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COURT OF APPEAL FOR ONTARIO

LASKIN, MACPHERSON and SIMMONS JJ.A.

BETWEEN:

MICHAEL CHISHOLM	)	Darcy R. Merkur,
	)	for the appellant
Plaintiff	)	
(Appellant)	)	
	)	
- and -	)	
	)	
LIBERTY MUTUAL GROUP	)	Eric T. Sigurdson and Dwain V.
	)	Burns,
		for the respondent
	)	
Defendant	)	
(Respondent)	)	
	)	
	)	Heard: February 13, 2002

On appeal from the decision of Justice Sandra Chapnik of the Superior Court of Justice dated August 13, 2001.

LASKIN J.A.:

[1] [1] The question of law on this appeal is whether a motorist, who was severely injured in a drive by shooting, is entitled to rehabilitation and other statutory accident benefits from his own insurer. The answer turns on whether "the use or operation of an automobile directly cause[d]" his injuries.

[2] [2] On a pleadings motion under rule 21.01(1)(a) to determine the question, Chapnik J. concluded that the plaintiff Michael Chisholm was not entitled to accident benefits from his insurer the defendant Liberty Mutual Group. She held that the direct cause of his injuries were the gun shots, not the use or operation of an automobile. Mr. Chisholm appeals. I agree with Chapnik J.'s conclusion and generally with her reasons. I would therefore dismiss the appeal.

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BACKGROUND

[3] [3] The incident that gave rise to this lawsuit took place in April, 1999. At that time the scheme for compensating car accident victims in Ontario included payment of no fault benefits under the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96 (the "1996 Schedule"). To be entitled to these benefits a person had to be an insured person under a car insurance policy, and in an "accident", a defined word under s.2 (1) of the 1996 Schedule:

> "accident" means 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.

[4] [4] Mr. Chisholm was an insured person under a car insurance policy issued by Liberty Mutual to his wife. He was driving his wife's car on Barton Street in Hamilton when an unknown assailant fired gun shots at it. Chisholm pleads that the shots wounded him in the neck, shoulder and legs, rendering him a paraplegic. He claims that he has suffered a catastrophic impairment. He seeks a range of statutory accident benefits that includes medical, rehabilitation, attendant care, housekeeping, home maintenance and income replacement benefits and case manager services. Liberty Mutual has refused to pay these benefits on the sole ground that though Chisholm suffered an impairment, he was not in an "accident" because the use or operation of a motor vehicle did not directly cause his impairment.

[5] [5] After the Financial Service Commission of Ontario failed to resolve the dispute by mediation, Chisholm brought this action for the payment of benefits under the 1996 Schedule. After delivering its statement of defence, Liberty Mutual brought a motion under rule 21 to determine whether it was legally obliged to pay these benefits. Chapnik J. held that it was not required to pay.

DISCUSSION

[6] [6] To succeed on his appeal Chisholm must pursuade the court that he was in an "accident" as defined under s. 2(1) of the 1996 Schedule. Chisholm argues that though the gun shots injured him, nonetheless the use or operation of his motor vehicle directly caused these injuries. He supports his argument with these four related submissions, which I will list and then discuss:

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1. Awarding him benefits would avoid a gap or inconsistency between coverage under the *Insurance Act*, R.S.O. 1990, c. I 8 and coverage under the 1996 Schedule;

2. Awarding him benefits would give effect to the "exchange of rights" principle that underlies motor vehicle accident compensation in Ontario;

3. The two part test in *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405 governs the interpretation of "accident" under the 1996 Schedule and he meets the *Amos* test; and,

4. The use or operation of his car directly caused his impairment because "but for" being confined in his car he would not have been injured.

[7] [7] To put Chisholm's legislative gap or inconsistency submission into context requires consideration of the relevant provisions of the *Insurance Act* and the legislative history of statutory accident benefits coverage. Since 1990 the system of motor vehicle accident compensation in this province has been premised on an "exchange of rights" principle. In one way or another the Legislature has restricted the right of innocent accident victims to maintain a tort action against the wrongdoer in exchange for enhanced no fault accident benefits from their own insurer. See *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.) and *Sullivan Estate v. Bond* (2001), 55 O.R. (3d) 97 (C.A.). The main provision of the *Insurance Act* limiting the right to sue is s.266, which precludes an action for damages "arising directly or indirectly from the use or operation … of an automobile" unless the injured person has died, sustained permanent serious disfigurement or permanent serious impairment of an important bodily function.

[8] [8] Enhanced accident benefits have been provided by regulation in a Schedule, which forms part of every car insurance policy in Ontario. Under the Schedules in effect before the 1996 Schedule, the language entitling insured persons to these benefits paralleled the limiting provisions of the statute. Both used the phrase "directly or indirectly". An accident victim had limited rights to sue in tort for injuries "arising directly or indirectly from the use or operation of an automobile" but was entitled to accident benefits where, directly or indirectly, the use or operation of an automobile caused the injuries. Thus the 1990 Schedule, R.R.O. 1990, Reg. 672, for accidents before January 1, 1994, defined "accident" as follows:

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> 2. “accident” means an incident in which the use or operation of an automobile causes, directly or indirectly, physical, psychological or mental injury or causes damage to any prosthesis, denture, prescription eyewear, hearing aid or other medical or dental device.

[9] [9] And the 1994 Schedule, O. Reg. 776/93, for accidents after December 31,1993 and before November 1, 1996 similarly defined “accident”:

> 1. “accident” means an incident in which, directly or indirectly, the use or operation of an automobile causes an impairment or causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

[10] [10] The 1996 Schedule came into effect after the Legislature passed the *Automobile Insurance Rate Stability Act*, S.O. 1996, c.21, which amended various provisions of the *Insurance Act*. These amendments gave innocent car accident victims broader rights to sue for loss of income, but overall the legislation with its amendments still significantly limited tort actions. Moreover, the limiting amendments maintained the phrase “directly or indirectly”. For example, s. 258.3(1) requires a person to apply for statutory accident benefits before bringing an action for injuries arising directly or indirectly from the use or operation of an automobile. Section 267.5 (3) prohibits a person injured directly or indirectly from use or operation of an automobile from suing “protected” defendants for health care expenses, defined as medical, rehabilitation and attendant care benefits.

[11] [11] The 1996 Schedule, which accompanied these statutory amendments, eliminated the word “indirectly” in the definition of accident. Now, as I have discussed, insured persons are entitled to accident benefits only if their impairment or injuries are directly caused by the use or operation of an automobile. Therefore, an insured person seeking accident benefits under the 1996 Schedule must meet a narrower or more stringent causation requirement. See *Saharkhiz v. Underwriters, Members of Lloyd’s, London, England* (1999), 46 O.R. (3d) 154 (Sup. Crt.).

[12] [12] Chisholm submits that this more stringent requirement creates a gap or inconsistency between the legislation and the regulation. Consider, for example, health care expenses: if a person’s injuries arise indirectly from the use or operation of an automobile – as Chisholm contends his injuries surely have – that person may not sue in tort for these expenses and may not recover them from his or her insurer.

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[13] [13] Chisholm argues that the court can avoid this result, can avoid the gap or inconsistency, by interpreting the phrase “directly causes” in the 1996 Schedule very broadly, equating it in substance to “directly or indirectly”. Even apart from the question whether the use or operation of an automobile indirectly caused Chisholm’s injuries, this argument has two flaws. First, it flies in the face of the government’s intent. The legislative history of the Schedule shows an intent to differentiate between direct and indirect cause. Undoubtedly, as a cost saving measure, the 1996 Schedule limits coverage to incidents in which the use or operation of an automobile directly causes an injury.

[14] [14] Second, Chisholm’s argument disregards s. 268(1) of the *Insurance Act* which makes entitlement to accident benefits “subject to the terms, conditions, provisions, exclusions and limits” in the Schedule. By this provision the Legislature intended that accident benefit coverage would be determined by regulation, and that the definitions in the Schedule would prevail over provisions in the Act. However unfortunate the results in some cases, and whatever the gap or inconsistency created by the current compensation scheme, the Legislature authorised the more stringent causation requirement found in s. 2 of the 1996 Schedule. See *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I. (2d) 284 (C.A.), *Warwick v. Gore Mutual Insurance Co.* (1997), 32 O.R. (3d) 76 (C.A.).

[15] [15] Chisholm cannot succeed on this appeal by asking the court to avoid the gap between the Act and the 1996 Schedule by interpreting “directly causes” as equivalent to “arising directly or indirectly from”. The alleged gap is statutorily mandated. Thus Chisholm must show that the use or operation of a car directly caused his injuries.

[16] [16] Chisholm’s second submission is that awarding him no fault benefits would give effect to the “exchange of rights” principle. As I have said, this principle underlies the scheme of motor vehicle accident compensation that has been in place in Ontario since 1990. But the principle does not help Chisholm’s appeal. In 1996 the government redrew the balance between tort rights and accident benefits. It changed the rights being exchanged. One of the changes was to limit the number of incidents that called for the payment of accident benefits.

[17] [17] Chisholm’s third submission relies on the *Amos* test. In *Amos* the Supreme Court of Canada held that a person attacked and shot through the window of his car by a gang of people trying to enter it was entitled to no fault benefits under a regulation to the British Columbia *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204. The regulation provided no fault benefits for injuries caused by an accident that “arises out of the ownership, use or operation of a vehicle”. Major J. wrote that this provision should be interpreted by applying a two part test:

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> (1) The purpose test: Did the accident result from the ordinary and well known activities to which automobiles are put?; and
>
> (2) The causation test: was there some nexus or causal relationship between the plaintiff's injuries and the ownership, use or operation of his car, or was the connection merely incidental or fortuitous?

[18] [18] Chisholm submits that the *Amos* test should apply to the interpretation of "accident" under the 1996 Schedule and that he meets this test. In my view the *Amos* test does not apply, and even if it did, I am dubious whether Chisholm could satisfy it.

[19] [19] This court did apply the *Amos* test to the definition of "accident" under the 1994 Schedule. Although the British Columbia regulation provided for the payment of benefits "in respect of death or injury caused by an accident that arises out of the ownership use or operation of a vehicle" and accident under the 1994 Schedule meant "an incident in which, directly or indirectly, the use or operation of an automobile causes an impairment", this court held that language of the two provisions was enough alike to use the *Amos* test to interpret the meaning of accident under the Schedule. See *Vijeyekumar v. State Farm Mutual Automobile Insurance Co*. (1999), 44 O.R. (3d) 545 (C.A.); *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (2000), 49 O.R. (3d) 255 (C.A.).

[20] [20] But the stringent causation requirement – "directly causes" – in the definition of accident under the 1996 Schedule means that the *Amos* test, or at least the causation part of that test, can no longer be used to interpret the definition. Indeed Major J.'s reasons in *Amos* say as much. In setting out the causation part of the test, Major J. explicitly stated at para. 17 that the required nexus or causal relationship between a plaintiff's injuries and the ownership, use or operation of his or her car was "not necessarily a direct or proximate causal relationship".

[21] [21] Both the motions judge and the Financial Services Commission of Ontario, the specialized body of arbitrators who routinely adjudicate claims for accident benefits, have also concluded that the *Amos* test no longer applies, or at best has very limited relevance. See *Petrosoniak v. Security National Insurance Company* (1998), F.S.C.O. A98-000198, *Karshe v. Non-Marine Underwriters, Mbrs of Lloyd's* (2000), F.S.C.O. A99-000855, and *TTC Insurance Company Limited v. Correia* (2001), F.S.C.O. Appeal P00-00061.

[22] [22] Moreover, even if the *Amos* test did apply, I doubt that Chisholm would be entitled to accident benefits. He meets the first part of the test, the purpose test, but likely not the second part, the causation test.

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In *Amos* the appellant was entitled to no fault benefits because his "vehicle was not merely the situs of the shooting". Instead, in Major J.'s words, at para. 25, "the shooting appears to have been the direct result of the assailants' failed attempt to gain entry to the appellant's van". Thus "the shooting was not random but a shooting that arose out of the appellant's ownership, use and operation of his vehicle."

[23] [23] The nexus or causal relationship between the appellant's injuries and the operation of his car, present in *Amos,* is not evident on Chisholm's pleadings. His statement of claim suggests a random shooting, an incident not entitled to coverage even under the *Amos* test.

[24] [24] That brings me to Chisholm's final submission, a submission that in my view goes to the heart of this appeal because it focuses on the meaning of "directly causes". Chisholm submits that the use or operation of his car is a direct cause of his injuries because he would not have been wounded unless he had been confined in his car. In substance Chisholm contends that the direct cause requirement can be satisfied by the "but for" test of causation. But for being in his car he would not have been injured. I do not accept this submission.

[25] [25] The "but for" test of causation serves as an exclusionary test. Its purpose is to eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome. If the but for test is not met then the injury would have occurred regardless of the act or omission in question. If the but for test is met then the act or omission in question is a factual cause of the injury. However, the but for test does not conclusively establish legal causation, the cause that attracts legal liability. See *Clerk and Lindsell on Torts,* 18th ed. (London: Sweet and Maxwell, 2000) ch. 2.

[26] [26] Here, in a broad sense, one could say that the use or operation of the car Chisholm was driving was a factual cause of his injuries. As he argued, but for driving his car he would not have been shot. Legal entitlement to accident benefits, however, requires not just that the use or operation of a car be a cause of the injuries but that it be a direct cause.

[27] [27] A direct causation requirement conjures up memories of the famous English tort case of *In Re Polemis,* [1921] 3 K.B. 560, where recovery was allowed for damages that were not a foreseeable result of the defendant's negligence but were directly caused by it. When one thinks of 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.

[28] [28] In his text *Handbook of the Law of* Torts, 4th ed. (St. Paul: West Publishing Co., 1971) at 263-4, Dean Prosser defined "consequences" directly caused as "those which follow in sequence from the effect of the

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defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later." Here an external force, the gun shots, came "into active operation later". Thus, in Prosser's terms, Chisholm's impairment was not a consequence directly caused by the use or operation of his car.

[29] [29] Put differently, even accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. An intervening act may not absolve an insurer of liability for no fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car – if it is "part of the ordinary course of things". See J.G. Fleming, *The Law of Torts*, 9th ed. (North Ryde, NSW: LBC Information Services, 1988) at p.247. Gun shots from an unknown assailant can hardly be considered an intervening act in the "ordinary course of things". The gun shots were the direct cause of his impairment, not his use of his car.

[30] [30] The motions judge and the Financial Services Commission have essentially adopted the same test of direct causation by relying on a definition of direct cause in Black's Law Dictionary: "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". See, for example, *Petrosoniak v. Security National Insurance Company*, *supra*. Applying this definition the motions judge correctly concluded that "there was not an unbroken chain of events". Instead "the shooting constituted an intervening act, independent of the vehicle's use or operation which clearly broke the chain of causation", thus disentitling Chisholm to accident benefits.

[31] [31] On similar facts, several arbitrators at the Financial Services Commission have reached the same result. See, for example, *Hanlon v. Guarantee Company of North America* (1997), O.I.C. Appeal P95-00003, *Zurich Insurance Company v. Lenti* (1998), O.I.C. Appeal P98-00030, *Elensky v. Royal & SunAlliance Insurance Company of Canada* (2001), F.S.C.O. A00-000720 and *Sarkisian v. Co-operators General Insurance* (2001), F.S.C.O. A99-000966. Conceivably road accidents may occur where there is more than one direct cause of a victim's injuries and one of the direct causes is the use or operation of an automobile. That, however, is not the case here. The only direct cause, the only effective cause of Chisholm's injuries, were the gun shots.

[32] [32] The Supreme Court of Canada's recent judgment in *Heredi v. Fensom* 2002 SCC 50 further supports this conclusion. In *Heredi* the court was called on to interpret s. 88(1) of the Saskatchewan *Highway Traffic Act*, S.S. 1986, c. H-3.1, which created a one year limitation period for actions for the recovery of "damages occasioned by a motor vehicle". Iacobucci J. emphasized that the court should take a substantive approach

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to whether an action is for "damages occasioned by a motor vehicle". The phrase "requires that the presence of a motor vehicle be the dominant feature, or constitute the true nature, of the claim" and not be ancillary to it.

[33] [33] In *Heredi*, the plaintiff was injured while riding in a paratransit bus. The driver had operated the bus "in such a manner so as to cause the plaintiff's crutches to jar her right shoulder, thereby causing injury". The driver had also negligently placed one of the crutches beneath her right shoulder. The issue for the court was whether the plaintiff's damages "were occasioned by a motor vehicle", in which case the limitation period barred her action, or by the driver's negligent placement of her crutch. The Supreme Court held that the operation of the motor vehicle was the dominant feature of the claim. It was, in Iacobucci J.'s words, "the direct cause of the injury", and the plaintiff's action was therefore statute barred.

[34] [34] It seems to me that the phrase "an incident in which the use or operation of an automobile directly causes an impairment" in the 1996 Schedule stipulates a more restrictive causation requirement than the phrase "damages occasioned by a motor vehicle" in the Saskatchewan legislation. But even applying the test in *Heredi* to the case before us, the dominant feature of Chisholm's claim is the gun shots. The use or operation of his car is at best ancillary.

[35] [35] 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.

[36] [36] Mr. Merkur, counsel for Chisholm, argued that had his client been intentionally hit by another car instead of by a gun shot, or had he lost control of his car while trying to get away from the shots, and was injured as a consequence, he would have been entitled to no fault benefits. Denying Chisholm benefits in this case, he argued, produced a distinction without a difference.

[37] [37] To me, little is to be gained by considering these and other hypothetical fact situations. They are best left to be decided when they arise in an actual case. Unfortunately for Mr. Chisholm, on the facts pleaded in his statement of claim and accepted in the statement of defence, the drive by shooting is not an incident covered by the 1996 Schedule. I would therefore dismiss the appeal. Liberty Mutual does not seek costs of the appeal and I would therefore not order them.

Released: AUG 15 2002

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Signed: “John Laskin J.A.”

“I agree. J.C. MacPherson J.A.”

“I agree. Janet M. Simmons J.A.”

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