



Appeal P06-00038

OFFICE OF THE DIRECTOR OF ARBITRATIONS

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

Appellant

and

DIANE WEBB

Respondent

BEFORE: Nancy Makepeace
REPRESENTATIVES: Harry Brown for Lombard
Rene Clonfero for Ms. Webb
HEARING DATE: April 27, 2007

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeal is allowed. The arbitrator's order dated November 10, 2006 is revoked and replaced by the following:

Ms. Webb was not injured as a result of an "accident" as defined in subsection 2(1) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*.

2. If the parties are unable to agree about expenses of this appeal, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

A handwritten signature in cursive script that reads "Nancy Makepeace".

Nancy Makepeace
Director's Delegate

October 5, 2007

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

On March 6, 2005, Ms. Webb fell on ice after a taxi cab dropped her off at her hotel. The insurer appeals from the arbitrator's decision that this incident was an "accident" as defined in subsection 2(1) of the *SABS-1996*.¹ I agree the arbitrator erred in law.

II. BACKGROUND

The matter proceeded on the basis of certain agreed facts as well as the oral evidence of Ms. Webb and of Michael Donnelly, the proprietor and general manager of Call-A-Cab, a family business. The cab driver, Glenys LeBlanc, did not testify. Ms. Webb's evidence was largely uncontested, though the parties disagreed about its implications. The arbitrator found that Ms. Webb testified in a "forthright and credible" manner, and he accepted her account of the incident.

The main facts, as found by the arbitrator, were as follows. Ms. Webb, who was staying at the Comfort Inn in Peterborough, visited her son, who lived nearby, in the early afternoon of March 6, 2005. At around 2:55 p.m., she called for a cab to take her back to the hotel. Ms. Webb sat in the front passenger seat of the cab driven by Ms. LeBlanc.

The cab pulled in under the canopy that extends out from the main entrance to the hotel. The orientation of the cab was such that Ms. Webb would have to walk around the cab, either in front of it or behind it, to reach the hotel. Ms. Webb testified that she paid her fare as she was getting out of the cab, then left with her belongings, intending to walk around the front of the cab into a side entrance. However, on checking her pocket, she realized she did not have her hotel pass-card, and therefore would have to go around the back of the cab to enter through the main entrance.

¹ The *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

As she reached the rear of the cab and turned towards the hotel, Ms. Webb noticed “many big patches of ice.”² The arbitrator accepted that the icy patches were “sufficient in size and number to impede her path to the curb.”³

The details of what happened next were important:

Ms. Webb then proceeded to walk behind and perpendicular to the back of the cab. When Ms. Webb reached a point closer to the driver's side than the passenger's side of the cab, one of her feet slipped on the ice at the rear of the cab and she began to fall. She tried to reach for the bumper with her right hand. Her fingertips touched the bumper, but she was unable to break her fall and she fell on both knees. She also scraped her left hand on the ground. At the point Ms. Webb fell, she was close enough to the rear of the cab to reach out and touch it and, according to the agreed facts, she was between 3 feet and 10 feet of the curb to the main lobby entrance.

In terms of time estimates, I found Ms. Webb to be a typically poor witness in this regard. She initially estimated "less than two minutes" from the time she exited the vehicle until she fell. Ms. Webb then clarified that her estimate included the time it took to pay the fare. On further questioning, she revised her estimate, excluding the time it took to pay the fare, by stating that it took "Not long, I know that. I don't know how long exactly. Maybe one minute". On still further questioning, Ms. Webb confirmed that she did not engage in any intervening act, such as tying her shoes, as she walked from the front passenger door to the rear of the car where she fell. I find that the time it took Ms. Webb to walk from the front passenger door to where she fell at the rear of the cab to be several seconds, but well short of one minute.⁴

The arbitrator then turned to consideration of the *SABS-1996* definition of “accident” – “an incident in which the use or operation of an automobile directly causes an impairment.” He reviewed the leading cases, focusing on *Chisholm v. Liberty Mutual Group*, [2002] O.J. No. 3135 (Ont. C.A.), *Seale and Belair Insurance Company Inc.*, (FSCO P02-00005, January 28, 2003), and *Saad and Federation Insurance Company of Canada*, (FSCO P03-00017, January 8, 2004), and a number of “non-occupant” cases that were factually similar to this one – *Mahadan and Co-operators General Insurance Company*, (FSCO A00-000489, March 15, 2001), *Shantz and Dominion of Canada General Insurance Company*, (FSCO A01-001147, May 13, 2002), *Pantazis and TTC Insurance Company Limited*, (FSCO A01-001564, September 16, 2002),

² Arbitration decision, p. 4.

³ Arbitration decision, p. 4.

⁴ Arbitration decision, pp. 4-5.

Eccleston and Guarantee Co. of North America, (FSCO A04-000759, November 3, 2004), and *Mariano and TTC Insurance Company Limited*, (FSCO A05-002112, September 15, 2006), appeal pending.

The arbitrator agreed with the insurer that this was not “an interrupted journey case where the incident leading to injury can be characterized as having occurred within the larger context of an intention to continue to use or operate the vehicle.”⁵ He also found that the facts did not easily fit within the disembarkation cases, where the claimant is injured while still in the process of stepping from a vehicle. In contrast, Ms. Webb:

had exited the vehicle and commenced to walk toward the hotel without incident. I agree that in most cases this should end the inquiry, especially where, as here, the applicant had commenced to walk for at least several seconds and several feet.⁶

The arbitrator went even further, finding “a certain attraction” in the insurer’s position that coverage ends when the claimant has safely disembarked and begun to walk away. However, in his view, the cases do not provide authority for this position. Instead, they require a case-by-case analysis.

In this case, the critical factor for the arbitrator was that the cab remained in the driveway, standing between Ms. Webb and the hotel, which forced her to walk around it to get to the entrance.⁷ This made the cab a more than incidental or fortuitous feature of the incident, in the arbitrator’s view; it was the location and orientation of the cab that, acting on current (icy) conditions, caused Ms. Webb’s fall. The arbitrator also considered the factors (time, proximity, activity and risk) discussed in *Seale* and *Saad*, and the “efficient cause” and “dominant feature” analyses adopted in *Chisholm*. This was his conclusion:

I therefore find that the use or operation of the cab was one of the direct causes of Ms. Webb's slip and fall; the other being the ice on the pavement. I further find that the use or operation of the vehicle was a dominant feature of the incident; ice on the pavement

⁵ Arbitration decision, p. 10.

⁶ Arbitration decision, p. 10.

⁷ Arbitration decision, p. 11.

also being a dominant feature. I find both features integral to understanding the "true nature of the claim."⁸

On appeal, the insurer disputes the arbitrator's analysis of the "interrupted journey" and "end of journey" cases and the distinction he drew with the "beginning of journey" cases, like *Fedrizzi and TTC Insurance Company*, (FSCO A97-000839, March 25, 1998), on which the insurer relied. The insurer submits that the arbitrator erred in law by finding that "use or operation" of the cab directly caused Ms. Webb's injuries though she was no longer an "occupant" when she fell. The insurer's position is that Ms. Webb was injured in a slip-and-fall, the dominant feature of which was ice on the hotel's driveway, making this an occupier's liability case, not an accident benefits case.

Ms. Webb submits that the arbitrator carefully weighed the evidence presented and correctly applied the principles established by the Court of Appeal, the Superior Court and the Commission. In particular, she submits that the definition of "accident" does not require that the claimant be an "occupant."

III. ANALYSIS

A. The role of the hotel and its insurer

At the arbitration hearing, Ms. Webb testified that she filled out a statement at the hotel after she fell, then received a call and a letter from Dominion of Canada General Insurance, the hotel's insurer, advising that she should contact the cab's auto insurer.⁹ She then called Mr. Donnelly, of Call-A-Cab, on March 16, 2005, to request a statement from Ms. LeBlanc, and again a week later on March 23, 2005, to ask for a replacement statement (she'd lost the first). Mr. Donnelly told her this was not an auto insurance matter and she would have to claim from the hotel's insurer. Both witnesses were questioned at some length about the details of these conversations, including whether Ms. Webb stated, as Mr. Donnelly recorded in his contemporaneous notes, that she believed the cab had nothing to do with it and the hotel was trying to pass the blame for what should be a claim under its policy.

⁸ Arbitration decision, p. 12.

⁹ Arbitration transcript, pp. 80-81, questions 130-134, evidence of Diane Webb.

The arbitrator dealt with this evidence as follows:

As stated, I accept Ms. Webb's evidence as it relates to the events leading up to her fall. I find the evidence as it relates to her motives or the driving force behind her application for accident benefits to be irrelevant. I also find Ms. Webb's lay opinion of whether or not she was involved in an "accident" to be irrelevant. Indeed, it is the very question I have been charged to determine in this proceeding based on findings of fact and the application of those facts to the law. The entire line of questioning related to Ms. Webb's motives for pursuing her accident benefits claim and her characterization of the incident proved unhelpful to the question before me.¹⁰

On appeal, the insurer agrees that Ms. Webb's motives are irrelevant, but submits that Ms. Webb's characterization of the incident in her early statements to Mr. Donnelly were admissible as an admission against interest, and provided the best evidence as to the circumstances of the loss, coming from the person who was in the best position to judge. The insurer relies on *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.), in which the Supreme Court of Canada approved the trial judge's ruling that three police officers could testify that the accused was impaired to drive, though they were not experts, because this was a matter of ordinary knowledge and experience. However, the weight to be given their evidence was a matter for the trial judge.

I am not persuaded Ms. Webb's statements were an "admission" at all. The insurer did not suggest that she changed or tailored her testimony to claim benefits. In fact, there was little real dispute about how she sustained her injuries; the dispute was about the legal implications of the facts. Even if, as the insurer submits, it was Ms. Webb's opinion that the hotel's insurer was answerable, this does not advance the insurer's case.

I also do not accept the insurer's submission that the arbitrator erred in law by refusing to order production of any communications between Ms. Webb and Dominion of Canada about the incident. The insurer's motion was discussed at some length at the beginning of the arbitration hearing. The arbitrator's comments showed he was alive to possible credibility issues, but when asked about alleged discrepancies, Mr. Brown explained there was a dispute about whether Ms.

¹⁰ Arbitration decision, p. 3.

Webb had told Mr. Donnelly the hotel was trying to pass blame (as stated in his notes) or that both parties were (as stated in her notes). Absent any inconsistency or discrepancy about how Ms. Webb fell, I agree with the arbitrator that it would not have been appropriate to delay a hearing that was to proceed on the basis of agreed facts in order to obtain these productions. In any event, Ms. Webb and Mr. Donnelly were questioned at length about the issue – indeed, this was a major focus of the arbitration hearing – so I am not persuaded the insurer was prejudiced by not having these documents.

This raises a more difficult procedural issue, though. This is really a coverage dispute between two insurers, only one of which is a party, and there was no way for Ms. Webb or Lombard to bring Dominion of Canada into the arbitration proceeding. Nor is this a “priority dispute” between two auto insurers that could be resolved pursuant to Ontario Regulation 283/95. After mediation of her dispute with Lombard, Ms. Webb elected to bring an application for arbitration at FSCO, as was her unilateral right. However, if she had, instead, chosen to start a lawsuit, Dominion of Canada could have been made a party along with Lombard. In this situation, an insurer may well be concerned that it will be found responsible for the claim just because it is the only insurer involved in the proceeding, and the competing policy is not put before the decision-maker. However, I am not persuaded this undermined the arbitration hearing. Whether or not the hotel’s policy excludes claims arising from use or operation of a motor vehicle, and whatever the language of the exclusion, the arbitrator must still decide whether coverage is provided under subsection 2(1) of the *SABS-1996*. That is what the arbitrator did.

B. The “Accident” Cases

There has been a great deal of litigation about the definition of “accident” in the *SABS*. As Director Draper stated in *Saad*, the definition is “easily stated, but difficult to apply.”¹¹ The arbitrator began his analysis with a statement of the general principles adopted by the Court of Appeal in *Chisholm*, the leading case, and in *Seale* and *Saad*, the two Commission appeal decisions that are factually closest to this one.¹² As there was no dispute about the arbitrator’s

¹¹ At p. 5.

¹² At pp. 5-6 of his reasons.

statement of the law, I do not find it necessary to review the principles, but propose, instead, to focus directly on the issues in dispute.

C. Ms. Webb was not an “occupant” at the time of her fall

The insurer submits that its coverage ended when Ms. Webb put two feet on the ground, closed the door of the cab, and began to walk around the cab to the hotel entrance, with no intention of returning to the cab. It relies on the definition of “occupant” in subsection 224(1) of the *Insurance Act*, to mean the driver, a passenger, or “a person getting into or on or getting out of or off the automobile.” Ms. Webb relies on *McIntyre (Estate) v. Scott*, 2003 CanLII 31493 (ON C.A.), in which the Ontario Court of Appeal held that the plaintiff, a motorcyclist who was struck by an uninsured driver after seeking shelter from the rain under an overpass, was an “occupant” of the motorcycle, under subsection 224(1).

I agree with Lombard that the rules for determining which insurer is responsible for accident benefits depend, in part, on whether the claimant was an occupant or a non-occupant. However, the scope of accident benefits coverage is determined under s. 2(1) of the *SABS*, which defines “accident” without reference to occupancy status. For example, coverage does not extend to a cab driver who was assaulted by a fare, though both were occupants of the automobile at the time of the assault. Conversely, a pedestrian who is struck by an automobile can claim accident benefits because she was injured in an “accident,” though she was not an occupant of any automobile.

There is a great deal of authority for the proposition that “use or operation” of an automobile extends beyond driving to include, amongst other things, getting into and out of a vehicle, and, for example, repairing and maintaining and loading and unloading a vehicle. However, there was no dispute in this case that “use or operation” of the cab extended from the time Ms. Webb got into the car to the time she stepped out of it and closed the door behind her. The issue is whether the line is drawn at that point, or some later point in Ms. Webb’s walk towards the hotel entrance. The real force of the insurer’s submission around “occupancy” is its quarrel with what it regards as different treatment given the “beginning of journey,” “interrupted journey” and “end of journey” cases in Commission arbitration and appeal decisions.

D. "End of Journey" Cases

Lombard submits that the arbitrator erred by finding that Ms. Webb's fall, at the end of her journey, was an "accident," while suggesting that he would have reached a different conclusion had the fall occurred while she was walking toward the cab, at the beginning of her journey. The legislature could not have intended coverage for the same risk (an icy surface) to depend on whether the claimant had got out of the car or was about to get in at the time of her fall. The insurer submits that the line of cases extending "end of journey" coverage is wrong in law, and that the correct approach is the one taken in *Fedrizzi* and other "beginning of journey" cases.¹³

Fedrizzi, which I decided as an arbitrator, concerned the broader "directly or indirectly" definition of "accident" in the *SABS-1994*. The claimant was walking toward a streetcar on an underground streetcar platform, which was slippery because of condensation on a very hot day; she fell. There was no evidence that the streetcar played any role in the incident except that it was her destination and that the incident occurred on TTC property. I concluded this was not enough to bring the incident within the scope of coverage; instead, I found that it fell within the risk associated with occupiers' liability.

The insurer in this appeal submits that the same analysis should apply, since there was no evidence that Ms. Webb tripped as she got out of the cab, and the cab had nothing to do with the risk that befell her.

Defining the outer limits of the definition of "accident" is a line-drawing exercise, and its application inevitably involves a judgment call. There are few "bright lines" that can be described with certainty. However, some parts of the map are easier to draw than others.

In my view, it is not surprising that arbitrators and judges have found that "it is easier to define when 'use or operation' begins than when it ends."¹⁴ This is because a cause works on events that come afterwards, not prior events. A person may trip while getting off a bus, for example,

¹³ These cases are discussed at length in *Seale*. See also, more recently, *Pangolino*, in which the arbitrator concluded the claimant was not injured in an "accident," when she fell in a TTC station after being jostled by another TTC patron as she walked towards her bus.

¹⁴ *Seale*, at p. 22.

but stumble several steps before falling, even if surface conditions play no part in the incident, as in *Pantazis*. Since use or operation of the bus started the chain of events, the incident is more likely to be found to be an “accident,” all else being equal, than if the person had tripped on the way to the bus, as in *Pangolino* or *Fedrizzi*, when surface conditions or passenger activity, for example, are more likely to be what started the causal chain.

The “interrupted journey” cases present special problems, especially regarding the nature of the risk and the ongoing use or operation of the vehicle, that are not present in this and other “end of journey” cases. *Seale*, *Shantz* and *Souchuk* involved emergency situations where a driver fell while trying to regain control of her vehicle (*Seale* and *Shantz*) or running to the aid of traveling companions whose vehicle had been hit (*Souchuk*).¹⁵ There was no emergency in *Saad*, but the driver fell on an icy surface while walking back to his car after putting air in his tires, a maintenance activity that has been found to come within “use” of an automobile. Director Draper concluded the arbitrator did not err in finding the incident an “accident,” though it “may have been close to the line.” The “interrupted journey” cases are more difficult than the “end of journey” cases, not because the legal principles differ – I agree with the insurer they do not – but because use or operation of the vehicle is more likely to have a continuing causal role and to remain the dominant feature of the incident.

The arbitrator accepted the insurer’s submission that this was not an “interrupted journey” case and that it did not “fit easily” within the cases where the person was found still to be in the process of getting out of or off the vehicle, like *Pinaretta* and *Mariano*:

In *Pinaretta*, for example, the slip and fall occurred while Ms. Pinaretta was found to be still engaged in the process of exiting the bus and fell “right at the bus stop”. In *Mariano*, the applicant fell within one or two steps and within one or two seconds of being compelled to exit a bus onto a dark roadway. In both cases, the applicants were found to

¹⁵ All these incidents were found to fall within the *SABS*-1996 definition of “accident.” In *Seale*, the claimant slipped on the icy road while trying to catch up with her van, which had gone out of control. The van had got stuck in the middle of an intersection. She had got out to push while a passerby took the wheel. The van then slid down a hill. I upheld the arbitrator’s conclusion this was an “accident.” In *Shantz and Dominion of Canada General Insurance Company*, (FSCO A01-001147, May 13, 2002), the claimant got out of her car to use a key box at the top of a parking ramp. The car rolled down the ramp, she ran after it and fell. In *Souchuk and State Farm Mutual Automobile Insurance Company*, (FSCO P02-00039, January 8, 2004), the claimant and a friend were driving in tandem on the 401 when the trailer on the first car was sideswiped and the vehicle began to serve. Finally, both vehicles came to a stop, and the claimant ran to see if his friends were injured. He fell on the roadway. Director Draper upheld the arbitrator’s conclusion this was an “accident.”

have fallen in the immediate vicinity of where they were left off, no more than a step or two. In both cases, the applicants were exposed to an immediate and obvious hazard or situation of danger which impeded their ability to complete the activity of safely disembarking the vehicle. In *Mariano*, there is the added time consideration that the fall occurred within one or two seconds of stepping off the bus.

In this case, Ms. Webb had exited the vehicle and commenced to walk toward the hotel without incident. I agree that in most cases this should end the inquiry, especially where, as here, the applicant had commenced to walk for at least several seconds and several feet. Lombard's position that the only logical place to draw the line in "end of journey" cases is at the point where a person has safely disembarked a vehicle and has begun to walk away, with no intention of returning, has a certain attraction. However, I am not aware of any cases that draw the bright line where Lombard would suggest. [footnote omitted] Rather, the court and arbitral case law suggest that each case must turn on its own unique facts with due regard to the principles and considerations set out above.¹⁶

I agree that the cases are fact-sensitive, but I do not understand them to extend as far as suggested by the arbitrator. For example, in a footnoted discussion, the arbitrator suggested that *Pantazis* and *Mahadan* might not be decided the same way in light of *Chisholm* and *Seale*. The claimant in *Pantazis* claimed she stumbled and fell after missing the bottom step while getting off a bus. The insurer did not accept her account of the incident, and the dispute was a factual one. As was noted in the decision under appeal, the parties in *Pantazis* agreed that if Ms. Pantazis missed her step as she got off the bus, and stumbled and fell as a result, this was an accident, but if she tripped and fell over her own feet or for some other reason after she got off the bus, it was not. Arbitrator Miller also drew "a fairly bright line" in *Mahadan*, finding that use or operation had ended when Mr. Mahadan removed his groceries, closed the trunk, and walked away, only to twist his ankle in a crack in the pavement of the parking lot.

In my view, *Mahadan* was rightly decided and the parties' agreement in *Pantazis* reflected their correct understanding of the state of the law.¹⁷ While subsequent decisions, including *Chisholm* and *Seale*, have added to the ongoing development of the law in this area, I am not persuaded they affect the "end of journey" cases. As I read the decisions, the prevailing consensus is that

¹⁶ Arbitration decision, pp. 10-11.

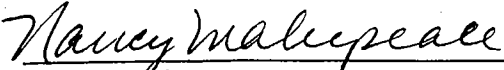
¹⁷ See also, for example, *Miko and York Fire & Casualty Insurance Company*, (FSCO A02-000985, September 18, 2003). The claimant retrieved a package from his friend's van, which was parked on the street. "He took the package from the van, locked the door, turned and stepped on to the adjoining sidewalk to walk back towards the house when he was struck by a bicycle and fell on the lawn." The arbitrator found that the bicycle striking the claimant was an intervening cause and that use or operation of an automobile did not directly cause his injuries.

use or operation generally ends when the claimant leaves the vehicle without incident and walks away. However, a different conclusion may be reached where use or operation of the vehicle created or added to the risk that befell the claimant, as found in *Pinaretta* and *Mariano*. In this case, the arbitrator found that the location and orientation of the stationary cab created an obstacle in Ms. Webb's path into the hotel lobby. There is no suggestion that the position of the cab created an emergency or any special risk beyond the ordinary risk faced by anyone who leaves a vehicle in a parking lot and walks towards the entrance of a hotel or a store, and I do not accept that the need to walk around a parked or stationary vehicle is enough, without more, to shift the nature of the risk from occupier's liability to automobile accident benefits.

The arbitrator concluded by saying he viewed this case as "very close to the line," and that he found merit in the insurer's position that "end of journey" cases should involve "drawing brighter lines" than have been drawn in "interrupted journey" cases. However, he seems to have felt he was compelled to reach a different conclusion because of *Chisholm* and *Seale*. The arbitrator did not err when he said that "the risk, at some point, must shift from a normal incident of using an automobile and become a risk associated with walking." As I read the "accident" decisions, they allow only one result on the undisputed facts in this case: because Ms. Webb got out of the cab without incident and fell only after she began walking toward the hotel entrance, use or operation of the cab was not a direct cause of her impairment. Looking at the matter with a common sense focus on the nature of the risk covered by automobile insurance, I conclude that Ms. Webb's injury falls outside the scope of the "accident" definition, and that the arbitrator erred in law in reaching the contrary conclusion.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.



Nancy Makepeace
Director's Delegate

October 5, 2007

Date