Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A04–002153

BETWEEN:

JEFFREY STEINHOFF

Applicant

and

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: David Muir

Heard: October 24, 25, 26, November 24, December 2, 2005, January 18, 19 and 20, 2006, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: David F. MacDonald and Michael Bennett for Mr. Steinhoff
Lorraine Takacs for the Motor Vehicle Accident Claims Fund

Issues:

In the early morning hours of October 27, 2002, Jeffrey Steinhoff was found laying in a driveway between two large Annex houses in the old City of Toronto. He was bleeding from the head and near death, suffering serious injuries to various parts of his body. He survived, but to this day has no recollection of what happened to him to cause the injuries he has sustained.[1]

[1] Although not directly relevant to any issue before me I was advised that Mr.Steinhoff's pre-accident amnesia extends backwards for several months, with only spotty recollections from the two years prior to October 27, 2002.

He claims that his injuries and impairments are caused by him being struck by an automobile and applied for statutory accident benefits from the Motor Vehicle Accident Claims Fund ("MVAC"), payable under the *Schedule.*[2] MVAC does not agree that Mr. Steinhoff was struck and injured by an automobile and the parties have been unable to resolve this dispute through mediation. Mr. Steinhoff applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Was Mr. Steinhoff injured as a result of an "accident" as defined in section 2(1) of the *Schedule*, that is, were the injuries he sustained on October 27, 2002 the result of his being struck by an automobile?

Result:

1. Mr. Steinhoff was injured as a result of an "accident" as defined in section 2(1) of the *Schedule*.

A court reporter was present for the taking of the evidence and a transcript of the evidence was produced and reviewed prior to the release of these reasons. The evidence was voluminous. In addition to the oral evidence, several volumes of documents and reports were entered into evidence. Two videotapes were filed. I have not summarized the evidence in great detail as a transcript of the entire proceeding is available. Instead, I have attempted to capture the key material points of dispute between the parties.

[2]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

Procedural Issues:

Two substantial procedural issues arose in the early stages of this hearing. The first was a request by MVAC for leave to commission and file an engineering report to provide an opinion regarding the possibility of a motor vehicle causing the injuries to Mr. Steinhoff.

I denied that request for the reason that section 39 of the *Dispute Resolution Practice Code* (4th ed.) prohibits the late filing of materials except in exceptional circumstances. There were no exceptional circumstances here. I noted for example that the questions to be addressed by an engineering assessment had been raised by MVAC's own medical expert more than a year prior to the hearing. Irrespective of the prohibitions in Rule 39, I ruled that it was simply too late in the day to be soliciting and introducing new expert engineering evidence in these circumstances

The second substantial procedural issue was the attempt by Mr. Steinhoff to introduce an array of "sounds" to be put to Mr. Elliott, the individual who found Mr. Steinhoff and who may have heard something associated with what befell Mr. Steinhoff that night. Mr. Steinhoff wished to clarify what it was that Mr. Elliott might have heard by presenting to him in his evidence, sounds of events such as a fist fight, a body hitting the hood of a car, etc. MVAC objected to the introduction of this evidence for, amongst other reasons, that the sounds in question were not the actual sounds of these things but approximations or creations of these sounds made by "foley" artists for use in movie, television and radio productions. Accordingly, it was submitted these sounds had no probative value – at best, it might be that Mr. Elliott would say that the sound he heard that night sounded like the sound of a foley artist slamming a telephone book against a piece of metal, for example.

I agreed with the submissions of MVAC and declined to admit the sounds in Mr. Elliott's evidence.

EVIDENCE AND ANALYSIS:

Background

Mr. Steinhoff began his day on Saturday, October 26, 2002 with a stair climb up the C.N. Tower in aid of charity. He returned home about 10:00 a.m. according to Mr. Fell, and likely remained there for the bulk of the day. About 4:00 o'clock that afternoon, he began a lengthy drinking session with Mr. Fell and several friends and acquaintances at the home they shared.

Mr. Steinhoff and his companions left for the Madison Pub at about 9:00 p.m. and continued drinking there until about 1:30 a.m. when they left to attend a frat house party on Prince Arthur Street. It would not have taken more than 5 or 10 minutes to walk from there to the party.

Mr. Fell testified that there were no altercations in which Mr. Steinhoff was involved at any point that evening either at the Madison or at the party. Mr. Fell testified that he and his companions were asked to leave the party at about 2:00 a.m. Mr. Fell testified that he and Mr. Steinhoff, as well as the others had stayed together while at the frat house, however, when they were asked to leave Mr. Steinhoff had disappeared. Mr. Fell assumed that he had gone off to the washroom and a short search in and around the property was conducted. Not finding him, Mr. Fell and company left assuming that perhaps Mr. Steinhoff had gone home on his own.

A quite large amount of alcohol was consumed by Mr. Steinhoff and his companions that afternoon and evening. Based on blood tests taken at the hospital later that morning, it is evident that Mr. Steinhoff would have been significantly impaired.

Mr. Steinhoff was found, as indicated, between two late Victorian houses, 264 and 266 St. George Street in the Annex neighbourhood about a kilometre from the frat house. These old homes have been tenanted and the space between them paved over providing a drive to a parking

lot behind the two buildings. Precise measurements of all of the dimensions of the area were not entered into evidence, but the general features of the space are easily understood.

The drive is roughly at right angles to St. George Street and runs east to west between the buildings. Some witnesses characterized the drive as narrow, others said it was wide. It is approximately 18 to 20 feet wide at its narrowest point and roughly 23 feet wide at its widest point near the rear of the buildings. It is plain that two vehicles (of average size) could conceivably pass side by side in this space, although it is unlikely that this would be a regular occurrence.

The driveway between the houses is apparently not well lit at night, although there is a floodlight on the north-east corner of the southernmost building illuminating the portion of the drive between St. George Street and the two houses. The drive ends in a parking lot. No measurements at all were made of this space but it appears to cover the entire expanse of the rear of the two lots.

Mr. Elliott, a resident of 266 St. George, testified that he had seen people move up the drive at speeds of up to 25 to 30 km-h.

Mr. Elliott testified that at about 3:00 a.m. he had heard a sound which he described at one point, as a clunk. He initially took it as being the sound of a closing lid of one of the large plastic recycling bins located in the drive between the two houses. He was not able to be more specific than that, but was certain that it was a discrete sound – not a series of sounds. He also testified that he did not see or hear a car in the drive that morning.

Mr. Elliott, a limousine driver departing for an early morning pick up at approximately 3:30 a.m., found Mr. Steinhoff, his head in a pool of blood, laying on his side in a semi-fetal position in the driveway about 30 metres from St. George Street. His feet were pointing west and his head east.

A minor controversy related to the width of the driveway arose when Dr. Knight, an expert retained by MVAC, stated that Mr. Elliott was unable to leave the scene until Mr. Steinhoff had been transported to the hospital because he could not get his vehicle past him.

The evidence is more ambiguous than that. Mr. Elliott came upon Mr. Steinhoff when he attempted to exit the parking lot at the rear of the properties and saw him laying in the middle of the driveway. Mr. Elliott was unable to be sure of the precise circumstances of his leaving the area for his early morning pick up. I agree with Dr. Knight that it is unlikely that he drove past Mr. Steinhoff, but there is also no substantial evidence that he could not do so if he had attempted it.

In any event, Mr. Elliott called 911 and police, firefighters and ambulance attendants attended the scene. On site, Mr. Steinhoff scored a Glasgow Coma Scale score of 3 and then later when intubated scored a 2 or more precisely 2T. His body temperature was 32 degrees Celsius. He was bleeding from the back of the head and from the ears. He had sustained a basal skull fracture. Mr. Steinhoff also suffered a broken scapula, bruised ribs, right sided pulmonary haematoma, right sided flank bruising, bruising over the right hip and thigh, a significant laceration to his right lower thigh, just above the knee. He also sustained some bruising and abrasions on his left hand and possibly some bruising on the dorsum of his right hand. His face was largely unscathed except for a laceration above his right eye.

The only substantial controversies about the injuries he suffered that night concern a laceration to his right lower leg, noted in the ambulance call report and a scrotal haematoma, first noted in hospital records several days after admission to hospital.

I find based on all of the circumstances that the scrotal haematoma was not an injury suffered by Mr. Steinhoff in the drive that night, but was more likely a result of treatment provided at the hospital. In this regard I prefer the evidence of Dr. King, an expert retained by Mr. Steinhoff as

well as Dr. Horak and Dr. Perrin, both treating physicians, that this injury was likely caused by treatment. I note in particular the evidence of Dr. Horak that this is an injury that would likely have been noted by emergency room nursing staff because of concerns it would have raised about a possible pelvic injury.

The question of whether or not Mr. Steinhoff suffered a minor laceration to his right calf (or lower leg as it is often referred to in the evidence) is somewhat more difficult to resolve. Dr. Knight based his view that there was no such injury exclusively upon the fact that the only reference to it in the records is in the ambulance call report. Dr. King, on the other hand, assumed that the report was accurate and incorporated it into his thinking. Although asked about this injury, neither Dr. Horak nor Dr. King were directly challenged in their acceptance that this injury was accurately reported. It would have been helpful to have had the views of Dr. Horak in particular on this point given his immediate familiarity with emergency room trauma procedures.

Mr. Steinhoff in his submissions stated that it is more likely that the ambulance attendants would miss a minor injury in the circumstances, rather than report an injury that was not there. I am inclined to agree, although for reasons set out below I do not think that it matters a great deal one way or the other.

Mr. Steinhoff was taken to St. Michael's Hospital by ambulance where his injuries were treated. In a departure from the usual protocol, the ambulance was driven by a police officer, P.C. Andrews, in order that both paramedics could attend to him.

If anyone witnessed the incident that night, they have not come forward. The police interviewed the occupants of the two adjacent buildings and no one has admitted to hearing or seeing anything untoward. Video tape from a security camera across St. George does not capture anything directly bearing on the issue at hand, although it does indicate significant vehicular traffic in both directions on St. George Street. No automobile debris often associated with a

pedestrian knock down was found at the scene. No evidence of a weapon was found. According to the police, no evidence of a scuffle or fight between two or more persons, or blood splatters were found anywhere near where Mr. Steinhoff was found. If Mr. Steinhoff was the victim of an assault, robbery was not an obvious motive as his wallet containing credit and bank cards was not removed.

Mr. Steinhoff's clothing was examined by the Centre for Forensic Sciences and a report entered into evidence. No evidence of weapon use (stigmata)[3] was found on the clothing. A fleck of red paint found on his belt buckle was said to be of a type consistent with paint used in metal refinishing. A length-wise abrasion, apparently new looking and measuring 5 cm long and 2.5 cm wide, was found on Mr. Steinhoff's belt to the right of his belt buckle. Grease stains were also found on a lower pant leg.

Was Mr. Steinhoff struck by an automobile?

The issue for determination is whether the injuries and impairments sustained by Mr. Steinhoff on the morning of October 27, 2002 were caused by his being hit by an automobile.

Two other theories are offered as possible explanations of what befell Mr. Steinhoff. It is MVAC's position that Mr. Steinhoff was not hit by a car but was either beaten, or fell from a height onto the pavement where he was found.

This latter scenario was not abandoned by MVAC, but found no support in the evidence. The medical experts were agreed in varying degrees that it was very unlikely that the injuries sustained by Mr. Steinhoff were consistent or even possible as a result of a fall. Dr. Knight testified that it was likely that Mr. Steinhoff would not have survived a fall from even the lowest

[3]Stigmata as used in these reasons refers to a sign or impression left by the use of a weapon, be it a baseball bat or other blunt instrument including a boot print, or impression left by a steel toe, if kicking or stomping were the mechanism of injury.

available height. Dr. Ranalli, a neurologist who gave evidence at the request of MVAC, was particularly compelling on this point, testifying that given the pattern of injuries sustained by Mr. Steinhoff, a fall "was unlikely to the point of exclusion." Dr. Perrin, a treating neurosurgeon, took the same view as Dr. Ranalli. The only witness to suggest that a fall was anything more than the remotest of possibilities was Detective Coulter whose opinion was based on little more than the fact that there was an accessible roof adjacent to where Mr. Steinhoff was found. I find based on all of the evidence, in particular that of Dr. Ranalli and Dr. Perrin, that Mr. Steinhoff did not fall from a height on the night of October 27, 2002.

The question remains whether Mr. Steinhoff was injured as a result of his being struck by an automobile or, as a result of a beating. Mr. Steinhoff must establish that he was struck by an automobile that night to be successful. To meet this burden he need not establish the exact mechanism of injury – in the circumstances a very difficult task, but he must establish on a balance of probabilities that he was struck by an automobile, rather than the only other possibility, that he was the victim of a vicious assault.

In support of Mr. Steinhoff's case, Dr. Horak, an emergency trauma physician who participated in Mr. Steinhoff's initial treatment[4], and Dr. Perrin both testified that in their view he had been struck by an automobile. Dr. King, a forensic pathologist retained by Mr. Steinhoff, concurred in this view.[5] These witnesses based their conclusions primarily on the nature and severity of the injuries and their pattern of distribution over Mr. Steinhoff's body.

[4] Dr. Horak was the supervising emergency physician on duty the night Mr. Steinhoff was admitted to St. Michael's Hospital. His evidence was based entirely on the medical records, some of which bear his signature, and his experience as an emergency room physician. He does not recall seeing Mr. Steinhoff, although he considered it unlikely that he would not have been consulted about his treatment given the seriousness of the injuries he had sustained.

[5] Dr. Joanna Hamilton, a neuropsychologist, concurred as well, but her view rests almost entirely on the opinion of Dr. King. I have attached no weight to this concurring opinion.

Dr. Knight agreed that the injuries sustained by Mr. Steinhoff were consistent with him being hit by a car, but for reasons discussed below thought that this was not the most likely cause, considering all of the surrounding circumstances. Dr. Ranalli also agreed that a pedestrian knock down was possible but testified that he did not think there was enough evidence to come to a definite conclusion about the cause of Mr. Steinhoff's injuries. However, he leaned "on the greater balance of probabilities, on assault based on the other evidence, not all of it medical, and for which I don't have any particular expertise." Detective Coulter, who also testified for MVAC, offered no firm opinion and stated that it could have been a fall, an assault, or alternatively a hit and run accident.

It is significant to note at this point that, based strictly on a medical analysis, by which I mean the nature of the injuries including their combination or pattern, severity and their location on Mr. Steinhoff's body, the consensus of medical opinion is that the injuries sustained were consistent with a pedestrian-automobile knock down. An important source of the disagreement between the experts extends beyond strictly medical issues.

Mr. Steinhoff's case rests primarily on the ability to infer a cause from the characteristics and pattern of the injuries he sustained. In this regard, Dr. King and Dr. Knight relied upon the same text as being authoritative in this area: Dr. Bernard Knight – Forensic Pathology (2nd ed.). Dr. Ranalli found this text helpful in forming his conclusions.

Although the precise mechanism of injury sustained by Mr. Steinhoff can never be known with certainty, a general sense of what can happen to a pedestrian who is struck by car is reasonably well understood.

In general terms, one of two things happens to a human body when struck by a motor vehicle – the body is either thrown up and onto, or over the vehicle; or alternatively, it is thrown forward,

i.e., projected in the same direction as the vehicle is moving. Which of these two trajectories the body follows will depend upon a number of factors but most critically, where the vehicle strikes the body in relation to its centre of gravity as well as its speed.

If the vehicle makes contact at a point below the centre of gravity, the body will tend to pivot around the point of contact and be thrown onto or perhaps over the car. If on the other hand the vehicle strikes the body above the centre of gravity it will tend to be thrown forward and perhaps run over.

Two important variables in determining which of these trajectories a body will follow are the profile or height of the front of the vehicle[6] and the standing height of the person when struck. An adult person of average height if struck while standing by an Austin Mini is going to be hit well below their centre of gravity and accordingly will, depending on the speed of the vehicle, be pitched onto the hood and/or roof of the car. This is called wrapping or scooping. If on the other hand this same person were struck by a Mack truck, they are most likely going to be thrown forward or projected because of the higher profile of the front end of that kind of vehicle.

The speed of the vehicle is also a factor in which of these two general trajectories a struck body moves through. According to the Knight text, scooping (or wrapping) can occur at speeds as low as 23 km-h, and at speeds below 19 km-h the body will most often be projected forwards. The impact of speed on the nature of the injuries sustained is, according to the Knight text, highly variable dependent on a host of factors. But fatal injuries, typically skull fractures, can occur at speeds as low as 10 km-h.

The experts, with the exception of Dr. Ranalli, were generally agreed that the injuries suffered by Mr. Steinhoff could have been caused in a wrapping or scooping scenario, that is, he was struck by a vehicle initially below his centre of gravity and was then thrown up onto the vehicle,

[6] Assuming it is the front of the vehicle which strikes the pedestrian.

striking it again resulting in some of the upper body and head injuries, before being thrown to the ground where further injuries to his head might have been sustained. Dr. King and Dr. Horak thought that this was the most likely scenario. Dr. Perrin thought it more likely that Mr. Steinhoff was struck by a vehicle on his right side and projected on to the ground striking his head on the left side causing a one-blow fracture to the skull. As indicated earlier, Dr. Knight and Dr. Ranalli agreed that either of these scenarios were possible but to varying degrees did not think either were the most likely cause of Mr. Steinhoff's injuries. Dr. Ranalli, in addition to his other concerns, did not think that a scooping scenario was likely given the speed that a vehicle would have been travelling up the drive.

The nature and types of injuries associated with an assault may be less amenable to a "pattern" kind of analysis because of the many more variables which may be in play. A point relied upon by MVAC was the fact that assaults can happen in any number of ways. That said, all of the medical witnesses who offered an opinion, including Dr. Knight and Dr. Ranalli, did make reference to patterns and types of injuries in their analysis of the likely causes of what befell Mr. Steinhoff, be that a motor vehicle collision or an assault.

The issues in the case were initially framed by the two medical experts, Dr. Knight and Dr. King respectively, retained by the parties to assist in presenting their positions.

Dr. King authored a report dated February 4, 2004.[7] Dr. King did not believe that Mr. Steinhoff had been beaten:

> I would have expected soft tissue injuries to the head, particularly to the face, to predominate. Beatings typically leave black eyes, swollen lips, broken teeth, a bruised if not broken nose and lacerations above the eyes. Furthermore, the skull fractures imply considerable force, unlikely to have resulted from a fist or even a

[7] Although little turns on it now, it is also clear in this first report that Dr. King believed that Mr. Steinhoff was found laying by the side of St. George and not 30 or so metres up the drive between 264 and 266 St. George Street. As discussed later, Dr. Knight always thought that Mr. Steinhoff was struck near the roadway.

> foot. A blow from a heavy weapon would be necessary to explain these and a patterned injury would likely have resulted. Finally, it is unlikely that he would have sustained the injuries that he had to the right side of the trunk, the right thigh and the right lower leg. Kicks to these areas could have been inflicted but they would not have caused the deep thigh laceration or the flank injury or, for that matter, the scapular fracture.

On the other hand, Dr. King considered it most probable that Mr. Steinhoff had been hit by an automobile:

> This type of incident typically involves three separate impacts to the pedestrian. (a) The front of the vehicle initially hits the lower part of the pedestrian, usually on the side. Injuries are found at or just below the knee (often a fracture, the so-called "bumper fracture"), the level of the thigh or hip and often on the back of the hand on the same side as the foregoing injuries. (b) The victim is then thrown up on to the hood sustaining injuries to the back or side of the trunk (particularly the chest), he then slides up the hood the head the (sic) hitting the windshield or the "A" frame around the windshield sustaining a severe head injury. (a) Finally, the subject is thrown off the vehicle, usually to the side, and lands on the ground sustaining additional injuries, often a second head injury.
>
> In my opinion, Mr. Steinhoff's injuries fit this pattern well. Admittedly, he doesn't have a bumper fracture and does not have fractures of the hip or pelvis. And, of course, he survived. I think that this suggests that the speed of the vehicle was relatively low and the force of impact therefore less than I have been accustomed to seeing in my practice dealing with fatal cases.

At the hearing, Dr. King expanded on his view that what he described as the pattern of predominately right sided injuries was more consistent with a pedestrian knock down. Dr. King was not persuaded that the skull fractures – he agreed with Dr. Perrin, below, that there were two – could have been caused by anything but a weapon of some kind.

Dr. King also thought it unlikely that the significant bruising to the flank area[8] could have been caused by a kick, stating that he could not remember ever seeing kicks producing that kind of

[8] In Dr. King's evidence, his references to the flank seemed to include the hip and side of body just above that area, whereas Dr. Knight would not have included the hip in the designation of flank but the area above the hip and up the area of the rib cage under the arm.

bruising. Dr. King testified that it was unlikely the lacerations to the right thigh could have been caused by a boot, as Mr. Steinhoff was clothed at the time that these injuries were inflicted. In his view, this significant laceration was most consistent with a significant blunt force contact with an automobile.

He did agree with Dr. Knight's comments in his first report, that the lacerations and bruising found on Mr. Steinhoff's knuckles were often seen in assault cases. However, Dr. King testified that in his experience the bruised dorsum of the right hand was not typical of an assault, but was more consistent with the right hand hanging by Mr. Steinhoff's hip when struck by the automobile in the pedestrian knock down scenario. He also reiterated his view that the absence of significant frontal head and face trauma was important to his conclusion.

Dr. Horak agreed that it would be unusual for there to be such limited trauma to the face if this were an assault. In Dr. Horak's experience in the emergency room, the assailant's violence is usually directed to the core of the body – the head and thorax, not the limbs. Dr. Perrin agreed with this view, and testified that in his experience it would be unusual to find the "very neat" distribution of injuries down one side of the body in an assault scenario.

Dr. Horak also agreed with Dr. King that the injuries to Mr. Steinhoff's head – a basal skull fracture – as well as the fractured scapula and lung haematoma were unlikely to have been caused by an assault. Dr. Horak described these kinds of injuries as being "exceedingly rare" in assault cases because of the forces required. Dr. Perrin concurred, in particular as related to what he felt were two discrete skull fractures.

Each of these witnesses testified that only the use of a weapon of some kind could cause most of these injuries but in particular the skull fracture(s), the fractured scapula and lung haematoma. Therefore, the absence of any stigmata indicating the use of a weapon was an important reason for concluding that this was not an assault but rather a pedestrian knock down. In particular,

these witnesses thought it important that there were no signs of weapon use, or boot prints, either on Mr. Steinhoff's body or on his clothing.

They all conceded that it was conceivable that Mr. Steinhoff was the victim of an assault, however, they each also thought that this was far less likely than a pedestrian knock down. Ultimately for Dr. King, Dr. Horak and Dr. Perrin, it was the dominant pattern of right sided injuries (lower limb injury, right thigh laceration, right thigh/flank bruising, right side pulmonary haematoma, right scapular fracture); the severity of these injuries – particularly the right scapular fracture and the significant skull fracture(s); and the absence of any evidence of weapon use with respect to any of these injuries, that formed the basis for their conclusion that the most likely cause of Mr. Steinhoff's injuries was a motor vehicle.

Dr. Knight responded to Dr. King first in a report dated September 28, 2004. The essence of his opinion is captured in the following passages:

> The injuries sustained by Mr Steinhoff could certainly have resulted from him being struck by a motor vehicle.
> ...
> His skull fractures, scapula fracture and flank haematoma with probable fractured right ribs could all have occurred by being struck by a motor vehicle at some considerable speed.
>
> If Mr. Steinhoff was walking northbound on the west or even the east side of St. George Street, when he was struck, the major forces of impact were directed largely to the right side of his body. The flank injury could have resulted from contact with the hood of the vehicle and the skull fractures would have occurred by his head hitting the A pillars or header of the vehicle. He would have travelled on the hood of the vehicle a distance before he would have been thrown off. He would then have come to rest on the roadway where he may have sustained further head or other injuries. In my opinion he would have remained where he landed on the road.
>
> However, if he had been hit by a vehicle it would be anticipated that he would have received some lower leg injuries as a result of the bumper striking his lower legs before he was projected onto the hood. There was no suggestion of appropriate lower leg injuries or fractures. There is no evidence that he was subsequently dragged into the alleyway and no sign of blood on the road nearby. There were no vehicle parts in the area.

> ...
> If this impact with a motor vehicle had occurred then probably it must have occurred as the vehicle entered the alleyway. The vehicle would have been travelling fairly slowly as it entered the alley after crossing the pavement.[9] There were no skid marks or signs of a motor vehicle having been present according to Detective Coulter.
>
> No vehicle was identified in the neighborhood with signs of having struck a pedestrian. If the vehicle had been entering the alleyway to travel to the rear of the buildings into the car park it would of necessity been moving slowly as it crossed the pavement and entered the narrow alley. Under these circumstances it is unlikely Mr. Steinhoff would have been subjected to the severe forces necessary to cause his injuries. There were no vehicle parts found near the body. Mr. Steinhoff did not sustain any leg injuries. For these reasons it is my opinion that Mr. Steinhoff did not receive his injuries by being struck by a motor vehicle.

The following short passage from Dr. Knight's second written report reiterates what appears to have been his central objection to Dr. King's theory:

> If the severe injuries Mr. Steinhoff suffered were caused by a vehicle this vehicle must have been travelling at a reasonably fast speed. In my opinion it is unlikely that a vehicle, after crossing the pavement, would have reached such speed in such a short distance up this narrow alleyway in which the staggering figure of the impaired man must have been clearly visible.

On the other hand, Dr. Knight was strongly of the view that these injuries were the result of an assault by one or more assailants. From the opening exposition of his views during examination-in-chief:

> Now, the injuries that sort of first of all struck me, as I was thinking about it, was the fact that Jeffrey had abrasions to his right knuckles. It wasn't just abrasions to his knuckles, he had swelling of his hand. As you look at those knuckles, there's a little spot on each knuckle, but the tissues in between the knuckles are swollen. He had a swollen right hand.

[9] By pavement, Dr. Knight refers to the sidewalk adjacent to St. George Street.

> His left hand has an injury and a laceration to his index finger, in addition to abrasions on the palm of his hand. And I said, 'well now, how does all this happen?' And then, taking this all a little further, he was – had reported scrotal haematoma or a haematoma of his scrotum. Now, the first sort of impression you think of is, he's been in a fight; he's injuring his right hand; he's tried to defend himself; somebody has given him a kick in the scrotum, in the groin; and then they've hit him somehow. ...
> ...
> What do you do then, when he's down on the ground? Well, I believe that he was either kicked or stomped; and a good kick on the back of his head, as he's down on the ground, would certainly be sufficient to cause the lacerations and the markings and bleeding from the back of his skull, together with the fractures of the solid bones, the occipital bones.
> ...
> Now, having got him down on the ground, we now give him a whack on the back of – and that results in the bruise to his back, to his flank, and another kick to the right thigh would result in the lacerations – probably the lacerations, with a steel-toed boot; good old kick in the thigh would give him a couple of lacerations.
>
> The injuries to the hand, probably because someone put their foot on it, would be one explanation. We don't know that he didn't already have those injuries. We know he probably didn't have the laceration to his finger, but the other injuries may have already been there. I don't know.
>
> So that is the basis on which I considered that, in the context of where he was found, the conditions under which he was found, this was probably an assault.

Dr. Ranalli, as indicated earlier, agreed that the injuries sustained by Mr. Steinhoff were consistent with a pedestrian-automobile collision but did not think this was the most likely cause because a car moving through this driveway would have done so quite slowly – 5 to 10 km-h in Dr. Ranalli's estimation. Dr. Ranalli, relying on the Knight text, testified that at those speeds Mr. Steinhoff would not have been scooped up onto the hood of the car but knocked over or projected. In this scenario, there should have been a one-blow injury to the head, but Dr. Ranalli felt that Mr. Steinhoff had suffered at least two blows to the head. This contrasts with Dr. Perrin's testimony that it was most likely one blow that caused the skull fractures. Dr. Ranalli also thought that at those speeds Mr. Steinhoff would not likely have suffered the severe fractures to his head and scapula.

Dr. Ranalli shared in the medical consensus that significant forces would have been required to fracture Mr. Steinhoff's skull and further agreed with the view that it would most likely have been caused by a blunt, flat object and not a weapon such as a bat or a crowbar, which would usually leave stigmata of some kind. He testified that it was possible that the skull fracture was inflicted by his head being pounded into the pavement. This latter possibility was not put to any of Mr. Steinhoff's witnesses as this scenario was only revealed in Dr. Ranalli's vive voce evidence. It would have been helpful to have had Dr. Perrin's view of this, in particular.

As indicated above I prefer the evidence tendered by Mr. Steinhoff over that presented by MVAC.

My reasons follow.

The experts who gave evidence in this proceeding, with one exception, were for the most part excellent witnesses. Unfortunately Dr. Knight's evidence, both in his reports and his testimony at the hearing, suffered from a number of deficiencies.

Dr. Knight's evidence contained some potentially critical errors which he was unable to adequately explain.

In his first report, he records that Mr. Steinhoff was found 30-40 feet from St. George, when in fact it was approximately 30 metres from the roadway. When the error was pointed out to him in cross-examination, he could offer no explanation for it, but more significantly he could not say with any clarity whether his analysis in that report was based on Mr. Steinhoff being found 30 to 40 feet from the roadway or, alternatively, 30 to 40 metres. This is significant because Dr. Knight always believed that Mr. Steinhoff was struck, if he was struck by an automobile, near St. George. As it was eventually agreed by all the experts that Mr. Steinhoff would not have been able to move very far once struck on the head questions arose, at least for Dr. Knight, about how he came to be found some 30 metres from the roadway.

Dr. Knight later insisted under questioning by counsel for Mr. Steinhoff, that six metres was half the distance across the drive that he himself estimated was 23 feet wide. It is not. This is all the more curious given the fact that he had been to the site of the incident, at least prior to the hearing, if not prior to authoring his first written opinion.

His first report was also not as clear as it could be on what became a critical point in his evidence and when questioned about it was, as in the circumstance above, not helpful in his explanation.

As discussed earlier, in his oral evidence, Dr. Knight relied upon the absence of a lower leg injury. However, on page 3 of his first report, Dr. Knight records in a listing of the injuries sustained, amongst his other injuries, a laceration of the right thigh and "a right upper calf laceration of lesser extent." When asked by counsel for Mr. Steinhoff whether he had discounted the existence of the right calf laceration in arriving at his conclusion at the time, he initially testified that he had not been in a position to question the "rights and wrongs of reported injuries." It was only when prompted by counsel for MVAC, that Dr. Knight was able to point to the statement later on page 11 of his report that there was no appropriate lower leg injury.

In the body of this report, there is no express statement by Dr. Knight that there was no right calf laceration, neither is there any explanation for the implicit conclusion that the obvious (and not controverted) right thigh laceration was not an appropriate injury. Dr. Knight was unable to clarify this point in his evidence at the hearing. The basis for this initial opinion is further called into question when he later states in the report, as set out above, that there is no leg injury at all. Curiously, in a follow-up report responding to Dr. King, he says nothing about the right lower leg or calf laceration. In particular, he does not contradict Dr. King's view that Mr. Steinhoff suffered a laceration to his lower right leg although Dr. King reiterates in his second report his view that there was such an injury in addition to the lower right thigh injuries.

Dr. Knight's evidence was at times contradictory and unclear.

For example, when asked in cross about what he had meant in his first report by an appropriate leg injury, Dr. Knight did not provide a direct response. However, earlier during his lengthy opening remarks in examination-in-chief, he testified that a pattern of motor vehicle inflicted injuries would include a head injury and a lower leg fracture or big laceration. But in this case, he was concerned that the pattern did not exist, that is, there was no lower leg injury. Later when questioned in chief, he reiterated his statement that he would expect a fracture or serious laceration of the lower leg would be part of a pattern of injuries. Despite his testimony that he would have expected a fracture, he had earlier presented data from a sample of pedestrian knock downs which suggested that the vast bulk of motor vehicle accident victims who suffer leg injuries do not sustain leg fractures.

In his opening exposition of his opinion, he stated that for scooping or wrapping to occur in which the head of the victim hit the A-frame of the vehicle, it would have to be travelling 45 km-h but later agreed with the Knight text which suggested this phenomenon can occur at much lower speeds.

He testified, in response to a question about the absence of any record by the Centre for Forensic Sciences of stigmata or markings from weapons including boot prints on Mr. Steinhoff's clothing, that whether or not they recorded such things would depend on what they were asked to look for. He later retracted that statement and indicated that such markings would be significant and the Centre would record such markings if they had discovered any.

On another occasion, he refused to answer a hypothetical question which required that he assume that Mr. Steinhoff had been struck by a vehicle.

These are just examples of the many occasions where Dr. Knight's evidence was less helpful than it could have been. The impression left was one of a kind of partisanship, or more likely, a defensive attachment to his opinion that seriously undermined the strength of his evidence when contrasted with the other experts.

In contrast to Dr. Knight, the other witnesses in this proceeding were quite straightforward and while committed to their views on the issues, were often quite ready to concede the weakness in the evidentiary basis of aspects of their opinions. For example, when challenged on his assertion in one of his reports that the absence of blood spotting on Mr. Steinhoff's shoes suggested that this was not an assault, Dr. King readily conceded that "this was a very weak piece of evidence and conclusion that I drew. I wouldn't like to put too much weight on the absence of blood stains." Dr. Ranalli was in many respects the ideal expert witness. He carefully outlined the basis for his views and was equally careful about respecting the boundaries of his expertise. When new facts or information were presented to him, he readily incorporated them into his thinking. For example, he withdrew an initial opinion based on injuries to Mr. Steinhoff's hands, that he might have exchanged blows with his alleged assailants, when upon review of the Knight text he learned that such injuries are often associated with pedestrian trauma.

As indicated earlier, there is a broad consensus of medical opinion that from a medical perspective the injuries sustained by Mr. Steinhoff are consistent with a motor vehicle pedestrian knock down.

On the one hand are the opinions of Dr. King, Dr. Horak and Dr. Perrin. These physicians gave evidence which was rooted very much in their practical experiences as respectively, a forensic pathologist, emergency room trauma physician and neurosurgeon. Each, according to their evidence, had seen hundreds of assaults and pedestrian motor vehicle knock downs in their careers. Each testified that in their clinical experience the nature of the injuries sustained by Mr. Steinhoff, their pattern and severity were strongly suggestive of a pedestrian-automobile collision. In this regard, Dr. Ranalli testified that in his clinical practice, the kind of injuries sustained by Mr. Steinhoff were associated most often with pedestrian car accidents or industrial falls. He also stated that lung lobe haematoma were most commonly associated with motor vehicle accidents, in part perhaps because motor vehicle accidents are more common than assaults.

I am persuaded by the evidence of all the medical experts, that some of the injuries would have required the use of a weapon of some kind (including a steel-toed boot). However, the absence of any stigmata associated with any of the minimum, four discrete areas of injury to his body (not including his head) suggest that a beating was less likely than the equally plausible, from a straight medical perspective, scenario of a pedestrian motor vehicle knock down.

The same questions arise when the head injuries are considered in isolation. Mr. Steinhoff's skull fracture(s) were significant and I accept the evidence of every witness but Dr. Knight that these injuries could only have been caused by a weapon of some kind (including a boot or the roadway). I note here that traffic accidents are, according to the Knight text, the most frequent cause of skull fractures, especially basal skull fractures such as Mr. Steinhoff suffered. There is no evidence of a weapon having been used. Dr. Ranalli's suggestion that the skull fracture(s) could have been caused by Mr. Steinhoff's head being slammed into the drive is possible, but how then did he suffer the fractured scapula and right pulmonary haematoma, not to mention the flank bruising and right thigh laceration?

On the other hand, Dr. Knight although at times denying the significance of patterns of injury, relied heavily on the absence of a lower leg injury completing a pattern associated with a motor vehicle pedestrian collision. Dr. King did think the injury significant and included it in his analysis. Unfortunately, he was not strongly challenged on the existence of the injury and was not asked what his views might be if there was no such injury. In any case, if there was such an injury, and I find that there likely was, it must have been quite minor.

However, the presence or absence of an injury below the knee in a wrapping scenario is largely a function of the profile of the vehicle in relation to the lower leg of the individual when struck. We know how tall Mr. Steinhoff is, however we do not know whether he was standing upright,

crouching or in some other posture when struck. And more importantly, we know nothing at all about the vehicle which may have struck him.

There is no evidence before me of typical motor vehicle profiles. However, it is beyond significant controversy that vehicle profiles are highly variable and with the proliferation of larger vehicles on our roads, front end profiles may be higher than in the past. As Dr. King remarked in his evidence, when he was a young doctor in England he could recall individuals presenting with fractures just above the ankles from being struck by Austin Minis.

I also note that the Knight text does not refer to lower leg injuries specifically, but rather the lower limb referring to the whole leg.

The point is that it does not necessarily follow from the fact that there is no significant lower leg trauma, that Mr. Steinhoff was not struck on his right side by an automobile. If the profile of the vehicle was higher such that the first contact was just above the knee but below Mr. Steinhoff's centre of gravity, wrapping might have occurred. It is also possible on the evidence of several witnesses, that Mr. Steinhoff was projected forward after being struck first on his right side.

The other related medical issue raised by MVAC is the absence of a lower limb fracture. Dr. King recognized this as a question mark, giving rise to his suggestion that this was perhaps a relatively slow speed impact. However, I also note in this regard that in Dr. Knight's evidence he tendered a breakdown of the types of injuries sustained in a sample of pedestrian knock down accidents. In this sample, a large majority of individuals who had suffered leg injuries, suffered mild injuries – that is, lacerations, abrasions, bruising, but no fracture. At the end of the day, the significance of the lower leg injuries is unclear.

In the end, Dr. Ranalli and Dr. Knight together proposed a plausible. It is possible that Mr. Steinhoff was assaulted by one or more persons who inflicted these serious injuries to

various parts of his body. However, the severity of each of the areas of injury, the basal skull fracture, the right sided dominance of injury, the absence of any evidence of weapon use and the lack of any significant trauma to his face suggest that this scenario is less likely than that proposed by Mr. Steinhoff.

Both Dr. Ranalli and Dr. Knight rely on factors that go beyond their expertise as physicians. I did not find their views, in this regard, persuasive.

In both his reports and even more so in his evidence, Dr. Knight created an elaborate edifice of circumstance that he believed pointed towards an assault as opposed to a pedestrian knock down. For example, he testified that we must consider the time that this event may have taken place – in his opinion at some point around 1:30 a.m.[10] based on an estimate of how quickly his body would have cooled. He also considered it important that Mr. Steinhoff was considerably impaired by alcohol, as well as the fact that he was found in what he characterized as a dark and narrow alleyway between two houses. While I agree that these are all facts that must be considered, Dr. Knight did not explain why they support an assault scenario as opposed to a pedestrian knock down.

To my mind it does not follow logically from the fact that Mr. Steinhoff was seriously impaired that it was more likely that he would have been assaulted than hit by a car. The same might be said for Dr. Knight's reliance on his opinion that whatever befell Mr. Steinhoff, happened at about 1:30 or 2:00 a.m.

Although conventional wisdom suggests that an assault is more likely to occur at night and equally when one or both of the participants are impaired, than at the corner of King and Bay at 11:00 a.m on a Monday morning, to my mind it is equally plausible to anticipate that a drunk

[10] This estimate of the time of the incident is at odds with the evidence of Mr. Fell that Mr. Steinhoff was present at the frat house until approximately 2:00 a.m. The Frat House is approximately .5 km from where Mr. Steinhoff was found. Although nothing turns on it, this estimate is likely wrong.

young man wandering the streets at 1:30 or 2:00 in the morning on a holiday weekend[11] in an area of the city with several bars and frat houses is also more likely to be struck by a motor vehicle, than when I am walking to the subway on my way to the office in the morning. Dr. Ranalli made this very point in his evidence when he testified that some of these surrounding circumstances increased the risk of both an assault or a pedestrian knock down. These surrounding circumstances do not point in any one direction in my view and do not necessarily require the inferences MVAC seeks to draw.

Stripped to the core, the opinions of Dr. Knight and Dr. Ranalli turn on their belief that a car could not (or would not) achieve the velocities necessary in the physical surroundings.

Dr. Knight assumes, both in his reports and in his evidence, that if Mr. Steinhoff was hit by a car, the collision occurred on or near the sidewalk approximately 30 metres from where he was found. It is not clear why he held this view.

It is common ground that once Mr. Steinhoff sustained the skull fractures, it is very unlikely that he would have been able to move very far. It follows that he was found at or very near the spot he was struck on the head, unless carried there by some means. There is no blood trail, so it is not likely that he was carried any significant distance as the bleeding from the head would have started very soon after the fracture, according to Dr. Ranalli, if not instantly, in the view of Dr. Knight.[12]

However, other than the assertion that an individual is more likely to be hit by a car near a public roadway than in a driveway, Dr. Knight offered no support for his view that Mr. Steinhoff would

[11] It was apparently Halloween.

[12] In a pedestrian knock down scenario, it is possible that an individual could be carried on the hood of an automobile for some distance and then deposited on the ground. It is also the case that a pedestrian struck by an automobile would, either in wrap or projection scenario, be thrown some distance. See Note 13 below.

have to have been hit at the entrance to the driveway at St. George Street. Dr. Knight went so far as to suggest that it was not probable that Mr. Steinhoff would have walked down the drive, and yet his theory of an assault requires that Mr. Steinhoff do that very thing. I find there is no basis in the evidence for concluding that Mr. Steinhoff was struck near the sidewalk adjacent to St. George Street as opposed to some other location further up the drive, closer to where he was found.

As a result of this assumption, Dr. Knight never grapples with the question of why a vehicle could not achieve the necessary velocity in the 30 metres between the road and where Mr. Steinhoff's body was actually found.[13]

Dr. Ranalli simply did not think that it was reasonable that a car would travel at sufficient speed up that driveway. What strikes one about this view, echoed by Dr. Knight on several occasions, is the supposition that the driver of the proposed vehicle would be acting reasonably. The supposition that all drivers act reasonably and with caution is not supported by real life experience.

In any event, the common sense opinions of Dr. Ranalli and Dr. Knight are contradicted by the evidence of David Elliott who testified that he saw cars moving at significant speeds (25 to 30 km-h) in that space. MVAC submitted that I should disregard this evidence, but I find no basis for doing so. Mr. Elliott lived at 266 St. George and used this driveway regularly. He is, or was a limousine driver and is perhaps better placed than many to estimate the speeds of moving vehicles. He gave his evidence in a straightforward and honest manner.

[13] Dr. Knight did testify about throw distances of objects, and gave evidence respecting how fast a vehicle would have to be travelling to throw Mr. Steinhoff 17 metres. He later withdrew the underlying science supporting this evidence as it related to the throw distance of a projectile such as a golf ball and not a human body. It was not explained how a throw distance related to the scooping or wrapping scenario outlined by Dr. King and Dr. Knight. In the end there was no explanation of how any of the evidence of throw distances related to the circumstances of this case, in particular how it related to the fact that Mr. Steinhoff was found 30 metres from St. George Street.

Even if Mr. Elliott overestimated somewhat, his uncontradicted evidence and Dr. Knight's text wherein it is stated that scooping or wrapping can occur at speeds as low as 19 to 23 km-h, suggest that the velocities necessary to get Mr. Steinhoff up onto the hood of a vehicle are entirely possible. At speeds below that threshold he might have been projected forward. Dr. Perrin considered this the most likely scenario. Dr. King testified that it was possible that Mr. Steinhoff was struck by the vehicle and projected or thrown directly to the ground. According to the Knight text, fatalities in pedestrian-automobile collisions can occur at speeds as low as 10 km-h.

MVAC states the absence of a motor vehicle is the most important issue in this case and points inevitably to this being an assault. The absence of any substantial direct evidence of a vehicle being involved in this incident is a serious problem for Mr. Steinhoff, but that absence is not determinative.

MVAC relied upon the absence of any debris commonly associated with a motor vehicle collision. Dr. King testified that in his experience with pedestrian motor vehicle accidents, there will not invariably be debris from the automobile. In particular, he noted that glass from a broken windshield is often not found now, although it would have been common in the past. Whether there was debris from an impact with an automobile would be entirely dependent upon how it struck Mr. Steinhoff and what the car was made of. I also note the findings of the Centre for Forensic Sciences discussed above which may, although I have not placed a great deal of weight on them, point to the possibility that an automobile struck Mr. Steinhoff.

For all of these reasons I find that Mr. Steinhoff has met his burden of establishing on a balance of probabilities that the injuries he sustained in the early morning hours of October 27, 2002 were the result of a pedestrian knock down accident in the drive between 264 and 266 St. George Street.

EXPENSES:

The parties agreed that the issue of expenses be left pending the release of my decision. In the event that they are unable to resolve the issue themselves, they may schedule an appointment in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

April 24, 2006

David Muir
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A04–002153

BETWEEN:

JEFFREY STEINHOFF

Applicant

and

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Steinhoff was injured as a result of an "accident" as defined in section 2(1) of the *Schedule*.

April 24, 2006

David Muir
Arbitrator

Date