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INSURANCE LAW BULLETIN

April 22, 2013 – Saleha Hasham, Student-At-Law

WHAT CONSTITUTES AN "ACCIDENT"

Martin v. *2064324* Ontario Inc. (2013 ONCA 7145)

On January 17, 2013 the Ontario Court of Appeal overturned most of the lower court's decision in *Martin v. 2064324* Ontario Inc.

In April 2005, Paul Martin was loading his car after finishing a shift at a nightclub when he was attacked by two unknown men. During the assault, Martin was hit on the back of his neck, and his head was slammed onto the car surface and forced into the trunk of his car. Martin was later forced back into the car to help the attackers operate the standard transmission. As the attackers attempted to flee, they ran over Martin's right foot.

Judge Douglas Gray of the Ontario Superior Court ruled that Martin's injuries were directly connected to the use and operation of his vehicle because they were caused by attackers whose purpose was to seize possession and control of his automobile. Accordingly, Martin was entitled to *SABS* benefits under his automobile policy. Justice Gray also concluded that Martin was entitled to compensation from Certas for his injuries pursuant to the unidentified uninsured and underinsured coverage in his policy. The Court of Appeal dismissed the claims against the insurer, Certas, but held there was a genuine issue for trial for the injury related to Martin's right foot.

For accidents that occurred before November 1, 1996 the term 'accident' was defined as an incident which, directly or indirectly, by the use or operation of an automobile causes an impairment. However, effective November 1, 1996 the words 'indirectly' were deleted and Section 2(1) of the *SABS* now defines an 'accident' as "*an incident in which the use or operation of an automobile directly causes an impairment*". Certas declined Martin's accident benefits application, denying that he was in an "accident" as defined under section 2(1) of the *SABS*. Certas also denied that Martin's injuries were caused by the use or operation of an automobile.

The Court of Appeal reviewed the judicial interpretation history of the definition of "accident" contained in the current accident benefits coverage. The Court of Appeal noted that previous cases had developed a modified causation test to determine whether an injury "arises out of the ownership, use or operation" of an automobile. The outcome of this analysis would conclude whether an insurer has a statutory obligation to provide no-fault benefits to its own insured.

The first part of the test asks whether the accident resulted from "ordinary and well-known activities" of automobiles. The second part, or causation part of the test, asks whether there is "some nexus or causal relationship" between the injuries and the ownership, use or operation of the vehicle, or whether the connection between the injuries and the vehicle is "incidental or fortuitous".

Certas argued that Martin did not meet the causation test, and the Court of Appeal agreed with Certas, holding that most of Martin's injuries did not arise in the ordinary course of things that are normally associated with the use or operation of a vehicle.

Whether a vehicle was merely involved in an incident is not the test and therefore cannot be used to demonstrate that injuries flowed from the use or operation of a vehicle. Rather, the use or operation of a vehicle must have directly caused the injury. The blows Martin sustained to the head were not the result of the "use" of the automobile; it was the forceful attempt by the attackers to put Martin into the truck which caused the injuries. The vehicle was ancillary to the assaultive act. The Court of Appeal held that Martin's car was nothing more than the venue where many of the assaults occurred.

Dominion of Canada v. Prest (2013 ONSC 92)

In *Dominion of Canada v. Prest*, an insured attempted to advance a claim for accident benefits as a result of an injury sustained while washing his car when he tripped over a curb sticking out from a wall. He claimed his right hand was touching the car and maintained that the incident qualified as an accident pursuant to section 2(1) of the Schedule. Once again, the definition of "accident" was interpreted to be limited to circumstances where a vehicle was being used or operated, resulting in direct impairment. An intervening act to which an injury could be more directly attributed (for example the curb in this case) would be the true cause of the injury.

Wawanesa v. Webb (2012 FSCO Appeal P11-00015)

In *Wawanesa Mutual Insurance Company v. Webb*, the claimant was injured when she slipped and fell due to a snow bank adjacent to where she had parked while trying to access the sidewalk. The arbitrator held that the claimant was injured in an "accident" pursuant to section 2(1) of the *SABS.* There was an unbroken chain of events because the claimant was still in the course of disembarking from her vehicle when she fell on

the roadway at the entry of the access point. The decision was overturned on appeal; the Director's Delegate found the injuries resulted due to the intervening feature of both snow and ice; not from the use and operation of the claimant's vehicle.

Hersi v. Ace Ina Insurance (2012 FSCO A-10-001461)

Physical Contact with Vehicle Not Necessary to Constitute Accident

Despite the fact that recent case law has effectively limited how far the definition of "accident" can be stretched, a recent FSCO decision has made it clear that there need not be physical contact between an automobile and a person who sustains an injury for there to be an "accident". If the automobile is found to be a dominant feature in the incident, and not ancillary to it, a claimant may have a valid claim that his or her injury constitutes an "accident".

In *Hersi v. Ace Ina Insurance,* the arbitrator found an "accident" occurred when Mr. Hersi fell while crossing the road within a pedestrian crosswalk. There was conflicting evidence concerning whether the approaching Greyhound bus had struck Mr. Hersi or stopped within arm's reach of him. The arbitrator determined that it was not necessary to determine which of the two events had occurred. The bus was determined to be the dominant feature in this incident and was not simply ancillary to it. The arbitrator explained that "the use and operation of the bus directly caused Mr. Hersi to lose his balance, fall to the road, and fracture his hip, even if it did not touch him". On the facts of this case, the proximity of the bus set in motion a series of events that brought about the fall without the intervention of any new or independent cause.

Factors Courts Consider in Determining if an Incident is an "Accident"

- whether the use of the car had ended before the injuries were sustained;
- whether the insured physically left the car before sustaining the injuries;
- whether there were intervening acts between the use of the car and the injuries sustained; and
- whether using the car was a dominant cause of the injuries.

The Bottom Line

The often confusing issue of whether an incident qualifies as an "accident" within the meaning of the *SABS* is now more predictable, thanks to a series of instructive decisions released over the past year. It is safe to assume that injuries that arise out of assault, battery, or slip and fall cases will likely not constitute an "accident" under the Schedule. The use or operation of a motor vehicle has to be a substantially contributing factor to the injuries a claimant has sustained; any intervening act or circumstance will dull the likelihood that an automobile was a dominant feature in the occurrence of the incident.