Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

**FSCO A06–001004**

**BETWEEN:**

**DIANE WEBB**

**Applicant**

**and**

**LOMBARD GENERAL INSURANCE COMPANY OF CANADA**

**Insurer**

# DECISION ON A PRELIMINARY ISSUE

**Before:** Robert Bujold

**Heard:** September 29, 2006, at the offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Rene Clonfero for Ms. Webb
Harry Brown for Lombard General Insurance Company of Canada

**Issues:**

The Applicant, Diane Webb, was injured on March 6, 2005 when she fell on ice after being dropped off by a taxi cab at a hotel she was staying at in Peterborough. She applied for statutory accident benefits from Lombard General Insurance Company of Canada ("Lombard"), payable under the *Schedule.*[1] Lombard refused to pay her benefits, claiming that Ms. Webb's impairments were not sustained as a result of an "accident" within the meaning of section 2 of the *Schedule.* The parties were unable to resolve their disputes through mediation, and Ms. Webb 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 — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The preliminary issue is:

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

## Result:

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

## EVIDENCE:

### Introduction

The issue to be determined in this hearing is whether or not Ms. Webb was involved in an "accident" as defined by section 2(1) of the *Schedule*. Specifically, I must decide whether or not Ms. Webb was involved in "an incident in which the use or operation of [the cab] directly cause[d] [her] impairment".

The parties agreed that the hearing of this preliminary issue would proceed, in part, on the basis of certain agreed facts and, in part, on the basis of *viva voce* evidence.[2]

Ms. Webb gave her *viva voce* evidence, both in chief and on cross-examination, in a generally forthright and credible manner. Lombard did not call the cab operator, Glenys LeBlanc, to contradict Ms. Webb's account of the incident that led to her injuries nor did Lombard challenge Ms. Webb's evidence in its closing submissions. I therefore accept Ms. Webb's evidence of the events leading up to her fall, as supplemented by the agreed facts.

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[2] The agreed facts are contained in 'Part I - Statement of Facts' (Ex.1) of Ms. Webb's preliminary issue brief, subject to the "specific facts upon which we cannot agree" as identified in Lombard's letter to the Commission dated August 10, 2006 (Ex.2).

Before I set out my findings of fact, I note that considerable evidence was heard on the issue of Ms. Webb's motives for pursuing an application for accident benefits. Lombard suggested that the insurer for the Comfort Inn, Dominion of Canada, was the real force behind the proceeding and led evidence that Ms. Webb did not personally believe that she had been involved in an accident. Lombard cross-examined Ms. Webb at some length on these points and called Mike Donnelly, the General Manager of Call-A-Cab, to give his evidence of phone calls he had with Ms. Webb.

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.

## Findings of Fact

Based on the agreed paragraphs in the Statement of Facts, Ms. Webb's *viva voce* evidence in chief, and further information elicited from Ms. Webb on cross-examination, I summarize the relevant facts as follows:

In the early afternoon of March 6, 2005, Ms. Webb visited her son at his home in the City of Peterborough. At approximately 2:55 p.m., Ms. Webb telephoned Call-A-Cab to transport her to the Comfort Inn, also in Peterborough, where she was staying. Glenys LeBlanc, responded to the call. Ms. Webb entered the front passenger seat of the cab. Upon arriving at the hotel,

Ms. LeBlanc stopped the cab underneath a carport awning, extending out from the area of the main lobby entrance. The cab was facing south with the passenger side of the vehicle away from the hotel. Ms. Webb testified that the back of the cab was lined up with the main lobby entrance to the hotel. This is consistent with diagrams prepared by the cab operator (Exhibits 4 and 5).

Ms. Webb then paid the operator and exited the vehicle. When Ms. Webb initially stepped out of the cab, there was no ice under her feet. However, Ms. Webb noticed ice "under the taxi" from approximately "the middle of the taxi to the back". Although the exact location of the ice that Ms. Webb first observed was not made clear in her evidence, she described it as "little patches of ice" and "nothing to slip on". I find that any ice alongside the passenger side of the cab was minimal and, in any event, did not impede Ms. Webb as she proceeded without incident toward the back of the passenger side of the vehicle.

When Ms. Webb reached the back of the cab, she turned to walk toward the lobby entrance which was now, more or less, directly in front of her. At this point, Ms. Webb noticed "many big patches of ice". Although Ms. Webb was unable to provide an estimate of the size of these ice patches, I accept that there were several patches of ice behind the cab that were sufficient in size and number to impede her path to the curb.

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.

## ANALYSIS AND CONCLUSIONS:

### The Law

The definition of "accident" in the current *Schedule* is more restrictive than in its predecessors. The 1990 *Schedule*, which governed accidents before January 1, 1994 ("*SABS - 1990*") and the 1994 Schedule, which governed accidents after December 31, 1993 and before November 1, 1996 ("*SABS - 1994*"), provided access to first party statutory accident benefits where the use or operation of an automobile, directly *or indirectly*, caused an impairment.[3]

In *Chisholm v. Liberty Mutual Group* [2002] O.J No.3135 (Ont C.A.), the Court of Appeal considered the definition of "accident" under the current *Schedule*. Some of the more salient principles or considerations identified in *Chisholm* are as follows:

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[3] Under these prior regimes, the question of whether or not a person was involved in an "accident" involved the two-part test set out by the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.). That two-part test asked the following questions: 1) The purpose test: Did the accident result from the ordinary and well-known activities to which automobiles are put? and 2) The chain of causation test: Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

- the *Amos* test has limited relevance and, at least the causation part, can no longer be used to interpret the definition of accident.
- the "but for" test of causation serves as an exclusionary test and screens out factors that make no difference to the outcome. However, meeting the "but for" test does not necessarily attract legal liability. Legal entitlement to accident benefits under the current *Schedule* also requires that the use or operation be a direct cause of the impairment.
- direct cause may be viewed as something knocking over the first in a row of blocks after which the rest fall down without the assistance of any other act.
- consequences directly caused may also be regarded as "those which follow in sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later" quoting *Handbook of the Law of Torts*, 4th ed. (St. Paul: West Publishing Co., 1971), at 263-264.
- direct cause has also been 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. (see *Black's Law Dictionary*)
- an intervening act may not absolve an insurer of liability for no fault benefits if it can be considered a normal incident of the risk created by the use or operation of the car - if it is "part of the ordinary course of things".
- there may be more than one direct cause of a victim's injuries and one of the direct causes may be the use or operation of an automobile.
- it may be appropriate to the analysis to consider whether the use or operation of the vehicle is the dominant feature, or the true nature, of the claim, and not ancillary to it.[4]

To the extent that the first part of the *Amos* test, the purpose test, has survived as part of the analysis to be used under the current *Schedule*, I have no trouble finding that the use or operation of the cab in this case meets that part of the test. The cab was put to the ordinary and well-known activity of transporting Ms. Webb from one location, her son's home, to another location, the Comfort Inn hotel.

[4] Referring to *Heredi v. Fensom* [2002] 2 S.C.R. 741 SCC 50

The more difficult question, at the core of this inquiry, is whether the use or operation of the cab can be fairly characterized as having directly caused Ms. Webb's injuries.

In answering this question, *Chisholm* offers considerable guidance. I also take guidance from the arbitral appeal decision in *Seale and Belair Insurance Company Inc.* (FSCO P02-00005, January 28, 2003). In *Seale*, Director's Delegate Makepeace provided an extensive review and analysis of both court and arbitral "accident" decisions under the current *Schedule*. Although *Seale* may be described as an "interrupted journey" case, Director's Delegate Makepeace also reviewed decisions that considered injuries sustained while getting into or out of an automobile, or walking towards or away from an automobile. From her analysis, I summarize the following further principles and considerations relevant to the case at hand:

- each case is relatively fact-specific and it is difficult to state a hard and fast rule.
- it is easier to define when "use or operation" begins than when it ends. Cases on the margin, under both the current *Schedule* and the prior regimes, turn, in part, on a number of factors, including whether the peril or mechanism of injury relates to use or operation of the automobile. For example, in *Whitehead*[5] (tripping over a block used to secure an automobile) and *Lefor*[6] (passenger struck by oncoming vehicle) the peril or mechanism of injury involved a hazard of the road. These cases can be contrasted with *Alchimowicz*[7] (diving off a dock), *Wolfe*[8] (hunting accident) and *Chisholm* (drive-by shooting) where the peril or mechanism of injury was not related to a hazard of the road.
- it may be appropriate to consider whether the injury was a normal risk associated with motoring.[9]

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[5] *Whitehead v. Whitehead*, [1984] I.L.R. 1-1820 (B.C.S.C.)

[6] *Lefor (Litigation Guardian of) v. McClure* (2000), 49 O.R. (3d) 557 (Ont. C.A.)

[7] *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I (2d) 284 (Ont. C.A.)

[8] *Wolfe v. Lumbermens Mutual Casualty Co.* [2001] O.J. No. 3454 (Ont. S.C.J.)

[9] See the Arbitrator's decision in *Seale* (FSCO A01-000635, January 31, 2002). See also, *Pinarreta and ING Insurance Company of Canada* (FSCO A04-001734, November 17, 2005)

- physical contact with an automobile is not required.[10]
- the relationship between use or operation of the vehicle and the impairment must involve the vehicle in more than an incidental or fortuitous way and provide more than the location or *situs* of the incident.
- "use or operation" extends well beyond driving and includes getting in and out of a vehicle, loading, unloading and delivering cargo, fuel delivery, changing a tire, and repair and maintenance.[11]
- factors of time, proximity, activity and risk are important in defining the incident that resulted in the injury.[12]
- the question of direct causation "involves standards and degrees and questions of reasonableness".[13]

Director Draper, in *Saad*, recognized that the test and principles set out above are easily stated, but difficult to apply. As he states, "causation is an elusive concept". However, he also recognizes that *Chisholm* and other case law provide important guidance and should be viewed as reflecting a common sense focus on the nature of the risk covered by automobile insurance.[14]

## Submissions of Counsel

Counsel provided both written and oral submissions. Briefly, those submissions were as follows:

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[10] See also *Shantz and Dominion of Canada General Insurance Company* (FSCO A01-001147, May 13, 2002) and *State Farm Mutual Insurance Company and Souchuk* (FSCO A02-000309, November 27, 2002) affirmed on appeal (FSCO P02-00039, January 8, 2004)

[11] See also *Federation Insurance Company of Canada and Saad* (FSCO P03-00017, January 8, 2004)

[12] See also *Souchuk and Saad [ibid]*

[13] Stated by the Arbitrator in *Seale*. See reference in appeal decision, para. 8

[14] *Saad*, para. 12

Ms. Webb contends that the cab, having stopped and remained where it did, compelled her to walk around the cab before she could walk to the doors of the lobby of the hotel. While admitting that she fell because the pavement was icy, Ms. Webb submits that the icy pavement was a subsequent contributing cause that did not break the chain of causation arising from the use or operation of the cab. The slip on the ice at the rear of the cab should be viewed, on the facts of this case, as a normal risk associated with her use of the cab. Ms. Webb further contends that, like the applicants in *Pinaretta* and *Mariano*[15], she was still disembarking the vehicle when she fell, and should be regarded as disembarking until she reached the sidewalk. Proximity, time, activity and risk are all pointed to as further support for her position that the use or operation of the cab was a direct cause of her injuries. Ms. Webb further submits that the use or operation of the cab was the dominant feature, or the true nature, of her claim, and the slip on the ice was ancillary.

Lombard focussed on the goals and clear intention of the legislation to restrain the number and type of claims for accident benefits that could be advanced when the required causal relationship between the use or operation of an automobile and an impairment was changed from "direct or indirect" to "direct" only. Lombard argues that once a person has disembarked and is no longer an occupant of a vehicle, and has no intention of returning to the vehicle, then, unless they are struck by a vehicle, the legislation does not intend that they should receive accident benefits for injuries caused by another source. This Lombard maintains is the only logical place to "draw the line".

Lombard also pointed to similarities shared by certain types of cases, and distinguished the present case as failing to fit within any class of case for which accident benefits coverage has been recognized. Unlike *Pinaretta* and *Mariano*, Lombard maintains that Ms. Webb was not disembarking the vehicle at the time of her fall. Unlike the "interrupted journey" cases, Ms. Webb had completed her travel in the cab and had no intention to return. Rather, Lombard

[15] *Mariano and TTC Insurance Company Limited* (FSCO A05-002112), September 15, 2006

contends that Ms. Webb's case is like that of the applicant in *Mahadan*[16] who, having closed the trunk of his vehicle, turned and caught his foot in a crack in the pavement which caused him to fall. In any event, the use or operation of the vehicle, Lombard argues, was not the dominant feature or true nature of Ms. Webb's claim.

## Analysis and Conclusions

I agree with Lombard that this is 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. Nor, in my view, do the facts fit easily within the line of cases where the person was found to still be in the process of disembarking the vehicle, such as *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 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

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[16] *Mahadan and Co-operators General Insurance Company* (FSCO A00-000489, March 15, 2001)

line where Lombard would suggest.[17] 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.

In looking at those principles as they relate to the facts of this case, I agree with Ms. Webb that the cab, itself, created an obstacle to her walking path to the hotel lobby. The location and orientation of the vehicle, together with the fact that it remained stationary, required that Ms. Webb circumnavigate the cab in order to complete the use for which the cab was put; namely, to go from her son's home to the hotel. The presence of the cab, in these combined aspects, exerted an active and direct influence upon Ms. Webb's actions, even after she had exited the vehicle, impeding and directing her path, and leading her without a break in the chain of causation to several large patches of ice located at the rear of the cab.

Whether Ms. Webb was still "disembarking" or "egressing" the vehicle at this point is not the statutory test and, in any event, seems to me to be a distinction without a difference. The fact remains that the vehicle was involved in more than an incidental or fortuitous way and provided more than the location or a provocation for the incident. The location, orientation and continued presence of the vehicle clearly initiated and directed an uninterrupted chain of events that led Ms. Webb to point where she fell.

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[17] I note in *Pantazis and TTC* (FSCO A01-001147, May 13, 2002) , a decision of Arbitrator Sapin under the current Schedule, **the parties 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. However, the parties would not have had the benefit of the principles set out in *Chisholm* or the FSCO appeal decisions that emphasize the importance of considerations such as time, proximity, activity and risk. I note that *Mahadan* could also be regarded as drawing a fairly bright line but, like *Pantazis*, the case was decided prior to *Chisholm* and subsequent appeal cases. I am not convinced that *Mahadan* would be decided the same today.

I note in *Eccleston and Guarantee Co. of North America* (FSCO A04-000759, November 3, 2004) the applicant had disembarked a bus and proceeded to cross the road before slipping and falling, but her injuries were found to be a direct result of a second bus that was rolling toward her.

Put differently, and using Professor Prosser's definition quoted in *Chisholm*, the consequences of Ms. Webb's fall may be regarded as having followed in sequence from the effect of the location and orientation of the cab upon conditions existing and forces already in operation at the time, i.e. ice at the rear of the cab, without the intervention of any external forces which came into active operation later.

I further find that the peril or mechanism of injury, i.e. ice at the rear of the cab, involved a usual hazard of the road. Unlike the gun shot in *Chisholm*, Ms. Webb's slip and fall was "a normal incident of the risk created by the use or operation of the [cab]" to transport her to the hotel in winter conditions - it was an intervening act that arose as "part of the ordinary course of things".

In terms of time (several seconds), proximity (at the rear of the cab within touching distance), activity (walking around the cab to complete her trip to the hotel) and risk (ice at the rear of the cab), I find these factors are all sufficiently connected to the use or operation of the vehicle to weigh, at least slightly, in Ms. Webb's favour.

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

I recognize that the use of a vehicle, even a cab, does not generally take one to the final end point of a person's destination. There is usually some (and often a lot of) walking that is also involved and, in that regard, I reject Ms. Webb's argument that it would be appropriate to draw a bright line at a sidewalk or door or some other demarcation point. Apart from the fact that there may be no sidewalk or other easily identifiable demarcation point, adopting Ms. Webb's position means that case-specific factors such as time and proximity would be ignored. This is contrary to the case law and, in my view, would produce results inconsistent with the intention of the legislation.

Regardless of the application and weight to be given specific considerations, any analysis needs to consider the nature of risk contemplated by automobile insurance, and in the context of "end of journey" cases the risk, at some point, must shift from a normal incident of using an automobile and become a risk associated with walking. It seems to me that at some point in time, the use or operation of the vehicle becomes sufficiently removed from the incident resulting in the impairment, both in terms of time and proximity, that it can no longer fairly be regarded, as a matter of fact or policy, as a direct cause. Even further along in time and proximity, any indirect causal link may be lost. As I understand the case law, it is a fact-driven determination for which there are no bright lines of distinction and for which one must take a principled approach and apply a certain degree of common sense.

I view this case as very close to the line. There is merit in Lombard's arguments that "end of journey" cases should involve drawing brighter lines than have been drawn in "interrupted journey" cases. Lombard argues that the line should be drawn where the person has exited the vehicle and begun to walk away without an intention to return. Then, Lombard argues, the journey is truly over, and considerations of time and proximity, or unbroken links in the chain of causation connecting the use or operation of the vehicle to the ultimate peril or mechanism of injury, are irrelevant. This would bring "end of journey" cases more closely in line with cases that consider when use or operation begins.[18] But that is not the current law, as I understand it, and applying the facts of this case to the principles set out above, I find that Ms. Webb has met the onus of proving that she was involved in an "accident" as defined in s.2(1) of the *Schedule*.

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[18] See for example, *Fedrizzi and TTC Insurance Company Limited* (FSCO A01-001564, September 16, 2002) where an LRT passenger was found not to have been in an "accident" where she slipped and fell while approaching a streetcar.

## EXPENSES:

The parties did not make submissions on the issue of expenses. If the parties are unable to reach agreement on entitlement to or quantum of expenses, they may request a determination pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

| ______________________ | November 10, 2006 |
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| Robert Bujold<br>Arbitrator | Date |

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario

**FSCO A06–001004**

**BETWEEN:**

**DIANE WEBB**

**Applicant**

**and**

**LOMBARD GENERAL INSURANCE COMPANY OF CANADA**

**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. Webb was injured as a result of an "accident" as defined in section 2(1) of the *Schedule*.

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Robert Bujold
Arbitrator

November 10, 2006
Date