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INSURANCE LAW BULLETIN

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DEFINITION OF "ACCIDENT" – IT JUST KEEPS GROWING

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A two-part test is used when determining whether or not an insured is involved in an "accident," defined in the *SABS*. The test involves: (1) the "purpose test" and (2) the "causation test." The purpose test asks whether the accident resulted from the ordinary and well-known activities to which automobiles are put. The causation test considers three further questions: (1) applying the "but for" test, was the use or operation of the vehicle a cause of the injuries?[1] (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 injuries that cannot be said to be part of the ordinary course of things? (3) was the use or operation of the vehicle the dominant feature of the claim and not ancillary to it.[2] Ultimately, the causation test aims to answer whether the use or operation of an automobile **directly** caused impairment.

***Economical Mutual Insurance Company v. Caughy,* (March 2016) ONCA 226**

The insured was injured at dusk while playing tag with his children at a campground. Following a considerable amount of alcohol consumption, Mr. Mcaughy tripped over a motorcycle and fell head first into a nearby trailer, suffering serious spinal cord injuries. Economical denied accident benefits on the basis that the incident did not meet the definition of "accident" under s. 3(1) of the *SABS*.

In considering the Purpose Test, Justice Nightingale cited the Supreme Court decision, *Citadel General Assurance Co. v. Vytlingham*,[3] in which the court contemplated aberrant uses of vehicles which would not be considered "ordinary and well known". Examples included injuries that resulted from: (1) using a car as a diving platform; (2) using a disabled truck for dynamite storage which explodes; or (3) negligently using a disabled

[1] The use of operation of a vehicle need only be one possible cause of the injury. The "but for" test is an exclusionary device that rules out irrelevant causes: if the "but for" test is not met, then the injury would have happened in any event and causation is not established. If the "but for" test is met, then the use of the vehicle is a factual cause of the injury. Once a vehicle is shown to be "a" factual cause of the injury, causation can only be proven if the vehicle is also the "direct cause" of the injury.

[2] *Chisholm v. Liberty Mutual Group,* (2002) ONCA 776

[3] [2007] 3 SCR 373

truck as a permanent prop to shore up a drive shed which collapses. Binnie J., writing for the court, stated that it was these sorts of aberrant situations that the Purpose Test was meant to exclude. Justice Nightingale reasoned that the Purpose Test was met because the parking of the motorcycle was an ordinary use to which vehicles were put. It had not been abandoned and was not inoperable. Parking was a well-known use of a vehicle.

Justice Nightingale considered the Causation Test closely. He accepted the "direct" causation requirement was more stringent that the previous "direct or indirect" legislation. While he observed the Court of Appeal's ruling in *Greenhalgh* that it was not enough that an automobile was somehow involved in the incident giving rise to the injury or merely the location where the injury arose, Justice Nightingale reasoned that causation was met because the parking of the motorcycle was the dominant feature of the incident. The fact that Mr. Caughy had been drinking alcohol and running in the dark were apparently not "intervening events".

On appeal, somewhat surprisingly, Economical limited its argument to the Purpose Test, insofar as the Purpose Test required "active use" of a vehicle. The Court of Appeal confirmed that there was no "active use" component in the Purpose Test. Rather, the issue was whether the incident arose from the ordinary and well-known activities to which vehicle were put. The Court found that vehicles were designed to be parked and this would constitute an ordinary or well-known use of the vehicle.

***Dittmann v. Aviva Insurance Co. of Canada*, (October 2016) ONSC 6429**

The plaintiff, Ms. Dittman, entered a McDonald's drive-through and purchased a coffee, which she accidently spilled on her thighs. Although the plaintiff's vehicle remained in gear and was running during the incident, it was not in motion. This case had been brought forward as a motion for summary judgment, in order to dismiss the plaintiff's claim for accident benefits. The issue involved the court determining whether the plaintiff had been involved in a motor vehicle "accident," as defined in s. 3(1) of O. Reg. 34/10 ("*SABS*"). The relevant provision defines an "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."

In this case, the Purpose Test was fulfilled because attending a drive-through was an ordinary and well-known activity to which automobiles were put. With respect to causation, the "but for" test was employed by Justice Gordon in deciding the first part of the test. Justice Gordon stated: "But for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee while in a seated position, would not have been transferring the coffee cup to the cup holder across her body, and would not have had the coffee spill on her lap." In determining the second stage of the causation test, it was found that spilling a beverage was within an expected level of risk involved in attending a drive-through. This was to be distinguished from intervening acts such as a drive-through attendant deliberately throwing hot coffee on the claimant or the claimant falling ill due to impurities in the coffee that was served. Such intervening acts would not be a normal incident of the risk created by the use of the car and would effectively break the chain of causation. Without discussing the "dominant purpose" test, Justice Gordon concluded that the incident fell within the definition of an "accident".

***Roberts v. Intact Insurance Company* (March 2017) FSCO Appeal P16-00009**

The insured and some friends attended a nearby lake with a pick-up truck. The truck was parked at the edge of the water, with the tailgate serving as a springboard for the purpose of diving into the lake. The intoxicated insured was last seen standing in the bed of the truck; she was next seen floating face down in the lake. Based on her injuries, it was deemed that she had jumped from the tailgate of the truck into twelve inches of water. Intact argued that tailgating was not an ordinary use to which vehicles were put, relying on *Vytlingam*.

Applying the two-part Purpose and Causation test, the arbitrator held that that the use of the pick-up truck for tailgating met the definition of ordinary and well-known use or operation of the vehicle. The use of the pick-up truck for social/recreational purposes was evident by the installation of accessories like cup holders in the truck bed. Accordingly, the insured was using the truck bed in the recreational manner for which it was designed. The arbitrator commented that had the claimant been jumping from the hood of the truck, this activity may not have passed the Purpose Test because the hood was not designed for such an activity. With respect to causation, the arbitrator then applied the three-part "Chisholm" test: (1) "but for"; (2) "intervening act"; and (3) "dominant feature". The arbitrator found that "but for" parking the truck on the edge of the lake and disembarking from the tailgate, the incident would not have happened. There was no intervening act between the act of disembarking from the tailgate and the insured landing in the water. The dominant feature of the incident was the insured jumping into the lake from the truck.

The arbitrator's decision was reversed on appeal. Director's Delegate Evans found that the arbitrator failed to follow binding case law establishing that treating a truck as a diving platform was an aberrant purpose and not one covered by automobile insurance. Delegate Evans referred to the "very clear direction" provided by the Supreme Court of Canada in *Vytlingam,*[4] emphasizing that the example of a motor vehicle being aberrantly used as a diving platform was mentioned three times by the court. However, Delegate Evans also agreed with the arbitrator on a number of points:

- A common use of a truck bed is recreational.
- As long as the person is in the process of disembarking when he/she suffers an impairment, regardless of the surface the person lands on, whether water, ice or concrete, the person is entitled to benefits *if* the vehicle was not used in an aberrant manner.
- There can be more than one exit from a vehicle and an exit is not limited to exiting at the time of arrival.
- An unusual exit from a vehicle may still pass the Purpose Test, even a drunken exit from a vehicle,[5] as long the vehicle was not used in an aberrant manner at the time of exit.

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[4] 2007 SCC 46

[5] Delegate Evans referred to *Caughy*, stating that he saw little difference in principle between stumbling into a vehicle and stumbling off a vehicle where the overall context involved an ordinary and well-known activity.

- The context around an incident was important in determining if the purpose test was met.

However, with respect to context, this is where the Delegate parted company with the arbitrator, who found context was directly tied to recreational use. Delegate Evans referred to *Economical Mutual Insurance Company and Whipple*[6], explaining that Mr. Whipple was partying on a commercial party bus that advertised its partying purpose. Mr. Whipple was therefore fulfilling the bus's purpose. In contrast, there was no evidence that the Ford Motor Company advertised the use of its pick-up trucks as diving platforms.

Delegate Evans found that the example given by the court in *Vytlingam* pointed to a very particular, aberrant use of a motor vehicle, namely the precise activity Ms. Roberts was engaged in – using the truck as a diving platform. Delegate Evans went on to say that, aside from using a truck bed as a diving platform, almost any other mode of disembarkation from the bed of a truck would attract insurance coverage.

CASE COMMENT

With respect to the Purpose Test, these decisions confirm that when a vehicle is designed and insured for a particular motoring purpose or use (such as in *Whipple*) an injury that occurs in the course of that use will be found to be an accident under the *SABS*. Also, "active use" is not required—a parked or stationary vehicle is well within the definition of "ordinary and well-known" use of vehicles. When viewed in the context of the guidance provided by the Supreme Court in *Vytlingam,* the decisions confirm that the Purpose Test is largely a gate keeping mechanism to rule out circumstances in which a vehicle is not being used as a vehicle bur for some other purpose.

Caughy appears to lower the bar with respect to causation. In *Chisholm,* Justice Laskin viewed direct causation in the following terms: "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."[7] This definition begs the question whether a stationary motorcycle can be an "active, efficient cause".

Chisholm also requires an analysis of whether the use or operation of the vehicle was the dominant feature of the incident and not merely ancillary to it. The question that must be asked is whether any other dominant feature could be the cause of the accident. *Dittman* brings into serious question whether it was the plaintiff's motor vehicle or the hot cup of coffee that was the "dominant feature".

Roberts confirms that if an insured fails to meet the Purpose Test, even in the most serious or sympathetic impairment situations, access to the *SABS* will be denied. However, *Caughy* and *Dittman* have demonstrated that the Causation Test remains open to creative arguments in determining the applicability of the *SABS*.

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[6] [2011] O.F.S.C.D. No. 85
[7] (2002) ONCA 776 at para 30.