

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of April 27 – May 1, 2009

Direct or indirect “use or operation of an automobile” doesn’t include a drive-by shooting

***Russo v. John Doe*, 2009 ONCA 305 (CanLII)**

On April 21, 2004 the plaintiff was rendered paraplegic in a drive-by shooting and initiated a claim against the unidentified driver and her own automobile insurer pursuant to the OPCF 44R (Family Protection) Endorsement. On appeal from a motion dismissing her claim, the Court of Appeal held that neither the provisions of the standard auto policy nor the Endorsement applied .

Insurance policies must be interpreted in a manner that is consistent with the reasonable expectations of both insurers and insureds. In order for the OPCF 44R to apply, the at-fault driver’s tort must be committed as a “motorist”. This requires the application of two tests to the facts of a case: the Purpose Test and the Causation Test. The former was met in this case, the latter was not.

The Purpose Test requires consideration of “whether the ... claim is in respect of an inadequately insured tortfeasor whose fault occurred *in the course of using a motor vehicle as a motor vehicle and not for some other purpose*”. The test was met in this case as the driver used the vehicle to transport guns and the men who fired the guns to the front of the restaurant where Ms. Russo was shot. It is the actual manner in which the vehicle was used which was relevant and not the reasons the driver chose to operate the vehicle. The driver’s use of the van was a well known and ordinary use of an automobile.

The Causation Test requires “an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made. The claimant must implicate the vehicle in respect of which coverage is claimed in a manner that is more than merely incidental or fortuitous.” In this case, the driver’s liability in tort was based on his operation of a motor vehicle and not on the firing of a gun. The operation of the motor vehicle neither directly nor indirectly caused Ms. Russo’s injuries. The firing of shots was an independent action that broke the chain of causation

Implications:

The issue of “use or operation of an automobile” arises in both tort and accident benefit contexts. This decision will not likely impact entitlement to accident benefits, since the entitlement criteria to accident benefits is narrower than that set out in the OCPF 44R Endorsement.



The endorsement permits recovery for injuries directly or indirectly caused by the use or operation of an automobile. The SABS gives entitlement to accident benefits for injuries directly caused by the use or operation of an automobile.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>.

Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site. If you have questions or comments about this edition of the newsletter, contact Karen Hulan at Legate & Associates: khulan@legate.ca