

BETWEEN:

BALJIT S. KUMAR

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Janice Sandomirsky

Heard: January 10, 2001, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Michael J. Gillen for Mr. Kumar
Eric K. Grossman for Coachman Insurance Company

Issues:

The Applicant, Baljit S. Kumar, was injured in a motor vehicle accident on November 29, 1998. He applied for and received statutory accident benefits from Coachman Insurance Company (“Coachman”), payable under the *Schedule*.¹ Coachman denied payment of statutory benefits on the basis that the Applicant was not involved in an “accident” within the meaning of subsection 2(1) of the *Schedule*. The parties were unable to resolve their disputes through mediation, and Mr. Kumar applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *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 and 303/98.

The preliminary issue is:

1. Was Mr. Kumar injured as a result of an “accident” as defined in section 2(1) of the 1996 *Schedule*?

Result:

1. Mr. Kumar was not injured in an “accident” as defined in subsection 2(1) of the 1996 *Schedule*.

BACKGROUND:

1. The Applicant, Mr. Kumar, was injured on November 29, 1998, at approximately 10:30 p.m. The incident occurred while he was operating a taxicab.
2. Mr. Kumar picked up a male passenger at a taxi stand at Square One Plaza in Mississauga. The passenger asked him to drive to Mineola Avenue. After turning into Mineola Avenue from Highway 10, the passenger directed Mr. Kumar to turn right at the first street and to stop the taxicab.
3. As Mr. Kumar was stopping the vehicle, the passenger moved from the rear passenger side of the car to the rear driver’s side of the car and hit Mr. Kumar on the right side of the head with a hard object. At the same time, Mr. Kumar opened his door with his left hand to try to get out of the car. He screamed for help. He was wearing his seat belt.
4. After hitting Mr. Kumar on the head, the passenger got out of the rear driver’s side of the car and ran away.
5. The car was still in gear and began to roll into the ditch on the right side of the road. The car came to a stop upon impact with the ditch. Mr. Kumar sat dazed and bleeding. After a few minutes, he backed the car out of the ditch and drove to his apartment, which he shared with his brother.

6. His brother called the police and drove Mr. Kumar in the taxicab to the emergency department of the Mississauga Hospital.
7. The police caught the assailant after he robbed another taxi some time later that evening. He confessed that he needed money and had devised a plan to rob a taxi. The assailant told the police that during the first attempt (the one on Mr. Kumar), he got scared and ran away. He told police that he used a rock to hit Mr. Kumar. The assailant was charged and convicted of assault causing bodily harm, robbery and breach of probation.
8. Mr. Kumar gave a statement to the police after this incident. In that statement, he outlined the events as noted above. There was no reference in that statement to any injury sustained as a result of the taxi rolling into the ditch.
9. The Emergency Record noted that Mr. Kumar was assaulted by a passenger, hit from behind with an unknown object, suffered five lacerations to top of head, with bleeding and a minor laceration and strain to right thumb. The record noted no loss of consciousness.
10. Mr. Kumar gave a report of the events to the Insurer on December 23, 1998. The report contained the following statements: "When the cab went into the ditch no part of my body hit the interior of the vehicle as I still had my seatbelt on. I did not sustain any personal injuries as a result of going into the ditch."

TESTIMONY:

At the hearing, Mr. Kumar confirmed much of what happened as noted in the report to the Insurer on December 23, 1998. There was one significant difference between his statement and his testimony. In his testimony, Mr. Kumar stated that he hit his face on the steering wheel when the car went into the ditch and that he lost consciousness.

When asked why his testimony at the hearing differed in this respect from his statement to the Insurer taken soon after the accident, Mr. Kumar said that he explained everything on that day. He stated that another taxicab driver acted as a translator and he was not well educated.

Mr. Kumar also stated that he told the emergency nurse that he “got unconscious for two to three minutes.” He could not explain why that information was not noted in the hospital report.

When questioned further about these discrepancies by the Insurer, Mr. Kumar agreed that his memory for events was better two years ago when he made the statements in the hospital and to the Insurer, than it was at the time of the hearing.

Mr. Kumar’s brother, Jatinder Kumar Batish, also testified at the hearing. He stated that he acted as an interpreter in the hospital with the emergency nurse and with the police constable. Mr. Batish described his brother as crying a lot while in the hospital and asking to see his family. He seemed afraid he might not survive and that the assailant might come and find him in the hospital. Mr. Batish testified that the inside of the taxi had blood on the neck rest, driver seat, steering wheel and dash. The only damage to the vehicle was to the passenger side of the bumper, which was pushed approximately four to five inches. It appeared to him that the damage to the bumper occurred when the vehicle hit the ditch.

FACTUAL FINDINGS:

The only significant factual dispute in this case was whether any of Mr. Kumar’s injuries were caused by his head hitting any part of the taxicab. The information from Mr. Kumar shortly after the incident to the Insurer was clear that he did not hurt himself through any impact with the automobile, even when it rolled into the ditch. This was consistent with the absence of any reference in the police report to any injuries sustained through impact with the vehicle. At the hearing, Mr. Kumar testified that in fact he hit his head on the steering wheel when it rolled into the ditch. He also claimed that he told the nurse at the hospital and the Insurer about this injury, but it must have gotten lost in translation.

I have no difficulty accepting the veracity of most of Mr. Kumar’s evidence, which was entirely consistent with his earlier statements. I do not accept his evidence, however, about hitting his head on

the steering wheel. That testimony was inconsistent with the information he provided shortly after the incident. I conclude that the evidence is more consistent with a finding that none of the injuries were caused through an impact with the taxi.

Nor does the evidence support Mr. Kumar's evidence that he lost consciousness as a result of the assault. It appears more consistent with his explanation that he was dazed and disoriented after receiving the blows to the head and the taxi rolling into the ditch. I conclude, therefore, that Mr. Kumar's injuries were the result of the blows to the head with a rock by the passenger in his taxi. The question is whether this meets the definition of "accident" in the 1996 *Schedule*.

Analysis:

Section 2 of the 1996 *Schedule* states:

2(1) In this Regulation,

"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.

[emphasis added]

This definition changed from the preceding 1994 *Schedule*² where "accident" was defined as:

....an incident in which, *directly or indirectly*, the use or operation of an automobile causes an impairment or causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device:

[emphasis added]

² *The Statutory Accident Benefits Schedule — Accidents on or after January 1, 1994*, Ontario Regulation 776/93 as amended by Ontario Regulation 635/94.

The new definition was considered in two decisions released prior to the hearing of this case:³ *Petrosoniak and Security National Insurance Company* (FSCO A98-000198, November 2, 1998) and *Karshe and Non-Marine Underwriters, Mbrs. Of Lloyd's* (FSCO A99-000855, December 15, 2000). In *Petrosoniak*, the applicant fell off his bicycle while riding over a wet patch of pavement. Arbitrator Novick found that the fluid that caused the applicant's bicycle to slide originated from a motor vehicle. The issue then was whether the injuries suffered by Mr. Petrosoniak were directly caused by the use or operation of an automobile. Arbitrator Novick concluded that the applicant was injured as a result of an accident, as defined in the 1996 *Schedule*. In reaching this conclusion, she stated that,

.....a series of events can be the direct cause of an accident, as long as there is no intervening agency or act. Consequently, if an unbroken chain of events involving the use or operation of an automobile leads to an injury, the injury can be said to have been directly "caused by" the incident.

The *Karshe* case is factually more similar to the Applicant's case. Mr. Karshe was also a taxicab driver who was assaulted by a passenger. In that case, a dispute about the taxi fare ended up with one of the passengers hitting Mr. Karshe in the face with "brass knuckles." This assault took place after the fare was paid and the passengers and driver were outside the taxi. One of the passengers then stole money from the cab.

Arbitrator Blackman applied a two-fold test, and considered first, whether the incident resulted from the ordinary use or operation of the vehicle (the purpose test), and second, whether the use or operation of the vehicle directly caused the impairment (the causation test). In considering the purpose test, Arbitrator Blackman found that the assault on Mr. Karshe was "motivated in significant measure by the argument arising over the payment of the fare and by the intent to steal from the taxi-cab."

³Since the hearing, two cases dealing with the new definition of "accident" have been released: *Sarkisian and Co-operators General Insurance Company* (FSCO A99-000966, January 17, 2001), and *Mahadan and Co-operators General Insurance Company* (FSCO A00-000489, March 15, 2001). Both cases followed the reasoning in *Petrosoniak* and found that the applicants were not injured in an accident.

He concluded from that finding that the assault was “both the end product of a commercial relationship resulting from the use of the automobile as a taxi-cab, and the means of obtaining access to an automobile being used as a taxi-cab.” Therefore, the use and operation satisfied the purpose test.

Arbitrator Blackman then considered the causation issue and queried whether the use or operation of the motor vehicle directly caused the impairment as required by the definition. He found that the use or operation of the taxicab “provided the opportunity, the motive, the atmosphere of hostility and/or the emotional impetus for a train of events culminating in an injury being sustained and was, therefore, a predisposing, secondary or indirect cause of Mr. Karshe’s impairment.” It was his view, however, that the change in definition of the word “accident” in the 1996 *Schedule* meant that that degree of connection was not sufficient to meet the “directly caused by” test. Arbitrator Blackman relied on the definition of “direct cause” set out in *Petrosoniak* and concluded that “Mr. Karshe’s injuries were only sustained upon the intervention of a force starting and working actively from a new and independent and intervening force other than an automobile, namely brass knuckles being applied by passenger #1 against the left side of Mr. Karshe’s face.” As a result, Arbitrator Blackman found that the use or operation of the taxicab was not the “efficient, predominate or direct cause of his impairment.”

The Applicant submitted that the facts in the case establish that his injury was directly caused by the use or operation of the taxicab. He argued that there was no issue that the use or operation of the vehicle as a taxicab met the purpose test. The Applicant referred to the decision in *Saharkhis v. Underwriters, Members of Lloyd’s London, England* (2000), 46. O.R. (3d) 154, where a taxicab driver was seriously injured when he was assaulted by two passengers in a dispute over a fare. On a motion for summary judgment, Mr. Justice Lederman stated that,

Because passengers are expected to pay a fare, and that commercial arrangement is inextricably linked to the ordinary and well-known purpose for using and operating a taxi-cab, as opposed to a regular automobile, one can readily conclude that the nature of the conflict between the plaintiff and the two passengers is inseparable from the use and operation of the taxi-cab.

In other words, the ordinary use and operation of a taxicab includes providing transportation to the public for a fee.

Having satisfied the purpose test, the Applicant submitted that the facts of this case also establish a direct causal link between the use or operation of the taxicab and the injuries he sustained. He noted that the passenger began hitting him before the vehicle had come to a stop. The car was still in gear and he was unable to exit the vehicle because of the seatbelt. Using his hands to try to protect himself from the assault, he was neither able to get out of the car nor put it into gear. Even accepting that no part of his body was injured through an impact with the vehicle, the Applicant argued that the car became his prison. He submitted that there was no break in the chain of events, which started when he picked up the passenger, and ended when the car rolled into the ditch after the assault. Therefore, it can be concluded that he was still in the process of operating the vehicle when the incident took place.

Furthermore, the Applicant argued that the assault was not a random act. The assailant had a plan. He told the police that he needed money and decided to get it by robbing a taxi driver. The robbery did not take place in this case because the assailant became frightened.

The Applicant distinguished *Karshe* on the basis that the assault in this case took place inside the vehicle and, he was still operating the vehicle when the assault occurred. Unlike the findings in *Karshe*, the Applicant submitted that there was no intervening act causing the injury. Even if the rock used by the assailant was an independent cause of the injury, the injuries were contributed to by the fact that he was stuck in the car and unable to escape his assailant.

Finally, the Applicant argued further that, as a matter of public policy, automobile insurance should cover for such events in order to ensure that drivers pick up people late at night. The Applicant submitted that a remedy under the criminal injury's legislation is not sufficient because it does not cover for loss of income.

The Insurer's submissions included an extensive review of the case law prior to the change in the definition of the word "accident." The Insurer took the position that the vehicle was merely the *situs* of the injury, and too incidental to find a causal connection. He cited the case of *Thronton v. Allstate Insurance* (1986) 391 N.W. 2d 320 (Michigan SC). In that case, a taxicab driver was shot and robbed by a passenger inside the taxicab. The court had to consider whether the injury *arose out of* the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. It concluded that, while the automobile need not be a proximate cause of the injury, there still must be a causal connection which is "more than incidental, fortuitous or but for..." The court found that the motor vehicle in that case was not the instrumentality of the injuries, but merely the *situs* of the armed robbery. The court stated that the relationship was at most incidental, and concluded that Mr. Thronton was injured by a robber's gunfire.

Similarly, in *McAllister and Dominion of Canada General Insurance Company* (OIC A-000926, December 3, 1992), the applicant's wife was murdered during the course of an armed robbery of the couple's motor home. In that case, Arbitrator Rotter concluded that the manner in which the motor home was being used or operated did not cause the murder, either directly or indirectly. She concluded that the vehicle was merely the location of the crime, not in itself the cause of the crime.

In *Ekunah and Simcoe & Erie General Insurance Company* (OIC A-007550, March 23, 1995), the applicant's husband was found dead in his taxi. He had been murdered. Arbitrator Draper concluded that the primary cause of death was not the use or operation of the taxi. In reaching this conclusion, he stated that:

At most, it might be found that the assailant was attracted to Mr. Ekunah because taxi-drivers are easy targets who are likely to carry cash. I do not believe, however, that automobile insurance is intended to insure against the risks of carrying cash.

On appeal,⁴ Director's Delegate Naylor stated the following in upholding the arbitration decision:

The language of the *Schedule* requires a causal connection between the injury and the use or operation of the vehicle, although it need not be a direct cause. The cause may be indirect: the vehicle need not be the instrument of the injury. However, it is not enough to show that an automobile was merely the location of the injury, that the victim or perpetrator were occupying it at the time of the injury, or that an automobile was involved in some peripheral or incidental way. The use or operation of the vehicle must have caused the injury, whether directly or indirectly.

The Insurer argued that the facts in these cases were similar to the Applicant's case and that they were found not sufficient to even meet the broader "indirectly caused" test. The Insurer then looked at cases where a causal connection was found to exist between the use or operation of the automobile and the injury. For example, in *Mander and Wellington Insurance Company* (OIC A-002057, September 24, 1993), Arbitrator Palmer considered a case where a limousine driver suffered from a nervous shock after being kidnapped and forced to drive at gunpoint and robbed. She concluded that the fact of being forced to operate his vehicle at gunpoint caused the injury, and, therefore that the use or operation of an automobile had, at least indirectly, if not directly, caused the applicant's injury.⁵

The Insurer argued that in this case, like the *Thronton*, *McAllister* and *Ekunah* cases, the automobile was only incidental to the attack that caused the injury, unlike the *Mander* case where the psychological injury was found to be caused, at least indirectly, by the driver being forced to use his vehicle at gunpoint.

Other cases cited by the Insurer involved incidents where there was an altercation between the occupants of the vehicles. Generally speaking, in cases where the altercation was over the use or possession of the automobile, the decisions have found a causal link. *Amos v. ICBC* [1995] S.C.R. 405 is an example of such a case. In that case, Mr. Amos was shot while trying to drive away from a

⁴*ibid.*, (OIC P-007550, April 26, 1996)

⁵Decision confirmed on appeal (OIC P-002057, December 30, 1997)

group of men who blocked his way. The Supreme Court of Canada concluded that there was a relationship between the use of the vehicle to resist the assailants and the firing of the gun that injured him.

The *Amos* case was contrasted with the facts in the *Hanlon and Guarantee Company of North America* (OIC A-011977, October 30, 1995) where Arbitrator Renahan found that the use or operation of the motor vehicle had ceased before the injury occurred. In *Hanlon*, the applicant was struck by the driver of another vehicle after a collision between the two. Arbitrator Renahan concluded that Mr. Hanlon's injuries occurred after the use or operation of the vehicles had ceased and, therefore, not a result of an "accident" within the meaning of the definition of "accident" in the 1994 *Schedule*.

In upholding this decision on appeal, Director's Delegate Draper stated that the situation was different where the use or operation of the automobile ends before the event causing the injury, and the only contribution of the automobile was to provoke the assailant or create an atmosphere of hostility between the parties. In that case, it was concluded that there was no causal relationship between the use or operation of the automobile and Mr. Hanlon's injuries. Director's Delegate Draper stated that:

"Cause" has an instrumental aspect that is lacking here. The incident involving the use or operation of an automobile ended with no one being injured. No further consequences were inevitable or linked to any ongoing use or operation of an automobile. Sometime later, in a location removed from the "incident," there was a verbal confrontation between the two men outside their vehicles. At that point, Mr. Daly attacked Mr. Hanlon. No automobile was the target of the attack, was used in the attack, or contributed to Mr. Hanlon's injuries.⁶

⁶See similar reasoning in the case of *Overley and Co-operators General Insurance Company* (arbitrator's decision overturned on appeal) (OIC P96-00043, March 20, 1997) and *Kohli and State Farm Mutual Insurance Company* (FSCO P99-00035, March 28, 2000)

Finally, the Insurer noted that in *Saharkhis*,⁷ the court focussed on the causal link between the argument that resulted in the injury and payment of the fare. In this case, however, the assault was not related to a dispute over the payment of taxi fare.

CONCLUSION:

To meet the definition of “accident” in subsection 2(1) of the 1996 *Schedule*, I must find, first, that the incident resulted from the ordinary use or operation of an automobile (the purpose test) and second, that it directly caused the impairment (the causation test).

I first considered the purpose test. As noted in *Saharkhiz*⁸ and other cases, the ordinary use of a taxicab involves picking up paying passengers and transporting them to their destination. In other words, there is a commercial component to the use of a vehicle as a taxicab. I am satisfied, on the basis of the evidence, that the use made of the taxicab on the night of the incident in issue can be characterized as an ordinary use or operation of the automobile, and therefore, meets the purpose test.

I am not satisfied, however, that Mr. Kumar’s injuries were directly caused by the use or operation of the taxicab. As noted in the appeal decision in *Ekunah*,⁹ even to meet the “indirectly caused” test, “it is not enough to show that the automobile was merely the location of the injury that the victim or perpetrator were occupying at the time of the injury or that an automobile was involved in some peripheral or incidental way.” Although there is a connection between the fact that Mr. Kumar was driving a taxicab, which has a commercial component, and an attempt at a robbery, in my view, the vehicle provided an opportunity for a robbery, but the use or operation of the vehicle was peripheral or

⁷*Supra*, see p. 7

⁸*Supra*, see p. 7.

⁹*Supra*, see p. 9.

incidental to the assault. In other words, the taxicab was the location of the attempted robbery which left Mr. Kumar injured, not the cause of his injuries.

I found that there was no injury caused by an impact with the automobile or as a result of the taxicab rolling into the ditch. As noted in *Karshe*,¹⁰ while it may not be necessary to find that the Applicant came into direct contact with a vehicle to bring the case within the definition of “accident” under the 1996 *Schedule*, there must be a direct link between the circumstance that caused the injury and the use of the automobile; it must be the “efficient, predominate, or direct cause of his impairment.” In this case, I conclude that the efficient, predominate or direct cause of the impairment was the impact of the rock used by the assailant to hit Mr. Kumar’s head and hand.

In *Saharkhiz*,¹¹ the court was satisfied that an assault resulting from a dispute over the payment of a fare was sufficient to meet the “indirectly caused” test in the 1994 *Schedule*. The court concluded that the dispute was the end product of the ongoing commercial relationship that was inseparable from the operation of the taxicab. Even assuming that a dispute over the payment of a fare would also meet the “directly caused” test under the 1996 *Schedule*, the assault in this case was not related to a dispute over the fare. The assault occurred as part of the assailant’s attempted robbery.

The Applicant made the argument that the seatbelt restrained him from fleeing the attack, and, therefore, was an aggravating factor in the injury. I accept that the use or operation of the vehicle includes the use of the seatbelt. I do not find, however, that the use of the seatbelt directly caused the impairment. The restraint of the seatbelt may have contributed to the degree of the injury, but, in my view, it was not the efficient, predominate or direct cause of the impairment.

¹⁰*Supra*, see p. 8.

¹¹*Supra*, see p.7.

In *Petrosoniak*,¹² it was concluded that a series of events may be considered a direct cause of an incident, as long as there is no intervening agency or act. In my view, there was an intervening act in this case — the impact of the rock on Mr. Kumar’s head and hand — and it was that intervening act that directly caused the impairment.

As a result, I find that Mr. Kumar was not injured as a result of an “accident” as defined in subsection 2(1) of the 1996 *Schedule*.

EXPENSES:

The parties made no submissions on the issue of expenses. If they are unable to settle the question of expenses between themselves, the matter can be brought to the Commission for a determination.

Janice Sandomirsky
Arbitrator

April 27, 2001

Date

¹²*Supra*, see p.5.

FSCO A00-000201

BETWEEN:

BALJIT S. KUMAR

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Mr. Kumar was not injured in an “accident” as defined in subsection 2(1) of the *Schedule*

Janice Sandomirsky
Arbitrator

April 27, 2001

Date