the *Schedule* heard together based on an agreed statement of facts[4].

[6] For the reasons provided below I find that the applicant's injuries are not the result of an accident within the meaning of the *Schedule.* The applicants' claims for benefits are dismissed.

PRELIMINARY ISSUE

[7] The preliminary issue to be determined is whether the applicants' impairments are as a result of an "accident" as defined by the *Schedule.*

[1] O.Reg 34/10
[2] S. 2, O.Reg.34/10
[3] S. 1, O. Reg. 34/10
[4] Amended Agreed Statement of Facts, dated November 22, 2018

AMENDED AGREED STATEMENT OF FACTS

[8] In the days and weeks before the accident the applicants' brother [H's} Monte Carlo was having issues with stalling and starting. The applicants were aware that these issues were easily remedied by replacing the fuel pump. The applicants had successfully replaced fuel pumps before.

[9] R moved the Monte Carlo into his garage a few days prior to the incident. On the day of the incident R commenced the process of replacing the fuel pump. He raised the rear of the vehicle by two hydraulic floor jacks and safety stands were installed. The car's rear ties were removed to provide easier access to the fuel tank. After C arrived he and R prepared to lower the fuel tank.

[10] Prior to lowering the fuel tank the following steps were completed:

i. A pressure gauge was used to relieve the pressure within the fuel system.

ii. The battery cables were disconnected.

iii. Gasoline was syphoned from the fuel tank.

iv. The filler hose was disconnected from the fuel tank.

v. The electrical connection was disconnected from the fuel pump.

vi. The fuel lines to the fuel tank were disconnected.

vii. A hydraulic jack and a piece of plywood were placed underneath the fuel tank to support it while it was being lowered.

[11] Both brothers were underneath the Monte Carlo. They illuminated the bottom of the car with a corded trouble light attached to the bottom of the car.

[12] As R and C began lowering the fuel tank towards the plywood the fuel tank shifted and gas spilled out of the tank on to the floor.

[13] R went to grab a pail to collect the spillage. As he returned from getting an oil catch pan and while they were rushing to prevent further spillage of gasoline, one of the brothers caught the extension cord connected to the trouble light. The light fell to the floor. The bulb shattered and ignited the spilled gasoline and vapours.

THE LAW

[14] In the *Schedule*:

> *"*accident" means an incident in which the use or operation of an automobile directly causes and impairment or directly causes damage to any prescription eyewear, denture, hearing aide, prosthesis or other medical or dental device.

[15] In 1995 decision of the Supreme Court of Canada ("SCC") decided *Amos v. ICBC*[5] ("*Amos"*) in which it adapted a two part test to be used to determine whether an incident is an accident covered by no fault statutory automobile benefits. *Amos* established that in the context of no-fault benefits the expectations of the parties is that no-fault benefits will be available when an accident occurs during the "ordinary and well known uses of their vehicles".

[16] The two tests adopted by the SCC in *Amos* are known as the "purpose" test and the "causation" test.

Amos Purpose Test

1. Did the accident result from ordinary and well-known activities to which automobiles are put?

Amos Causation Test

2. Is there some nexus or causal relationship between the appellant's injuries and the ownership, use or operation of his vehicle or is the connection merely incidental or fortuitous?

[17] The parties agree that the he causation test established in *Amos* was narrowed by the Ontario Court of Appeal (OCA) in *Chisholm v. Liberty Mutual Group* ("*Chisholm")*[6] *.* In *Chisholm* the OCA considered the current definition of "accident" found in the *Schedule* which differs from the definition of "accident" considered by the SCC in *Amos.* Ultimately the OCA recognized that the definition of "accident" found in the *Schedule* is narrower that the definition of accident considered in *Amos.*

[5] (1995), 3 S.C.R. 405
[6] [2002] O.J. No. 3135

[18] The OCA concluded that definition of accident in the *Schedule* requires not just that the use or operation of a motor vehicle be a cause of the injuries it must be a "direct cause".

[19] The OCA considered the causation test again in *Greenhalgh v. ING Halifax ("Greenhalgh"))*[7]*, Downer v. Personal* (*"Downer"*)) and *Martin v. 2064324 Ontario Inc.("Martin"))*[8]

[20] In *Greenhalgh* the OCA found that there was good reason to retain the *Amos* purpose test and the causation test as set out in *Chisholm.* The OCA found that the definition of "accident" in the *Schedule* involves the consideration of two questions:

Purpose Test

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

Causation Test

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?

[21] The SCC considered the question of whether an impairment arose from the ownership or directly or indirectly from the use or occupation of a motor vehicle in the case of *Citadel General Assurance Company v. Vytlingam*[9] ("*Vytlingam")*.

[22] In *Vytlingam* the SCC found that insurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured and insurer.

[23] The SCC stated that:

> *"Motorists generally believe that when an accident occurs while they are making "ordinary and well-known" use of their vehicles, no fault benefits will be available. This is the mutual expectation of both the insured and the insurer."*

[7] [2004] O.J. No.3485 (CA)
[8] 2013 ONCA 19
[9] [2007] 3 R.C.S.

[24] The SCC in *Vytlingam* stated that in *Amos* when Major J. said it was a condition of no-fault coverage that the claim relate to the "ordinary and well-known activities to which automobiles are put" he was simply signalling that someone who uses a vehicle for non-motoring purposes cannot expect to collect motor vehicle insurance. The SCC also found that the "ordinary and well known activities to which automobiles are put" limits coverage to motor vehicles that are being used as motor vehicles.

[25] In *Vytlingam* the SCC substituted a phrase in the *Amos* purpose test so the test is now - Did the accident occur in the course of the ordinary and well known activities to which automobiles are put?

[26] Economical and Intact argue that the *Vytlingam* case is a watershed decision supporting the proposition that a person in the course of repairing an automobile in a garage is not using or operating it as a motor vehicle. In their view the statement by Justice Binnie in *Vytlingam* 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… if the vehicles involvement is held to be no more than incidental or fortuitous or "but for", and is ruled severable from the real cause of the loss, then the necessary causal link is not established.*"

[27] The applicants do not agree. The applicant's argue that the real function of the purpose test is to exclude coverage for off-beat or aberrant uses of vehicles. They argue that in *Vytlingam* the SCC implied that cases where coverage is excluded will be extremely rare and that coverage is intended to be broad and not much will be excluded as an aberrant use of a motor vehicle as a motor vehicle.

[28] The applicants argue that *Vytlingam* affirms that coverage should be broader in accident benefits cases and that it does not support the proposition that a person repairing an automobile in a garage is not using or operating the motor vehicle.

[29] In its decision in *Economical v. Caughy*[10] the OCA confirmed that Justice Binnie's statement in *Vytlingam* that *"The "*ordinary and well known activities to which automobiles are put*"* limits coverage to motor vehicle being used as motor vehicles In *Caughy* the issue was whether the temporary parking of a

[10] 2016 ONCA 226

motorcycle on a walkway constituted an ordinary and well-known use of a vehicle. The OCA confirmed that it is.

[30] The OCA in *Caughy* held that there is no active use component in the purpose test. The sole question is whether the incident resulted from the "ordinary and well known uses to which automobiles are put".

ANALYSIS

[31] For the purpose of my analysis I have applied the two part test set out in *Greenhalgh* as it is the most recent OCA pronouncement of the tests to be applied in interpreting the *Schedule's* meaning of "accident".

Purpose Test

[32] For the purpose test I have considered both the wording of the purpose test in *Greenhalgh* and the test applied by the S.C.C. in *Amos* as modified by the SCC in *Vytlingam*:

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

ii. Did the incident occur in the course of the ordinary and well known activities to which automobiles are put?

[33] For the reasons provided below I find that the applicants in the course of replacing the fuel pump on their brother's Monte Carlo were not using or operating the Monte Carlo within the meaning of the *Schedule.*

[34] I do not find that replacement of a fuel pump in a vehicle that has not been operated for several days and is hoisted on hydraulic jacks to be an ordinary and well known activity to which automobiles are put by motorists.

[35] For that reason I find that the January 30, 2016 incident in R's garage was not an "accident" within the meaning of the *Schedule.*

[36] In making my decision I have kept in mind the principle confirmed by the SCC in *Vytlingam* that my interpretation must keep in mind the reasonable expectation of both the insured and the insurer.

[37] I have focused on the case law interpreting the meaning of the word "accident" as it is used in the *Schedule*. I agree with the submission of Intact and Economical that cases that pre-date the legal test set out by the OCA in *Chisholm*, *Greenhalgh, Downer and Martin*, applied tort principles and/or were

decisions in other provincial jurisdictions under their respective schemes and are not helpful or binding precedent.

[38] While the SCC decision in *Vytlingam* is not a no-fault benefits case I agree with Intact and Economical that reliance on the *Vytlingam* decision by the OCA in *Caughy* confirms that the SCC's comments in *Vytlingam* with respect to the purpose test are binding precedent.

[39] The question to be decided is whether R and C were using the Monte Carlo for a recognized and well known purpose to which automobiles are put when they undertook to repair the vehicle by replacing the fuel pump in the vehicle in R's garage.

[40] Intact and Economical argue that the fact that the Monte Carlo was inoperable at the time of the incident is an important consideration in this case. They rely on the statement of the Court of Appeal in *Caughy* that "*there was no evidence that the motorcycle was inoperable"* to support their argument that the fact that the Monte Carlo was inoperable at the time of the incident means that it could not be used or operated as a motor vehicle.

[41] The applicants argue that *Caughy* stands for the proposition that there is no requirement that a vehicle must be in active use or able to be driven at all times as long as the use being made is an ordinarily and well-known activity such as parking, changing tires, repairing a vehicle or alighting/disembarking. They submit that the vehicle does not even have to be turned on as long as the use being made is ordinary or well known.

[42] While the OCA in *Caughy* clearly stated that a vehicle does not have to be in active use to meet the purpose test it also stated that coverage is limited to motor vehicles being used as motor vehicles. In my view the comments of Justice Binnie's in *Vytlingam* are key to determining if the Monte Carlo was being used for an ordinary and well know activity. Justice Binnie stated:

> *"When Major J. said in Amos that it was a condition of no-fault coverage that the claim relate to the ordinary and well know activities to which automobiles are put, he was simply signalling that someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance."*

[43] In my view the fact that the vehicle was moved into the garage a couple of days before the repair was undertaken, the fact that the vehicle was inoperable at the time of the incident and the complexity of the repair undertaken support the

conclusion that the applicants were not using the vehicle for a motoring purpose at the time of the incident.

[44] C argues that Intact "at all material times expected or ought to have expected that their insured, [H][11], his family members and/or his mechanics would perform repairs on the vehicle and such repairs would constitute the use an operation of the vehicle and such use and operation of the vehicle could result in an injury to the insured and/or third parties using the vehicle with the insured's consent".[12]

[45] I do not agree that it is a reasonable expectation of insured or insurers that insureds who undertake to repair a third party's vehicle and are not using the vehicle for a motoring purpose at the time of the repairs are covered by no-fault accident benefit.

[46] Several cases have considered the issue of whether incidents involving the repair of a motor vehicle constitute an "accident" within the meaning of the *Schedule.*

[47] Economical and Intact rely on the Financial Service Commission of Ontario ("FSCO") decisions in *Olesiuk v. Kingsway General Insurance Company*[13] ("*Olesiuk")* and *Khan v. Certas*[14] ("*Khan")* to support the proposition that repair of an inoperable vehicle does not constitute use of the vehicle.

[48] In *Olesiuk* the claimant was injured when he fell off the hold of a truck which he was repairing and as a result of the incident sustained serious injuries. The arbitrator found that when one is repairing a vehicle he is not actually using that vehicle.

[49] In *Khan* the vehicle stopped running some distance away from the applicant's home. A tow truck took the vehicle to the applicant's garage where the applicant removed a gas tank to access a faulty pump. The applicant disconnected the fuel line leading from the gas tank to the engine. After disconnecting the fuel line the applicant used compressed air power tools to attempt to disconnect the bolts holding the gas tank to the underside of the van. At some point while using the compressor and air tools the garage caught on fire. The van was completely destroyed and the applicant sustained burns to his head and body.

[11] The applicants' brother who owned the Monte Carlo
[12] Paragraph 25, Submissions of C.C.
[13] 2011 CarswellOnt 9791
[14] 2008 CarswellOnt 4541

[50] The arbitrator in *Kahn* found that at the time of the repair the applicant was doing something to the vehicle but he was not using the vehicle as a motor vehicle.

[51] He found that the common sense approach outlined in *Vytlingam* necessitated the conclusion that the repair of the vehicle in the garage was not use of or operating the vehicle. He found that the applicant's activities were that of a repair man not of a motorist.

[52] While I am not bound by the decision of a FSCO arbitrator I agree with the conclusion the arbitrator reached in *Khan.*

[53] The applicant's rely on *Olesiuk* to argue that it is conceivable that the use or occupation of a vehicle could start a chain of events that leads to necessary repairs that results in an impairment.

[54] The determination of whether a motor vehicle is in use or operation within the meaning of the *Schedule* is very fact specific. This is not a case where the use or operation of a vehicle started a chain of events that led to necessary repairs that resulted in an impairment.[15] [16] The Monte Carlo had been in R's garage for several days before the incident took place.

[55] The applicants argue that repairs of a vehicle fall into a category of uses to which automobiles are normally put and constitute a normal use and occupation[17]. The applicants rely on Financial Services Commission of Ontario ("FSCO") case of *Umer v. Non-Marine Underwriters, Mbrs. of Lloyds ("Umer")*[18].

[56] In *Umer* the insured took his taxi to a garage for repairs. As he watched the repairs, gasoline spilled from the gas tank of his taxi and caught fire. The insured suffered burns as a result of the fire. His insurance company denied accident benefits under the *Schedule* on the basis that the injuries did not result from an accident as defined in the *Schedule.* The FSCO arbitrator found that the applicant was injured as a result of an "accident" and was entitled to claim benefits.

[57] I do not find the *Umer* case of any assistance in my deliberations on the purpose test. In *Umer* the parties agreed that the repair of the insured's automobile at the garage fell into the category of uses to which automobiles are

[15] *Olesiuk v. Kingsway General Insurance Company,* FSCO A10-002609
[16] *Federation Insurance Company of Canada v. Saad,* FSCO Appeal P03-00017
[17] Part IV, paragraph 2, Submissions of C.C.
[18] FSCO A02-00721

normally put and the FSCO arbitrator did not have to determine the issue that is before me.

[58] The applicants also rely on two decisions of the British Columbia Supreme Court to support their position. I do not find either the case of *Elias v. Insurance Corporation of British Columbia*[19] *("Elias)* or *Shelton v. Insurance Corporation of British Columbia, et al*[20] *("Shelton")* to be applicable to the facts before me. In both of these cases which were decided before 1996 amendments to the *Insurance Act* the issue before the B.C. Supreme Court was the liability of insurers for property damage.

[59] I also do not find the Ontario Superior Court case of *Horsefield v. Economical Mutual Insurance Company*[21] ("*Horsefield")* helpful in my deliberations. The issue in *Horsefield* was liability for property damage caused by a fire that occurred while a vehicle was being repaired.

[60] The question was whether an exclusion clause in a tenant's insurance policy that excluded damage arising from the ownership, use or operation of any motorized vehicle applied. The Court found that the tenant's maintenance and repair of his motor vehicle constituted the "use" of a motorized vehicle within the meaning of the motorized vehicle exclusion in the policy.

[61] In my view *Horsefield* may be distinguished on the facts in that the Court was asked to interpret the mean of the word "use" of a motor vehicle in the context of the motor vehicle exclusion clause in the contract and not in the context of no-fault automobile insurance.

[62] I am of the view that on the facts of this case the repair undertaken by the applicant's is not an ordinary and well know use of a vehicle by an insured which is covered the Schedule. I do not see any connection between the Monte Carlo being used for a motoring purposes and the repair by R and C undertaken in the R's garage several days after the vehicle was last used for motoring purposes. In my view the no fault automobile benefits provided in the *Schedule* are not meant to be available to a person whose only connection to the vehicle is that of a repairman.

[63] While it is accepted that coverage provisions in insurance policies ought to be read widely, it is also recognized that common sense must be used. I do not

[19] 1992, CanLII 762 BCSC
[20] 1991 Can LII 2142 BCSC
[21] 2017 ONSC 4868

agree with the applicants that the replacement of a fuel pump is a “minor repair” ordinarily undertaken by car owners or their family members. How many insured’s have their own hydraulic lifts in their garage and the know-how to access and replace a fuel pump?

[64] The facts of this case are easily distinguishable from the facts of the *Davis v. Aviva Canada Inc.*[22]*(“Davis”)* case relied on by the applicant’s. In Davis the applicant was injured when the hood of her car collapsed on her while she was replacing windshield fluid. The car was parked in the driveway and the applicant was not planning to go anywhere. The Ontario Superior Court found opening of a car hood to check the level of windshield washer fluid is an “ordinary and well known activity to which automobiles are put.

[65] In *Davis* the Court also recognized that the cases turn on the fact and that there is “no doubt that some accidents arising out of auto repairs, depending on the venue and surrounding circumstances, could well fall outside of the parameters of “ordinary and well know activities to which automobiles are put.”

[66] Having determined that the applicants’ repairs to the Monte Carlo do not meet the purpose test I need not consider whether the causation test is met.

COSTS

[67] The applicant CC request costs.

[68] Rule 19.1 of the Tribunal’s Rules[23] allows a party who believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith to make a request to the Tribunal for costs.

[69] Rule 19.4 requires a party requesting a cost order to make a submission setting out the reasons for the request and the particulars of the other party’s conduct that are alleged to be unreasonable, frivolous, vexatious or in bad faith.

[70] C has not made any submissions setting out the particulars of any other party’s conduct that he alleges to be unreasonable, frivolous, vexatious or in bad faith. For that reasons I am unable to consider his request for costs and the claim is denied.

[22] 2017 ONSC 6173
[23] Safety, Licensing Appeals & Standards Tribunals Ontario , Common Rules of Practice and Procedure, October 7, 2107

ORDER

[71] For the reasons provided above I **Order:**

1. The applications are dismissed.
2. CC's request for costs is denied.

Released: June 12, 2019

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Susan Mather
Vice Chair