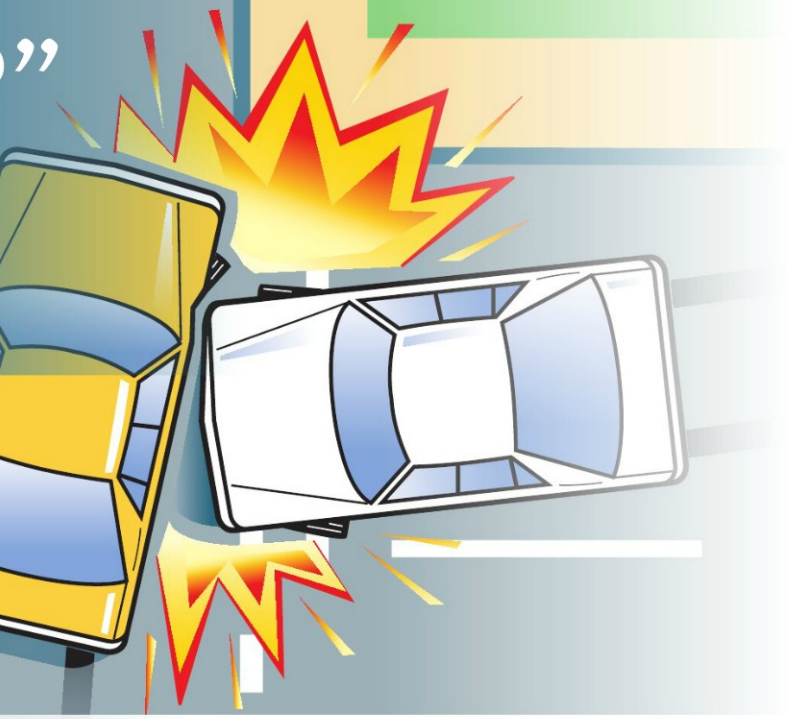
What exactly is an "Accident?"

Conflicting decisions have made the interpretation about as clear as mud

BY DANIEL STRIGBERGER



When I was growing up in Toronto, my family would often drive through the city to get from Point A to B. Unfortunately, there were times when we would drive past an automobile accident scene. I remember my mother always saying, "I sure hope no one was hurt in that accident." Now as an insurance lawyer, whenever I see an accident (which may result in a new file), I usually say, "I sure hope no one was hurt (too much) in that accident."

Today, more often than not with a new automobile claims file, I receive a request to provide a legal opinion as to whether the claimant was involved in an "accident." These files usually involve incidents where a claimant had a slip/trip and fall near an automobile. In some cases, an individual has done maintenance work on a vehicle and has been injured. (Rarely, fortunately, they are shot at in their vehicles). As I analyze these cases, I find that my mother is never able to help me on those files.

The reason why automobile insurers ask these questions is that a claimant who seeks statutory accident benefits from an insurer must establish that they were involved in an "accident". Luckily for us, section 3 (1) of the SABS defines "accident", as follows:

"'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."

In other words, for an accident benefits claimant to have been in an "accident", he or she would have to prove:

1. There was an incident involving an automobile; and
2. The use or operation of an automobile directly caused the impairment.

To an outsider, this definition might seem simple and clear enough for claimants and the industry to handle. A pedestrian struck by a car would have access to accident benefits. So would an occupant of a truck or a motorcycle involved in some sort of collision. My mother would agree.

However, there has been a number of arbitration decisions over the years from the Financial Services Commission of Ontario (FSCO) that would make anyone – even those people who have never seen an automobile – question whether they also qualified for accident benefits. Who would have thought that an inebriated 62-year-old man injured while doing a headstand against a stripper pole, in the back of a moving limousine bus, would be found to have been in an "accident?" (See *Whipple v. Economical Mutual Insurance Co., 2011*).

So how are automobile insurers and their lawyer supposed to apply this "clear as mud" definition? (Often in circumstances where truth is stranger than fiction). In some cases, I get asked whether the vehicle in question is an "automobile," but that is a topic for another article.

As a history major, I feel compelled to explain how we got here: The Bill 164 SABS defined "accident" to include those incidents where an automobile directly or "indirectly" caused an impairment. With the introduction of the

Bill 59 SABS, the Legislature narrowed the definition by removing the word "indirectly" from it.

Defining "accident" has been the subject of debate ever since the Bill 59 SABS narrowed the definition of "accident." The Court of Appeal set the Bill 59 era test in *Chisholm v. Liberty Mutual Group* and in *Greenhalgh v. ING Halifax Insurance Co.*, as follows:

1) Did the incident arise out of the use or operation of an automobile (the "purpose test"); and
2) Did such use or operation of an automobile directly cause the impairment (the "causation test")?

In *Greenhalgh*, the causation test was broken down into two further tests:

1) Was the use or operation of the vehicle a cause of the injuries?
2) If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things?" In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?

With that in mind, consider the following facts (from real-life cases stemming from accidents after November 1, 1996). Decide for yourself whether the following claimants were involved in an "accident" (answers are below):

(A) The applicant was attempting to repair his wife's van inside his garage. In the process, he removed the van's gas tank to access the fuel pump. An arc from an air compressor inside the garage ignited the gasoline vapours and resulted in the applicant receiving burns to his head and body.

(B) The applicant was watching his vehicle being repaired at a garage. While he was watching, gasoline spilled from the gas tank of his vehicle and ignited, causing him injuries.

(C) The applicant decided to stop for gas at a station and check his vehicle's tires. He was injured after falling on some ice at the gas station.

(D) The applicant drove to a Canadian Tire store to purchase the new wiper blades. She parked her car in the lot without incident and walked into the store without incident. On her way back to her car but before arriving there, and at least 20 feet from it, she slipped and fell on the ice that had accumulated in the lot.

(E) The applicant was one in a group of cyclists training for a charity event. One of the roads on the route was blocked. Their ride guide led them to the sidewalk and directed them to follow him in a single file. While travelling east on the sidewalk, the cyclists encountered a parked automobile. While manoeuvring around this automobile, the applicant fell off her bicycle and sustained injuries.

There has been a number of arbitration decisions over the years from the Financial Services Commission of Ontario (FSCO) that would make anyone – even those people who have never seen an automobile – question whether they also qualified for accident benefits.

More recently, in *Dominion of Canada General Insurance Company v. Prest (2013 ONSC 92)*, the claimant had parked his vehicle in his parking spot at his residence in order to wash it. He exited the vehicle and walked to the end of his car. He then tripped over a concrete curb that "sticks out" from the wall of the parking garage. He stated his right hand was touching the car when he tripped. There was no issue he suffered an impairment as a result of the incident.

As a result of the incident, Prest applied to Dominion for accident benefits. Dominion then sought a determination in Court as to whether the claimant was involved in an accident. The judge found that Prest failed to meet the "purpose" test. He held that the incident or accident did not result from the ordinary and well known activities to which automobiles are put. The judge ruled that at the time of the incident the vehicle was neither being used nor operated (it was parked).

The judge noted: "A parking spot at one's residence is typically where a car is put when there is no intent to use it." He also found that the causation test was not met. He found that the car's use had ended without injury. The trip-and-fall was an intervening act.

So how then do we apply the law to the facts?

It is apparent in the case law that each case is fact specific. When presented with an unusual claim, insurers should investigate the incident early in the claims process and collect as much information as possible about how the incident occurred.

It is important to remember that not every slip and fall in a parking lot will be considered to be an "accident." Not every explosion in a garage will be considered to be an "accident." And hopefully not every incident involving a limousine stripper pole will be considered an "accident."

Answers: A – No accident -- Khan v. Certas Direct Insurance Co., [2008] O.F.S.C.D. No. 120 (FSCO Arb.)

B – Accident -- Umer and (Lloyd's) Non-Marine Underwriters, [2003] O.F.S.C.I.D. No. 52 (FSCO Arb.)

C – Accident -- Saad v. Federation Insurance Co. of Canada, 2004 CarswellOnt 6040 (FSCO App.)

D – No accident -- Nickerson v. Security National Insurance Co., 2012 CarswellOnt 15737 (FSCO Arb.)

E – Accident -- DiMarco v. Chubb Insurance Co. of Canada, 2012 CarswellOnt 1946 (FSCO Arb.)

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