



Appeal P10-00020

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ECONOMICAL MUTUAL INSURANCE COMPANY

Appellant

and

DANIEL WHIPPLE

Respondent

BEFORE: David Evans

REPRESENTATIVES: Christopher Schnarr for Economical Mutual Insurance Company
Martin Tiidus for Mr. Whipple

HEARING DATE: March 8, 2011; further written submissions were provided by June 10, 2011

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated November 15, 2010 is hereby dismissed.
2. An appeal legal expense hearing shall be requested within thirty days of the date of this decision, accompanied by a Bill of Costs and written submissions, as set out below.

David Evans
Director's Delegate

October 6, 2011

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

On June 26, 2009, Mr. Daniel Whipple attempted a headstand against a stripper pole in a moving limo bus, suffering catastrophic injuries. His insurer, Economical Mutual Insurance Company, appeals the Arbitrator's decision that under the *SABS-1996*¹ this incident was an "accident."

II. BACKGROUND

As set out by the Arbitrator, Mr. Whipple was an avid golfer and skier who had organized annual golf trips with fellow members of the private Lookout Golf Club. The men, described by Mr. Whipple as respectable business and professional men over the age of 50, were returning via Interstate 90 from a day of golfing in New York State when Mr. Whipple was injured at about 10:30 in the evening.

The group had rented limo buses several times from Premier Limousine. The incident occurred in a 24-passenger luxury limousine coach tall enough for passengers to stand and move around in. The Arbitrator noted that it was advertised as a "Party Bus," and the website advertised "we can provide service and transportation needs to fit the client requests." The Arbitrator found the limo bus was a party vehicle whose amenities included "a pole with a light above it in the center of the wrap-around seating in the rear of the vehicle, referred to by all of the witnesses, including the owner and driver of the vehicle, as a 'stripper pole'... [T]he pole was an amenity of the vehicle, was intended to be used as one, and was so used by various members of the group on the evening of the incident."

Mr. Whipple had requested the limo bus so that the men could move about freely and generally party, including bringing their own alcohol on board. While Premier did not provide alcohol, it did not discourage its consumption and drivers were instructed to accommodate clients' wishes

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

“within reason,” which included stops to pick up duty-free alcohol. The Arbitrator found “the ability to consume alcohol on the bus while in transit was an ordinary and expected use of the vehicle, was part of the service provided by the company, had been chosen for that reason by the group in the past, and was one of the reasons Mr. Whipple chose it on behalf of his group on this occasion.” The incident happened on the return trip, by which point the witnesses agreed that the group was fairly inebriated, but the Arbitrator found that the level of intoxication did not concern the driver.

During the return trip, the passengers started playing a game of one-upmanship around the stripper pole, which started with some of the men “amusing themselves and the others with a rudimentary form of ‘pole dancing,’ i.e., cavorting around the pole at the rear of the bus, mimicking the antics of strippers.” Mr. Whipple testified that “each one was trying to ‘out-do’ or one-up the others, raising the ante so to speak, and this is likely what prompted him to attempt a headstand and one-up them all.” As the Arbitrator noted, Mr. Robert Dick, the owner of the bus, considered the use made of the pole by members of Mr. Whipple’s group to be an “expected use” that was not prohibited, as did the driver, Mr. Richard Berry. There were also few restrictions on the use of the bus, and

Mr. Dick and Mr. Berry confirmed there was no written policy or contract dictating how the vehicle could be used, nor were any rules or policies communicated to Mr. Whipple when he rented the vehicle. There was no evidence of any waiver – express or implied. The only rules appear to have been that illegal activity (such as drugs, and presumably, underage drinking) and smoking were not allowed, and if the driver became aware of any inappropriate or unsafe conduct (overly boisterous horseplay, for example), it was within his discretion to stop the vehicle and either warn the clients, or terminate the ride if necessary, which would involve leaving the clients to find their own way home...

After one man slid down the stripper pole upside down, Mr. Whipple tried to top that antic with his headstand. Mr. Whipple had done headstands on other occasions before, such as the previous year against a wall of a condominium. The Arbitrator noted that “Mr. Whipple is a tall, slim man. He considered himself a fairly athletic (and adventurous) golfer and skier and stated he was confident he could do a headstand, did not think it would be dangerous to attempt it, and would not have done it if he had thought it was a dangerous thing to do.”

The Arbitrator set out the description of the headstand by David Ripley, a fellow passenger, as follows: “Mr. Whipple walked normally up to the pole, placed his head on the floor, braced himself with his hands and flipped his legs in the air, caught one foot on the pole, missed it, his arms gave out, his forehead hit the floor and his neck snapped.” There was no evidence of any sudden swerving or braking of the bus before or after the incident, and neither the bus’s driver nor its owner had ever seen anyone attempt such a headstand. Although the driver described the ride as “smooth,” Mr. Whipple testified that its movement was like the swaying motion in a train. Mr. Whipple fractured his neck, resulting in incomplete quadriplegia. He will spend the rest of his life in a wheelchair.

The Arbitrator found that Mr. Whipple’s headstand met the purpose and causation tests of an “accident,” discussed below. She found that “Although Mr. Whipple’s use of the limo bus was unprecedented ... it was in the context of the group’s activities in the vehicle that evening and within the scope of its function as a mobile party vehicle.” She found no break in the chain of causation because “in this context, the headstand, though unusual, flowed naturally from the increasingly creative activities around the pole, which was an integral part of the vehicle.” She found that the activities around the stripper pole were “part of the ordinary course of things” for the party bus, and that once the activities around the pole began, they continued in an unbroken chain, the last link being Mr. Whipple’s headstand. In addition, she found “the dominant feature was the party bus itself and its integral stripper pole, in operation and used for the purpose it was designed.” Finally, she found the motion of the party bus itself directly contributed to Mr. Whipple’s injuries.

Accordingly, the Arbitrator found Mr. Whipple had been in an accident and was entitled to statutory accident benefits.

III. ANALYSIS

The term “accident” is defined in s. 2(1) of the *SABS* as meaning “an incident in which the use or operation of an automobile directly causes an impairment.” Two tests apply in considering whether the incident was an accident. The use-or-operation purpose test set out in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 SCR 405, requires that the incident result from

the “ordinary and well-known activities to which automobiles are put.” The causation test set out in *Chisholm v. Liberty Mutual Group* (2002), 60 OR (3d) 776 (CA), requires that the use or operation must in turn directly cause the impairment, meaning – especially in this case where the Insurer argues that Mr. Whipple’s headstand was an intervening act or broke the chain of causation – that the incident was “part of the ordinary course of things.”

The *Amos* purpose test asks: Did the accident result from the ordinary and well-known activities to which automobiles are put? The Supreme Court in *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46, added that this formulation imports a causation element (“results from”) which is duplicative of the causation test. The Supreme Court at para. 11 suggested instead using the formulation “Did the accident occur *in the course of* the ordinary and well-known” activities to which automobiles are put? By way of background, in *Amos*, the Appellant was attacked by a gang while driving and was seriously injured when shot while distancing his van from the assailants. In *Vytlingam*, the tortfeasors had driven to and from an overpass from which they dropped a boulder they had been carrying in the vehicle. In both cases, the purpose test was met.

The Supreme Court at para. 19 in *Vytlingam* illustrated what the *Amos* purpose test excludes, such as using

a car as a diving platform ... or retiring a disabled truck to a barn to store dynamite (which explodes), or negligently using the truck as a permanent prop to shore up a drive shed (which collapses, injuring someone)... In none of these cases could it be said that the motor vehicle was being used as a motor vehicle. That is the sort of aberrant situation that the *Amos* purpose test excludes, and nothing more.

The Court of Appeal in *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 OR (3d) 338, gave as a further example of an unforeseen or unprecedented use “an accident which arose where an insured attempted to lift his car solely to show his strength, thereby hurting his back.”

The purpose test is the most relevant test in this case. Mr. Whipple met the purpose test just before and just after the incident as a passenger in the limo bus. However, in and of itself that would be insufficient, as nobody would normally expect a passenger to simply stand up and

attempt a headstand against a pole, stripper or otherwise. But in this case, in light of the type of vehicle in question, its amenities, and the activities inside it, the purpose test is fundamental to the Arbitrator's decision. Thus, Mr. Whipple's actions can be seen as occurring *in the course of* the ordinary and well-known activities of that particular limo bus. Indeed, as was noted by the Director's Delegate in *CGU Insurance Company of Canada and Irving*, (FSCO P03-00022, November 29, 2004), it is important to properly frame the purpose question to establish an additional link to the injury, which the Arbitrator did in her analysis of the purpose test.

The importance of the purpose test to this case is shown by the fact that the Arbitrator repeated much of it in the causation portion of her decision, even referring back to pages of her decision dealing with purpose. Thus, if Mr. Whipple's attempted headstand was part of the limo bus's purpose, there could be no break in causation, which is essentially what the Arbitrator said:

[The headstand] was the culminating activity in a series of antics where the participants, all occupants of a motor vehicle, were entertaining each other by using an obvious amenity in the vehicle, while the vehicle was in use on a highway, exactly as the vehicle was intended to be used. In this particular case, that was the 'motoring purpose' of that particular type of vehicle.

Seen in that light, the headstand was not severable from Mr. Whipple's other use of the bus as a passenger, which certainly met the purpose test.

This case asks the interesting question of what is covered when an apparently aberrant situation occurs inside a moving vehicle, where the amenities and context provide a stimulus to exactly that situation. Mr. Whipple's attempted headstand in the limo bus as it drove along I-90 seems hardly less aberrant than treating a car as a diving platform, and his attempted one-upmanship to prove his agility seems similar in principle to attempting to lift a car to show one's strength.

On balance, I am not persuaded that the Arbitrator erred in her answer to that question, which is that almost any behaviour that seems unpredictable and unreasonable in one context could be deemed to be an accident within another specific context such as that in this incident.

In doing so, the Arbitrator referred back to the principles discussed in *Stevenson v. Reliance Petroleum Ltd.*, [1956] SCR 936. Rand J. stated that the "ordinary and well-known activities to

which automobiles are put” applies to *different* forms of accommodation or service, and depends upon *its* ordinary features. This point was reiterated in *Bouder and ING Insurance Company of Canada*, (FSCO P07-00034, July 17, 2008), where the Director’s Delegate noted that what is important in cases under the *SABS* is the objective “ordinary and well-known” use *of the type of vehicle in question*. So, as the Arbitrator did in this case, you have to look at the particular vehicle to see what type of ordinary and well-known activities it could be put to.

And this vehicle was marketed as a party vehicle, where the users faced few restrictions on their use of the limo bus. Advertising alone makes for a well-known use, and that use could be pretty much any type of “party activity.” No rules or policies were communicated to Mr. Whipple when he rented the bus, nor was there any evidence of any express or implied waiver. The fact that the vehicle was referred to as a “Party Bus” designed to provide “service and transportation needs to fit the client requests” supports the Arbitrator’s determination that Mr. Whipple’s activities were not outside of the scope of the vehicle’s use and operation. The Arbitrator found that the freedom, privacy and amenities within the limousine coach were viewed as provided, permitted and tolerated by the owner. Specifically, the stripper pole was seen by the Arbitrator to be an invitation to the exact forms of activities that occurred, although the performance of a headstand was admittedly somewhat unusual. (A point I will return to is the Arbitrator’s statement that, absent the stripper pole, the vehicle might have been simply the location or opportunity for the headstand and thus insufficient to establish causation.) Accordingly, the Arbitrator’s finding that the group’s partying activities were integral to the ordinary use of the limo bus was well supported by the evidence before her, so that Mr. Whipple’s headstand flowed from and was not outside of the party vehicle’s ordinary use. Accordingly, I am not persuaded that the headstand falls so far outside of what is expected in an insurance contract that it does not meet the *Amos* use and operation test. That is why I see no error in her finding.

Turning now to the *Chisholm* causation test, as already noted in the context of this case it is whether the incident was “part of the ordinary course of things.” This test was essentially answered by the consideration of the purpose test, so I will not dwell on it except for the Arbitrator’s discussion of the dominant feature test.

The Arbitrator duly addressed the case law. She referred to the Black's Law Dictionary test of the "active, efficient cause" relied on since *Petrosoniak and Security National Insurance Company*, (FSCO A98-000198, November 2, 1998), and the analogies of a falling row of blocks (*Chisholm*) or a net of causation (*Leyland Shipping Company Limited v. Norwich Union Fire Insurance Society, Limited*, [1918] HL (E) 350). The Arbitrator then discussed the three guiding principles in *Greenhalgh*: "but for," intervening act, and dominant feature.

First, the Court in *Greenhalgh* noted that the "but for" test can act as a useful screen. This incident passes the "but for" test, since but for the pole being there Mr. Whipple would not have attempted the headstand.

Second, the Court asked: if the use or operation of the 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"? This is the essential portion of the causation test that was answered by the purpose test. The Arbitrator found that in Mr. Whipple's case, "the activities around the 'stripper pole' were 'part of the ordinary course of things' for the party bus, and that once the activities around the pole began, they continued in an unbroken chain, the last link being Mr. Whipple's headstand." In light of her findings regarding the purpose test, I see no error.

Third, the Court noted that *in some cases* "it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident." The Arbitrator found that the incident met the test because the dominant feature was the party bus itself and its stripper pole. I do not find this analysis particularly helpful in this case, in that it merely recaps the earlier discussion. As I understand the comments in *Chisholm*, it is not necessary to consider the dominant feature in every case. Furthermore, the Arbitrator really applied the dominant feature test in considering the effect of the limo bus's motion on the incident, which then unduly broadened the reach and scope of this decision.

By way of background, the dominant feature test arose in *Heredi v. Fensom*, [2002] 2 SCR 741. A bus driver propped up a passenger after seating her by placing one end of the crutches she used beneath her right shoulder and bracing the other end against the interior wheel well of the bus.

He then drove so aggressively that his driving injured her shoulder.² In that sense, the operation of the vehicle was specifically in issue because it injured the passenger. Thus, the dominant feature of the incident was the way the driver drove. In this case, Economical argued that there was nothing in the driver's driving that directly contributed to Mr. Whipple's injuries. In response, and after mentioning *Heredi*, the Arbitrator found that on the basis of "ordinary driving experience, informed common sense and basic physics" there is an "appreciable difference" between a stationary vehicle and one in motion on a highway:

By appreciable, I mean the motion, however slight, can be transmitted to the occupant of a moving vehicle, regardless of whether or to what extent they may be aware of it. To the extent the parties still dispute whether the motion of the party bus itself directly contributed to Mr. Whipple's injuries, I reject Economical's argument that it would not have played any role.

I understand the common-sense notion that if Economical argued that Mr. Whipple's headstand was so outlandish precisely because it was performed in a moving limo bus, then conversely the limo bus's motion must surely have played a role in the fall. However, the problem with the Arbitrator's finding is that it could apply to any antic in any moving vehicle anywhere at any time. The strength of the Arbitrator's decision up to this point was its specificity, dealing with the party antics that were induced by that particular stripper pole in a vehicle that was advertised as a party limo bus. However, this finding means that any failed antic would meet the causation test, because it could be argued there were multiple causes for the antic's failure: the person's own recklessness and an even imperceptible motion of the vehicle. (Here, as noted, there was no swerving or braking or anything the driver did to directly contribute to the fall.) The end result of the Arbitrator's reasoning is that it suffices to simply be in a moving vehicle when you try an antic, thus contradicting the principle that mere location does not establish causation.

However, that does not affect the overall determination made by the Arbitrator. The Arbitrator addressed the very specific nature of this limo bus and the activities inside it. The use was ordinary and well-known because the limo bus had been advertised as a party vehicle and

² As of May 12, 2011, Ontarians in Ms. Heredi's situation – suffering injuries in a public transit vehicle like a municipal bus but involving no collision – cannot claim or recover statutory accident benefits but can sue the owner and driver of the vehicle for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile: ss. 267.5 (1) and (6.1) and ss. 224(1) and 268(1.1) of the *Insurance Act*.

because antics around a stripper pole can be seen not just at the usual venues but also through popular television shows, internet videos, or advertisements for pole dancing exercise classes.

As for the broader meaning of this case, which Economical was obviously concerned about, especially since it was not even the insurer of the limo bus itself but just of Mr. Whipple, the Arbitrator herself pointed out that “Economical’s argument that the vehicle was merely the location or opportunity for the headstand ... might have been the case had there been no stripper pole.” Therefore, not any incident involving a headstand or any other dangerous antic against anything at all is necessarily an “accident.” The case only involves the ordinary and well-known use of a stripper pole in a party limo bus

For these reasons, the appeal is therefore dismissed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an appeal legal expense hearing shall be requested within 30 days of the date of this decision in accordance with Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – August 2011).

The request shall be accompanied by a Bill of Costs describing the expenses claimed, the services received and the costs, as well as submissions regarding entitlement to and/or the quantum of such expenses.

David Evans
Director’s Delegate

October 6, 2011
Date