

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

DIONNE ECCLESTON

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Joyce Miller

Heard: September 13, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: P. Michael Rotondo for Ms. Eccleston
Jennifer Kent for Guarantee Company of North America

Issues:

The Applicant, Dionne Eccleston, claims she was injured in a motor vehicle accident on April 7, 2003. She applied for statutory accident benefits from Guarantee Company of North America ("Guarantee"), payable under the *Schedule*.¹ Guarantee denied her application for benefits on the basis that she was not injured in a motor vehicle accident. The parties were unable to resolve their disputes through mediation, and Ms. Eccleston

¹ The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Was Ms. Eccleston injured as a result of an "accident" as defined in subsection 2(1) of the *Schedule*?

Result:

1. Ms. Eccleston was injured as a result of an "accident" as defined in subsection 2(1) of the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

Ms. Eccleston is 38 years old. At the time of the alleged accident, Ms. Eccleston was employed as a temporary worker for Request Personnel Services Inc. as a General Office Assistant and was assigned to work at Euclid Arvin Meritor, a truck parts manufacturer in Mississauga.

Ms. Eccleston testified that on the morning of the accident she followed her usual routine to go to work. At 6:30 a.m. she boarded the Route 16 bus which took her to the bus terminal at Westwood Mall in Mississauga. She arrived there at 6:45 a.m. and at 7:00 a.m. she boarded the Route 42 bus which took her to the bus stop on the north-east corner of Derry Road and Tomken Road.

Ms. Eccleston testified that to get to Gana Court, a street off the north side of Derry Road west of Tomken Road, she had to cross Tomken Road.

Ms. Eccleston testified that Tomken Road is a wide street with six lanes, two pedestrian islands and a median. Ms. Eccleston's daily route to work required her to cross Tomken Road from the north-east corner of Derry Road and Tomken Road. Ms. Eccleston described Tomken Road as follows:

- lane one situated at the north-east corner of Tomken Road is a turning lane for cars turning right off Derry Road
- next is a pedestrian island
- lanes two and three are northbound lanes
- next is a meridian between lanes three and four
- lanes four and five are southbound lanes
- next is a pedestrian island
- lane six at the north-west corner of Tomken Road and Derry Road is a turning lane for southbound traffic

The intersection has a clearly demarcated crosswalk line that goes across the intersection.

Ms. Eccleston testified that when the Route 42 bus reached Tomken Road it could not let the passengers off at the bus stop because of the high mound of snow at the stop. Instead, the bus driver pulled across the turning lane to allow the passengers to disembark.

Ms. Eccleston testified that she got off the bus with a group of people. However, because there was a high mound of snow and ice on the pedestrian island, they could not walk onto the pedestrian island. As a result, she and her fellow passengers were forced to go onto the road around the northern tip of the pedestrian island in order to cross the intersection. By the time they had crossed over to the fourth lane, the light began to signal that it was changing. Everyone walking with her ran off to catch a southbound Route 51 bus. She was left alone to continue crossing the road.

Because of the high mounds of snow at the 51 bus stop, which would normally be at the sixth lane curb, the bus stopped for passengers in lane five. As Ms. Eccleston was crossing lane 5, the other passengers had boarded the bus, the lights were changing and the bus had crossed over its stop line and was crawling towards the pedestrian crosswalk in anticipation of an advancing green light to stop flashing.²

² The flashing green light was for the northbound traffic turning west.

Ms. Eccleston testified that as she was crossing the fifth lane, she felt the rolling bus was pushing her to hurry and get off the road. She stated that she felt intimidated and frightened by the bus rolling towards her. As well, at the same time that the bus was crawling towards her, it was abutting onto the pedestrian island and blocking the northern tip of the island. This prevented her from taking a safe passage around the island. As a result, in order to get away from the rolling bus, she was forced to step onto the island with its high mound of snow and ice.³

Ms. Eccleston testified that as she put her right foot on the island and was lifting her left foot, she slipped and fell onto her hands and knees. Because of the slippery mound of snow and ice, she slipped backwards with the right side of her body coming to rest under the front bumper of the Route 51 bus which had now stopped moving.

Ms. Eccleston stated that when she got up she placed her hand on the windshield of the bus close to the door to steady herself, she noticed the bus driver was laughing at her. Because the bus had moved into the crosswalk to go south, she was again forced to climb up on the snow and ice mound to get out of the way. As a result, she again fell and slid down the other side of the mound into the sixth lane barely missing from being hit by a truck. By the time she had gotten up, the bus had left.

Ms. Eccleston stated after she got up from her fall she went to her office. When she got there she stated she was quite shook up and had visible injuries to her hands and knees as a result of her fall.

On the same day of this incident, Ms. Eccleston delivered a letter to the City of Peel describing the events of her fall. She later forwarded a copy of this letter to Guarantee. On June 16, 2003, she applied for accident benefits. On August 6, 2003, Guarantee wrote to Ms. Eccleston acknowledging that "a transit bus was at the scene of the fall"⁴ but that it was the snow and ice that had caused the fall and accordingly her application for accident benefits was denied.

³ To corroborate her testimony, Ms. Eccleston filed as an exhibit two pictures, taken the next day, of the pedestrian island with its mound of snow and ice. See Exhibit 1, tab 4.

⁴ Exhibit 2

The issue in dispute is whether Ms. Eccleston was involved in a car accident pursuant to subsection 2(1) of the *Schedule*.

Submissions

Ms. Eccleston's Submissions

Ms. Eccleston submits the bus rolling towards her and blocking her safe passage around the north-west tip of the pedestrian island set in motion a chain of events that forced her to climb onto the snow and ice mound on the pedestrian island which resulted in her slip and fall. That is, it was the ordinary use and operation of a motor vehicle that set in motion this chain of events. Ms. Eccleston submits that the dominant feature of her slip and fall was the bus which forced her onto the pedestrian island.

Ms. Eccleston submits that her case is similar, if not more compelling, to a number of arbitration decisions which found the applicants' injuries from a slip and fall were "directly" caused by the use and operation of a motor vehicle. These include the appeal cases of *Belair and Seale*⁵, *State Farm and Souchuk*⁶ and *Federation Insurance and Saad*.⁷ In the latter cases, Ms. Eccleston submits, the applicants had some choice as to whether or not they should walk on the area that resulted in their falls. In her case, she had no choice but to climb onto the mound of snow and ice to get out of the way of the bus moving towards her.

Accordingly, Ms. Eccleston submits that she was involved in a car accident pursuant to subsection 2(1) of the *Schedule*.

Guarantee's Submissions

Guarantee submits that, although for the most part Ms. Eccleston was a credible witness, there was some discrepancy in her evidence regarding the temporal limits of the changing of the lights from green to red and the cessation of the flashing advance green light that would impugn her credibility. Guarantee submits that in Ms. Eccleston's

⁵ *Belair Insurance Company Inc. and Seale* (FSCO P02-00005, January 28, 2003)

⁶ *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004)

⁷ *Federation Insurance Company of Canada and Saad* (FSCO P03-00017, January 8, 2004)

description of the changing of the lights there appeared to be an insufficient time period between when the light while she was crossing the road turned to red and the cessation of the flashing green light for the northbound traffic and thus impugns her credibility.

Guarantee further submits that while the bus was at the scene of Ms. Eccleston's slip and fall, it cannot be said to be the dominant feature of the incident; the slip and fall was the dominant feature of this incident. Guarantee submits that in this case there was a clear intervening act that caused Ms. Eccleston's injuries, namely, the snow and ice on the pedestrian island. Accordingly, Guarantee submits it cannot be said that the use and operation of a motor vehicle "directly" caused Ms. Eccleston's injuries.

In support of its view, Guarantee relies on the case of *Mahadan and Co-operators*⁸ wherein it was found that the use and operation of a motor vehicle had not *directly* caused the applicant to slip and fall, and the pre-1996 case of *Fedrizzi and TTC*,⁹ wherein it was found that the use and operation of a motor vehicle had not *directly or indirectly* caused the applicant to slip and fall.

The Law

Subsection 2(1) of the *Schedule*, which was enacted on November 1, 1996, defines "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.

Prior to November 1, 1996, the definition was more expansive in that it encompassed impairments caused "indirectly or directly" by the use or operation of an automobile. The post-November 1996 definition limited the definition to "directly causes."

⁸ *Mahadan and Co-Operators General Insurance Company* (FSCO A00-000489, March 15, 2001)

⁹ *Fedrizzi and TTC Insurance Company Limited* (OIC A97-000839, March 25, 1998)

In the Court of Appeal decision of *Chisholm and Liberty Mutual*,¹⁰ Justice Laskin clearly confirms that the new definition of "accident" significantly narrows the scope of what can be considered an accident in comparison to the definition prior to November 1996.

A leading arbitration case in interpreting the revised definition of an accident is *Petrosoniak and Security National Insurance Company*.¹¹ In that case, Arbitrator Novick found that the deletion of the word "indirectly" from the definition now required that there be a direct link between the circumstance that caused an injury and the incident. In interpreting the new definition of "accident," Arbitrator Novick adopted the definition of "direct cause" found in Black's Law Dictionary where the phrase was defined as:

... 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 and independent source.

This interpretation of "directly causes" has been consistently adopted by both arbitrators and judges in interpreting the post-November 1996 definition of "accident."

A number of arbitration cases have discussed the new definition in depth and its effect on the concept of what is an "accident" post-November 1996. I have relied on them and the *Chisholm* case to extract the following propositions applicable to dealing with the issue of what is an "accident" pursuant to subsection 2(1) of the *Schedule*. These are:

- The use or operation of a motor vehicle must directly cause the impairment.¹²
- A direct cause is a cause which sets in motion a train of events leading to a result without any later intervening act.¹³

¹⁰ *Chisholm v. Liberty Mutual Group* [2002] O.J. No. 3135 (August 15, 2002)

¹¹ (FSCO A98-000198, November 2, 1998). In this case, Arbitrator Novick held that an oil slick left on the road by a vehicle "directly caused" the applicant's injuries, when his bike slipped on the oil slick.

¹² *Petrosoniak and Security National Insurance Company* (FSCO A98-000198, November 2, 1998); *Sarkisian and Co-operators General Insurance Company* (FSCO A99-000966, January 17, 2001); *Karshe and Non-Marine Underwriters, Mbrs. of Lloyd's* (FSCO A99-000855, December 15, 2000); *Kumar and Coachman*

Insurance Company (FSCO P01-00026, August 9, 2002); *Elensky and Royal & SunAlliance Insurance Company of Canada* (FSCO P01-00030, August 9, 2002); *Chisholm v Liberty Mutual* [2001] O.J. No. 3294, August 13, 2001; *TTC Insurance Company Ltd. and Correia* (FSCO P00-00061, July 16, 2001); *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004); *Federation Insurance Company of Canada and Saad* (FSCO P03-00017, January 8, 2004); and *Umer and Non-Marine Underwriters, Mbrs. of Lloyd's* (FSCO A-000721, April 3, 2003)

- Direct cause does not mean the only cause or the most immediate cause. There can be more than one direct cause of a victim's injuries, and one of the direct causes must be the use or operation of a motor vehicle.¹⁴
- The motor vehicle need not come into direct physical contact with the accident victim.¹⁵
- The role played by the motor vehicle must be more than just the location, opportunity or motive.¹⁶
- The motor vehicle must be a dominant feature in the incident, and not ancillary to it.¹⁷

These principles will be incorporated in my analysis below.

ANALYSIS AND FINDING

Credibility

Before discussing the specific issue of whether an accident occurred, I would first like to comment on the issue of credibility. Although Guarantee agreed that Ms. Eccleston was a credible witness in that she gave her evidence in a straightforward and detailed manner, it nevertheless raised a point in its closing submissions to impugn Ms. Eccleston's credibility. Specifically, Guarantee submitted that Ms. Eccleston's time lines with respect to when the light she was crossing had changed from green to red and when the flashing green light for the northbound traffic had stopped.

¹³ *Ibid*

¹⁴ *Chisholm v. Liberty Mutual Group* [2002] O.J. No. 3135 (August 15, 2002); *TTC Insurance Company Ltd. and Correia* (FSCO P00-00061, July 16, 2001); *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004); and *Belair Insurance Company Inc. and Seale* (FSCO P02-00005, January 28, 2003)

¹⁵ *Petrosoniak and Security National Insurance Company* (FSCO A98-000198, November 2, 1998); *Shantz and Dominion of Canada General Insurance Company* (FSCO A01-001147, May 13, 2002); *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004); and *Belair Insurance Company Inc. and Seale* (FSCO P02-00005, January 28, 2003)

¹⁶ *Lenti and Zurich Insurance Company* (FSCO P98-00030, December 18, 1998); *Karshe and Non-Marine Underwriters, Mbrs. of Lloyd's* (FSCO A99-000855, December 15, 2000); *Waters and Royal & SunAlliance Insurance Company of Canada* (FSCO A00-001143, October 18, 2001); *Kumar and Coachman Insurance Company* (FSCO P01-00026, August 9, 2002); *Elensky and Royal & SunAlliance Insurance Company of Canada* (FSCO P01-00030, August 9, 2002); and *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004).

¹⁷ *Chisholm v. Liberty Mutual Group* [2002] O.J. No. 3135 (August 15, 2002), which cites *Heredi v. Fenssom* [2002] SCC 50; and *State Farm Mutual Automobile Insurance Company and Souchuk* (FSCO P02-00039, January 8, 2004)

In response, Ms. Eccleston submits that she was not asked in cross-examination to explain any concern that Guarantee had with respect to her time lines in the changing of the colour of the lights. Ms. Eccleston submits that it would be unfair to draw any conclusion about her credibility from Guarantee's closing submission when she was not given an opportunity to explain Guarantee's concern.

I agree with Ms. Eccleston that it is unfair to draw an inference that impugns her credibility about one alleged discrepancy in her evidence first raised in Guarantee's closing submissions. If Guarantee had any concern about a discrepancy in her description of the changing of the colour of the lights, Ms. Eccleston should have been given an opportunity to explain this discrepancy.

I find that Ms. Eccleston presented her evidence in a detailed, straightforward and credible manner. Her evidence was consistent with the letter she sent to the City of Peel on the day of the incident as well as the statement she provided Guarantee after she applied for accident benefits. I, therefore, find that in otherwise credible testimony, a discrepancy for which Ms. Eccleston was not given an opportunity to explain does not impugn her credibility on the substance of her claim.

Was Ms. Eccleston involved in a motor vehicle accident pursuant to subsection 2(1) of the *Schedule*?

For the following reasons I find that Ms. Eccleston was involved in an accident pursuant to subsection 2(1) of the *Schedule*.

As was found in other arbitration cases such as *Seale*, *Souchuk* and *Saad*, for there to be an accident pursuant to subsection 2(1) of the *Schedule*, the motor vehicle need not come into direct physical contact with the applicant. In these latter cases, it was found that the resulting injuries to the applicants from a slip and fall were directly caused by the use and operation of a motor vehicle.

In the *Seale* case, the applicant's vehicle was stranded in the middle of an icy intersection. The applicant exited the vehicle with the intention to push it out of the intersection. Before she got a chance to push the vehicle it started sliding sideways down

the hill, coming to rest in a snowbank. The applicant then walked towards her vehicle. She slipped and fell on the icy road and broke her arm.

The Arbitrator in this case found that Mrs. Seale's injury was as a result of a car accident pursuant to subsection 2(1) of the *Schedule*. In the appeal decision, which upheld the Arbitrator's decision, Director's Delegate Makepeace outlined a number of factors that are relevant in evaluating the connection between the use or operation of an automobile and a resulting impairment. These factors include time, proximity, activity and risk.

Director's Delegate Makepeace held that Mrs. Seale's fall happened while she was engaged in an ordinary activity in a Canadian winter – trying to regain control of a vehicle on an icy road. She concluded that there was a "perfect chain" commencing with Mrs. Seale's van getting stuck on the icy road and her attempt to gain control of her vehicle that resulted in her slip and fall on the icy road. The incident happened within a minute and there were no other intervening factors. The Director's Delegate concluded that the entire sequence of events was one incident and that the use and operation of an automobile was the dominant feature of the incident.

In *Saad*, the applicant had stopped at gas station to get gas and to fill his tires. After filling the tires with air, he returned the air hose and walked back towards his car with the intention of leaving. He slipped on the icy ground and injured his neck and back. The arbitrator, relying on the analysis of the appeal case in *Seale*, found that Mr. Saad's injuries were as a result of a car accident pursuant to subsection 2(1) of the *Schedule*.

In her decision, she stated:

Mr. Saad was travelling home and engaging in ordinary and well known activities involving the use and operation of a motor vehicle which directly caused his accident. The time, proximity, activity and risk with a subsequent contributing cause have not broken the chain of causation. As has been held in the past, direct cause does not mean the only cause or the most immediate cause. There was a sufficient nexus in this case between the use and operation of a motor vehicle with an unbroken chain of events.

Mr. Saad's fall occurred when he was engaged in an ordinary activity of filling his car with gasoline and then his tires with air. He did all of the usual things when he noticed that his tire had lost air. He fell because the pavement was icy, but the icy pavement, in my view, was a subsequent contributing cause which did not break the link in the chain of causation. I find that the use or operation of an automobile was the dominant feature of the incident.

On appeal, the Director of Arbitrations upheld the arbitrator's reasoning and found that there was no error of law in her conclusion that Mr. Saad was involved in an accident as defined in subsection 2(1) of the *Schedule*.

In *Souchuk*, the applicant slipped and fell on a dry road when she left her vehicle to come to the aid of her friends who were driving in a vehicle in front of her that had been struck by another car. In coming to his conclusion that Ms. Souchuk was involved in a car accident pursuant to subsection 2(1) of the *Schedule*, the arbitrator found that both Ms. Souchuk's vehicle and her friend's vehicle in front of her were the central cause of her pulling over to the side of the highway, getting out and running toward her friends. In his view, Ms. Souchuk's injury arose, not from an external or an unrelated force, but from a fall while running from one vehicle to the next to determine if her friends had been hurt in the accident. He concluded that while the immediate cause of her injury was her fall, "the dominant feature or nature of her claim was the use or operation of an automobile."

On appeal, the Director of Arbitrations upheld the arbitrator's decision and held that, in his opinion, the arbitrator's decision was "a reasonable attempt to follow *Chisholm*, and is generally consistent with the analysis in *Seale*. As well, although he thought it was "close to the line," the Director of Arbitrations accepted the arbitrator's conclusion that what caused Ms. Souchuk to leave her vehicle to come to the aid of her friends in the other car was a normal part of operating an automobile on the highway and that the true nature of the claim was the use or operation of the automobiles, and not a slip and fall. The Director of Arbitrations accordingly found that there was no error in law.

In the present case, I accept Ms. Eccleston's submission that the facts of her case are more compelling than in the latter three cases. Ms. Eccleston did not choose to walk

down an icy road to follow a car. She did not choose to walk on an icy pavement at a gas station. Nor did she choose to run down a dry road to see the aftermath of an accident. In her case, Ms. Eccleston had no choice but to get out of the way of the oncoming bus and step onto the snow and icy mound that resulted in her slip and fall.

It is clear from the facts of this case that when Ms. Eccleston had reached the fifth lane of Tomken Road, she was caught between a "hard rock and a wall." The Route 51 bus was rolling towards her, the light was changing to red, and the bus was blocking her path to go safely around the snow-filled, north-west pedestrian island. I accept as credible Ms. Eccleston's testimony that she felt intimidated by the bus coming at her, pushing her to get out of the intersection. She, therefore, had no choice but to step onto the pedestrian island. It was the only place she could go.

As stated in *Chisholm*, a direct cause does not mean the only cause or the most immediate cause. There can be more than one direct cause of an applicant's injuries, and one of the direct causes is the use or operation of a motor vehicle. In this case, I find that the use and operation of the bus was the dominant feature in the incident and a direct cause of her injuries. I find that the bus rolling towards Ms. Eccleston set in motion a train of events which forced Ms. Eccleston to step onto the pedestrian island, which resulted in her falling on the snow and ice. No doubt that slipping on the ice caused her injuries, however, this was ancillary to the bus rolling towards her and forcing her to climb the mound of snow and ice. On the facts of this case, I find that the time, proximity, activity and risk with a subsequent contributing cause have not broken the chain of causation.

I find that the present case can be distinguished from the *Mahadan* and *Fedrizzi* cases.

In *Mahadan*, the applicant had parked his car and taken some five bags of groceries from his trunk. He closed his trunk and turned to leave when his foot twisted in a groove in the pavement, which had been under construction. Mr. Mahadan fell towards his left side and hit his right hand on the trunk of the car before falling onto the concrete.

As the arbitrator in that case, I held that:

While Mr. Mahadan's motor vehicle led him to the location of his injury, his injuries, nevertheless, were sustained from a new and independent source other than his car. I find that what caused Mr. Mahadan to trip and fall was the crack in the pavement. This crack in the pavement had nothing to do with the use and operation of a motor vehicle, but was there because of the construction work being done on the parking lot.

In *Fedrizzi*, the applicant was walking along a street car platform to board a streetcar which was two feet away when she slipped on a wet patch. In that case, Arbitrator Makepeace held that "... the streetcar played no role in the incident except that it was the applicant's destination when she fell." She further held the fact that "the incident occurred on TTC property does not establish a causal nexus between the injury-causing incident and the use or operation of an automobile."

Unlike *Mahadan* and *Fedrizzi*, in the present case it was the use and operation of a motor vehicle, the bus moving towards Ms. Eccleston, that caused her to step onto the snow and ice which resulted in her slip and fall. In the *Mahadan* and *Fedrizzi* cases, the slip and fall incidents occurred independently of the use and operation of a motor vehicle. The motor vehicle in the latter cases was merely at the location of the incident. It was not the cause.

Accordingly, for these reasons, I find that Ms. Eccleston was injured as a result of a motor vehicle accident pursuant to subsection 2(1) of the *Schedule*.

EXPENSES:

If needed the parties may now speak to me on the issue of expenses.

Joyce Miller
Arbitrator

November 3, 2004
Date

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

DIONNE ECCLESTON

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Ms. Eccleston was injured as a result of an "accident" as defined in subsection 2(1) of the *Schedule*.
2. If needed, the parties may now speak to me on the issue of expenses.

Joyce Miller
Arbitrator

November 3, 2004
Date