



BETWEEN:

FARIBA KHORASANI

Applicant

and

ZURICH INSURANCE COMPANY (COMMERCIAL BUSINESS)

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Jeffrey Rogers

Heard: By written submissions, completed on September 28, 2007.

Appearances: Mr. Bernard B. Gasee, solicitor for Mrs. Khorasani
Mr. Eric Grossman, solicitor for Zurich Insurance Company (Commercial Business)

Issues:

Morteza Khorasani, Fariba Khorasani's husband, died as a result of a stab wound, inflicted while he was operating a taxi, on September 6, 2005. Mrs. Khorasani applied for statutory accident benefits from Zurich Insurance Company (Commercial Business) ("Zurich"), payable under the *Schedule*.¹ Zurich refused to pay benefits, taking the position that Mr. Khorasani did not sustain an impairment as a result of an "accident", within the meaning of section 2 of the *Schedule*. The parties were unable to resolve their dispute through mediation, and Mrs. Khorasani applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The preliminary issue is:

1. Did Mr. Khorasani sustain an impairment as a result of an “accident” as defined in section 2(1) of the *Schedule*?

Result:

1. Mr. Khorasani did not sustain an impairment as a result of an “accident” as defined in section 2(1) of the *Schedule*.

FACTS

The facts are agreed. On September 6, 2005, Mr. Khorasani was operating a Zurich insured taxi in the normal course of his occupation as a taxi driver. At approximately 3:30 a.m., he picked up a fare named Shane Smith. After a ride of about six minutes, he stopped to drop off the fare at an apartment building on Don Mills Road, in Toronto. When the taxi stopped, Shane Smith took out a knife, leaned forward and stabbed Mr. Khorasani in the neck, striking the carotid artery. When the incident occurred, Mr. Khorasani was still in the taxi, as the operator. He had not yet turned off the meter. Shane Smith fled.

Mr. Khorasani ended up lying face down on the ground outside the cab. He quickly bled to death. Shane Smith was later apprehended and was convicted of manslaughter for the death of Mr. Khorasani.

ANALYSIS

“Accident” is defined in section 2 of the *Schedule* as “an incident in which the use or operation of an automobile directly causes an impairment....”

The definition divides into two parts. The first part is concerned with the “use or operation of an automobile.” The second part is concerned with causation of impairment.

Rulings on the meaning of “accident” are rooted in the decision of the Supreme Court in *Amos v. Insurance Corp. of British Columbia*² where it was decided that a person attacked and shot through the window of his car by a gang of people trying to enter it, was entitled to no-fault benefits under a British Columbia scheme that provided benefits for injuries caused by an accident that “arises out of the ownership, use or operation of a vehicle.” The Court established a two part test as follows:

1. The purpose test: Did the accident result from the ordinary and well-known activities to which automobiles are put?; and
2. The causation test: was there some nexus or causal relationship between the injuries and the ownership, use or operation of the vehicle, or was the connection merely incidental or fortuitous?

This test was applied to determine entitlement to accident benefits in Ontario under earlier versions of the *Schedule* that provided for benefits where impairment was caused “directly or indirectly” by the use or operation of an automobile.

When “indirectly” was removed from the definition, Arbitrators concluded that the *Amos* test no longer applied or was of limited relevance. The Court of Appeal considered the effect of the change in *Chisholm v. Liberty Mutual Group*.³ The Court upheld the motion Judge’s decision that the plaintiff, who was rendered paraplegic when an unknown assailant fired gunshots at his car, was not injured in an “accident” as currently defined. The Court ruled that the *Amos* test, at least the causation part of the test, could no longer be used to interpret the definition. Instead, the Court adopted the definition of direct causation in Black’s Law Dictionary that Arbitrators and the motions Judge had applied: “the active, efficient cause that sets in motion a chain of events

² [1995] 2 S.C.R. 405

³ (2002), 60 O.R. (3d) 776

which brings about a result without the intervention of any force started and working from a new and independent source.”

The Court of Appeal revisited the issue in *Greenhalgh v. ING Halifax Insurance Company*.⁴ The Court ruled that the decision in *Chisholm* did not reject the *Amos* test. It found that the “purpose test” was retained, while the “causation test” was modified to accord with the narrowing of the definition by the removal of “indirectly.” The Court confirmed the modified causation test as set out in *Chisholm* and restated it in the form of two questions:

1. Was the use or operation of the vehicle a cause of the injuries?
2. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the “ordinary course of things?” In that sense, can it be said that the use or operation of the vehicle was a “direct cause” of the injuries?⁵

The Court also established three “considerations” to be used in arriving at an answer to the questions. The first is the “but for” consideration. Would the injury have occurred, but for driving the automobile? However, the Court noted that “the ‘but for’ test only serves to eliminate from consideration factually irrelevant causes, but does not establish legal causation. The next part of the test must therefore be considered.”⁶

The second consideration the Court established is the “intervening act” consideration. This consideration addresses the question of “whether it can be said that the use or operation of the motor vehicle was a ‘direct cause’ of the injuries.”⁷ The Court noted that there might be circumstances where there is more than one direct cause, but “an intervening act will absolve the insurer of liability if it cannot fairly be considered a normal incident of the risk created by the use or operation of the car.”⁸

⁴ (2004) 72 O.R. (3d) 338 (C.A.) at page 344

⁵ At page 350

⁶ At page 351, paragraph 37

⁷ At page 351, paragraph 38

⁸ At page 351, paragraph 38

The third consideration is the “dominant feature” consideration. This consideration is applied when there is more than one cause of the injury. The Court noted that, in those circumstances, if the use and operation of the automobile was not the dominant feature of the accident, “the link between the use and operation and the impairment may be too remote to be called ‘direct.’”⁹

Both the “purpose test” and “causation test” must be satisfied, in order to fall within the definition of “accident.” As Arbitrator Novick noted in *Elensky and Sunallinace Insurance Company*¹⁰, “it is not enough to show that a vehicle was being used or operated and then argue that a sufficient causal link exists. Rather, the Applicant must show that the use of the vehicle, or its operation, directly caused the injuries complained of.”

Where a driver is injured while operating an automobile, the “purpose test” will normally be satisfied, as will the “but for” consideration of the “causation test.” When the injury results from an assault, the debate focuses on the “intervening act” and “dominant feature” considerations of the “causation test.”

Mrs. Khorasani submits that her husband’s death was directly caused by his use or operation of the taxi, because as a taxi driver, he was required to pick up passengers, transport them in close confinement and collect the fare from them. Therefore, Shane Smith was not a random stranger, but someone Mr. Khorasani had a duty to have a relationship with. It was submitted that, if it were not for the taxi, Shane Smith would not have been a passenger and would not have caused harm in order to avoid paying the fare. There was never an intervening act, as the use of the taxi was ongoing. It was further submitted that, if the stabbing was an intervening act, the insurer is not absolved of liability because assault can fairly be considered a normal risk of the operation of a taxi, as evidenced by the fact that insurers charge higher premiums for insuring taxis.

The question of whether an assault on a driver is an intervening act that breaks the chain of causation has been considered in many cases. Two involved assaults on taxi drivers while in their

⁹ At page 353, paragraph 47

¹⁰ FSCO A00-000720, May 31, 2001, at page 7, upheld on appeal

cabs: *Ekunah and Simcoe & Erie General Insurance Company*¹¹ and *Kumar and Coachman Insurance Company*.¹² In *Ekunah*, a taxi driver was found murdered in his cab. In *Kumar*, a passenger hit the driver over the head with a hard object, while he was driving the cab.

In her decision in *Kumar*, Arbitrator Sandomirsky neatly summarized the *Ekunah* decisions as follows:

“the applicant’s husband was found dead in his taxi. He had been murdered. Arbitrator Draper concluded that the primary cause of death was not the use or operation of the taxi. In reaching this conclusion, he stated that:

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

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

The language of the *Schedule* requires a causal connection between the injury and the use or operation of the vehicle, although it need not be a direct cause. The cause may be indirect: the vehicle need not be the instrument of the injury. However, it is not enough to show that an automobile was merely the location of the injury, that the victim or perpetrator were occupying it at the time of the injury, or that an automobile was involved in some peripheral or incidental way. The use or operation of the vehicle must have caused the injury, whether directly or indirectly.”¹³

Ekunah was decided before “indirectly” was removed from the definition of accident. In finding that Mr. Kumar was not injured in an “accident”, Arbitrator Sandomirsky stated as follows:

I am not satisfied, however, that Mr. Kumar’s injuries were directly caused by the use or operation of the taxicab. As noted in the appeal decision in *Ekunah*, even to meet the “indirectly caused” test, “it is not enough to show that the automobile was merely the location of the injury that the victim or perpetrator were occupying at the time of the injury or that an automobile was involved in some peripheral or incidental way.” Although there is a connection between the fact

¹¹ OIC A-007550, March 23, 1995, upheld on appeal OIC P-007550, April 26, 1996

¹² FSCO A00-000201, April 12, 2001, upheld on appeal FSCO P01-00026, August 9, 2002

¹³ At pages 9 and 10

that Mr. Kumar was driving a taxicab, which has a commercial component, and an attempt at a robbery, in my view, the vehicle provided an opportunity for a robbery, but the use or operation of the vehicle was peripheral or incidental to the assault. In other words, the taxicab was the location of the attempted robbery which left Mr. Kumar injured, not the cause of his injuries.

CONCLUSION

The decisions in *Ekunah* and *Kumar* clearly establish that an assault on a cab driver, even when it occurs while operating the cab, is an intervening act that breaks the chain of causation.

Mr. Khorasani's circumstances cannot be distinguished. I find that, although Mr. Khorasani was using an automobile for an ordinary purpose when he was injured, and although it is arguable that, but for the fact that he was a taxi driver, he would not have been injured, the assault by Shane Smith was an intervening act, that cannot fairly be considered to be part of the risk created by the use or operation of the cab. I therefore find that Mr. Khorasani did not sustain an impairment as a result of an "accident" as defined in section 2(1) of the *Schedule*.

EXPENSES

The parties made no submissions on expenses. If they are unable to resolve the issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

November 14, 2007

Date



FSCO A07-000465

BETWEEN:

FARIBA KHORASANI

Applicant

and

ZURICH INSURANCE COMPANY (COMMERCIAL BUSINESS)

Insurer

ARBITRATION ORDER

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

1. Mr. Khorasani did not sustain an impairment as a result of an “accident” as defined in section 2(1) of the *Schedule*.

Jeffrey Rogers
Arbitrator

November 14, 2007

Date