Court of Appeal Takes Expansive Approach to Definition of "Accident" In Caughy Decision

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The Ontario Court of Appeal's decision in *Caughy v. Economical Mutual Insurance Company* 2016 ONCA 226 seems to have expanded the definition of "accident," for the purposes of statutory accident benefits, to include a trip and fall incident.

Recall the definition of "accident" in the *Statutory Acident Benefits Schedule- Effective September 1, 2010* ("Schedule") is "an incident in which the use or operation directly causes an impairment or directly causes damage to prescription eyeware, denture, hear aid, prosthesis or other medical or dental device.

The unfortunate Mr. Caughy suffered what turned out to be devastating spinal cord injuries as a result of what could have been a rather innocuous event: while playing tag with his children at a campground, he tripped and fell on a motorcycle parked near his trailer. Mr. Caughy had originally parked his trailer close to another camper, leaving a sort of walkway between the trailers. Unbeknownst to him, the motorcyclist had parked the motorcycle in the darkened walkway during the evening hours. Mr. Caughy (who had been drinking a "considerable" amount of alcohol) fell head first into the trailer, suffering serious spinal cord injury. One wonders if the resulting decisions illustrate the adage that hard cases make bad law.

At the lower court stage, the presiding judge, Justice Nightingale found this scenario constituted an "accident." Justice Nightingale noted that the Supreme Court of Canada, in the 1995 decision *Amos vs ICBC*, under differently worded legislation, established a two-fold test:

1. Did the accident result from ordinary and well known uses to which automobiles are put (the "Purpose Test")
2. and, was the relationship casual or merely fortuitous or incidental? (the "Causation Test")

Justice Nightingale then noted that the Ontario legislation was amended in 1996 by eliminating the phrase "directly or indirectly" and limiting the definition to impairments caused "directly" by use or operation of a vehicle. In various Ontario Court of Appeal decisions (subsequent to *Amos*), such as *Greenhalgh vs ING Halifax* 2004 CanLII 21045 (ON CA), the test was refined such that the second branch, the Causation Test, requires consideration of whether, even if the "use or operation" of the vehicle was "a cause" of the injury, was there an **intervening act** which cannot be said to be "part of the ordinary course of things". Another consideration is that of **dominant feature**.

Justice Nightingale reasoned that the "Purpose Test" was met because the parking of the motorcycle (albeit in a walkway intended for pedestrians) was an ordinary use to which vehicles are put. It appeared the motorcycle had been parked there temporarily. It had not been abandoned nor was there any evidence it was inoperable. Most vehicles are parked most of the time.

Justice Nightingale gave more attention to the Causation Test. He accepted that the "direct" causation requirement is more stringent than that under the old "direct or indirect" legislation. He observed the Court of Appeal's reasoning in cases such as *Greenhalgh* that "it is not enough that an automobile was somehow involved in the incident giving rise to the injury" and that "it is not enough to show that the automobile was the mere location of an injury inflicted by a tortfeasor." After articulating this, Justice Nightingale reasoned the Causation Test was met because the parking of the motorcycle was the dominant feature of the incident and it was not ancillary. The fact that Mr. Caughy had been drinking alcohol and running in a dark area were not "intervening events" sufficient to break the chain of causation.

On appeal, Economical restricted its argument to the Purpose Test. It did not challenge the finding that the Causation Test has been met. Economical's main argument was that the Purpose Test requires that there be some **active use**. Economical argued that since the motorcycle was parked and its operator apparently not close by, it had been abandoned. An analogy to a tree trunk was drawn. The Court rejected this argument, stating first of all, there was no evidence the motorcycle was "abandoned" (as opposed to being parked for a few hours) and secondly, there is no active use component *in the Purpose Test*. Rather, the issue is whether the incident arose from the "ordinary and well-known activities" to which vehicles are put. Parking a vehicle is a well-known activity associated with a vehicle. The Court noted that "use" is an important part of the analysis under the Causation Test- but again, the appeal was not framed in relation to that.

Read in a superficial way, the Court of Appeal's decision suggests that the Purpose Test is just a gate keeping device to rule out "aberrant" uses of a vehicle such as using a vehicle as a diving platform or to prop up a shed (as mentioned in *Vytlingam vs Citadel*, a Supreme Court decision referred to by the Court of Appeal). On that point, it is difficult to see anyone disagreeing with the Court's observation that parking a vehicle is an ordinary activity in the sense that any vehicle must be parked at some point. But if the Purpose Test is just a simple screen to rule out "aberrant uses" then it doesn't serve much purpose, as almost any incident involving a vehicle will pass the test other than very obvious aberrant uses (such as using a car as a diving platform, although some Arbitrators may beg to differ). Additionally, the argument (although unsuccessful in this case) that a vehicle is parked is evidence of "lack of use" and "lack of operation" has some strength.

The Court of Appeal may cause confusion for those trying to understand the boundary between the Purpose Test and the Causation Test. Moreover, whether one is considering the Purpose Test or the Causation Test, the Court of Appeal's decision represents a departure from previous decisions, which do, in fact, at least imply an "active use" element in the overall analysis. Not least of these is the earlier decision of Justice Laskin of the Court of Appeal in *Chisholm v. Liberty Mutual Group* [2002] O.J. No. 3135. That case involved a motorist who was seriously injured in a drive by shooting. Justice Laskin agreed with the lower court judge that the direct cause of his injuries was gunfire, not use or operation of a vehicle.

In *Chisholm,* Plaintiff counsel argued that the relevant consideration was "but for, " since "but for" being in his car, Mr. Chisholm would not have been shot. But Justice Laskin noted that "but for" is merely an exclusionary device. If the "but for" test is not met, then the injury would have happened regardless 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. But legally, direct causation requires more than that. Justice Laskin used the analogy of a row of dominoes in relation to 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." Justice Laskin also approved a definition from Black's Law Dictionary as follows: "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." Accordingly, Mr. Chisholm's use of a vehicle was "a" factual cause of his injury, but it was not the "direct cause" from a legal standpoint. By analogy, the motorcycle over which

Mr. Caughy tripped was "a" cause of his injury, but it is questionable whether it should be a "direct cause" to the requisite legal degree. If a vehicle is parked for several hours, such that it basically constitutes an obstacle to pedestrians, can it really be said to be an "active and efficient cause" that "sets in motion a train of events?"

Ultimately, one passage from *Chisholm* has particular resonance in the *Caughy* decision. "The 1996 Schedule reflects a government policy decision. The government decided to circumscribe the insurance industry's liability to pay no-fault benefits by holding it responsible only for injuries directly caused by the use or operation of a car. Like almost any statutory standard, the direct causation requirement will, at the margins, produce hard cases, perhaps even sympathetic cases and seemingly arbitrary results."

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