



Appeal P02-00039

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

LANA M. SOUCHUK

Respondent

BEFORE: David R. Draper

REPRESENTATIVES: Michael P. Taylor for State Farm
Judy Beckett for Ms. Souchuk

HEARING DATE: June 27, 2003, with additional written submissions filed in October 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 order, dated November 27, 2002, is confirmed.
2. If the parties cannot agree on appeal expenses, they may request a determination of this issue by writing to the Commission within 30 days of this order, as set out in Rule 79.1 of the *Dispute Resolution Practice Code*.

David R. Draper
Director of Arbitrations

January 8, 2004

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This appeal involves the definition of “accident” in the 1996 version of the *SABS* — “an incident in which the use or operation of an automobile directly causes an impairment . . .”¹ It is being released with three other decisions that consider this definition in different fact situations.² In this case, Lana Souchuk broke her left elbow in a fall as she ran to see if her friends, whose vehicle had been forced off the road, were injured. The Arbitrator concluded this was an accident. The Insurer, State Farm Mutual Automobile Insurance Company (“State Farm”), appeals. For reasons set out below, the appeal is dismissed.

II. BACKGROUND

The arbitration hearing proceeded based on an agreed statement of facts, reproduced below:

- I was one of two vehicles traveling in tandem from Windsor to London on September 2, 2000;
- Vehicle #1 was owned and driven by Russell Chadwick who is my brother in law by a former common law relationship. His brother was a passenger in his 2000 Dodge pick up;
- Russell was towing my 28' Glendette trailer which was packed with some of my possessions as I was moving from Windsor to London;
- I was driving my 1979 Chev Impala directly behind Russell on the 401. I was alone in my vehicle which was also packed with more of my belongings.
- The U-Haul containing my furniture was about one hour behind us and was being driven by my boyfriend.

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

² *Liu and Lombard General Insurance Company of Canada*, (FSCO P02-00030, January 8, 2004); *Swaby and Allstate Insurance Company of Canada*, (FSCO P03-00004, January 8, 2004); and *Saad and Federation Insurance Company of Canada*, (FSCO P03-00017, January 8, 2004).

- When my boyfriend arrived at the accident scene the ambulance had already taken me to hospital;
- The weather was fine, the roads were dry; both vehicles were traveling along the 401 in the right lane at approximately 100 kph.
- The accident happened at about 11:00 a.m. in the morning;
- The accident occurred on the 401 near the Lawrence Side Road;
- We had stopped at the two service centers west of Windsor being Tilbury and West Lorne;
- After stopping at the service center at West Lorne we continued along the 401 towards London;
- I maintained a distance behind Russell's pick up of about 4-5 car lengths;
- I watched a small pick up pass me in the passing lane at normal passing speed.
- I could see that as the small pick up passed along side my trailer that the head of the lone occupant bent down.
- I thought the driver was probably bending down to put in a CD or tape but I found out later that he actually fell asleep.
- As his head went down his pick up truck collided with the side of my trailer. The collision occurred near the front two feet of the trailer.
- I leaned on my horn to alert my friends and the other driver.
- When the small pick up collided with the trailer it seemed as if the two vehicles were stuck together for a few seconds and then the small pick up veered to the left into the median.
- Russell's pick up truck and my 28' trailer fishtailed back and forth across both lanes of the 401 as Russell was trying to control the vehicles.
- The hubcaps were flying off across the 401.
- I braked heavily to avoid contact.
- Russell's pick up and the trailer veered off the 401 to the right onto the grass. The trailer was tipped slightly but not turned over. The door of the trailer was open and my belongings were falling out.
- I had brought my vehicle to a stop in the right lane of the 401. I flung open my car door and ran out of my vehicle to see if my friends were injured.
- I ran about four feet passed [*sic*] the hood of my car when I fell on the roadway and injured my left arm.
- I was taken by ambulance to hospital and later found out that I had broken my left elbow.
- On May 31, 2001 the insured applied for benefits.
- On June 15, 2001 the insured was sent an Explanation of Benefits Payable denying benefits on the basis that she had not been involved in an accident.

The issue before the Arbitrator was whether Ms. Souchuk was involved in an accident, as defined in the *SABS-1996*. To decide this issue, he reviewed the arbitration, appeal and court decisions considering this definition,³ and adopted the following approach:

I accept the definition of “direct cause” set out in Black’s Law Dictionary and applied in various arbitration decisions, as well as by the Court of Appeal in *Chisholm*. Applied to the present case, the definition would mean that the use or operation of a vehicle must have been the efficient cause of an uninterrupted chain of events resulting in Ms. Souchuk’s injury. I agree with the arbitration decision in *Seale* to the effect that the phrase “directly causes” does not mean that there must be a physical connection between a motor vehicle and an insured’s injuries.⁴ While the Legislature has clearly attempted to narrow coverage by replacing the previous “directly or indirectly...causes” with the current “directly causes,” there are still a variety of situations in which the use of a car can directly give rise to injuries without a person being in contact with the car or any part of the car. I note, as well, the comment in *Chisholm* to the effect that an “accident” will have occurred as long as **one of the direct causes** of the injury was the use or operation of an automobile. Particularly significant is the Court’s comment that even 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. This resembles the finding in *Seale* to the effect that the insured’s injury was a normal and reasonably foreseeable risk of motoring. (pp. 8-9).

In applying the law to the facts of this case, the Arbitrator distinguished it from the assault cases. He found that the vehicles — both Ms. Souchuk’s Impala and Russell Chadwick’s pick-up truck — were the central cause of Ms. Souchuk pulling over to the side of the highway, getting out and running toward her friends. In his view, Ms. Souchuk’s injury arose, not from an external and unrelated force such as a

³ *Mahadan and Co-operators General Insurance Company*, (FSCO A00-000489, March 15, 2001); *Seale and Belair Insurance Company Inc.*, (FSCO A01-000635, January 31, 2002) [later affirmed on appeal]; *Shantz and Dominion of Canada General Insurance Company*, (FSCO A01-001147, May 13, 2002); *Petrosoniak and Security National Insurance Company*, (FSCO A98-000198, November 2, 1998); *Karshe and Non-Marine Underwriters, Mbrs. of Lloyd’s*, (FSCO A99-000855, December 15, 2000); *Sarkisian and Co-operators General Insurance Company*, (FSCO A99-000966, January 17, 2001); *Chisholm v. Liberty Mutual Group*, [2002] O.J. No. 3135; *Kumar and Coachman Insurance Company*, (FSCO P01-00026, August 9, 2002), application for judicial review filed; and *Elensky and Royal & SunAlliance Insurance Company of Canada*, (FSCO P01-00030, August 9, 2002).

⁴ See, also, the recent arbitration case of *Liu and Lombard General Insurance Company of Canada* (FSCO A01-001429, October 4, 2002), in which the arbitrator stated that “the legislation doesn’t say that the vehicle must be the direct physical cause” and that “had the drafters so intended, they could easily have said so” [emphasis in original].

gunshot or a physical assault, but from a fall while running from the one vehicle to the next to determine if her friends had been hurt in the accident. While her injury was not physically connected to the vehicles, “it was not the result of a new and independent force. It was directly related to, and caused by, the use and operation of a motor vehicle.” Finally, the Arbitrator considered the Supreme Court of Canada decision in *Heredi v. Fenson* (2002), 213 D.L.R. (4th) 1, cited in *Chisholm*. He found that while the immediate cause of Ms. Souchuk’s injury was her fall, “the dominant feature or nature of her claim was the use or operation of an automobile.”

III. ANALYSIS

State Farm argues that the Arbitrator erred in his interpretation of the “directly caused” requirement in the definition of “accident.” In its submission, his approach blurred the purpose and causation tests, resulting in an indirect connection being treated as direct. The better approach, State Farm argues, is to consider the true nature of the claim — the *Heredi* approach. In this case, State Farm contends that Ms. Souchuk is claiming benefits because she slipped and fell and, therefore, that is the true nature of the claim.

State Farm’s position is understandable. Impairments indirectly caused by the use or operation of an automobile have been removed from coverage. The current definition of “accident” is clearly a “narrower or more stringent causation requirement,”⁵ or even “a significant narrowing.”⁶ It is not enough that there is a chain of causation between the use or operation of the automobile and the impairment — the causal connection must be direct.

⁵ *Chisholm*, paragraph 11.

⁶ *Saharkhiz v. Underwriters, Members of Lloyd’s, England* (2000), 46 O.R. (3d) 154, aff’d on appeal, (2000), 49 O.R. (3d) 255.

While *Chisholm* provides important guidance on the meaning of “direct,” each case will turn on its particular facts. I agree with Director’s Delegate Makepeace that the decisions, including *Chisholm*, reflect a common sense focus on the nature of the risk covered by automobile insurance, and that various factors are relevant in evaluating the connection between the use or operation of the automobile and the impairment — time, proximity, activity and risk.⁷

In my opinion, the Arbitrator’s decision is a reasonable attempt to follow *Chisholm*, and is generally consistent with the analysis in *Seale*. On the facts of the case, the Arbitrator found that the use or operation of the automobiles started the ball rolling. That is what caused Ms. Souchuk to leave her vehicle to come to the aid of her friends in the other car — a normal part of operating an automobile on the highway. Like the “extraction” or “interrupted journey” cases,⁸ he concluded this incident fit within the definition of “accident.” The true nature of the claim, in his opinion, was the use or operation of the automobiles, not a slip and fall. While I would view this case as close to the line — even closer than *Saad* — I am not persuaded the Arbitrator erred in law.

IV. APPEAL EXPENSES

The parties did not address the question of appeal expenses. If they are unable to reach an agreement, they may request a determination of this issue by writing to the Commission within 30 days of this order, as set out in Rule 79.1 of the *Dispute Resolution Practice Code*.

David R. Draper
Director of Arbitrations

January 8, 2004

Date

⁷ *Seale and Belair Insurance Company Inc.*, (FSCO P02-0005, January 28, 2003), at pp. 10 and 27.

⁸ See *Seale*, and *Greenhalgh v. ING Halifax Insurance Co.*, [2003] O.J. No. 2740.