COURT OF APPEAL FOR ONTARIO

CITATION: Dittmann v. Aviva Insurance Company of Canada, 2017 ONCA 617
DATE: 20170724
DOCKET: C62970

Sharpe, Lauwers and Roberts JJ.A.

BETWEEN

Erin Dittmann

Plaintiff
(Respondent on Appeal)

and

Aviva Insurance Company of Canada

Defendant
(Appellant on Appeal)

Kadey Schultz and Christopher Macauley, for the appellant

Michael Gauthier and James Ross, for the respondent

Heard and released orally: July 21, 2017

On appeal from the judgment of Justice R.D. Gordon of the Superior Court of Justice, dated October 24, 2016.

REASONS FOR DECISION

[1] The respondent sustained serious burns to her lower body when the entire contents of a coffee cup she ordered at a McDonald's drive-through spilled as she attempted to transfer the cup from the drive-through window to the cup holder in her vehicle.

[2] The motion judge determined that the respondent was impaired as a result of an accident as defined in the *Statutory Accident Benefits Schedule (O. Reg 34/10, Effective September 1, 2010)* and accordingly that she entitled to statutory accident benefits in accordance with her insurance policy.

[3] In our view, the motion judge did not err in his application of the SABs causation test. As the motion judge pointed out, at para. 13, and as elaborated in para. 28 of the respondent's factum, the use and operation of the respondent's vehicle was a direct cause of the respondent's injuries. We refer here in particular to the following passage from para. 13 of the motion judge's reasons where he states as follows:

> I come to this conclusion because but for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee cup while in the seated position, would not have been transferring the coffee cup to the cup holder across her body, and would not have had the coffee spill on her lap. In addition, but for her being seated and restrained by a lap and shoulder harness she may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on her.

[4] We are satisfied that these findings are amply justified on the evidence, and that they meet the requirements of the direct causation test prescribed by s. 3 of the SABs regulation as this court laid out in *Greenhalgh v. ING Halifax Insurance*, [2004] O.J. No. 3485 (C.A.), at para 38, and in *Downer v. Personal Insurance Co.*, 2012 ONCA 302, at paras. 34, 38 and 39.

[5] We are also satisfied that, as pointed out in the respondent's factum, the restraint of the seatbelt increased the respondent's exposure to the scalding liquid and thereby increased the level of her impairment.

[6] There was no intervening act, as that phrase had been interpreted in the case law, in the circumstances of this case.

[7] As pointed out in *Salamone v. Aviva Canada*, 2016 OFSCD No 191, at para. 31, the issue is not, what was the "triggering event" of the incident, but rather, what caused the impairment. In this case, the use of a running motor vehicle in gear to access the drive-through and the seatbelt restraint were direct causes and dominant features of the impairment the respondent suffered.

[8] Accordingly, the appeal is dismissed.

[9] Costs to the respondent fixed at $12,000, inclusive of disbursements and taxes.