Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Borsato v. Pembridge Insurance, 2021 ONLAT 19-013826/AABS

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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:

Kirith Borsato

Applicant

and

Pembridge Insurance

Respondent

DECISION

ADJUDICATOR: **Kimberly Parish**

APPEARANCES:

For the Applicant: Eddie J. Wiley, Counsel

For the Respondent: Eric K. Grossman, Counsel
Patrick M. Baker, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant, Kirith Borsato ("Ms. Borsato") claims to have been injured in an automobile accident on July 4, 2014. She applied for accident benefits to the respondent, Pembridge Insurance. pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").

[2] A case conference was held on June 4, 2020 and the parties were unable to resolve the issues in dispute. The parties agreed to proceed to a written hearing to determine the preliminary issue in dispute.

PRELIMINARY ISSUE

[3] I have been asked to decide the following preliminary issue:

a. Was the applicant involved in an "accident" as defined in s. 3(1) of the *Schedule*?

RESULT

[4] For the reasons noted below, I find the applicant was not involved in an "accident" as defined by s. 3(1) of the *Schedule.* As a result, the applicant is not entitled to claim accident benefits under the *Schedule*.

Agreed Facts

[5] Both parties agreed on the facts relating to the incident which occurred on July 4, 2014 (the "incident"). On this date, Ms. Borsato and her husband ("Mr. Borsato") drove to a feed store to purchase horse feed. When they arrived, they observed skids and pallets in front of the shed. Mr. Borsato reversed their vehicle and parked close to the shed and turned off the engine. Mr. Borsato gave the keys to Ms. Borsato and they both exited the vehicle. They entered the feed store and were directed to the shed to pick up the two bags of horse feed.

[6] Mr. Borsato picked up the two bags of horse feed and Mr. and Ms. Borsato proceeded to walk back to their vehicle. Ms. Borsato was walking approximately 10 feet in front of Mr. Borsato. While she was walking, Ms. Borsato was navigating her way around a number of skids and pallets. While she was walking, she raised her hand and clicked the key fob to remotely unlock the vehicle and the rear hatch so Mr. Borsato could load the horse feed into the cargo area. While clicking the key fob and observing the rear taillights of the vehicle flash, Ms. Borsato tripped over a slightly raised forklift tine.

[7] Ms. Borsato was approximately 5 to10 feet away from the vehicle when she fell forward, hitting her hands and knees on the pavement. She did not make contact with the vehicle at the time she fell, and the engine was off.

LAW

[8] Section 3(1) of the *Schedule* provides the definition of an accident as follows:

> "accident" means 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.

[9] The Ontario Court of Appeal set out the following two-part test to determine whether an accident occurred as defined within the *Schedule*[1]. Both parts of the test must be satisfied for the incident to be determined an accident:

a. **Purpose test:** Did the incident arise out of the use or operation of an automobile?

b. **Causation test:** Did such use or operation of an automobile directly cause the impairment?

ANALYSIS

Purpose test: Did the incident arise out of the use or operation of an automobile?

[10] Ms. Borsato submits that the incident involved three separate vehicular uses which satisfy the purpose test, and which directly caused her impairment as follows:

a. Ms. Borsato was walking towards their vehicle while depressing the key fob to unlock the vehicle and the rear trunk. While she observed the rear taillights flash, she tripped over a fork tine. She also submits that she was in the process of entering the vehicle when she tripped.

b. The location of where the vehicle was parked was important. The vehicle was parked close to the shed which required the unlocking of the vehicle, and the opening and loading of the vehicle to be done near the forklift tine.

[1] *Greenhalgh v. ING Halifax Insurance Co*., 2004 CanLII 21045 (ONCA)("*Greenhalgh*")

c. Mr. Borsato was 15 to 20 feet away from the vehicle when the incident occurred. Ms. Borsato submits that Mr. Borsato then loaded the vehicle with the horse feed, and they drove away together after the incident.

[11] The respondent disagrees with Ms. Borsato and submits that simply unlocking a vehicle for the purpose of loading cargo is not sufficiently connected to a motoring purpose and thus does not satisfy the purpose test.

[12] Ms. Borsato relies on a decision issued by the Ontario Insurance Commission ("OIC"), *Gligoric v. Economical Mutual Insurance Co.*[2] In that decision, the insured person had his keys in hand and attempted to unlock his vehicle when he slipped and fell on ice and sustained injuries. He had not touched the vehicle.

[13] She also relies on a Tribunal decision, *G.R. v. Economical Mutual Insurance Company*[3] in which the insured person slipped on the ice/snow when he was cleaning snow off his vehicle. In that decision, the adjudicator relied on *Gligoric* and determined that cleaning snow off of a vehicle and attempting to unlock a vehicle are both activities accepted as a part of the definition of the ordinary use of a vehicle. I find *G.R.* distinguishable as the parties in that case agreed the insured person met the purpose test. The adjudicator needed to determine whether the test for causation had been satisfied.

[14] The respondent argues that *Gligoric* satisfied the operative definition of coverage in effect at the time pursuant to s. 1 of the 1994 *Schedule*[4] which referenced an "accident" as an incident in which directly or indirectly, the use of an automobile causes an impairment. The respondent argues the application of O. Reg. 403/96 changed the definition of an "accident" as it implemented a direct causation requirement and that definition remains unchanged in the current applicable *Schedule* O. Reg. 34/10. I agree with the respondent that *Gligoric* relied on the 1994 *Schedule* in which the definition of an "accident' encompassed a broader scope. I find the definition of an "accident" under the *Schedule* O. Reg. 403/96 and currently in effect under *Schedule* O. Reg. 34/10, explicitly makes the distinction in which the use or operation of an automobile directly causes the impairment. As such, I do not accept the definition of an accident as relied on by *Gligoric* to establish the purpose test has been met. I disagree with the determination reached by the Tribunal in the *G.R.* case. Therefore, I do not accept that while Ms. Borsato depressed her key fob, saw the rear taillights flash,

[2] *Slobodan Gligoric v. Economical Mutual Insurance Co.,* [1997] O.I.C.D. No. 229 ("*Gligoric*"), paras 34-35.
[3] *G.R. v. Economical Mutual Insurance Company,* 2019 CanLII 122726 (ONLAT)("*G.R.*"), at paras 29-30.
[4] O. Reg. 776/93.

and tripped over the fork tine, it establishes this occurred during the course of the ordinary use and operation of a vehicle.

[15] The respondent also relies on the Tribunal decision, *K.B. v. Intact Insurance Company*[5] in which the insured person was walking to her vehicle with her keys in hand and tripped in a pothole near her vehicle. The adjudicator noted that *Gligoric* involved a different version of the *Schedule* which included a broader definition of "accident". The adjudicator in *K.B*. determined not to apply that broader definition when addressing the purpose test. The adjudicator also found that the vehicle had nothing to do with the injuries sustained by the insured person. I find this case is directly on point with Ms. Borsato's case. I agree with the respondent that there must be an actual nexus between an activity and an injury to satisfy the purpose test and an insured person's intention to use a vehicle once they reach it does not satisfy the purpose test. I also agree with the adjudicator in the *K.B*. case to not apply the broader definition of an accident as encompassed within a prior *Schedule*.

[16] The respondent also relied on the Tribunal decision, *R.M. v. Certas Direct Insurance Co*[6]*.* The adjudicator determined the insured person met the purpose test because at the time she fell, she had already started the process of opening the car door. The adjudicator rejected the submission of the insured person that remotely unlocking a car with a key fob while walking towards it constitutes use or operation of a vehicle. Ms. Borsato argues that in *R.M.,* the insured person had completed the act of unlocking her vehicle prior to experiencing a fall. Whereas, in Ms. Borsato' s case, she was in the process of unlocking her vehicle when she tripped and fell. I disagree with Ms. Borsato's analysis. I do not accept that while unlocking the vehicle and tripping over the forklift tine that she has satisfied the use or operation of the vehicle in the purpose test.

[17] Ms. Borsato submits by parking the vehicle near skids, pallets and the forklift, that this required her to unlock her vehicle in the presence of these hazards. Ms. Borsato argues that the trip and fall and her resulting impairment arises from the use or parking of the vehicle. I do not accept this argument in support of establishing the purpose test. I find this argument relates to causation.

[18] Ms. Borsato argues that the incident arose out of Mr. Borsato loading the horse feed into the vehicle. Ms. Borsato relies on *17-006380 v. Liberty Insurance*[7] in which the insured person was placing something in her vehicle or taking

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[5] *K.B. v. Intact Insurance Company*, 2017 CanLII 63622 (ONLAT)("*K.B.*").
[6] *R.M. v. Certas Direct Insurance Co.,* 2019 CanLII 22204 (ONLAT)("*R.M.*").
[7] *17-006380 v. Liberty Insurance*, 2018 CanLII 97385 (ONLAT), at para. 34.

something out when she was struck in the head by an unidentified cyclist. The adjudicator agreed that the use and operation of the vehicle was a dominant feature of the incident. I find that case distinguishable as Ms. Borsato's trip and fall occurred prior to loading the vehicle while Mr. Borsato was walking approximately 10 feet behind carrying the bags of horse feed. It was after the fall occurred that the horse feed was loaded into the vehicle by Mr. Borsato and then he and Ms. Borsato drove away in their vehicle. I agree with the respondent that the loading of the intended cargo had not yet begun when Ms. Borsato tripped and fell.

[19] Ms. Borsato relies on an Ontario Court of Appeal decision*, Economical Mutual Insurance Company v. Caughy*[8] which concluded that parking a vehicle is an ordinary and well-known activity to which vehicles are put and that there is no requirement that the vehicle be in active use. I find *Caughy* distinguishable from this case as the insured person in *Caughy* tripped on a parked motorcycle and then fell into the back of a pickup truck. Ms. Borsato tripped over a forklift tine and did not come into contact with their parked vehicle.

[20] For the above reasons, I find the purpose test has not been met and that the incident did not arise out of the use or operation of an automobile. In the event that my finding is incorrect with respect to the purpose test, I find that Ms. Borsato's incident does not meet part two of the causation test which I address below.

Causation test: Did the use or operation of an automobile directly cause the impairment?

[21] The Ontario Court of Appeal in *Greenhalgh*[9] identified three main considerations when applying the causation test:

a. Whether the incident would have occurred "but for" the use or operation of the automobile;

b. Whether there was the presence of an intervening cause serving to break the link of causation, where the intervening cause cannot be said to be part of the ordinary course of use/operation of the automobile; and

c. If the use or operation of the automobile was the dominant feature of the incident.

[8] *Economical Mutual Insurance Company v. Patrick Caughy,* 2016 ONCA 226 (CanLII), paras 17, 21.
[9] *Supra,* note 1, para. 12.

[22] Ms. Borsato submits that the use of their vehicle satisfies the "but for" test as she would not have tripped over a forklift tine and sustained an impairment but for where Mr. Borsato had parked their vehicle. Ms. Borsato relies on *Greenhalgh*[10] and further submits the "but for" test is not to assess whether the use of a vehicle is the "direct cause" of the impairment as this is assessed under the "intervening act" and "dominant feature" prongs of the test for causation.

[23] She also relies on *K.P. and Aviva General Insurance*[11] in which the adjudicator concluded that "but for" the applicant going down the driveway to get into the car, the incident which caused the applicant's impairment would not have happened. Ms. Borsato submits she was walking to the vehicle while unlocking it using the key fob so she could enter the vehicle and drive away. She further submits the incident and impairment would not have occurred without the use of her vehicle and thus the vehicle was a cause of her impairment. Further relying on *K.P.*, Ms. Borsato submitted there can be more than one cause for an accident which can be either "vehicular" or non-vehicular related[12]. In *K.P.* the adjudicator concluded there were two direct causes for the accident; the icy snow-covered driveway conditions and the Lyft driver who showed up to pick up the applicant could not pull the vehicle up to the house entrance. Ms. Borsato argues that she was required to unlock their vehicle in unfavorable conditions, similar to the applicant in *K.P.*

[24] The respondent submits that Ms. Borsato does not meet the "but for" test as there is no evidence that the use of an electronic key fob had any bearing on her trip and fall and that the use of the key fob was an irrelevant cause that made no difference to the outcome. The respondent submits the facts of this case are distinguishable from *Greenhalgh*. The respondent also submits Ms. Borsato's vehicle was not rendered inoperable, nor that it was abnormal or aberrant that Mr. Borsato chose to park their vehicle in a non-designated parking spot. I agree with the respondent. Further, the respondent submits that Ms. Borsato would not have experienced a trip and fall "but for" where the forklift was parked, with the fork tines slightly raised and not being noticed by Ms. Borsato while she was walking. The respondent argues that her vehicle played no part in the circumstances. The respondent relies on *Chisholm v. Liberty Mutual Group*[13] which held that a direct cause is the active, efficient cause which "sets in motion

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[10] *Supra,* note 1, paras *36-37.*
[11] *K.P. and Aviva General Insurance*, 2020 CanLII 35505 (ONLAT) ("*K.P.*"), at para. 25.
[12] *Ibid,* at para. 33.
[13] *Chisholm v. Liberty Mutual Group,* 2002 CanLII 45020 (ONCA)("*Chisholm*"), at para 30.

a train of events" leading to a result "without the intervention of any force started and working actively from a new and independent source".

[25] In their submissions, both parties agreed with the analysis in *Greenhalgh*[14] which relied on *Chisholm* that the "but for" test eliminates from consideration factually irrelevant causes but conclusively does not establish legal causation. I agree and will now address the two prongs of the legal test for addressing causation.

Intervening Act Analysis

[26] Ms. Borsato submits the use of the vehicle directly caused her impairment based upon the following factors. First, she submits the use of the vehicle caused her to trip and fall. She submits using the vehicle (depressing the key fob while simultaneously observing the vehicle tail lights to confirm the vehicle unlocked) diverted her attention from the forklift tine which she tripped on. She also submits that she felt pressure to open the vehicle doors quickly so Mr. Borsato could load the bags of horse feed into the vehicle. Ms. Borsato relies on three decisions from the Financial Services Commission of Ontario ("FSCO") in which direct causation was established. In the first decision, *Grewal v. Dominion of Canada General Insurance Company*[15], a vehicle struck the applicant's house which startled him. This led to the applicant running down the stairs and tripping and striking the bannister causing him to fall down the stairs. Ms. Borsato also relied on the FSCO decision, *McAlpine v. Northbridge Personal Insurance Corporation*[16] in which an ATV driving on the road frightened a horse which caused the applicant to be thrown from the horse and be trampled. The third FSCO decision, is *Saad and Federation Insurance Company of Canada*[17]. In that case, the applicant returned the air hose to its holder after filling his vehicle tires with air. While walking back to the vehicle in which the engine was running, he slipped and fell on ice.

[27] The respondent rejects the applicant's reliance on the FSCO decisions and submits the facts are distinguishable as the events were causally connected which I also agree. In *Grewal,* the applicant ran and tripped down the stairs after his house shook following a vehicle striking it. In *McAlpine*, it was determined that the ATV was the active, efficient cause which set into motion the chain of event's which caused the applicant's injuries. In *Saad*, it was accepted that a sufficient

[14] *Supra,* note 1, para 37.
[15] *Harjinder Grewal v. Dominion of Canada General Insurance Company,* 2003 CarswellOnt 5811, [2003] O.F.S.C.D., No. 169 ("*Grewal*").
[16] *Sheila McAlpine v. Northbridge Personal Insurance Corporation*, 2015 CarswellOnt 14894 ("*McAlpine*").
[17] *Badreddine Saad and Federation Insurance Company of Canada,* 2003 CarswellOnt 4299, [2003] O.F.S.C.I.D. No. 68 ("*Saad*").

nexus was established in the use and operation of an automobile with an unbroken chain of events.

[28] The respondent argues the vehicle neither played a role in Ms. Borsato's trip and fall, nor the injuries she sustained as a result of tripping over an unsafely parked forklift. The respondent relies on *K.B.* in citing *Greenhalgh* and when applying the test for causation. *Greenhalgh* noted that it needs to be addressed whether the use or operation of the vehicle directly caused the injuries, or whether there was an intervening act which cannot be said to be part of the ordinary course of things[18]. The respondent also relies on two FSCO decisions; *Nickerson and Security National Insurance Co.*[19] and *Banos and Jevco Insurance Company*[20]*.* The applicants in both cases were walking back to their vehicles after exiting a retail store when they slipped and fell on ice prior to reaching their vehicles. Both arbitrators determined the causal link was weakened as this activity was not directly related to the applicants' vehicles.

[29] I do not accept Ms. Borsato's argument that as a result of where the vehicle was parked that this exposed Ms. Borsato to hazards. I find this is a weak causal link unrelated to the vehicle's usage. I am persuaded by *R.M.* which determined that walking towards a vehicle while using the key fob to unlock the doors does not constitute the use or operation of an automobile[21]. I do not find Ms. Borsato has established there was a causal link involving the use or operation of the vehicle. I reject Ms. Borsato's argument that the observation of unlocking the trunk while depressing the key fob diverted her attention, causing her to trip over the forklift tine. I find it was the location of where the forklift was parked with the forklift tines partially raised which caused Ms. Borsato to trip and sustain impairments. Further, I reject Ms. Borsato's argument that she felt pressure to hurry and unlock the vehicle so Mr. Borsato could load the two bags of horse feed. Mr. Borsato had not yet reached the vehicle to load it at the time when Ms. Borsato fell.

[30] Ms. Borsato submitted that her use of the vehicle and the time, proximity, activity, and risk, associated with tripping over the forklift tine did not break the chain of causation. She relies on the FSCO decisions of *Mariano and TTC Insurance Company Limited*[22] and *Pinaretta and ING Insurance Company of Canada*[23]*.* In both cases, the applicants tripped and fell while disembarking from a bus. It was

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[18] *Supra,* note 5, para 19 which cited *Greenhalgh*
[19] *Nickerson v. Security National Insurance Co.,* FSCO A11-011753, at pp. 5-6.
[20] *Banos and Jevco Insurance Company*, FSCO A14-011846, at pp. 7-8.
[21] *Supra,* note 6, para 19.
[22] *Mariano and TTC Insurance Company Limited*, 2006 CarswellOnt 5837.
[23] *Clementina Pinaretta and ING Insurance Company of Canada,* 2005 CarswellOnt 6926.

found the contributing cause did not break the chain of events and disembarking was a required activity associated with using a bus. Ms. Borsato also relied on *Saad*[24] in which the applicant completed filling the tires with air and slipped on ice when walking back to his vehicle that was running. It was determined the chain of causation was not broken. The applicant also relies on *K.P.*[25] in which the adjudicator concluded it was reasonably foreseeable that if the applicant was required to walk down an icy driveway to get to the vehicle that she may slip and fall and become injured. The adjudicator concluded the direct cause of the accident was the use and operation of the vehicle.

[31] I find the cases noted above are distinguishable from Ms. Borsato's case. This is because the chain of causation was found to be unbroken in the above noted cases relied on by Ms. Borsato. I find in Ms. Borsato's case, the chain of causation was broken. Mr. and Ms. Borsato parked their vehicle, shut off and locked their vehicle. I agree with the respondent that their trip ended at this point and a new trip and not yet begun. In the above noted cases, it was determined that the applicants were all involved in activities associated with the use and operation of an automobile which directly caused the accident. In Ms. Borsato's case, I find her tripping over the forklift tine was the direct cause of the incident which was an intervening act not causally connected to the use or operation of a vehicle. I find it was this intervening act that broke the chain of causation. I do not accept that pressing the key fob to unlock the vehicle constitutes entering or loading the vehicle. I find Mr. and Ms. Borsato were neither entering nor loading the vehicle when Ms. Borsato tripped over the fork tine. Lastly, I do not accept that depressing the key fob and observing the taillights flash establishes the use or operation of a vehicle.

Dominant Feature Analysis

[32] Ms. Borsato submits the use of the vehicle was the dominant feature causing her impairment and that the forklift tine was an ancillary cause of her injuries. She submits when unlocking the vehicle using the key fob and seeing the taillights flash is when she tripped over the forklift tine. Ms. Borsato argues the use of the vehicle was ongoing when she tripped and fell and thus was the dominant feature which most directly caused her injuries. The respondent submits that at the time the incident occurred, there was no entering or loading of the vehicle, nor was the engine running. The respondent further submits that the location of

[24] *Supra*, note 17, paras 5 and 6.
[25] *Supra,* note 11, para 33.

the parked forklift resulted in breaking the chain of causation in this incident in which the vehicle had no impact on the outcome.

[33] The applicant submits that *Grewal* is applicable to this case. I disagree. While the adjudicator in *Grewal* concluded that the vehicle was the dominant feature causing the applicant's injuries, I do not find that to be the same in this case. In *Grewal* it was determined there was no intervening act and the chain of causation was unbroken[26]. Ms. Borsato was walking towards her vehicle which was parked, and the engine was not running. She used the key fob to unlock the vehicle and when the taillights flashed, she tripped over the forklift tine. I do not find this establishes the use or operation of the vehicle at the time the incident occurred.

CONCLUSION AND ORDER

[34] I find Ms. Borsato tripping over the forklift tine was the intervening act which broke the chain of causation. I find that tripping over the forklift tine directly caused Ms. Borsato's injuries and not the vehicle. Therefore, I find the incident Ms. Borsato was involved in was not an "accident" as defined within s. 3(1) of *Schedule*.

[35] For the reasons I noted above, the application is dismissed.

Date of Issue: April 27, 2021

Kimberly Parish, Adjudicator

[26] *Supra,* note 15, para 9.