Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A16-000215

BETWEEN:

MILES STOLOVE

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before:	Arbitrator Harvey Savage
Heard:	In person at ADR Chambers on April 17, 2017
Appearances:	Ms. Deborah Lewis for Mr. Miles Stolove Mr. Jason Frost for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Mr. Miles Stolove, was injured in a motor vehicle accident on July 7, 2011 and sought accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Stolove, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issue in this Preliminary Issue Hearing is:

1. Was Mr. Stolove injured in an "accident" as that term is defined in the *Schedule*?

Result:

1. Mr. Stolove was not injured in an "accident" as that term is defined in the *Schedule.* Mr. Stolove's Application for Arbitration is dismissed.

EVIDENCE AND ANALYSIS:

Background

The issue in this case is whether Mr. Stolove was injured in an "accident" as that term is defined in the *Schedule*. State Farm asserted that the incident that occurred on July 7, 2011 was not an incident in which "the use or operation of an automobile directly causes an impairment." Consequently, Mr. Stolove has been denied accident benefits.

Facts

The parties filed separate statements of facts, and a transcript of an Examination Under Oath was also filed by the Insurer.

On July 7, 2011, Mr. Stolove arrived at a storage facility called Yellow Storage. He arrived at 10 a.m., and was accompanied by four other people (Matt, Karen, an unnamed person, and Mr. Stolove's brother). The weather was sunny and dry.

Their purpose at Yellow Storage was to move items for Karen. There were various automobiles parked at Yellow Storage, one of them belonging to the Applicant, a 2000 Jeep Cherokee that was parked perpendicular to Yellow Storage's garage door, two to three feet away. Another one

belonged to Matt, a Chevy truck, and it was parked beside the garage door parallel to the Applicant's Jeep Cherokee.

The Applicant was carrying items from a small storage room to a larger one on the premises, and then to Matt's truck.

Other than a brief interlude of time when the Applicant left for about one hour and picked up some tables for Karen, the Applicant was solely engaged in moving items from a smaller to larger storage unit and from the storage unit to Matt's truck. At no time during the movement of items was the Applicant's car engine on, and the only vehicle that was used for storage of items was Matt's truck.

On one trip, he was returning from Matt's truck when a heavy metal overhead garage door descended on him. The Applicant has alleged that he suffered serious injuries as a result of the door falling on him, and the materials indicate an ongoing negligence claim with regard to those injuries.

The Applicant was taken by ambulance from the scene to hospital where he received treatment.

Applicant's Position

For accident benefit purposes, the Applicant submits that the incident satisfies both questions of the two-fold test in determining whether an "accident" has occurred under s. 3(1) of the *Schedule*.

He submits with respect to the first question of the two-fold test – "use or operation" – that Matt's truck was being put to the ordinary and well-known activities that trucks are put to in being loaded. The truck was being used for its ordinary purpose, which was to load and unload storage materials, thereby meeting the purpose test.

With respect to the second question – direct causation – he submits that his injuries resulted from an uninterrupted sequence of events involving the use and operation of a vehicle, that of loading and unloading storage materials.

The Applicant submits that direct cause does not mean the only cause or most immediate cause. There can be more than one direct cause of a victim's injuries. However, one of the direct causes must be the use or operation of a motor vehicle, and he reiterates that the vehicle being part of the loading/unloading serves that purpose.

He submits further that the context of the garage environment in this case – hazards around the facility – are part of the normal risk in that environment when using or operating vehicles for the alleged purposes.

He submits that in such a context, the falling garage door was not an intervening act breaking the chain of causation. In fact, the chain of causation was not interrupted until the use of the truck had come to an end, that of being the repository of materials. Only seconds had elapsed from leaving the truck and entering the archway.

Summarizing his position, the Applicant submits that in respect of time, proximity, activity and risk, there was a nexus between his use of the truck and his injuries.

Insurer's Position

The Insurer submits that the Applicant satisfies neither the "purpose test" nor the "causation test", both of which are required to establish involvement in an "accident".

Regarding the first question, it submits that the act of the Applicant walking into the entranceway of the building and then being struck on the head by a collapsing overhead door is completely independent from the normal use and operation of the Applicant's vehicle. It was the garage door unfortunately falling upon the Applicant that focused the risk upon the Applicant's act of walking,

which was removed from a normal incident of the using of the automobile, which was parked with the engine off at all relevant times.

The Insurer submits that the causation test was also not proved since the vehicle did not cause the Applicant's injuries. Rather, the falling door was completely independent from the use of any vehicle, and it was this intervening event which was solely responsible for the Applicant's injuries. In fact, the falling malfunctioning door was the dominant feature of the incident as confirmed in various available records regarding the incident – including the police occurrence report, ambulance report, hospital records, OCF-3, and the Applicant's Statement of Claim.

Analysis

I find that Mr. Stolove was not involved in an "accident" as that term is defined in the *Schedule*. Mr. Stolove's injuries were not directly caused by the use or operation of Matt's vehicle.

The cause of his injury was the garage door descending upon him while he was walking through the doorway. Any connection between the use or operation of an automobile and his injury was remote, and therefore does not meet the test.

These types of cases all turn on the particular facts, but it is accepted that the required analysis has two parts:

> (i) Did the incident arise out of the use or operation of an automobile? ("Use or operation" referring to an ordinary and well-known activity to which automobiles are put)
> (ii) Did this use or operation of an automobile directly cause the impairment?[2]

The Applicant claims that his injury resulted directly from the use or operation of Matt's vehicle because:

[2] *Greenhalgh v. ING Halifax Insurance Co.*, [2004] O.J. No. 3485.

- Loading a vehicle is clearly within the range of normal use of a vehicle, and the closing garage door is a normal risk created by the use or operation of an automobile;
- He submits that there was a continuous causal chain which had not ended when the garage door fell. There was not an intervening act that broke the chain of events.

On the facts before me, I find that the Applicant meets the ordinary use test, but fails the causation test.

Although I accept that loading/unloading goods is within range of an ordinary use to which automobiles are put, I find that the unfortunate incident of the garage door falling on him did not arise out of the use or operation of an automobile. Accordingly, my remaining analysis will only focus on the causation part of the two step analysis.

Did this use or operation of an automobile directly cause the impairment?

To find an "accident" as defined in the *Schedule*, the evidence must show a clear link between the use and operation of the vehicle and the person's injuries. This link may be found by considering the vehicle in the whole scenario and factors such as time, proximity, activity, and risk. I examine each of these factors in turn.

I have already considered activity in relation to whether this incident was as a result of the use or operation of a vehicle. Looking at activity more broadly, the fact that the Applicant was more involved in the activity of walking through the entrance way of the storage garage than any activity directly related to the vehicle weakens the link. In addition, factors such as time and proximity weaken the Applicant's case even further. When the door crashed upon him, the vehicle was not in the immediate vicinity and had been stationary for some time leading up to the incident.

When looking at risk as a factor, the question to ask is whether the injury was a natural and reasonable incident or consequence of the use of a motor vehicle and a risk associated with

motoring. The argument would seem too tenuous or weak a connection between the truck being loaded/unloaded about eight feet removed from the garage, and the malfunctioning garage door which descended on the Applicant.

Delegate Naylor, in an Appeal from an Arbitral decision of Arbitrator Baltman,[3] acknowledged that a link of causation cannot be so remote as to deprive "cause" of all meaning.[4] In that Appeal, she upheld the Arbitrator's decision that the sudden sound of an automobile was a strong factor causing a cyclist to veer into a pothole and injure himself; that was an injury caused by the use or operation of an automobile, however indirectly.

In *Khan and Certas Direct Insurance*,[5] Arbitrator Richards found that the Applicant's repair of his wife's vehicle, during which time escaping vapour fumes burned him, did not constitute an "accident", both because the repair to the vehicle was not a "use" of that vehicle, and also because he found that the Applicant's injuries were not caused directly by the repairs – the faulty air compressor igniting the flames was an intervening event that broke the chain of causation.

In *Olesiuk*,[6] the Applicant argued that in effecting repairs to a stationary vehicle, he was using the truck's hood as a platform when he fell. Arbitrator Feldman said that repairing a vehicle, in general, will not constitute a use of a vehicle and cannot be converted into a "use" merely by standing on a vehicle while making repairs.

Arbitrator Feldman, referring to various Supreme Court of Canada and Ontario Court of Appeal decisions, also opined that common sense should be used and interpretation must give effect to the reasonable expectations of the Insured and Insurer. He also reiterated Driedger's oft-cited 'modern rule' of interpretation that "courts are obliged to determine the meaning of legislation in its total

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[3] *Federation Insurance Company of Canada and Saad* (FSCO Appeal P03-00017, January 8, 2004).
[4] *Federation Insurance Company of Canada and Vineski* (FSCO Appeal P96-000034, October 18, 1996).
[5] *Ibid.*, at paragraph 35.
[6] *Olesiuk and Kingsway General Insurance Company* (FSCO A10-002609, September 7, 2011), at pages 8 and 11.

context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation".

In *Webb and Wawanesa,*[7] Director's Delegate Blackman confirmed that most incidents involving a motor vehicle for a motoring purpose will meet the purpose test, but he added:

> Under the modified causation test from *Chisholm* and *Greenhalgh,* it is not enough to show that the 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.

In *Greenhalgh*,[8] the Court of Appeal held that in *Chisolm*, "Laskin J.A. found three inquiries helpful in answering the 'direct cause' question: the 'but for' inquiry, the 'intervening act' inquiry, and the dominant feature' inquiry." He said that, "Even under the more expansive legislation, Mr. Chisolm could not succeed … (I)t was the gun shots, and not the use or operation of an automobile, that could be said to be the 'dominant feature' of Mr. Chisolm's injury."

Greenhalgh states, and *Downer* reconfirms, that the 'but for' test only serves to eliminate from consideration factually irrelevant causes, but does not conclusively establish legal causation. The case law is clear that a policy of automobile insurance may not necessarily insure, even when one is inside a car, against assault, gun fire or every other possible peril.

I find that Delegate Blackman's reasoning in *Webb,* and the binding decisions referred to therein, are persuasive, in that the risk at some point must shift from a normal incident of using an automobile and become a risk associated with walking, as in the present case. The Applicant was walking through the doorway to retrieve more items when the door collapsed on him.

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[7] *Webb and Lombard General Insurance Company of Canada*, [2007] O.F.S.C.D No. 188 (Arbitral decision) and FSCO Appeal P11-00015.

[8] *Supra,* note 2.

The dominant feature had nothing to do with an automobile. The Chevy truck was parked outside the garage from the time that he arrived. The Applicant's own automobile was used only as a means for him to get to the storage garage.

The only dominant feature in this case was the Applicant walking back and forth to assist his friend in moving storage goods. During that process, the door collapsed onto him causing his serious injuries.

None of the reports which documented the accident – the police occurrence report, the ambulance report, the Sunnybrook ER report – make any reference to the involvement (or even existence) of a motor vehicle in connection with the accident. The Statement of Claim, even as amended in 2014, makes no reference to liability under the *Insurance Act*.

Examining all of the facts and circumstances, it seems to me that the role of the vehicle in the whole scenario was too remote to have played a role of causal factor in this incident. Matt's parked and stationary vehicle was, at very best, an indirect, tenuous link to the Applicant's incident.

Finally, even accepting that under the present definition of "accident", the use or operation of an automobile does not automatically end when one leaves a car,[9] it is still necessary that the facts show that the use or operation of the vehicle had a continuing causal role, and remained a dominant feature of the incident[10] and not ancillary to it.[11] It is not enough to show that the vehicle was involved in some peripheral or some incidental way.[12]

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[9] *Shantz and Dominion of Canada General Insurance Company* (FSCO A01-001147, May 13, 2003) and *Seale v. Belair Insurance Company Inc.*, (2003) O.F.S.C.I.D., No. 8.

[10] *Webb and Lombard General Insurance Company of Canada*, [2007] O.F.S.C.D. No. 188.

[11] *Chisholm v. Liberty Mutual Group*, 2002 CanLII 45020 (ONCA).

[12] *Ekunah and Simcoe & Erie General Insurance Company* (OIC Appeal P-007550, April 22, 1996); *Kumar and Coachman Insurance Company* (FSCO Appeal P01-00026, August 9, 2002); *Karshe and Non-Marine Underwriters* (FSCO A99-000855); *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO Appeal P02-00039, January 8, 2004).

Given all the circumstances in this case, I do not see how the use or operation of the vehicle remained a dominant feature of the incident that caused the Applicant's injuries. I find that the Applicant's accident was an incident completely separate from the use or operation of the vehicle. It was truly an intervening incident. There was nothing integral to the use or operation of the vehicle occurring when the Applicant had this accident and injured himself.

Therefore, I find that the use or operation of the vehicle did not directly cause the Applicant's injuries. As a result, Mr. Miles Stolove was not involved in an accident as defined in the *Schedule*.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*

Harvey Savage Arbitrator	June 19, 2017 Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. Mr. Stolove was not injured in an "accident" as that term is defined in the *Schedule*. Mr. Stolove's Application for Arbitration is dismissed.

June 19, 2017

Harvey Savage
Arbitrator

Date