**Ontario Supreme Court**
**Chisolm v. Liberty Mutual Group**[1]
**Date: 2001-08-13**

Chisolm

and

Liberty Mutual Group

Court File No. 01-CV-205642

*Ontario Superior Court of Justice Chapnik J.*

*Heard: August 8, 2001*

*Judgment rendered: August 13, 2001*

*Darcy Merkur, for plaintiff.*

*Dwain C. Burns, for defendant (moving party).*

The judgment of the court endorsed on the record was as follows:

[1] CHAPNIK J.:—The applicant/defendant moves for an order pursuant to Rule 21 of the Rules of Civil Procedure determining an issue of law; namely, whether the plaintiff was involved in an "accident" as defined in s. 2(1) of the *Statutory Accident Benefits Schedule—Accidents on or after November 1, 1996,* O. Reg. 403/96, as amended.

[2] Section 2(1) of the Regulation defines "accident", in part, as "*an incident in which the use or operation of an automobile directly causes an impairment*".

[3] On or about April 3, 1999 the plaintiff was operating a motor vehicle when an unknown assailant shot him in the neck, shoulder and legs. For the purposes of this motion, the facts proferred by the plaintiff, being that the motor vehicle was stopped at the time, that the bullets were shot at the motor vehicle and that the plaintiff (who was seated in the driver's seat) was a victim of a "drive-by shooting", are taken as given.

[4] As a result of the incident, the plaintiff alleges he sustained serious and permanent personal injuries and impairments. Since he was insured by the defendant's insurance company at the time under a valid motor vehicle insurance policy, he submitted an application to the defendant for various accident benefits. When his claim was denied, the plaintiff commenced this action against the defendant, his insurer.

[1] Notice of Appeal was filed in the Ontario Court of Appeal September 11, 2001 (Court File No. C36954).

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[5] In this action, therefore, the plaintiff claims entitlement to accident benefits as a result of the injuries he sustained in the April 3, 1999 incident. The defendant denies that the plaintiff was involved in an “accident” as defined in the Schedule and specifically, Regulation 403/96.

[6] To counter the defendant’s denial of coverage, the plaintiff contends that the legislation when read and interpreted as a whole having regard to its purpose of providing protection for insured drivers is meant to cover this kind of activity; that the factual circumstances in this case result in entitlement since the plaintiff was in the course of normal use of the vehicle (at which the shots were fired) and was thus trapped in the car; and that a narrow interpretation of the legislation would cause absurdity, leave the plaintiff with little or no recourse and defeat the object and insuring intent of the legislation.

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[7] Prior to the implementation of the no-fault regime in 1990, an injury “arising out” of the use and ownership of a vehicle was subject to coverage under automobile insurance. Later, pursuant to Bill 164, injuries “directly or *indirectly*” caused by the use or operation of a vehicle were included in the benefits scheme. Effective November 1, 1996, Bill 59 and Regulation 403/96 removed the word “indirectly” from the definition of “accident” in the Accident Benefits Schedule.

[8] Presently, therefore, the definition of “accident” requires a direct causal relationship between the use or operation of the automobile and the injury. Accordingly, some of the cases relied on by counsel, such as *Amos v. Insurance Corp. of British Columbia,* [1995] 3 S.C.R. 405, 127 D.L.R. (4th) 618, and *Saharkhiz v. Underwriters* (1999), 46 O.R. (3d) 154 (S.C.J.), affirmed (2000), 49 O.R. (3d) 255 (C.A.), have limited relevance to the fact situation before me. Indeed, in the latter case, at p. 256, the Court of Appeal noted and approved of the motion judge’s conclusion “that the injuries sustained by the respondent were caused, at *least indirectly,* by the use and operation of the taxi-cab”. [Emphasis added.]

[9] Nevertheless, the legal tests applied by the Supreme Court of Canada in *Amos* pertaining to the term “accident” remain relevant. In that case, the Court applied a “purpose test” and then a “causation test” to the facts before it to determine whether the event qualified as an accident within the meaning of the legislation.

[10] In the case at bar, the plaintiff was shot while driving his automobile. Since the accident occurred in the course of the ordinary and well-known activities to which automobiles are put, the first of the two-part test or the “purpose test” is satisfied.

[11] The real issue in this matter is whether the requisite nexus or causal link exists between the injury and the plaintiff’s use or operation of the vehicle. The plaintiff says there is; the defendant insists there is not.

[12] In Ontario, the legislature has set up a tribunal and a scheme to specifically deal with accident benefit disputes. If parties are unable to resolve their dispute by mediation, they may either take the matter to court or apply under the *Insurance Act,* R.S.O. 1990, c. I.8, for arbitration by an adjudicator under the auspices of the Financial Services Commission of Ontario. It appears from the volume of decisions, that many potential litigants have chosen the latter route. In any event, the Commission constitutes a specialized tribunal with considerable expertise in the area of claims and accident benefits. In my view, their decisions, which are generally well reasoned and persuasive, must be given a degree of deference.

[13] To summarize the Commission’s decisions on this point of interpretation (without reviewing each of them), I think it is fair to say that they hold that the use or operation of the vehicle must have caused the injury. It is insufficient that the injured party was operating the vehicle at the time or that the injury occurred in the automobile, or that the automobile was involved in the incident incidentally or peripherally. Indeed, where an insured was injured as a result of a bomb exploding beneath the seat of his vehicle, he was held not to be involved in an accident within the meaning of the statute. *Zurich Insurance Co. and Lenti:* (P98-00030, Dec. 18, 1998 (F.S.C.O.)).

[14] I agree with this reading of the legislation. Despite the well-presented arguments of respondent’s counsel, based on statutory purpose and construction, in my view, the propositions he cited, do not apply here. Certainly, the legislation must be given a broad and liberal interpretation and read as a whole. However, the Regulation is both clear and unambiguous. The use or operation of the vehicle must directly cause the impairment.

[15] “Direct cause” has been defined as “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

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actively from a new and independent source". See, for example, *Petrosoniak v. Security National Insurance Company,* [1998] O.I.C.D. No. 183 (QL) at p. 4, paras. 23-4.

[16] The respondent argues that it was only because the plaintiff was trapped in his car that he became the victim of the "drive-by shoot". That may be so. Nevertheless, in this case, there was not an unbroken chain of events. Even given the factual circumstances as taken that the plaintiff's motor vehicle was stopped and the bullets were shot at the automobile itself, in my view, the shooting constituted an intervening act, independent of the vehicle's use or operation which clearly broke the chain of causation. Moreover, it appears to me that a criminal assault which does not take place within the context of the vehicle's ordinary and well-known use is not a risk that is sought to be protected by a motor vehicle liability policy. The overall objective of the legislation is to compensate insured people injured in motor vehicle accidents. This result is not an absurdity as alleged by counsel for the plaintiff. It reflects the intention of the legislature evidenced by the legislative amendments.

[17] In the circumstances, I find that the plaintiff's injuries were caused by gunshot wounds and not by the use or operation of his motor vehicle. Accordingly, the plaintiff was not involved in an "accident" as defined in s. 2(1) of Regulation 403/96, as amended.

[18] Order to go dismissing the action, but in the circumstances, without costs.

*Motion dismissed; action dismissed.*

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