

**BETWEEN:**

**LANA M. SOUCHUK**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

### **REASONS FOR DECISION**

**Before:** Eban Bayefsky

**Heard:** By written submissions received on June 19, 2002 and by telephone conference call on June 26, 2002. Additional written submissions were received by Sept. 27, 2002.

**Appearances:** Judy Beckett for Ms. Souchuk  
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

**Issues:**

The Applicant, Lana M. Souchuk, claims that she was injured in a motor vehicle accident on September 2, 2000. She applied for, but was denied, statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.<sup>1</sup> State Farm maintained that Ms. Souchuk had not been injured in an “accident” within the meaning of section 2(1) of the *Schedule*. The parties were unable to resolve their dispute through mediation, and Ms. Souchuk applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The *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, 303/98 and 114/00.

The issues in this hearing are:

1. Was Ms. Souchuk injured in an “accident” within the meaning of section 2(1) of the *Schedule*?
2. Is either party liable to pay the other the expenses of the hearing, pursuant to section 282(11) of the *Insurance Act*?

**Result:**

1. Ms. Souchuk was injured in an “accident” within the meaning of section 2(1) of the *Schedule*.
2. If required, the parties may now make submissions on the issue of expenses.

**EVIDENCE AND ANALYSIS:**

***Facts***

The hearing proceeded on the basis of an agreed statement of fact, reproduced as follows:

- 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.
- 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 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.

### **Law**

Section 2(1) of the *Schedule* defines an "accident," in part, as an "incident in which the use or operation of an automobile directly causes an impairment..." Section 2(1) defines an "impairment" as a "loss or abnormality of a psychological, physiological or anatomical structure or function."

The three decisions considering section 2(1) that are most relevant to the present situation are as follows. First, *Mahadan and Co-operators General Insurance Company* (FSCO A00-000489, March 15, 2001) involved a person who had left his car carrying groceries and who had fallen after twisting his foot in a crack in the pavement. The Arbitrator held that, while the insured's car had led him to the location of the incident, the crack in the pavement was the real cause of his injuries. The Arbitrator found that the crack in the pavement was a "new and independent source" of the insured's injuries and that the crack had "nothing to do with" the use and operation of the insured's car.

Secondly, *Seale and Belair Insurance Company Inc.* (FSCO A01-000635, January 31, 2002) involved a person who had left her car after it had gotten stuck on the ice, and who had slipped on the ice after her car had slid down a hill into a snowbank. The Arbitrator found that the insured was in the process of returning to her vehicle so that she could continue her trip home, and that she had not abandoned her vehicle, always maintaining her intention to use it to drive home. The Arbitrator found that the ice on the road caused the insured to both lose control of her vehicle and to fall, that the use of the vehicle and the fall occurred in the same vicinity, and that the insured fell within a minute of leaving her car. The Arbitrator held that the definition of "accident" does not require that the injury occur "while the insured has physical contact with the vehicle." The Arbitrator found that the insured's injury was "reasonably foreseeable in these circumstances and was not caused by an intervening act" and that the slip-and-fall was a "normal and reasonably foreseeable risk of motoring." The Arbitrator concluded that the insured's injuries were directly caused by the use or operation of her vehicle.

Thirdly, the recent decision of *Shantz and Dominion of Canada General Insurance Company* (FSCO A01-001147, May 13, 2002) involved a person who had left her car and who had fallen when following the car as it rolled down a ramp. The Arbitrator held that the insured's injuries resulted from an "uninterrupted chain of events" beginning with her driving her car onto the ramp and ending with her falling to the ground. The Arbitrator noted that there was no evidence that the insured fell because of an obstruction on the ramp or any other external object or force interfering with her movement. The

Arbitrator inferred that the insured was pursuing her car down the ramp and concentrating her efforts on stopping the car, and that as a result, she lost her footing and fell. The Arbitrator stated that driving, stopping and attempting to regain control of a vehicle are ordinary and well-known activities to which automobiles are put. The Arbitrator concluded that the movement of the automobile played an “instrumental role in the chain of events” leading to the insured’s injuries and, therefore, that the use and operation of the automobile directly caused the insured’s impairment.

Three other decisions have made important comments on the interpretation of the term “accident” under section 2(1). In *Petrosoniak and Security National Insurance Company* (FSCO A98-000198, November 2, 1998), where the insured fell off his bicycle after riding over a patch of truck oil on the road, the Arbitrator quoted the following definition of “direct cause” from 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.” The Arbitrator held that there must be a direct link between the “circumstance that causes the injury and the incident.”

In *Karshe and Non-Marine Underwriters, Mbrs. of Lloyd’s* (FSCO A99-000855, December 15, 2000), a case involving a taxicab driver being assaulted over a dispute about cab-fare, the Arbitrator held that it is not enough that the use or operation of a car provided the “opportunity, the motive, the atmosphere of hostility and/or the emotional impetus for a train of events culminating in an injury.” The Arbitrator stated that the use or operation of the car must be the “efficient, predominate or direct cause” of the insured’s impairment.

In *Sarkisian and Co-operators General Insurance Company* (FSCO A99-000966, January 17, 2001), where the insured was shot while performing maintenance on his car, the Arbitrator found that the car “did not play a direct instrumental role in the chain of events” leading to the insured’s death and that while the insured’s “replacement of windshield fluid put him at the site of his car,...his vehicle played no role in his death or in any force giving rise to his death.”

Three recent appellate decisions have considered the meaning of the term “accident” under the current legislation. In the case of *Chisholm v. Liberty Mutual Group*, [2002] O.J. No. 3135 (August 15, 2002), the Ontario Court of Appeal concluded that injuries arising from a drive-by shooting were not “directly caused by the use or operation of a car.” The Court rejected the “but for” test as the proper approach to this question, finding that “legal entitlement to accident benefits ...requires not just that the use or operation of a car be a cause of the injuries but that it be a direct cause.” The Court stated that “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.” The Court found that the gunshots were a subsequent external force or later intervening act causing the appellant’s injuries. However, the Court stated that “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.’”

The Court of Appeal also questioned whether the two-part test set out by the Supreme Court of Canada in *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405, continued to apply to the narrower definition of “accident” under the current *Schedule*. The test consisted of the purpose test, namely, whether an accident resulted from the ordinary and well-known activities to which automobiles are put, and the causation test, namely, whether there was some nexus or causal relationship between the insured’s injuries and the ownership, use or operation of the car, or whether the connection was merely incidental or fortuitous. The Court of Appeal stated that “the stringent causation requirement — ‘directly causes’ — in the definition of accident under the *1996 Schedule* means that the *Amos* test, or at least the causation part of that test, can no longer be used to interpret the definition.” Nevertheless, the Court considered whether the case before them would satisfy the two-part test and found that it would only satisfy the purpose test.

In the appeal decision of *Kumar and Coachman Insurance Company* (FSCO P01-00026, August 9, 2002), the Director’s Delegate concluded that injuries suffered by a taxi driver from being hit over the head with a rock by a passenger were not directly caused by the use or operation of a motor vehicle.

The Delegate found that, while the appellant was operating the vehicle at the time of the accident and, therefore, satisfied the purpose test, “the vehicle played no direct role in [his] impairments.” The Delegate concluded that “considering the matter from a common sense point of view, and keeping in mind the legislature’s decision to narrow the scope of coverage,...the event that set in motion the chain of causation leading to Mr. Kumar’s impairment was an assault, not the use or operation of an automobile.” The Delegate found that “while the taxicab provided the opportunity, location and motivation for the assault, it did not directly cause an impairment.”

Finally, in the appeal decision of *Elensky and Royal & Sunalliance Insurance Company of Canada* (FSCO P01-00030, August 9, 2002), the Director’s Delegate concluded that injuries suffered by a truck driver when he was “ambushed, beaten and shot” outside of his truck were not directly caused by the use or operation of an automobile. The Delegate found that the appellant was using his truck for “its intended and ordinary commercial use when he stopped to ask for directions to complete his journey.” However, the Delegate stated that this was not enough and that “the purpose test and chain of causation test must be considered together.” The Delegate concluded that, while the appellant’s truck “brought him to the location, provided a target for robbery, and ultimately allowed him to flee,” therefore playing “some role in the series of events,” the use or operation of the truck “was not an ‘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.’”

### ***Submissions***

Ms. Souchuk submitted that the use of her car directly caused her injuries. She maintained that her injuries arose from an unbroken chain of events involving the use of her car. She maintained that she injured herself when she flung open the door and ran out to ascertain whether her friends had been hurt (all of which were part of the ordinary use and operation of a vehicle). She noted that nothing in the condition of the road caused her to fall. She stated that, although she fell after she had left her vehicle, she had not abandoned her car or ceased being the driver of the car. Ms. Souchuk argued that the

cases closest to the present one were *Seale* and *Shantz* and she urged me to follow these. She maintained that the recent cases of *Chisholm*, *Kumar* and *Elensky* were distinguishable.

State Farm submitted that Ms. Souchuk was not involved in an “accident” because her injuries were caused by her fall, not by her use or operation of a car. State Farm maintained that Ms. Souchuk’s fall on the roadway and/or the condition of the roadway constituted an intervening act, breaking the chain of causation. State Farm argued that Ms. Souchuk’s use of a car simply brought her to the location of the intervening act. State Farm maintained that, at the time of the incident in question, Ms. Souchuk had, for “all intents and purposes, left her own vehicle” and had fallen for reasons “that had nothing to do with her vehicle.” In discussing the recent cases of *Chisholm*, *Kumar* and *Elensky*, State Farm submitted that the chain of causation was broken when Ms. Souchuk got out of her vehicle, that the dominant feature or true nature of her claim was a slip-and-fall on the road and that the use of a motor vehicle was merely ancillary to the claim.

### ***Findings***

I find that Ms. Souchuk was injured in an “accident” within the meaning of section 2(1) of the *Schedule*.

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.<sup>2</sup> While the Legislature has clearly

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<sup>2</sup>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].

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.

I find that the use of a car directly caused an uninterrupted chain of events ending in Ms. Souchuk’s injury. To the extent that Ms. Souchuk’s fall can be considered an intervening act, I find that it was a normal incident of the risks of using a car or was part of the ordinary course of the incident in question.

The circumstances of Ms. Souchuk’s injury satisfy a number of the criteria set out in the case law. To the extent that the first part of the two-part test set out in *Amos* still applies, State Farm did not strenuously argue that Ms. Souchuk did not satisfy the purpose test. State Farm submitted that their principal objection was that Ms. Souchuk’s injury was not causally related to the use or operation of an automobile. Nevertheless, as in the appeal decision of *Elensky* (in which the Director’s Delegate found that the truck driver who had been attacked outside of his vehicle was using his truck for “its intended or ordinary commercial use when he stopped to ask for directions to complete his journey”), I find that Ms. Souchuk was using her car for its intended or ordinary use when she pulled over to the side of the highway to see if her friends had been hurt in the accident. Similarly, the vehicle to which Ms. Souchuk was running had just been involved in a collision.

Unlike the case of *Mahadan*, 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.

The use of a car was not “merely ancillary” to Ms. Souchuk’s injuries. She was directly involved in the motor vehicle accident between the small pick-up truck (whose driver had fallen asleep at the wheel) and her brother-in-law’s larger pick-up truck (to which Ms. Souchuk’s trailer and belongings were attached). Ms. Souchuk saw the collision between the small truck and her trailer. She had honked her horn to alert both her friends and the driver of the small truck. Ms. Souchuk had had to “brake heavily” to avoid colliding either with the larger truck and trailer or with the hubcaps flying across the highway. After the large truck veered off the road, Ms. Souchuk pulled her car over, flung her door open and ran out to see if her friends were hurt. She had run only a few feet past the front of her car when she fell and injured her arm. As discussed in *Shantz* and *Sarkisian*, I find that the use of her own car, as well as that of her brother-in-law’s pick-up truck, played an instrumental role in the chain of events leading to Ms. Souchuk’s injury.

I do not find it relevant that Ms. Souchuk was outside of her car when she fell and injured herself. As noted above, there is no requirement that the insured be in physical contact with an automobile to have been involved in an “accident.” In any event, Ms. Souchuk was in the process of leaving her vehicle and approaching her brother-in-law’s vehicle when she fell. I find that her injury was directly related to the use of her own vehicle and that of her brother-in-law.

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. To the extent that Ms. Souchuk’s injury had more than one direct cause, I find that the use of her vehicle and that of her brother-in-law was one of those causes.

As discussed in *Chisholm* and *Seale*, the notion of “direct cause” involves more than the immediate effects of the use of a car. It can include acts that normally and ordinarily arise from the use of a car. I find that the current situation falls squarely within this analysis. Running from one car to another

immediately following an accident, particularly when the insured's car had (as described above) been involved in the accident and when the car to which the insured was running contained her friends who may have been hurt, is an act that normally and ordinarily arises from the use or operation of a motor vehicle. The act of running between cars (and of falling) at the scene of an accident is a normal incident of the risks of using a car, and is a part of the ordinary course of things. To the extent that "reasonable foreseeability" is a consideration, I find that Ms. Souchuk's running and falling at the scene of the accident was an entirely foreseeable risk in the use of her car and that of her brother-in-law. Therefore, while Ms. Souchuk's fall might be considered an "external force" or an "intervening act," it was a normal, ordinary and foreseeable risk in the use of a motor vehicle.

In *Chisholm*, the Court of Appeal likened "direct causation" to a row of blocks being knocked down without any intervening act. The essence of this notion is that an initial force produces an uninterrupted sequence of events. I find that the collision on the highway (including the brother-in-law's truck veering off onto the grass) set in motion an uninterrupted sequence of events resulting in Ms. Souchuk's injury. I do not find that Ms. Souchuk leaving her car and running between the vehicles constituted a new and independent force. It would be arbitrary to find that Ms. Souchuk falling outside of her car and between the two vehicles constituted a separate and unrelated incident, isolated from the sequence of events started by the collision. That is, it would be arbitrary to find that events at either end of the sequence constituted accidents, but not an event both physically and temporally between these points and unrelated to any external force. I find that Ms. Souchuk's injury occurred within, and resulted from, an uninterrupted sequence of events involving the use and operation of a motor vehicle.

I accept the general principles set out in the assault cases of *Chisholm*, *Kumar*, *Elensky* and *Karshe*, but find them to be distinguishable from the present case. Unlike the assault cases, the motor vehicles in the current situation provided more than the opportunity, location and motive for Ms. Souchuk's actions. The vehicles were the central cause of her pulling over to the side of the highway, getting out and running towards her friends. Her injury arose, not from an external and unrelated force such as a gunshot or a physical assault, but from a fall while running from one vehicle to the next to determine if

her friends had been hurt in the accident. While Ms. Souchuk's injury was not physically connected to the vehicles, I find that 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, State Farm invoked the case of *Heredi v. Fenson*, 2002 S.C.C. 50 (cited in *Chisholm*) to the effect that the "dominant feature" or "true nature" of Ms. Souchuk's claim was not car-related and that the use of a vehicle was "merely ancillary" to her claim. I do not accept this. I find that the vehicles involved, from the time of the collision to the moment of Ms. Souchuk's injury, played a pivotal and uninterrupted role in the sequence of events. While the immediate cause of Ms. Souchuk's injury was her fall, I find that the dominant feature or true nature of her claim was the use or operation of an automobile.

I, therefore, find that Ms. Souchuk was injured in an "accident" within the meaning of section 2(1) of the *Schedule*.

**EXPENSES:**

If required, the parties may now make submissions on the issue of expenses.

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Eban Bayefsky  
Arbitrator

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November 27, 2002

Date

FSCO A02-000309

**BETWEEN:**

**LANA M. SOUCHUK**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE 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. Ms. Souchuk was injured in an “accident” within the meaning of section 2(1) of the *Schedule*.

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Eban Bayefsky  
Arbitrator

November 27, 2002

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Date