

Noteworthy

2004 No. 6

Greenhalgh v. Halifax ING Insurance Co: Purpose and Causation

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by *Pamela Stevens*

In this decision, released August 27, 2004, the Court of Appeal addressed the test for recovery of accident benefits, in circumstances where the insured driver had abandoned her vehicle in winter weather and suffered severe injuries after being exposed to the elements. The Court overturned the decision of Kiteley, J. that the insured was entitled to benefits, holding that while the insured could possibly meet the “purpose” test set out in *Amos v. ICBC*, she could not meet the “causation” test set out in *Chisholm v. Liberty Mutual Group*.

The insured, accompanied by a friend, took a wrong turn on a country road at about 9:00 p.m. on January 14, 2002. When she attempted to turn around, her vehicle became lodged on a rock and eventually stalled. She tried to call for help on her cell phone but the battery died. The insured and her friend then left the vehicle to walk back along the road to a home they had seen earlier. They became disoriented in the darkness, strayed off the road and ended up walking through the night for about 9 or 10 hours. While doing so, they fell into a

river and the insured lost her boots. She and her friend were found some time between 7:00 and 8:00 a.m. the next day.

As a result of exposure, the insured suffered frostbite, and eventually lost a number of her fingers and both legs below the knees. She submitted a claim for accident benefits to her insurer.

The applicable legislation is set out in subsection 2(1) of the *Statutory Accident Benefits Schedule* which states:

“Accident” means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eye wear, denture, hearing aid, prosthesis or other medical or dental device.

According to the Court of Appeal, the following two questions arise from the language of this provision:

1. Did the incident arise out of the use or operation of an automobile (the “purpose” test)?

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2. Did such use or operation directly cause the impairment? (the “causation” test)

The purpose test as set out in *Amos v. ICBC* asks whether the accident resulted from the ordinary and well known activities to which automobiles are put. In that case, Amos was shot by an unknown assailant while driving his vehicle.

The causation test asks whether the use or operation of an automobile was the cause of the injuries. If the answer is yes, it is then necessary to ask whether there was an intervening act or acts that resulted in the injuries that cannot be said to be part of the ordinary course of things.

The causation test was considered by the Court of Appeal in *Chisholm v. Liberty Mutual Group*. In that case, the insured was also shot by an unknown assailant while operating his vehicle. In this context, Laskin, J.A. concluded in *Chisholm* that the insured passed the “but for” test: but for the use and operation of the motor vehicle the accident would not have occurred. It was, however, necessary to go further. The next question was whether an intervening act resulted in the injury. In *Chisholm*, Laskin, J.A. held that an intervening act would absolve the insurer of liability if it could not fairly be considered a normal incident of the risk created by use and operation of a car.

It was held in *Chisholm* that the

gunshot constituted an intervening act that was not a normal incident of the risk created by the use or operation of a car. Therefore, the use or operation of the car was not a direct cause of the injury.

The Court of Appeal then reviewed a number of decisions from the Financial Services Commission in which the use of the car had ended without injury being suffered: where the insured had physically left the car and was struck on the head by another driver wielding a cellphone; where the insured tripped on a groove in the pavement after leaving his vehicle so that no automobile physically contributed to the insured’s injuries and where there was a time lag between the use of the car and the injuries.

In *Greenhalgh* there were numerous occurrences listed by the Court of Appeal between the time the car became stuck, its use ended and the time the insured suffered her injury:

- her cell phone died;
- The weather was very cold;
- it was dark;
- she became disoriented;
- she walked for a long distance over a period of time;
- she fell into a river;
- she lost her boots;
- she had to continue her journey without her boots

before finally being found; and

- she was found miles away from her car.

The Court stated that none of these intervening acts could be considered a normal incident of the risk created by the use or operation of the car and so they concluded that the car was therefore not a direct cause of the injuries.

The two prior no-fault Schedules contained a broader definition of “accident”, which permitted access to benefits where an incident directly or indirectly caused an impairment.

In considering this aspect of the case, the Court of Appeal repeated the view of Laskin J.A. in *Chisholm* that the narrower or more stringent causation requirement in the Bill 59 legislation reflected a government policy decision to circumscribe the insurance industry’s liability to pay no-fault benefits, despite the fact that the direct causation requirement would at the margins “produce hard cases, perhaps even sympathetic cases and seemingly arbitrary results.”

This decision brings certainty to an area that has in the past given rise to much confusion and the detailed analysis by the Court of Appeal should permit insurers to respond with more confidence to applications for benefits that clearly do not meet both the purpose and causation tests.

Case Management: Changes to Come

by Jamie Trimble

Regional Senior Justice Winkler has announced that he wishes to suspend Case Management and Mandatory Mediation and invoke a smarter case management system where there is management only where management is required. These changes will effectively end Case Management and Mandatory Mediation in Toronto.

THE PROBLEM:

The Toronto Court system is not working.

THE SYMPTOMS OF THE PROBLEM:

The Long Trial list is setting dates 30 months ahead (i.e. appear now and get a date in the spring of 2007). Motions are booking 6 to 7 months in advance.

Without fixed and certain trial and motion dates, the settlement rate is dropping, as there is no urgency for counsel. Longer shelf life of a case means more work at the client's expense, including increased motions work.

THE CAUSE OF THE PROBLEM:

Case Management and Mandatory Mediation mean that cases are being over-

judged and over-managed. There are too many attendances. Masters apply a mechanical "one size fits all" approach with no flexibility.

Work that Masters should be doing (Pre-Trials, motions) is being given to Judges, who are then less available for trials.

There are fewer Judges and fewer Masters and fewer resources coming from Queen's Park.

Counsel are not ready. Too many motions are adjourned. Counsel do not proceed with trials. They get on the Long Trial list before they are ready, hoping to become ready in time for trial. By then, reports become stale and have to be updated and responded to. There is further production. This adds further delay to the case. Of the cases on the Long Trial list that did not proceed at their appointed time in 2003, only 15 were adjourned because there was no court or Judge.

In Simplified Rules, all trials last 4 to 5 days, and the costs awards exceed the value of the claim. No one opts for a Simplified Trial. Everyone does their discovery at trial. There are too many motions. 60% of all motions in the

province are brought in Toronto, many of them pointless or inappropriate.

70% of the Long Trial cases are motor vehicle accident cases, most of which are jury cases. Juries do not want to sit that long. Individuals find ways of excusing themselves. It takes longer to pick a jury.

THE SOLUTION TO THE PROBLEM:

Justice Winkler proposes a pilot project governed by a Practice Direction, undertaking top to bottom reform of the Toronto Court Process, the key features of which are:

- suspend operation of Case Management (including Mandatory Mediation).
- in Simplified Rules cases, force disclosure of all documents, theories of the case and will-say statements of all witnesses. Masters are to try to convince parties to accept Simplified Trials.
- no case is to be placed on the list unless certified as ready.
- there will be a no adjournment policy.
- counsel can certify readiness for trial up to the 2

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year mark and be placed on the list. The action must be set down as in days of yore.

- no case can be tried unless it has undergone ADR (unless the Pre-Trial Conference Judge dispenses with it).
- review cases at a Status Hearing under Rule 48. At the two year mark, the Status Hearing Notice goes out. Counsel can either set the action down or request a hearing. In lieu of the hearing, they may, 72 hours before the hearing, avoid attendance if they submit a plan or timetable for readiness. If it is approved, they need not attend. Otherwise, there is a hearing. If the parties are not ready at that time the Master may set a timetable.
- Trial Scheduling Court is abolished. Trial dates are

set at the Pre-Trial Conference.

- in complex cases, one can have a designated Master or Judge appointed under Rule 37.

The theory is that this will free up the Masters' time to do things like Motions, Status Hearings and Settlement/Pre-Trial Conferences. This will free up Judges to do more trials. Providing trials reduces the "shelf life" of the cases and induces settlements. Reducing shelf life reduces the amount of motions work.

THE NEXT STEP:

Justice Winkler intends to seek input from various bar organizations in the hope that this will lead to a Practice Direction which will be more meaningful. It is expected that this Practice Direction will come into force early in the new year.

CONCLUSION:

Response to the Regional Senior Justice is mixed. For some, this is a welcome initiative; a long over-due return of control of the case to the litigant with minimal control or interference by the court. To others, this represents a return to the "bad old days" where delay was used as a tactical weapon, and a party's ability to move a case along was severely limited. To others, still, this is a strong reaction to real problems. This latter group wonders whether the new proposal doesn't "throw the baby out with the bathwater". Ultimately, the changes outlined will come, largely because the court must invoke them in response to restrictions in funding by the Provincial Government.

Our role is to do what we can to make sure that what is done, best serves the needs of our clients.