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INSURANCE LAW BULLETIN

DEFINITION OF ACCIDENT

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Two recent decisions of the Ontario Courts help to define the term "accident" as it appears in the *Statutory Accident Benefits Schedule* (SABS). These decisions clarify the two part test to be used when determining whether an insured was in an automobile accident within the meaning of SABS. The first is *Whipple v Economical Mutual Insurance*, a Divisional Court decision released on April 30, 2012. The second is *Downer v The Personal Insurance Company*, released by the Court of Appeal on May 9, 2012.

BACKGROUND

Section 3(1) of the current SABS defines accident as:

> "an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device"

(a) Whipple v Economical Mutual Insurance

The *Whipple* case arose from a rather unique set of circumstances. On June 26, 2009, Whipple was returning from a golf trip with a number of fellow golf club members in a "party bus" limousine. The limousine included a stripper pole. Various passengers attempted to outdo one another by performing feats around the pole while the limousine was in motion. Whipple attempted a headstand against the pole. However, his arms gave out and his forehead hit the floor, causing his neck to snap. As a result, he suffered catastrophic injuries and was rendered quadriplegic. The main issue was whether he was involved in an "accident" under the SABS.

At the Financial Services Commission of Ontario, at both Arbitration and Appeal, it was held that this incident met the SABS definition of accident. Both levels held that this incident met the purpose and causation tests for an accident. While a stripper pole and the actions that took place are not ordinary or well-known activities for a typical automobile, in this particular limousine the pole dancing was found to be an invited activity.

(b) *Downer v The Personal Insurance Company*

This case arose on February 26, 2000 when Downer arrived at a gas station to purchase fuel. While his vehicle was parked and he was sorting money for the purchase, he was assaulted by a group of unidentified assailants. They hit him and attempted to pull him from his vehicle. Downer was able to put his vehicle in gear and drive away. He believed in doing so however, that he may have run over one of the assailants. Downer claimed benefits from his insurer for physical injuries from the assault and psychological injuries from his belief he ran over an assailant. The Personal Insurance Company paid benefits for nearly two years, then terminated payments on the basis his injuries were not a result of an "accident." Downer commenced an action seeking a declaration that he is entitled to benefits. In response, Personal moved for summary judgment to dismiss the action. The main issue was whether Downer was involved in an accident under the SABS. The motion judge granted a declaration that both the assault while in his vehicle and the possible collision with an assailant met the definition of an accident. Central to the judge's reasoning was that there was a connection between Downer's ownership of the car and the assault, as the assault must have occurred because the assailants wanted to steal his vehicle.

THE DIVISIONAL COURT DECISION IN *WHIPPLE*

The main issue was whether the unusual incident involving Whipple and the stripper pole in the party bus limousine was an accident under the SABS definition. The court held that there is a two part test to determine whether an incident is an "accident" within the meaning of the SABS. This test consists of a "purpose" test and a "causation" test. The purpose test is: did the accident result from the ordinary and well-known activities to which automobiles are put? The causation test was stated as: 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?

The case revolved around whether the dancing around the stripper pole could be considered an ordinary activity to which an automobile is put and whether the injury occurred as part of the ordinary course of things. The key in this situation was the type of vehicle in use: the party bus limousine. The court agreed with the decisions about the nature of the vehicle: it was marketed as a party vehicle, it had amenities such as the stripper pole, and these amenities invited acts like those carried out by the occupants. As such, dancing around the stripper pole was an ordinary use of this particular automobile. The insurer argued that while the dancing may have been an ordinary use, the headstand attempted by Whipple was not as no one had ever attempted such an act by the pole before. Since it was not an ordinary use, the insurer argued it should therefore fail the purpose test for accident. Further, the insurer argued the headstand should be seen as an intervening act between the ordinary use of the vehicle, the dancing, and the injury and therefore it should also fail the causation test. The court disagreed with both arguments. The court held it was reasonable to conclude that a headstand was an ordinary use in that vehicle, especially since there was no logical distinction between dancing around the pole and a headstand against it. Additionally, it was not an intervening act because he was doing what was "normal" in a vehicle with amenities like a stripper pole.

The court concluded Whipple's stripper pole headstand fell under the meaning of accident.

THE COURT OF APPEAL DECISION IN *DOWNER*

The only issue at the Court of Appeal was whether the motion judge erred in declaring Downer was involved in an accident within the meaning of the SABS. The court found that while the assault on Downer while counting money in his vehicle did not meet the definition of an accident, the possible collision with an assailant might and therefore sent this latter question to trial.

The court held that the motion judge properly identified that there is a two step test to determine whether an incident is an accident under the SABS including a "purpose test" and a "causation test." As mentioned, the motion judge held that the assault met this test on the basis there was a connection between the injuries suffered and the ownership of the vehicle due to the fact Downer owned the vehicle and, as the judge assumed, the assailants wanted to steal the vehicle. The collision with the assailant also met the test as it was a direct consequence of Downer driving his vehicle and was no different than a typical collision with a pedestrian.

The Court of Appeal found that the motion judge erred in the consideration of the "causation" aspect of the test for a couple of reasons. The first is that he included "ownership" in the causation step. The court held this was an error because the definition of accident in the Ontario SABS makes no reference to ownership of the vehicle, only the use and operation of the vehicle. This was problematic to the case at hand because the judge relied on Downer's ownership to draw the connection between the Downer and the incident. The court stated that the proper causation test for an accident does not include a consideration of ownership.

The second error made by the motion judge was that he failed to consider whether an intervening act outside the ordinary course of things resulted in Downer's injuries. It is simply not enough to show that an automobile was the location of an injury or that it was somehow involved in the incident that gives rise to the injury. The court held that the use or operation of the vehicle must have *directly* caused the injury. The court gave the example of a driver getting shot while in his vehicle. Being shot at cannot be considered within the "ordinary course" of using or operating the vehicle. It was not the use or operation of the car that caused the injuries, but rather the gunshots. Similarly, an assault on a plaintiff while sitting in his vehicle cannot be considered to be a normal incident within the risk created by the use or operation of the vehicle.

In light of these errors, the court stated the proper test for causation, which has two steps:

> i) Was the use or operation of the vehicle a cause of the injuries?
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> ii) 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?

It should be noted that these two steps are merely step two of the two part test for the determination of an accident; the purpose test must also be met.

COMMENTARY

These two cases accomplished a few things when it comes to the definition of accident under section 3(1) of the *Statutory Accident Benefits Schedule*. First it affirmed the test for determining whether an incident involving an automobile is an “accident” and that this test has a purpose step and a causation step, with the causation step itself having two parts.

Second, the *Whipple* case made it clear that when determining the “ordinary use” of an automobile or whether the injury occurred within “the ordinary course of things,” the inquiry is vehicle specific. What is considered “ordinary” for one vehicle will not necessarily be considered “ordinary” for another type of vehicle. To take the example from *Whipple*, dancing and attempting headstands was considered a normal use for the party bus limousine. It is unlikely that these same activities would be considered normal in a typical mini-van or pick-up truck. It is important to note that what may seem to be a completely ridiculous use for one automobile may be a completely appropriate use in another. These cases also indicate a willingness by the courts to accept somewhat unusual circumstances as within the definition of “ordinary” as long as the use is expected and invited by the particular characteristics of the automobile.

Third, the ownership of the automobile by the injured person is not to be considered when determining the relationship between the incident and the automobile in the causation test. Rather, only the use and operation of the automobile are to be taken into account. As was mentioned in *Downer*, it was irrelevant to causation that Downer owned the vehicle. Since the use or operation of the vehicle did not cause his injuries in respect to the assault, this incident failed the causation step and was therefore not an accident. However, the use or operation of his vehicle, driving it to escape the assault, may have caused psychological injuries to the plaintiff and therefore may meet the test for an accident.

Finally, as mentioned in *Downer*, one must consider whether intervening acts sever causation such that it can be said the use or operation of the vehicle did not cause the injury. Simply being present near or in an automobile is not enough for an injury to have been caused by the automobile. Nor is it enough that the vehicle was simply involved in some way in the event that led to the injuries. The automobile must have *directly* caused the injury in order for the incident to be considered an accident.