# COURT OF APPEAL FOR ONTARIO

CITATION: Downer v. The Personal Insurance Company, 2012 ONCA 302

DATE: 20120509

DOCKET: C54313

Lang, LaForme JJ.A. and Pattillo J. (*ad hoc*)

BETWEEN

Michael Downer

Plaintiff (Respondent)

and

The Personal Insurance Company

Defendant (Appellant)

Ryan M. Naimark, for the appellant

John W. Bruggeman, for the respondent

Heard: February 17, 2012

On appeal from the judgment of Justice John C. Murray of the Superior Court of Justice, dated August 23, 2011, with reasons reported at 2011 ONSC 4980.

**H.S. LaForme J.A.:**

## INTRODUCTION

[1] This appeal raises the question whether the motion judge erred in concluding that the plaintiff, Michael Downer, was involved in an "accident" within the meaning of s. 2(1) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96 ("*Schedule*").

[2] The incident occurred on February 26, 2000 when the plaintiff was physically assaulted by several unidentified assailants while parked at a gas station. The plaintiff managed to escape by putting his car in gear and driving away. He believed that in doing so, he may have run over one of his assailants. The plaintiff claims psychological and physical injuries as a result of the incident.

[3] Following the incident, the plaintiff's automobile insurer, The Personal Insurance Company of Canada ("Personal"), paid him monthly statutory accident benefits ("SABs"), including income replacement benefits, for some 26 months. However, Personal later advised him that it was terminating his benefits because the incident giving rise to his injuries was not an "accident" as defined in s. 2(1) of the *Schedule*. Section 2(1) defines an accident as "an incident in which the use or operation of an automobile directly causes an impairment". Personal further advised that it was seeking repayment of all benefits paid to date because they were paid to him in error.

[4] After a failed mediation before the Financial Services Commission of Ontario, the plaintiff commenced an action against Personal seeking a declaration that he is entitled to SABs and income replacement benefits. Personal later moved for summary judgment seeking to dismiss the action. The central issue on the motion was whether the plaintiff was involved in an "accident" within the meaning of s. 2(1) of the *Schedule*. The motion judge granted a declaration that the plaintiff was involved in an "accident" within the meaning of the *Schedule*.

[5] Personal appeals from the motion judge's decision and requests an order declaring that the plaintiff was not involved in an "accident" as defined in s. 2(1) of the *Schedule* and further requests an order for summary judgment dismissing the plaintiff's claim.

[6] For the reasons that follow, I would allow the appeal, in part, to the extent that I would grant a declaration that the physical assault on the plaintiff does not constitute an "accident" under s. 2(1) of the *Schedule*.

[7] However, the plaintiff also claims to have suffered psychological injuries, including depression, anxiety and post-traumatic stress disorder. It was uncontested on the motion that the plaintiff believed he may have run over one of his assailants as he fled the scene driving his vehicle. Since the plaintiff's alleged psychological injuries associated with this belief, if proven, may have been caused by an "accident" as defined in the *Schedule*, I would not dismiss this aspect of the plaintiff's claim.

[8] In the circumstances, the issue whether the plaintiff was involved in an "accident" is a genuine issue requiring a trial. In addition, there are other issues in the action that the motion judge was not asked to decide on the motion for summary judgment. As a result, it is my view that the action must proceed to trial.

**FACTUAL BACKGROUND**

[9] For purposes of the summary judgment motion, the parties agreed that the facts involving the incident were as described in the plaintiff's written statement of March 9, 2000, which he provided to the insurer in support of his claim for

accident benefits (see the motion judge's reasons, at para. 5). The pertinent facts may be summarized as follows.

[10] On February 26, 2000, the plaintiff drove his jeep into a gas station to purchase gas. While his engine was running, and while seated in the car sorting money for the purpose of buying gas, he noticed three or four young men standing around his vehicle. One of them called "hey", and as the plaintiff turned to look, a man hit him from the driver's side. Another man came into his vehicle and repeatedly hit him on the head, while others tried to pull him out of the vehicle.

[11] There was a brief struggle with one individual over control of the gear shift, but the plaintiff was able to reverse the vehicle and pull out of the gas station. He heard something when he pulled out and he thought he may have run over one of them. The men involved in the attack were not identified or apprehended.

[12] The next day, the plaintiff reported the incident to Personal, which accepted his claim and paid him SABs, including income replacement benefits, totalling $73,061.27.

[13] Some 17 months later, following a review of its files, Personal took the position that the plaintiff was not involved in an "accident" within the meaning of s. 2(1) of the *Schedule*. Personal notified the plaintiff by letter dated August 3, 2001 that it had erroneously paid him benefits, that it would not pay him further benefits, and that it would be seeking a repayment of all benefits paid in error pursuant to s. 47(1) of the *Schedule*. Even after this letter was sent, Personal continued paying him benefits until May 2002.

[14] The plaintiff commenced this action in July 2002 seeking, among other things, a declaration that he was and continues to be entitled to SABs. Personal filed a defence and counterclaim for the monies previously paid. The plaintiff filed a reply and defence to counterclaim raising the issue of estoppel.

[15] On January 20, 2011, Personal moved for summary judgment seeking to dismiss the plaintiff's claim.

[16] On the motion, the parties agreed that the central issue to be decided was whether the plaintiff had been involved in an "accident" within the meaning of s. 2(1) of the *Schedule*. The parties did not argue the question of whether the plaintiff had suffered an "impairment", nor did they ask the motion judge to decide the issues of repayment and estoppel raised by Personal's counterclaim.

**REASONS OF THE MOTION JUDGE**

[17] The motion judge discussed the legislative history of and the relevant case law on the statutory definition of an "accident" in s. 2(1) of the *Schedule*. He noted that "accident" was defined in the pre-November 1, 1996 version of the *Schedule* as "an incident in which, *directly or indirectly*, the use or operation of an automobile causes an impairment": see *Statutory Accident Benefits Schedule – Accidents after December 31, 1993 and before November 1, 1996*, O. Reg. 776/93, s. 1 (emphasis added). He recognized that the definition of "accident" was replaced by the more restrictive definition in s. 2(1) the *Schedule*, which defines an accident as "an incident in which the use or operation of an automobile *directly* causes an impairment" (emphasis added).

[18] The motion judge explained that the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, established a two-part test for determining if an incident gives rise to accident benefits under automobile insurance policies. The British Columbia automobile insurance statute considered in *Amos* provided for benefits payable "in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle". As the motion judge said, at para. 11, the two-part test under *Amos* is as follows:

1) Did the accident result from the ordinary and well-known activities to which automobiles are put? (the "purpose test"); and

2) Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the plaintiff'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 "causation test").

[19] The motion judge went on to explain that, after the narrower definition of "accident" was introduced in 1996, this court in *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.) and in *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 O.R. (3d) 338 (C.A.), modified the causation test from *Amos*. The motion judge, at para. 12, framed the modified causation test as follows: "Is there a direct or proximate causal relationship between the plaintiff'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, indirect or merely incidental or fortuitous?"

[20] Based on this test, the motion judge held that the purpose test was met because pulling into a gas station in order to purchase fuel is an activity to which

all vehicles are put (at para. 14). He decided that the causation test was also met because "there is a direct or proximate causal relationship between the plaintiff's injuries and the ownership, use or operation of his vehicle" (at para. 15). In reaching this conclusion, the motion judge made the following findings, at para. 21:

> In the case at bar, the use of the car had not ended before injury was suffered. The insured had not physically left the car but was in his vehicle and the engine was running when he was assaulted. There was no temporal distance between the end of the use of the car and the injuries. The logical and probable inference from the facts is that the assailants were intent on taking possession of and seizing control of Mr. Downer's vehicle while Mr. Downer was in possession and control of his vehicle. The injuries suffered in this case are not analogous to the injuries caused by a random gunshot in a drive-by shooting, as in *Chisholm,* where there was no causal relationship between the claimant's injuries and the operation of his car. The injuries caused to Mr. Downer are directly connected to the use and operation of his vehicle because they were caused by assailants whose purpose was to seize possession and control of his automobile from him. The assault on Mr. Downer was not random but arose out of his ownership, use and operation of his vehicle. As in *Amos*, it was the "use or operation" of his own vehicle that put Mr. Downer in harm's way.

[21] The motion judge said that the reasons in the above-cited paragraph are sufficient to find that the plaintiff was involved in an "accident" within the meaning of the *Schedule.* However, he went on to point out, at para. 22, that the plaintiff claims to have suffered depression, anxiety and post-traumatic stress disorder. In his statement, the plaintiff referred to his belief that he may have run over one of the assailants with his motor vehicle. The motion judge observed: "To the extent that this belief may contribute to depression, anxiety and post-traumatic stress disorder or any other psychological condition, it is clear that it is a direct consequence of the use or operation of his motor vehicle."

[22] Finally, the motion judge referred to the Supreme Court of Canada's decision in *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46, [2007] 3 S.C.R. 373. In that case, two individuals dropped a large boulder from an overpass onto the Vytlingams' vehicle, causing permanent catastrophic injuries to the driver and serious psychological harm to two family members in the vehicle. The issue before the Supreme Court was whether one of the tortfeasors, whose conduct was the subject matter of an indemnity claim, was at fault as a motorist for purposes of the inadequately insured motorist coverage under Ontario Policy Change Form 44R – Family Protection Coverage.

[23] Writing for the court, Binnie J. made the comment, at para. 14, that "there is no doubt that the Vytlingams were entitled to no-fault benefits since they were using their car for an 'ordinary and well-known' motoring activity in driving north on Interstate 95, and that the injuries they suffered were related to such 'use and operation'." Binnie J. stated that "*Amos* clearly established the Vytlingams' entitlement to statutory benefits."

[24] Counsel for the plaintiff in this case submits that Binnie J. was aware of the change in the definition of "accident" when he said that "there is no doubt that the Vytlingams were entitled to no-fault benefits". The incident in question in *Vytlingam* occurred in 1999, when the more restrictive definition of "accident" in s. 2(1) of the *Schedule* was in effect.

[25] The motion judge made it clear, at para. 24, that he was not relying on *Vytlingam* in concluding that there is a direct or proximate causal relationship between the plaintiff's injuries and his ownership, use or operation of his vehicle.

However, he said that if counsel for the plaintiff's interpretation of this decision is correct, "it is very strong authority in support of his argument on behalf of the plaintiff."

**ISSUES**

[26] On the appeal from the motion judge's order dismissing the motion for summary judgment,[1] Personal's central argument is that the motion judge erred in concluding that the plaintiff was involved in an "accident" within the meaning of the *Schedule*. However, Personal also submits that the motion judge failed to address the issue of estoppel raised by the plaintiff in his affidavit filed in response to the motion.

[27] This argument is not properly raised on the appeal. Counsel on the motion – the same counsel who argued this appeal – agreed that the central issue for the motion judge to decide was whether the plaintiff had been involved in an "accident" within the meaning of the *Schedule*. The motion judge referred to counsel's agreement at para. 4 of his reasons and went on to say: "[A]lthough the motion is for summary judgment, this Court is asked to decide a question of law and counsel are agreed that I should deal with this issue and none of the other issues in dispute."

[28] Based on counsel's agreement, the motion judge did not consider any of the other issues in dispute, including the plaintiff's estoppel argument, Personal's counterclaim seeking to recover previously paid accident benefits, and Personal's contention that the plaintiff did not suffer any "impairment" within the meaning of the *Schedule*. It would be inappropriate for this court to decide a

ground of appeal concerning an issue that was not argued before the motion judge.

**DISCUSSION**

[29] The motion for summary judgment raised a narrow question of law that was to be determined on the basis of undisputed facts (see the motion judge's reasons, at para. 5). The applicable standard of review in these circumstances is correctness: see this court's decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 70; and *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 27 and 33.

[30] In my view, Personal's motion fell into the second category of cases referred to in *Combined Air*, at para. 42, involving claims or defences that are alleged to be wholly without merit. Personal's position was that, based on the uncontested evidence on the motion for summary judgment, the plaintiff's claim should be found wholly without merit because he was not involved in an "accident" within the meaning of s. 2(1) of the *Schedule*. The motion was thus limited to a narrow question of law that was argued on the basis of the pleadings as supplemented by a very limited body of undisputed evidence. In other words, there was little to distinguish Personal's motion for summary judgment from a motion under rule 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[31] To resolve the central issue of statutory interpretation as framed by Personal and as argued by the parties, the motion judge did not need to exercise the enhanced powers conferred by rules 20.04(2.1) or (2.2), which permit the

motion judge to weigh the evidence, evaluate credibility, draw reasonable inferences from the evidence, and order the presentation of oral evidence. To the limited extent that the motion judge drew an inference from the evidence, he did so regarding the motive of the assailants in assaulting the plaintiff. As will be explained below, the issue of motive was irrelevant to the question of law before the motion judge.

[32] In rejecting Personal's argument that the plaintiff's claim had "no chance of success", the motion judge decided the question of law in favour of the plaintiff and concluded that he was involved in an "accident" within the meaning of s. 2(1) of the *Schedule*. In my view, the motion judge erred in how he resolved this question of law on the agreed facts before him. Specifically, he erred in concluding that the causation test was satisfied in relation to the injuries caused by the assault on the plaintiff while he was parked at the gas station.

[33] The source of the motion judge's error is attributable to the way he framed the causation test. He failed to use the language from *Greenhalgh* and, instead, he incorrectly articulated a version of the causation test that tracks much of the language from*Amos*. In the motion judge's words, at para. 12, the modified causation test is as follows:

> Is there a direct or proximate causal relationship between the plaintiff'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, indirect or merely incidental or fortuitous?

[34] However, the actual wording of the causation test as stated in *Greenhalgh*, at para. 36, consists of two questions:

1. Was the use or operation of the vehicle a cause of the injuries?

2. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things?" In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?

[35] The motion judge's statement of the causation test reveals two errors. First, it erroneously refers to "ownership", even though s. 2(1) of the *Schedule* only refers only to "use or operation" of the vehicle.[2] Second, the motion judge failed to ask whether an intervening act outside the "ordinary course of things" resulted in the injuries.

[36] Both errors are apparent in the motion judge's conclusion that there was a causal connection between the assault on the plaintiff and his "ownership, use and operation of his vehicle". The motion judge found this causal connection was established based on the undisputed fact that the plaintiff was seated in his vehicle with the engine running when he was assaulted, and on "the logical and probable inference" that the assailants wanted "to seize possession and control of his automobile" (at para. 21). According to the motion judge, this motive meant that the attack on the plaintiff "was not random but arose out of his ownership, use and operation of his vehicle."

[37] It is questionable if the evidence was reasonably capable of supporting the inference of motive drawn by the motion judge and attributed to the assailants. In any event, in my view, the motion judge erred in law by relying on the location of the attack and on the inferred motive of the assailants as proving that there is a direct causal relationship between the injuries suffered during the attack and the use or operation of a motor vehicle.

[38] The factual inference drawn by the motion judge regarding the assailants' purported motive was only capable of supporting the proposition that, but for the plaintiff's use or operation of the vehicle, he would not have been assaulted. However, as this court explained in *Greenhalgh*, at para. 37: "[T]he 'but for' test only serves to eliminate from consideration factually irrelevant causes, but does not conclusively establish legal causation."

[39] Under the modified causation test from *Chisholm* and *Greenhalgh*, it is not enough to show that an 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.

[40] Laskin J.A.'s reasons in *Chisholm* illustrate this point. In that case, a driver was catastrophically injured by gun shots while driving his car. Laskin J.A. explained, at para. 29, that the gun shots caused the impairment suffered by the driver, not the use or operation of the vehicle:

> [E]ven accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly 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". ... Gun shots from an unknown assailant can hardly be considered an intervening act in the "ordinary course of things". The gun shots were the direct cause of his impairment, not his use of the car. [Citation omitted.]

[41] Similarly in this case, the assault on the plaintiff as he sat in his car sorting his money cannot fairly be considered as a normal incident of the risk created by the use or operation of the car.

[42] Before concluding on this point, I note that while the motion judge did not rely on *Vytlingam* in concluding that the plaintiff was involved in an "accident" within the meaning of s. 2(1) of the *Schedule*, plaintiff's counsel pressed the relevance of this decision on appeal. In my view, *Vytlingam* is not binding authority on the point of law in issue here. The court in that case was not required to consider the meaning of the definition of "accident" in s. 2(1) of the *Schedule* and was not purporting to decide whether the Vytlingams' injuries were directly caused by the use or operation of their automobile. Significantly, in making the comment that "*Amos* clearly established the Vytlingams' entitlement to statutory benefits", Binnie J. did not refer to this court's rejection of the*Amos* causation test in *Chisholm* and *Greenhalgh*.

[43] The motion judge thus erred in concluding that the plaintiff's injuries from the assault were the result of an "accident" within the meaning of s. 2(1) of the *Schedule*. The governing appellate authority on the causation test for defining an "accident" under s. 2(1) of the *Schedule* makes it plain and obvious on the agreed facts that the plaintiff's injuries – insofar as they were caused by the assault – were not directly caused by the use or operation of his vehicle, but rather were caused by an intervening act in the form of an assault that cannot be said to have been part of the "ordinary course of things".

[44] However, I take a different view in connection with the plaintiff's belief that he may have run over one of his assailants and the psychological impairment that he may have suffered as a result of this belief.

[45] The motion judge referred to the plaintiff's belief that he may have run over one of his attackers when he drove away from the scene as another element of the incident in question. The motion judge stated, at para. 22, that, "[t]o the extent that this belief may contribute to depression, anxiety and post-traumatic stress disorder or any other psychological condition, it is clear that it is a direct consequence of the use or operation of his motor vehicle."

[46] On the appeal, Personal submits that there is no independent evidence that the plaintiff actually ran over anyone or that his psychological conditions were caused by this belief. According to Personal, the onus was on the plaintiff to put this evidence forward on the motion for summary judgment.

[47] I do not agree with Personal's position for two reasons. First, while the medical evidence dealing with psychological impairment did not distinguish between the causes, the plaintiff's evidence in his affidavit filed in response to the motion was that he was very stressed and nervous after the incident, in part because he thought that he may have killed someone or seriously injured a person by running over them.

[48] The second and more important reason is the way in which the parties argued the motion. The plaintiff was not seeking summary judgment by way of cross-motion and, as noted by the motion judge at para. 4, Personal did not ask him to decide the impairment issue on a summary basis. The motion judge reinforced this point at para. 22:

> I am cognizant that impairment is an issue in this case and I am not, by the remarks that follow, intending to comment on whether the plaintiff was or is impaired.

[49] The motion judge therefore simply assumed, without deciding, that there was a possibility that the plaintiff's belief that he ran over one of his assailants may have contributed to his alleged psychological impairments. I agree that running over someone can fairly be considered as a normal incident of the risk created by the use or operation of a vehicle.

[50] Any resulting psychological impairment from such an incident could be "a direct consequence of the use or operation of his motor vehicle". The motion judge's comments, at para. 22, which I agree with, help to illustrate this application of the causation test:

> What if, while fleeing the assailants on the way out of the gas station, Mr. Downer had hit an innocent pedestrian with his vehicle? Would any trauma suffered as a result be a direct consequence of the operation of the motor vehicle? Surely the answer is yes.

[51] Whether or not the plaintiff actually suffered the psychological injuries that he complains of, and whether or not such injuries were caused by his belief that he may have run over one of the assailants, were not issues before the motion judge. Personal was not challenging the accuracy or veracity of the plaintiff's evidence or the existence of his alleged impairments. And the plaintiff was thus not required to file supporting evidence from experts to establish his psychological impairments or the causes thereof on the motion.

[52] The issues whether the plaintiff believed he may have run over someone, and whether such belief actually caused him to suffer any of the psychological injuries he complains of, remain to be determined along with the other issues in dispute between the parties that were not raised on the motion for summary

judgment, such as Personal's counterclaim for repayment of benefits and estoppel.

**DISPOSITION**

[53] For these reasons, I would allow the appeal, in part, to the extent that I would set aside the motion judge's declaration and, in its place, I would grant a declaration that the physical assault on the plaintiff does not constitute an "accident" under s. 2(1) of the*Schedule*. To the extent the plaintiff's claim is for a declaration that he is entitled to SABs and income replacement benefits arising from the physical assault, I would grant summary judgment in favour of Personal and dismiss this part of the plaintiff's claim.

[54] However, I would dismiss the motion for summary judgment to the extent the plaintiff claims entitlement to accident benefits based on psychological impairments arising from his evidence that he ran over someone during the incident of February 26, 2000.Given how the motion for summary judgment was argued, the question whether the plaintiff was involved in an "accident" in this respect is a genuine issue requiring a trial, as are the issues that the motion judge was not asked to decide, such as repayment of benefits and estoppel. The plaintiff may bring a motion in the Superior Court of Justice to amend the pleadings in accordance with these reasons.

[55] Because I have set aside the declaration granted by the motion judge, I would set aside the motion judge's costs award and in its place make an order for no costs of the motion. Given the divided success on the appeal, I would also make no order for costs of the appeal.

Released: "HSL" "H.S. LaForme J.A."

"MAY -9 2012" "I agree S.E. Lang J.A."

"I agree L.A. Pattillo J. (*ad hoc*)"

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[1] The parties agree, as do I, that the motion judge's order dismissing the motion for summary judgment is a final order. An order dismissing a motion for summary judgment on a question of law, where the only genuine issue is the question of law, gives rise to *res judicata* and, hence, is a final order: *R.S. v. R.H.* (2000), 52 O.R. (3d) 152 (C.A.), at para. 21.

[2] For ease of reference, s. 2(1) of the *Schedule* defines an accident as "an incident in which the use or operation of an automobile directly causes an impairment".