



Appeal P02-00005

OFFICE OF THE DIRECTOR OF ARBITRATIONS

BELAIR INSURANCE COMPANY INC.

Appellant

and

CASSANDRA SEALE

Respondent

BEFORE: Nancy Makepeace
COUNSEL: Eric K. Grossman for Belair
James E. Pitcher for Mrs. Seale
HEARING DATE: September 4, 2002, by telephone conference
Written submissions completed by September 5, 2002
Written submissions re-opened and completed by January 17, 2003

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 dismissed, and the arbitration decision, dated January 31, 2002, is confirmed.
2. Belair shall pay Mrs. Seale's appeal expenses.

January 28, 2003

Nancy Makepeace
Director's Delegate

Date

*Minor errors on pages 14 and 25 corrected on February 4, 2003, as authorized by the *Dispute Resolution Practice Code* and the *Statutory Powers Procedure Act*.

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Belair Insurance Company Inc. (“Belair”) appeals from the Arbitrator’s decision, dated January 31, 2002, in which he ruled that Mrs. Seale was injured in an “accident,” as defined in the *SABS-1996*.¹ Although this was a decision on a preliminary issue, I exercised my discretion to acknowledge the appeal, pursuant to Rule 51 of the *Dispute Resolution Practice Code*, because of the novelty and importance of the issue, which goes to the basis of coverage, rather than dealing with interlocutory or procedural matters. I stayed the arbitration proceeding pending the outcome of the appeal, but denied Belair’s motion for a stay of the Arbitrator’s order that it pay Mrs. Seale’s arbitration expenses.

I am not persuaded the Arbitrator erred. For the following reasons, I find that Mrs. Seale’s use or operation of her automobile – namely, her efforts to extricate her automobile from a road hazard (ice) – directly caused her injury.

II. THE ARBITRATION DECISION AND THE PARTIES’ SUBMISSIONS

The main facts were undisputed at the arbitration hearing. On the morning of November 21, 2000, Mrs. Seale was driving her van home after working the night shift at a correctional facility. It had snowed overnight and the local roads were not yet cleared. She reached an intersection where she intended to turn right, travelling uphill, towards her home. Her van lost traction on the ice and got stuck in the middle of the intersection. She turned the engine off, and called an automobile association, but was told that help was 45 minutes away.

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

A passerby, Mrs. Harwood, offered to help. They agreed that the best way to get the van moving would be to turn left, downhill. Mrs. Seale got out of the vehicle and moved to the back, intending to push. Mrs. Harwood got in. However, before Mrs. Seale got a chance to push, the van started sliding sideways down the hill, eventually coming to rest in a snowbank about halfway down the hill after about 30 seconds. As the sidewalk was snow-covered and impassable, Mrs. Seale walked down the road towards her van. She slipped and fell on the icy road, and broke her arm in the fall.

There was a dispute about the timing of events. In Mrs. Seale's signed statement, Belair's adjuster wrote, "the van started sliding sideways down the hill and ended up sliding into a snowbank. I watched this from the top of the hill. Then I started walking towards the van when I slipped and fell . . ." However, at the arbitration hearing, Mrs. Seale testified that she followed her van as it slid down the hill, wanting to tell Mrs. Harwood to stop the vehicle. She admitted signing the statement, but testified she only skimmed it before signing it. The Arbitrator accepted her explanation, noting that Mrs. Seale was unable to read the handwritten statement at the hearing.² He also found it "likely that Mrs. Seale would not have stood in the middle of the intersection and watch[ed] her vehicle slide. She was in a position of danger." The Arbitrator found that Mrs. Seale fell after her van came to a stop, and that she had been outside the van for less than a minute.

Mrs. Seale asks me to infer that she was walking quickly, with a sense of urgency, because her vehicle was in danger – it was sliding towards a busy intersection. The Arbitrator made no finding about danger to the vehicle, and it is not my role, on appeal, to make findings of fact. It makes little difference, given the Arbitrator's finding that Mrs. Seale was in personal danger, which I was given no reason to doubt. The situation speaks for itself. Mrs. Seale was not walking downhill on that icy road with any purpose in mind but to get her van out of the snowbank and go home as soon as possible.

² I also found the handwritten statement illegible, and relied on the typed version, which was not signed by Mrs. Seale.

Applying the two-part test set out in *Amos v. ICBC*,³ the Arbitrator concluded that “the use or operation of the van was involved in the injury,” then turned to the more difficult chain of causation issue. He summed up his conclusions in three concise paragraphs:

My review of the authorities leads me to the following conclusions. The question of whether the use or operation of the vehicle directly caused Mrs. Seale’s broken arm involves standards and degrees and questions of reasonableness. It involves consideration of independent intervening acts or forces. Coverage is also a question of whether the loss was a normal and reasonable risk of motoring. The definition of “accident” does not require that the injury occur while the insured has physical contact with the vehicle. The question is where to draw the line.

Mrs. Seale’s vehicle got stuck on ice. She left her vehicle to go to the back and push it if Mrs. Harwood could not move it. Before she could push, the vehicle slid down the hill into a snow bank. While returning to her vehicle so that she could continue her trip home, Mrs. Seale slipped and fell on the ice and broke her arm. Throughout this incident, Mrs. Seale maintained her intention to use her vehicle to continue her trip home. She did not abandon her vehicle. When Mrs. Seale got out of the vehicle, she expected that her trip home by vehicle was interrupted. The ice on the road was the operative force which caused Mrs. Seale to both lose control of her vehicle and to fall. The use of the vehicle and the fall occurred in the same vicinity. Mrs. Seale fell within a minute of leaving the vehicle. In my view, the injury was reasonably foreseeable in these circumstances and was not caused by an intervening act. In my view, the slip and fall in these circumstances was a normal and reasonably foreseeable risk of motoring.

The question of whether Mrs. Seale’s injury was directly caused by the use or operation of her vehicle is a question of standards and degrees. In the circumstances as I have described them, I am of the view that Mrs. Seale’s injury was directly caused by the use or operation of her vehicle.⁴

Belair submits that Mrs. Seale’s legal position is no better than if she had slipped while walking towards or away from her car in any other context. The icy road, far from providing a sufficient linkage to use or operation of her vehicle, is an intervening cause that breaks the chain of causation. Belair relies on my recent decisions in *Kumar and Coachman Insurance Company*, and *Elensky and Royal &*

³ [1995] 3 S.C.R. 405.

⁴ Arbitration decision, pp. 9-10.

SunAlliance Insurance Company of Canada,⁵ and the decision of the Ontario Court of Appeal in *Chisholm and Liberty Mutual Group*.⁶

Mrs. Seale relies on the Arbitrator's analysis. She also relies on court decisions extending coverage to injuries sustained while extricating vehicles from snow and other hazards. She submits that her injury resulted from "a perfect chain" of events, starting with the ice on the road that caused both the van's loss of control and her own slip and fall, with no intervening agency. Her intention throughout was to resume her journey home once she regained control of the vehicle. She submits that the decisions Belair relies on are distinguishable because they concern assaults.

At the hearing, I invited the parties' submissions on a recent arbitration decision, *Shantz and Dominion of Canada General Insurance Company*. In early January 2003, I also invited the parties to make submissions on three *SABS-1996* "accident" cases released after the appeal hearing: *Pantazis and TTC Insurance Company Limited*; *Liu and Lombard General Insurance Company of Canada*, under appeal; and *Souchuk and State Farm Mutual Automobile Insurance Company*, under appeal.⁷ Written submissions were completed by January 17, 2003.

III. ANALYSIS AND CONCLUSION

A. General Principles

The issue in this appeal is whether "use or operation of an automobile directly cause[d] [Mrs. Seale's] impairment." The scope of this definition has been the subject of a great deal of litigation. However, as a result of recent decisions, there is a growing consensus about the governing principles.

⁵ (FSCO P01-00026, August 9, 2002) and (FSCO P01-00030, August 9, 2002), respectively. An application for judicial review is pending in *Kumar*.

⁶ [2002] O.J. No. 3135 (August 15, 2002), affirming [2001] O.J. No. 3294 (Ont.S.C.J.). In *Kumar and Elensky*, I applied the lower court decision in *Chisholm*. The Court of Appeal released its decision upholding Justice Chapnik a week after I released my decisions.

⁷ (FSCO A01-001147, May 13, 2002); (FSCO A01-001564, September 16, 2002); (FSCO A01-001429, October 4, 2002); and (FSCO A02-000309, November 27, 2002), respectively.

The definition of “accident” in s. 2(1) of the *SABS-1996* is narrower than its predecessors, which provided coverage where use or operation of an automobile “directly or indirectly” caused an impairment. Although the amending legislation did not alter the broader language of the “right to sue” provisions of the *Act* (“arising directly or indirectly from the use or operation of an automobile”), it is the narrower language of the *SABS-1996* that governs accident benefit entitlement.⁸

The starting point for the analysis is the decision of the Supreme Court of Canada in *Amos v. ICBC*. It concerned the British Columbia statutory accident benefits regulation, which provided coverage for “injury caused by an accident that arises out of the ownership, use or operation of a vehicle.” Mr. Amos suffered gunshot wounds during an attempted carjacking. In deciding that he could claim benefits, the Supreme Court of Canada adopted a two-part coverage test that combined the two leading analyses established in the previous authorities:

1. The purpose test: Did the accident result from the ordinary and well-known activities to which automobiles are put?
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? [emphasis added]

There was little question that the first part of the test was satisfied, since Mr. Amos was driving his van when he was attacked. The focus of the judgement was on the causation test. The Court set out a number of principles:

“... it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase “arising out of” is broader than “caused by”, and must be interpreted in a more liberal manner.”[para. 21]

“Such proof is helpful in establishing the necessary nexus or causal link, but it should not be mandatory for an injured plaintiff to establish an assailant’s intent. It is always open to the courts to draw reasonable inferences regarding causation from the facts.” [para. 21-22]

⁸ *Alchimowicz v. Continental Insurance Co. of Canada*, (1996), 37 C.C.L.I. (2d) 284, 22 M.V.R. (3d) 41

“Negligence or fault in the use or operation of a motor vehicle does not need to be the cause of the injury. The liability for the injury may arise from a tortious act other than the negligent use of a motor vehicle.” [para. 23]

“... a motor vehicle need not be the instrument of the injury to satisfy the causal connection requirement.” [para 24]

“Generally speaking, where the use or operation of a motor vehicle *in some manner contributes to or adds to the injury*, the plaintiff is entitled to coverage.” [emphasis added, para. 26]

Although the statutory language at issue in *Amos* differed from the language of the *SABS-1990*⁹ and *SABS-1994*,¹⁰ the Ontario Court of Appeal held that the provisions were “enough alike” that *Amos* applies to the definitions of “accident” under the previous two benefit schedules.¹¹ This allowed for coverage where the causal connection was weaker than “proximate cause” or “direct cause.” Nevertheless, the vehicle had to provide more than the location or provocation for the incident. It had to be involved in more than an incidental or fortuitous way.

The leading Commission decisions on the “accident” definition have concerned assaults, including “road rage” assaults and robbery-related assaults on cab drivers and truck drivers. Although a substantial minority of decisions have gone the other way, the weight of Commission cases under the *SABS-1990* and *SABS-1994* held that assaults do not come within the “accident” definition. The decisions are reviewed in detail in *Kumar*, a *SABS-1996* decision about a robbery-related assault on a cab driver. In that decision, I affirmed the arbitral consensus that the broad *Amos* “some causal connection” test does not apply to the “accident” definition in the *SABS-1996*. I adopted the definition of “direct cause” that was accepted in *Petrosoniak and Security National Insurance Company*,¹² and applied in subsequent *SABS-1996* cases, including *Correia and TTC Insurance Company Ltd.*,¹³ the first appeal decision to consider the issue:

⁹ The *Statutory Accident Benefits Schedule - Accidents on or before December 31, 1993*, Ontario Regulation 672, as amended.

¹⁰ The *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended.

¹¹ *Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1999), 44 O.R. (3d) 545, and *Saharkhiz v. Underwriters, Members of Lloyd’s, London, England* (2000), 49 O.R. (3d) 255.

¹² (FSCO A98-000198, November 2, 1998).

¹³ (FSCO P00-00061, July 16, 2001).

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.

I also reaffirmed that “[d]irect cause does not mean the only cause or the most immediate cause.” I distinguished *Kumar* from *Petrosoniak* and *Correia* in that the latter cases “asked when the ball *stops* rolling,” whereas the issue in *Kumar* was “whether it *starts*.” I rejected Mr. Kumar’s “but for” argument. I drew the following conclusion:

Considering the matter from a common sense point of view, and keeping in mind the legislature’s decision to narrow the scope of coverage, I find that the event that set in motion the chain of causation leading to Mr. Kumar’s impairment was an assault, not use or operation of an automobile. I find that while the taxicab provided the opportunity, location and motivation for the assault, it did not directly cause an impairment. Therefore I find that the Arbitrator did not err in concluding that Mr. Kumar was not injured in an “accident” as defined in the *SABS-1996*. [at p. 33]

The connection in *Elensky* was even more remote. Mr. Elensky, a truck driver, had no commercial relationship with his assailants, and the attack occurred outside his truck. I concluded that the attack did not come within the definition of “accident.”

In *Chisholm v. Liberty Mutual*, which concerned a drive-by shooting, Laskin J.A. confirmed that the broad “some causal connection” test set out in *Amos* does not apply to the narrower definition of “accident” in the *SABS-1996*. Moreover,

even if the *Amos* test did apply, I doubt that Chisholm would be entitled to accident benefits. He meets the first part of the test, the purpose test, but likely not the second part, the causation test. In *Amos*, the appellant was entitled to no fault benefits because his “vehicle was not merely the situs of the shooting”. Instead, in Major J.’s words, at para. 25, “the shooting appears to have been the direct result of the assailants’ failed attempt to gain entry to the appellant’s van”. Thus “the shooting was not random but a shooting that arose out of the appellant’s ownership, use and operation of his vehicle.”

The nexus or causal relationship between the appellant’s injuries and the operation of his car, present in *Amos*, is not evident on Chisholm’s pleadings. His statement of claim suggests a random shooting, an incident not entitled to coverage even under the *Amos* test.” [para. 22-23]

Justice Laskin then considered Mr. Chisholm's "but for" argument – the submission that "use or operation of his car is a direct cause of his injuries because he would not have been wounded unless he had been confined in his car." He stated that the "but for" test "serves as an exclusionary test," but "does not conclusively establish legal causation." [para. 25] He then turned to the definition of "direct cause":

A direct causation requirement conjures up memories of the famous English tort case of *In Re Polemis*, [1921] 3 K.B. 560, where recovery was allowed for damages that were not a foreseeable result of the defendant's negligence but were directly caused by it. When one thinks of direct causation one thinks of something knocking over the first in a row of blocks after which the rest falls down without the assistance of any other act.

In his text *Handbook of the Law of Torts*, 4th ed. (St. Paul: West Publishing Co., 1971) at 263-4, Dean Prosser defined "consequences" directly caused 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." Here an external force, the gun shots, came "into active operation later". Thus, in Prosser's terms, Chisholm's impairment was not a consequence directly caused by the use or operation of his car.

Put differently, even 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". See J.G. Fleming, *The Law of Torts*, 9th ed. (North Ryde, NSW: LBC Information Services, 1988) at p.247. 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 his car.

The motions judge and the Financial Services Commission have essentially adopted the same test of direct causation by relying on a definition of direct cause in Black's Law Dictionary: "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, for example, *Petrosoniak v. Security National Insurance Company*, Applying this definition the motions judge correctly concluded that "there was not an unbroken chain of events". Instead "the shooting constituted an intervening act, independent of the vehicle's use or operation which clearly broke the chain of causation", thus disentitling Chisholm to accident benefits.

On similar facts, several arbitrators at the Financial Services Commission have reached the same result. See, for example, *Hanlon v. Guarantee Company of North America* (1997), O.I.C. Appeal P95-00003, *Zurich Insurance Company v. Lenti* (1998), O.I.C. Appeal P98-00030, *Elensky v. Royal & SunAlliance Insurance Company of Canada* (2001), F.S.C.O. A00-000720 and *Sarkisian v. Co-operators General Insurance* (2001), F.S.C.O. A99-000966.¹⁴ Conceivably road accidents may occur where there is more than one direct cause of a victim's injuries and one of the direct causes is the use or operation of an automobile. That, however, is not the case here. The only direct cause, the only effective cause of Chisholm's injuries, were the gun shots. [para. 27-31]

Considering the matter from another point of view, Justice Laskin concluded that the "dominant feature" of the claim was "the gun shots. The use or operation of [Mr. Chisholm's] car is at best ancillary." [para. 34] The latter approach calls to mind Delegate Naylor's comment, in *Correia*, that "direct cause speaks to the quality of the relationship between the use or operation of the automobile and the injury, not simply to their closeness in time."¹⁵ Further, by reiterating the principle that "[a]n intervening act may not absolve an insurer or 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 -- it is 'part of the ordinary course of things',"¹⁶ Justice Laskin appears to approve of Justice Chapnik's comment that "a criminal assault which does not take place within the context of the vehicle's ordinary and well-known use is not a risk that is sought to be protected by a motor vehicle liability policy."¹⁷ In my view, this common sense focus on the nature of the risk underlies the varying judicial and arbitral statements of the rule.

In the concluding paragraphs of *Chisholm*, Justice Laskin reaffirmed that the many possible fact situations must be considered on a case by case basis. Mrs. Seale was not assaulted. Her injury presents a different kind of problem.¹⁸

¹⁴ The decisions referred to are all assault cases. *Hanlon*, a road rage case, and *Lenti*, which concerned a car bombing, were decided under the "directly or indirectly" definition in the *SABS-1994*.

¹⁵ Note 13, at p. 10.

¹⁶ At para. 29.

¹⁷ At para. 16 of the lower court decision.

¹⁸ For this reason, I do not find it necessary to consider *Liu and Lombard General Insurance Company of Canada*, (FSCO A01-001429, October 4, 2002), under appeal, which was released after the appeal hearing in this matter. Mr. Liu was a passenger on a bus headed for a casino when the bus was hijacked and the passengers robbed. Mr. Liu was assaulted by one of the robbers. Arbitrator Baltman concluded this was an "accident" because "the attack on Mr. Liu was not a later intervening act but an integral part of a well-calculated, premeditated plan to both overtake the bus

B. The Non-Occupant Cases

(i) Court Decisions

“Use or operation” extends well beyond driving a vehicle, and includes, for example, loading, unloading and delivering cargo,¹⁹ fuel delivery,²⁰ refueling,²¹ changing a tire,²² and repair and maintenance.²³

Injuries sustained while getting into or out of a vehicle have generally been found to be motor vehicle injuries.²⁴ The outcome is more uncertain where the plaintiff had stepped away from the vehicle at the time of the incident, but this is by no means determinative. In *Whitehead v. Whitehead*, the plaintiff

and rob its passengers.” (At p. 10).

¹⁹ For example, loading furniture onto a dump truck: *Huba v. Schulze* (1963), 37 D.L.R. (2d) 570 (Man.Q.B.); removing a boat from the water onto a boat trailer: *Canadian Indemnity Co. v. Security National Insurance Co.* (1994), 26 C.C.L.I. (2d) 295 (Sask. Q.B.); and a disabled vehicle being towed by a tow truck: *Dagg v. Abram’s Towing & Storage* (1994), 21 O.R. (3d) 377 (Gen.Div.).

²⁰ For example, fire resulted when an oil delivery truck overfilled a gas tank: *Stevenson v. Reliance Petroleum Ltd.*, [1956] 5 S.C.R. 936 (S.C.C.). See also *Winnipeg Supply & Fuel Co. v. Canadian General Insurance Co.*, (1950), 66 Man. R. 453 (S.C.C.); *Irving Oil Co. v. Can. Gen. Ins. Co.*, [1958] S.C.R. 590 (S.C.C.).

²¹ For example, *Pioneer Grain Co. v. Wellington Insurance Co.* (1988), 35 C.C.L.I. 176 (Alta.): gasoline spilled during siphoning into a motorcycle’s gas tank was later ignited by the operator’s cigarette.

²² *Strickland v. Miller*, [1998] O.J. No. 2762 (Ont.Gen.Div.). The tire flew off and collided with the plaintiff’s vehicle. The defendants’ auto insurer commenced a third party claim alleging that their father had been negligent in changing the tire. Taliano J. also stated it is not necessary that the “use” be coincident with the accident.

²³ For example, drilling a hole through the trunk in order to connect trailer wiring punctured the gas tank, causing a fire: *Gramak Ltd. v. State Farm Mutual Automobile Insurance Co.* (1975), 10 O.R. (2d) 518, aff’d (1976), 12 O.R. (2d) 553n (Ont.C.A.); cleaning motorcycle engine parts with gasoline, causing fire in the basement area of an apartment complex: *Kracson v. Pafco Insurance Co.* (1981), 32 O.R. (2d) 336 (Ont.Co.Ct.); draining the leaky gas tank of a motorcycle in order to repair it: *Shelton v. Insurance Corp. of British Columbia* (1991), 7 C.C.L.I. (2d) 48 (B.C.S.C.); spot-welding and filling holes in the body: *Elias v. Insurance Corp. of British Columbia* (1992), 12 C.C.L.I. (2d) 135 (B.C.S.C.); and repairing the exhaust assembly after removing it from the car: *Munro Estate v. Johnston* (1994), 25 C.C.L.I. (2d) 34 (B.C.S.C.). But not lighting a hibachi inside a van, causing the carbon monoxide deaths of two people sleeping in the van: *Chateauvert v. Economical Mutual Insurance Co.*, [1980] I.L.R. 1-1223 (Ont.H.C.J.).

²⁴ For example, *Fraser v. Peckham et al* (1983), 42 O.R. (2d) 354 (Ont.S.C.): as the plaintiff was getting out of the defendant’s taxicab, the passenger door, which was defective, flew open, causing her to fall and injure her hip; *Omand v. Disabled and Aged Regional Transit System* (1983), 14 O.R. (3d) 52 (Ont.Ct.Gen.Div.): failure to secure a wheelchair while using a wheelchair elevator device; *Hachey-Tweedle v. Trillium Funeral Service Corp. (c.o.b. as Morris Sutton Funeral Home)*, [1999] O.J. No. 883 (Ont. Gen. Div.): as the plaintiff pushed the driver’s door closed with her elbow, she slipped and fell on the icy parking lot.

tripped over a chock block in her son's driveway shortly after getting out of a car. The issue was which insurer must pay her damages: her son's homeowner's policy, which indemnified him for occupier's liability, or the car owner's motor vehicle liability policy. The British Columbia Supreme Court held that the motor vehicle policy provided coverage. The driver had turned off the ignition, removed the key, opened the door, and alighted simultaneously with his mother. "She left her door open for her daughter and turned toward the house. She had taken no more than a step or two when she tripped over the block of wood." [para. 8]. The Court had "no difficulty with the proposition that loading and unloading are part of the use of a passenger vehicle," and rejected the argument that the plaintiff's use of the car was over once she got out "and had both feet on the driveway." [para. 16] While this "had a strong appeal initially," on reflection, the Court concluded "[t]his is not a case where somebody walked down the driveway." The plaintiff's son was found liable both as operator and occupier.²⁵

Mrs. Seale relies on the decision of the Ontario Court of Appeal in *Lefor (Litigation Guardian of) v. McClure*, in which Justice Sharpe, writing for Borins and MacPherson JJ.A., held that Ms. Lefor's motor vehicle liability insurer was required to indemnify her for any damages suffered by her seven-year-old daughter, Netasha.²⁶ Ms. Lefor, on her way to a concert, stopped her car across the street from her mother's house, where she planned to leave her children. With the engine running, she left the car to escort her children across the street. Netasha darted across the street and was struck by an oncoming car. The insurer relied on *Law, Union & Rock Ins. Co. v. Moore's Taxi Ltd.*, the leading Supreme Court of Canada "chain of causation" case prior to *Amos*.²⁷ In that decision, on similar facts, the Supreme Court held that the taxi company's duty of care to the child passenger was separate and distinct from its duty of care with regard to use and operation of the vehicle. Therefore, the risk was covered under the company's comprehensive policy, which excluded "claims arising out of . . . the ownership, use or operation . . . of any motor vehicle." In *Lefor*, Justice Sharpe stated that the earlier

²⁵ [1984] I.L.R. 1-1820 (B.C.S.C.)

²⁶ (2000), 49 O.R. (3d) 557 (Ont.C.A.)

²⁷ [1960] S.C.R. 80

decision “must be read in light of the more recent judgement of the Supreme Court of Canada in *Amos*”:

I agree with the submission of the respondents that the amendment to the wording of the standard form motor vehicle liability insurance policy 1990 to provide coverage with respect to injuries arising “indirectly” as well as directly from the use or operation of a motor vehicle, strengthens their case. In view of that broad language and in view of the principles enunciated by the Supreme Court in *Amos, supra*, it is my view that the motions court judge correctly concluded that the accident arose from the ownership or directly or indirectly from the use or operation of Karen Lefor’s motor vehicle. Netasha was being dropped off at her grandmother’s house by her mother who was immediately proceeding in the automobile to a concert. Stopping vehicles to pick up and drop off passengers is an ordinary and well-known aspect of the use and operation of an automobile. There is a clear nexus, within the meaning articulated in the *Amos* case, between the use and operation of Karen Lefor’s vehicle and Netasha’s injuries. The automobile was stopped temporarily, its motor still running, to drop off Netasha. The accident occurred as a result of the use of Ms. Lefor’s vehicle as a means of conveying passengers from one place to another. Ms. Lefor’s decision to park her car on the opposite side of the road from her mother’s house and leave it running while she and her children darted across the street placed Netasha in a situation of danger and triggered the sequence of events that resulted in Netasha’s injuries. The alleged negligence of Karen Lefor after she left her vehicle does not preclude coverage as, on the authority of *Amos, supra*, the motor vehicle need not be the instrument of the injury, and injuries which do not arise from the negligent use of a motor vehicle may be covered: see *Incerto v. Landry* [citation omitted], per Lax J.: “The liability for the injury may arise from a tortious act other than the negligent use of a motor vehicle . . . where the use or operation of a motor vehicle in some manner contributes to the injury, there is an entitlement to coverage.” [para. 8]

Justice Sharpe stated that *Lefor* was “clearly distinguishable” from the earlier decision of the Ontario Court of Appeal in *Alchimowicz v. Continental Insurance Co. of Canada*, where “the use of an automobile was a remote background fact.”²⁸ The issue in *Alchimowicz* was not, as in *Lefor*, the scope of the insurer’s duty to indemnify under s. 239 of the *Act*, but the scope of the “accident” definition under

²⁸ Similarly, in *Fraser Valley Taxi Cabs Ltd. v. Insurance Corporation of British Columbia*, (1993), 100 D.L.R. (4th) 282, a passenger was ejected from the defendant’s taxicab because he was drunk and abusive. Between 30 and 45 minutes later, he was struck and killed by another vehicle as he staggered along the road. The majority of the British Columbia Court of Appeal distinguished *Wu v. Malamas* (1985), 21 D.L.R. (4th) 468 (B.C.C.A.), concluding that the case was “on the same side of the line as” *Law, Union and Rock Insurance v. Moore’s Taxi Ltd.* because use or operation of the vehicle had ceased. The Supreme Court of Canada refused leave without reasons, [1993] S.C.C.A. No. 101.

the *SABS-1990*. The Court's brief reasons in that decision clearly focused on the unusual facts. After agreeing that "indirect" is broader than "direct," the Court said,

However, we do not agree that when a drunken person is driven to a beach site, leaves the car, and some 25 minutes later dives off a dock to sustain serious injuries, that this could be construed on any subtle variation of the facts at trial as an incident caused by the use or operation of a motor vehicle. As liberally as one may choose to interpret legislation which provides benefits to persons who are injured, it must be remembered that this is automobile legislation.²⁹

More helpful are the two extrication cases the Arbitrator relied on: *Sklar v. Saskatchewan Government Insurance Office*³⁰ and *Incerto v. Landry*.³¹ Mr. Sklar's car got stuck in a snowbank. A passerby helped him clear the snow from the rear of the vehicle, but the two men were unable to move the car. Mr. Sklar refused the helper's offer of a ride. He stayed with the car and tried to get it moving by rocking it back and forth. This only caused the rear tire to blow out and the wheel to dig a hole into the ground beneath the snow. The weather got worse, and he took shelter inside the car. Eventually snow piled up, blocking the exhaust pipe. He died from carbon monoxide poisoning, and was found the next day.

The Saskatchewan legislation provided accident benefits for loss resulting from bodily injuries sustained by an insured "directly, and independently of all other causes, through accidental means, . . . provided that the bodily injuries are suffered as a result of . . . driving, riding in or on, or operating a moving motor vehicle . . ." Sirois J. held that Mr. Sklar "suffered an accident through getting stuck in the snowbank, while driving, riding in and operating a moving motor vehicle." [p. 472] He and the passerby "did the normal thing under the circumstances" by trying to free the car. Mr. Sklar's decision to continue with his efforts, and to remain in the vehicle

²⁹ (1996), 37 C.C.L.I. (2d) 284, 22 M.V.R. (3d) 41

³⁰ (1965), 54 D.L.R. (2d) 455 (Sask. Q.B.)

³¹ (2000), 47 O.R. (3d) 622 (Ont. S.C.J.)

was not what caused his death, it was the swirling snow piling up at the rear of the vehicle thereby causing the deadly carbon monoxide gas to accumulate therein which caused his death. It was this further happening in the chain of circumstances totally unexpected, unforeseen and undesigned, brought into operation by chance and therefore fortuitous which snuffed out his life. And this further event was merely another step in the chain of circumstances which followed directly from the primary causation – the accident of getting stuck in the snowbank. This event led directly and independently of all other causes to the eventual death by carbon monoxide poisoning within a matter of hours. . . .

In *Incerto v. Landry*, Mr. Landry was driving Mr. Incerto's car when it got stuck in a gravel rut at the side of the road. All three occupants got out of the car. Ms. Heald, one of the passengers, got behind the wheel, and Mr. Landry stood beside the driver's door, giving directions. Mr. Incerto moved to the front of the car and put his hands on the hood, preparing to push it back onto the roadway. On instructions from Mr. Landry, Ms. Heald put the vehicle into neutral. It rolled over Mr. Incerto, killing him. On a duty to defend motion, Lax J. held that there could be liability under both the automobile policy and the homeowner's policy, and therefore both insurers were obliged to defend the action. The incident satisfied the *Amos* test:

On the first part of the *Amos* test, this accident resulted from an ordinary and well-known activity of an automobile, namely that Landry drove the car off the road and into a ditch. The injury that resulted was not incidental or fortuitous. It arose, at least indirectly, from the activity of attempting to extricate the vehicle from the ditch. On the pleadings and the agreed facts, there is some nexus between the death of Incerto and the use or operation of the motor vehicle. Landry's operation of the vehicle contributed in some manner to the injury. This is sufficient to satisfy the second part of the *Amos* test. [para. 14]

It was this paragraph that was cited by Justice Sharpe in *Lefor*. Belair relies on *Wolfe v. Lumbermens Mutual Casualty Company*, in which *Lefor* and *Incerto* are distinguished.³²

Mr. Wolfe and Mr. Herbison were members of a hunting party. Mr. Wolfe drove his pickup truck to the hunting area, then left the truck to shoot what he thought was a deer but turned out to be Mr. Herbison. He had left the headlights on, though they were not being used to assist in the shooting. Mrs.

³² [2001] O.J. No. 3454 (Ont.S.C.J.)

Wolfe remained in the truck, with the engine running. Mr. Wolfe fired his rifle while standing about 2½-3 feet away from the open door of the truck.

Power J. concluded that Mr. Herbison's injuries resulted from a hunting accident, not an automobile accident:

I agree with counsel for the Applicants that the legislation and the policy must be broadly interpreted. However, the elastic band stretches only so far. Here, the band has clearly "snapped". Despite Mr. MacLeod's fine presentation, I am satisfied that the circumstances giving rise to the Herbison action cannot, in common sense, and on any rule of wide construction, be considered as arising out of an automobile incident. . . . I agree with the submissions for the Respondent that the two-part Amos test has not been met. Indeed, in my opinion, the Applicants cannot meet either part of the test. Similarly, there is no duty to defend under s. 245 of the Act since the accident in question is not one resulting from the ownership, or directly or indirectly from the use or operation of an automobile.

In my opinion, when the shooting took place, the vehicle was not in use by Mr. Wolfe. While Mrs. Wolfe was using the vehicle, her use was in no way connected with the shooting. In other words, there is no nexus or causal relationship between Mr. Herbison's injuries and her ownership, use or operation of the truck. Her use or operation of the vehicle was merely incidental or fortuitous.

In my opinion, Mr. MacLeod's submission that, at the time of the shooting, the truck was still in use by Mr. Wolfe in the sense that it was running, that Mrs. Wolfe was in it, and that it would have been used to transport the kill, is too far fetched. As aforesaid, Mr. Wolfe was simply not making use of the truck when he discharged his rifle. [para. 46-48]

About *Incerto*, Justice Power said, "there, liability was imposed because the death occurred from the activity of attempting to extricate the vehicle from the ditch - i.e. there was a clear nexus between Incerto's death and the use and operation of the car." [para. 49] Mr. Landry, like Mrs. Seale, was standing outside the vehicle while another person operated the vehicle.

(ii) *Arbitral Case-law*

Commission decisions have also taken a broad approach to non-occupant cases, apart from the assault cases. The two cyclist cases, one decided under the *SABS-1990*, and the other under the *SABS-1996*,

sketch the outer boundaries of “accident.” The first of these was *Vineski and Federation Insurance Company of Canada*.³³ Mr. Vineski was riding his bicycle on the road when he was startled by the sound of a vehicle engine starting, and looked around to locate the source of the noise. While looking away, he rode into a pothole, a wheel broke off, and he fell. Arbitrator Baltman found that Mr. Vineski was injured in an “accident.” The insurer appealed, and the Insurance Bureau of Canada intervened.

Delegate Naylor confirmed the Arbitrator’s order after a lengthy review of the authorities. Specifically, she rejected the argument that the addition of the words “or indirectly” was intended only to incorporate the “transmission of force” principle. She stated:

The case law indicates that the absence of such qualifying language does not operate to limit recovery to injuries resulting from actual contact with an automobile, and that use of language relating to cause, even direct cause, imports the principle of proximate cause. It must be assumed that this formed the basis of understanding when the language of the *Schedule* was chosen. [p. 13]

She further concluded that “causes, directly or indirectly” takes us somewhat beyond a strict analysis of the doctrine of proximate cause,” and allows for consideration of a more remote causal link.” However,

the link cannot be so remote as to deprive the word “causes” of meaning. As I stated in *Ekunah and Simcoe & Erie General Insurance Company*, (April 22, 1996, OIC P-003550), it is not enough to show that an automobile was merely the location of the injury, that the injured person was occupying it at the time or that an automobile was involved in some peripheral or incidental way. The use or operation of an automobile must have **caused** the injuries, whether directly or indirectly. To determine this, . . . the role of the automobile in the whole scenario must be considered. [p. 14]

She concluded:

³³ (OIC A-012588, September 8, 1995), confirmed on appeal, (OIC P96-000034, October 18, 1996).

the sound of the vehicle was the originating cause of the sequence of events that led to the ultimate injury. The facts are quite different from *Tippet v. Doe et al.*,³⁴ where a cyclist lost control, went off the road and then, by chance, struck a parked car. Here, the starting of the engine triggered the consequences that followed and was a crucial component of the chain of events that resulted in Jonathan's fall. I agree with the arbitrator that the chain of events was not broken by Jonathan's conduct, the state of the road or the fact the bicycle wheel broke. The fact that Jonathan may have a cause of action against the municipality in respect of the state of the road does not preclude a finding that his injuries were also caused by the use or operation of an automobile.

Federation argues that this is not the type of risk contemplated by automobile insurance. Jonathan could have as easily been distracted by the sound of a dog barking, a pedestrian or any number of things. Federation's position is that this is an accident which arose from the use of a bicycle, not from the utilization of an automobile. Although the starting of the vehicle may have been a more remote cause than the breaking bicycle wheel or the state of the road, the language of the legislation allows for this. As for the risk contemplated, it is a matter of common knowledge that bicycles and cars co-exist uneasily together on public roadways, and a cyclist distracted by the potential danger posed by a starting car does not strike me as obviously outside the protection afforded by compulsory automobile insurance. (pp. 15-6)

Dismissing the application for judicial review, the Divisional Court stated:

it must be remembered that we are considering 'no fault' insurance where negligence is not an issue. While this may represent the extreme limit of protection, neither the conclusion of the arbitrator nor that of the Director's Delegate is patently unreasonable.³⁵

Petrosoniak was the first arbitration decision to consider the narrowed definition in the *SABS-1996*. Like *Vineski*, it involved a cyclist who lost control and fell onto the road without having any physical contact with an automobile. The cause of Mr. Petrosoniak's accident was an oily fluid on the roadway. Arbitrator Novick accepted that the fluid was released by a motor vehicle. Turning to the law, she stated that the broad *Amos* test and the cases relying on it were of limited assistance, since the amended "accident" definition "clearly requires a direct causal relationship." [p. 6] She adopted the

³⁴ (1987), 27 C.C.L.I. 70 (B.C.S.C.) [footnote added]

³⁵ Unreported decision of Flinn, O'Driscoll and Sedgwick JJ., dated October 23, 1997, Court File No. 674/96. The Court of Appeal refused leave, with costs (unreported decision, dated January 28, 1998).

definition of “direct cause” referred to earlier – “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.” She concluded that the insured person was injured as a direct result of riding over the wet patch:

While the fact that the fluid fell onto the roadway, as opposed to falling directly onto Mr. Petrosoniak, may constitute an intermediate step in the process which ultimately led to his injuries, it does not, in my view, constitute an intervening act or a force ‘working actively from a new and independent source’ . . . [p. 7]

Belair’s counsel submitted that *Petrosoniak* turned on the insurer’s misguided concession that the fluid on the road came from a vehicle. Although it is clear the Arbitrator wished she had received more evidence on the point, she made a finding based on the insured person’s testimony. In any event, the principles she applied have been adopted in subsequent *SABS-1996* cases, and I am not persuaded to depart from them in this case.

The Commission has also had a number of opportunities to consider injuries sustained while getting into or out of an automobile, or walking towards or away from an automobile. Like the court decisions, they are relatively fact-specific, and it is difficult to state a hard and fast rule.

Taken together, the arbitral decisions suggest that use or operation of an automobile generally does not begin until a driver or passenger has physical contact with the automobile by placing the key in the lock, opening the door, or climbing the stairs of the bus, for example. Walking towards an automobile with the intention of using it does not, in itself, constitute use or operation. So, in one of my decisions, Ms. Fedrizzi’s fall on a slippery LRT platform was not an “accident,” though she was on her way to the streetcar. I reasoned from clear cases:

If the Applicant had fallen *before* she entered the LRT station, there would be no dispute that the incident was not an “accident” as defined. If she had fallen *after* she boarded the streetcar, there would be no dispute that the incident was an “accident.” As the previous arbitration and court decisions make clear, there are no hard and fast rules for determining exactly when, during the Applicant’s progress from the station entrance to the door of the

streetcar, her activities began to involve “directly or indirectly, the use or operation of an automobile.”

I was presented with no evidence that the Applicant fell while climbing the stairs to board the streetcar, that she fell because she shifted her weight in the process of approaching or preparing to board the streetcar, that she was jostled by other passengers, or that the arrival of the streetcar distracted or startled her. The Applicant testified that she was “walking toward” the streetcar when she fell. In my view, it does not matter whether the Applicant was several steps or several feet away from the streetcar at the time of her fall. The streetcar was her destination, but that was true even before she entered the LRT station, and there is no question that a fall before she entered the station would not be an “accident” as defined in section 1. In my view, that the streetcar was the Applicant’s destination and the incident occurred on TTC property does not establish a causal nexus between the injury-causing incident and the use or operation of an automobile.³⁶

I concluded that while the limits of the definition of “accident” were unclear, Ms. Fedrizzi’s injury fell outside them. The risk fell exclusively within the scope of occupiers’ liability.

Similarly, the assault on Mr. Kohli was not an “accident,” though he was approaching his car, which his assailants then stole. Arbitrator Allen rejected Mr. Kohli’s testimony that he had already put his key in the lock when he was attacked. On appeal, Director Draper confirmed the Arbitrator’s decision, approving of her finding that “use or operation” “requires the vehicle to have been more than the object of an intention or merely present during the incident. To my mind, these words contemplate a more functional or instrumental role” He recognized that “[t]he line may be difficult to draw,” but was satisfied the Arbitrator considered the appropriate factors.³⁷

On the other side of the line was *Gligoric and Economical Mutual Insurance Company*. The insured person fell on an icy surface as he reached out to put his key in the lock. Arbitrator Jones found that this was an “accident” because unlocking a car door is “an ordinary and well-known activity to which an automobile can be put.” and Mr. Gligoric “was putting out his arm and thereby moving his body to open the vehicle” when he fell:

³⁶ (OIC A97-000839, March 25, 1998)

³⁷ *Kohli and State Farm Mutual Automobile Insurance Company*, (FSCO A98-000146, June 16, 1999), confirmed by (FSCO P99-00035, March 28, 2000).

The ice, in combination with Mr. Gligoric attempting to enter his vehicle caused the incident which directly or indirectly caused his injuries.³⁸

And when Mr. Abdi hit his head and shoulder on the bus pole after the doors closed on his leg, knocking him off balance, Arbitrator Miller found this was an “accident,” although he was not able to board the bus.³⁹

Use or operation of the automobile generally continues while the person gets out of the car or off the bus, as long as physical contact is maintained. The result is less clear once the person moves away from the automobile. Arbitrator Miller found that Mr. Mahadan’s injury was not an “accident” because he had removed his groceries from the trunk, closed the lid and turned away from the car when he caught his foot in a crack in the pavement that “had nothing to do with the use and operation of a motor vehicle, but was there because of the construction work being done on the parking lot.”⁴⁰ Mrs. Ribeiro’s fall was an “accident” because she still had one foot on the steps of the bus when she fell, but Arbitrator Manji stated, in *obiter*, that it would not have been an “accident” if she had fallen on a patch of ice and snow 15 feet away, as the insurer claimed.⁴¹

The same Arbitrator found that Mr. Lynam’s fall was an “accident,” whether he slipped on the step board of his van or on the icy curb, because in either case his fall was caused by the ice in combination with his shifting his weight in order to alight. The Arbitrator noted that s. 224(1) of the *Insurance Act* defines “occupant” to include the driver, a passenger, whether being carried in or on the automobile, and a person getting into or on or getting out of or off the automobile. She concluded there was

³⁸ (OIC A96-001588, December 19, 1997), at p. 10.

³⁹ *Abdi and TTC Insurance Company Limited*, (FSCO A00-000015, May 2, 2001).

⁴⁰ *Mahadan and Co-operators General Insurance Company*, (FSCO A00-000489, March 15, 2001).

⁴¹ *Ribeiro and Guarantee Company of North America*, (OIC A95-000369, October 24, 1996).

some nexus or causal relationship between Mr. Lynam's use or operation of his van and his injury. The causal connection was not merely incidental or fortuitous. Formosa argues that it was the ice on the ground which was the cause of the injury and not any use or operation of his van. However, Mr. Lynam lost his balance and fell while he was in the process of shifting his weight from the seat of the van to his feet on the ground or step board. The ice in combination with his act of exiting from the van caused the incident.⁴²

Again, in *Bissoon and Pilot Insurance Company*, Arbitrator Blackman concluded that Mr. Bissoon was injured in an "accident" when he was struck by another vehicle while standing on the road, putting on his coat. The rear driver's side door was still open, and it was also struck by the other vehicle.⁴³

Friedrichs and Guarantee Company of North America was another case where lack of physical contact with the automobile was not determinative.⁴⁴ Ms. Friedrichs was in an "accident," though she had released the handrail and moved away from the bus when she was pushed over by students attempting to get on. Arbitrator Baltman found that little turned on her distance from the bus because "[t]he movement of persons onto a bus is integral to its use or operation."

Similarly, though in the context of the *SABS-1996*, Arbitrator Sapin found that Ms. Pantazis's fall was an "accident," though she "hit the ground" 8-10 feet away from the bus, because she stumbled as a result of the bus driver's failure to kneel the bus. 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.⁴⁵

These cases show that it is easier to define when "use or operation" begins than when it ends. Further, cases on the margin turn on a number of factors, including whether the peril or the mechanism of injury

⁴² *Lynam and Formosa Mutual Insurance Company*, (OIC A-010990, January 18, 1996), at para. 32.

⁴³ (OIC A95-000120, November 6, 1996), confirmed on appeal without comment on this point, (FSCO P96-00084, October 8, 1997).

⁴⁴ (OIC A96-001053, June 20, 1997).

⁴⁵ *Pantazis and TTC*, note 7 above.

relates to use or operation of the automobile. The same patterns can be observed in the court decisions. For example, the results in *Whitehead* (tripping over a block used to secure an automobile) and *Lefor* (passenger struck by oncoming vehicle), which involved hazards of the road, can be contrasted with *Alchimowicz* (diving off a dock), *Wolfe* (hunting accident), *Chisholm* (drive-by shooting), where the “dominant feature” of the incident was not use or operation of an automobile.

The interrupted journey cases are amongst the most difficult, but they can also be understood to follow the same patterns. Mr. Wupori’s fall from a fence was not an “accident” because the connection between his injury and operation of the automobile was “too remote.” Arbitrator Novick said that while “parking a car is integral to its use or operation, I cannot agree that injuries that are sustained in the course of climbing a fence some 500 feet away from the vehicle in question result from the vehicle’s use or operation.” Mr. Wupori intended to enter a carport through the backyard in order to open the door, which was stuck, so that his father could park in the carport.⁴⁶

Shantz and *Souchuk* are “interrupted journey” cases decided under the *SABS-1996*. As Ms. Shantz approached the key box at the entrance to the parking garage in her apartment building, she realized she could not reach it from inside the car. She shifted the car into “park,” took off her seat belt and stepped out of her car. She left the door open and the engine running. As she put her key in the key box, the car began to roll down the ramp. She followed it, hoping to get back in and stop it. As the car hit the wall at the end of the driveway, she tripped and fell forward onto the ground, suffering injuries to her face, hands, shoulders, elbows and knees. She fell beside the driver’s side door, without touching the car.

Arbitrator Skinner found that “[d]riving, stopping and attempting to regain control of a vehicle are ordinary and well known activities to which automobiles are put,” and therefore, “the use and operation of the automobile were involved in this incident.” [p. 3] She then asked “whether there is a sufficient nexus between the use and operation of the automobile and Ms. Shantz’s injuries to justify a conclusion that such use and operation of the automobile directly caused her impairment.” Applying the test set out

⁴⁶ *Wupori and Western Assurance Company*, (FSCO A97-002200, January 25, 1999).

in *Petrosoniak*, she rejected the insurer's submission that Ms. Shantz's use of the key box, leaving the car, and falling on the pavement were intervening events. She concluded that

each one of these steps results from the previous step in an uninterrupted chain of events beginning with Ms. Shantz driving her car to the top of the ramp and ending with her falling to the ground. I heard no evidence that Ms. Shantz fell because of an obstruction on the ramp or any other external object or force interfering with her movement. I infer from the facts that Ms. Shantz was pursuing her car down the ramp and concentrating her efforts on stopping the car. As a result, she lost her footing and tripped and fell.

I find that the movement of the automobile played an instrumental role in the chain of events leading to Ms. Shantz's injuries. I therefore find that the use and operation of the automobile directly caused her impairment.

Arbitrator Skinner found that Ms. Shantz "intended to proceed in her car into the garage." She stepped out of her car to use the key box, then followed her car as it went down the ramp "in an effort to regain control of it." Parking a car, and regaining control of it, clearly fall within "use or operation." [p. 7] As stated in *Fedrizzi*, *Wupori* and other cases, intention alone does not create a sufficient causal nexus, even under the "directly or indirectly" definition, but the *Shantz* decision can be understood another way. As I read it, the Arbitrator saw the series of events as a single incident that started when Ms. Shantz pulled her car alongside the key box and ended when she fell beside her car. Her fall cannot be understood as a separate incident, and her automobile played a central role in the incident from start to finish.

In the most recent case, Ms. Souchuk was driving her car from Windsor to London, where she was moving. Ahead of her was a relative, Mr. Chadwick, driving a pickup truck and towing her trailer. Her car and the trailer were full of her belongings. Her boyfriend followed with a U-Haul containing her furniture about an hour behind.. The two lead vehicles were travelling in the right lane when a pickup truck in the passing lane collided with the trailer. Ms. Souchuk leaned on her horn and braked. Mr. Chadwick's truck and the trailer veered off onto the grass beside the highway. The trailer tipped but did not turn over. Ms. Souchuk pulled over, stopped, and ran out of her car to see if her friends were

injured. According to the agreed statement of fact, she ran “about four feet” past the hood of her car when she fell on the road and broke her left elbow.

Arbitrator Bayefsky applied the *Petrosoniak* definition of “direct cause” that was accepted by the Court of Appeal in *Chisholm*. He affirmed that “direct cause” does not require physical contact with an automobile, and need not be the only cause of injury. He found “particularly significant” the Court’s comment that “an intervening act will not relieve an insurer of liability if the act was a normal incident of the risks of using a car or if it was part of the ordinary course of things.” He found that stopping her car to see if her friends had been injured was an “intended and ordinary use” of her car. In any event, she herself was involved in the accident: she saw it, honked her horn, and had to brake heavily to avoid hitting the other vehicles.

As Arbitrator Skinner had in *Shantz*, Arbitrator Bayefsky noted that there was nothing in the condition of the road that caused Ms. Souchuk to fall:

To that extent, it cannot be said that there was a “new and independent source” of the insured’s injuries, having “nothing to do with” the use of a motor vehicle. [p. 9]

On that basis, Arbitrator Bayefsky distinguished Ms. Souchuk’s case from *Mahadan*. Belair submits that *Mahadan* is directly applicable to Ms. Seale’s case, and that *Souchuk* does not help her. In Belair’s view, “*Souchuk* has nothing in common factually with *Seale* other than that the lady fell after getting out of her car.” I agree with Mrs. Seale that *Mahadan* is distinguishable from her case in that “Mr. Mahadan’s use and operation of his vehicle effectively ceased when he arrived home and the crack in the pavement had nothing to do with his decision to get out of his vehicle.” On the other hand, Mrs. Seale interrupted her journey and left her vehicle only after it had become disabled by ice, and she slipped and fell on the very ice-covered roadway which had disabled her vehicle.

Despite the factual disparities, I find that *Souchuk* offers considerable support for Mrs. Seale’s position. Ms. Souchuk was not injured, and her car was not damaged, in the collision involving Mr.

Chadwick's truck. She "braked heavily" and brought her car to a stop, managing to avoid contact. Her injury happened when she left the vehicle in response to the collision. She was not struck by an automobile, but fell on the road.

In my view, the heart of Arbitrator Bayefsky's decision is his finding that Ms. Souchuk's injury "occurred within, and resulted from, an uninterrupted sequence of events involving the use and operation of a motor vehicle." [p. 11] He accepted there were multiple causes for her injury:

Even if it could be said that the use of a car was not the only cause of Ms. Souchuk's injury, I find that it was one of the direct causes. The immediate cause (and, therefore, one of the direct causes) of her injury was her fall on the ground. However, her fall on the ground was also directly caused by her running from her car up to the truck following the collision, to see if her friends were hurt. [p. 10]

C. Conclusion

This is a difficult case. Mrs. Seale was not in her van, alighting from it, or touching it when she fell. Nor was she struck by another vehicle. She suffered the kind of injury any pedestrian can suffer while crossing an icy road. Belair argues that Mrs. Seale's use or operation of her automobile ended when she put both feet on the ground, leaving Mrs. Harwood behind the wheel. What happened after that, in Belair's view, had only an incidental or fortuitous connection with the automobile.

Belair submits that the Arbitrator erred in taking a "separatist" approach to the two-part *Amos* test. While the authorities are clear that *Amos* requires a two-step enquiry, I agree that the ultimate question mandated by the *SABS-1996* is whether use or operation of an automobile directly caused damage or injury. The Arbitrator's brief reasons concerning the purpose test, leading to his conclusion that use or operation of the van "was involved in the injury," suggest a weaker nexus between use or operation than "directly causes." However, I am satisfied that he considered the appropriate factors in reaching his ultimate conclusion, and I find no error in that conclusion.

Belair submits that the Arbitrator applied a “but for” test by considering the time and location of the injury, Mrs. Seale’s activity at the time, and the nature of the hazard that caused her injury. I am not persuaded that is what the Arbitrator did. In my view, these factors – time, proximity, activity and risk – are important in defining the incident that resulted in injury. It is clear that “direct cause” need not be the only cause, that physical contact with an automobile is not required, and that a subsequent contributing cause may not break the chain of causation if it is “part of the ordinary course of things’.”⁴⁷ In this case, each link in the chain of events that led to Mrs. Seale’s injury was “part of the ordinary course of things.”

Mrs. Seale’s fall happened while she was engaged in an ordinary activity in a Canadian winter – trying to regain control of a vehicle on an icy road. She did the usual things when her van got stuck. After calling an automobile association, she accepted help from a passerby. As is often done in such situations, she allowed Mrs. Harwood to take the wheel so she could do the hard work of pushing. When her van slid down the hill, she followed it, again doing the ordinary thing. She did not, as her counsel put it, decide to get a coffee first, then fall on the way. She walked down the road because the sidewalk was impassable. She fell because the road was icy, the same reason she had lost control of her van. There was “a perfect chain” between the two events, in my view. Putting it another way, the entire sequence of events was once incident. This distinguishes Mrs. Seale’s case from the assault cases, and the cases involving unusual hazards unrelated to use or operation of an automobile. Unlike in the assault cases, I find that use or operation of an automobile was the dominant feature of the incident.

Belair submits that “no reasonable person would expect that after you turn off your car and get out of it and then walk after it down the street and fall and break your elbow, this would be considered a ‘car accident’.” As in many of the cases about the definition of “accident,” framing the question is important in deciding the outcome. Mrs. Seale describes the incident differently: “an insured person is driving home from work after an ice storm, the vehicle becomes disabled on a steep hill by ice, a good

⁴⁷ *Chisholm*, note 6, para. 31.

samaritan offers to help, the insured person walks behind the vehicle to push, the vehicle slides down the very ice covered hill upon which it originally became disabled, the insured person walks down the ice covered hill while the vehicle is still sliding in an attempt to instruct the good samaritan driver to stop the vehicle . . . , the insured person slips and falls on the same ice and roadway which disabled the vehicle without ever abandoning his or her intention to continue the vehicular journey home.” Given all the circumstances, I do not accept there is any absurdity in Mrs. Seale’s position. It is close to the line, but I am not persuaded the Arbitrator erred in finding that use or operation of an automobile directly caused Mrs. Seale’s injury.

IV. EXPENSES

Belair shall pay Mrs. Seale’s appeal expenses, as assessed or agreed.

Nancy Makepeace
Director’s Delegate

January 28, 2003

Date