IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration
B E T W E E N:

TTC INSURANCE COMPANY LIMITED

Applicant

and

LOMBARD CANADA

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: March 21, 2011

Counsel:

Norma Priday for the Applicant

Harry P. Brown for the Respondent

Award

Introduction

The parties appointed me pursuant to the *Arbitration Act, 1991,* and Section 7 of Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute as to which of the applicant and the respondent has the higher priority obligation to pay Statutory Accident Benefits ("SABS") to Anisha Charania.

The arbitration was conducted pursuant to the terms of a written arbitration agreement signed by the applicant on March 16, 2011, and by the respondent on March 21, 2011. The arbitration was also conducted pursuant to a July 9, 2010 letter from Densem ADR Solutions Inc. to counsel for the parties.

Factual Background to the Issues[1]

Anisha Charania was injured on January 4, 2009. The injury occurred while she was being wheeled in her wheelchair from her apartment building at 10 Teesdale Place, Scarborough. She was being wheeled by Nasir Zaidi, the operator of a Wheel-Trans van. When her injury occurred, the intended destination of Ms. Charania and Mr. Zaidi was a van parked on the street in front of Ms. Charania's apartment building. This van was owned by Dignity Transportation Inc., and was deployed as a Wheel Trans vehicle pursuant to a contract between Dignity Transportation and TTC. For convenience, this vehicle will be referred to in this Award as "the Wheel Trans van". At all material times the Wheel Trans van was insured by Lombard Canada under a policy of motor vehicle liability insurance.

As a result of her injury, Ms. Charania applied to TTC for SABS. TTC paid SABS to Ms. Charania, and served a Notice of Dispute Between Insurers on Lombard seeking to recover the SABS paid to Ms. Charania, interest thereon, and its recoverable expenses in adjusting the claim.

The Issues

The first issue to be decided is the extent of my jurisdiction as an arbitrator appointed pursuant to section 7 of Regulation 283/95 under the *Insurance Act*.

[1] These facts are derived from the documentary and *viva voce evidence,* and are not in dispute between the parties.

The second issue is whether Lombard has priority in accordance with section 268 of the *Insurance Act* in the handling of Ms. Charania's SABS claim.

Jurisdiction

I will address the jurisdiction issue first. There is disagreement between the parties as to the extent of my jurisdiction.

TTC's position is that my jurisdiction is limited solely to deciding which of TTC and Lombard has the higher responsibility to "manage" the SABS claim made by Ms. Charania. TTC submits that in deciding this question I do not have jurisdiction to answer questions of law that may go to the issue of SABS entitlement. I only have jurisdiction, in effect, to choose between the insurers in the dispute as to which of them should pay. Specifically, TTC argues, I do not have jurisdiction to deal with the question of law; whether an "accident" occurred, as that term is defined in Regulation 403/96 of the *Insurance Act,* The Statutory Accident Benefits Schedule on or after November 1, 1996 ("the SAB Schedule"). TTC submits that only FSCO arbitrators or judges are empowered to deal with this question.

TTC submits that Lombard should have immediately accepted priority from TTC for Ms. Charnia's SABS claim, and then if Lombard had wished to dispute Ms. Charania's entitlement to SABS it could have applied to FSCO or to the courts to have that issue determined.

Lombard's position is that as the first insurer to receive the SABS application, TTC had a choice. It could either have disputed Ms. Charania's

entitlement to SABS at FSCO or through the courts, or it could have paid SABS to Ms. Charania and followed the priority dispute process set out in Regulation 283/95. By electing to follow the Regulation 283/95 pay and dispute process however, Lombard argues that TTC must prove Lombard's liability to pay SABS in accordance with the requirements of section 268 of the *Insurance Act*. Such proof requires a resolution of the issue of whether an accident occurred, as that term is defined in the SAB Schedule.

Lombard submits that an arbitrator appointed pursuant to section 7 of Regulation 283/95 does have authority to deal with the question of law concerning whether an accident occurred, and must address that question to resolve the priority dispute.

The parties agreed, and I find, that by operation of section 17 (1) of the *Arbitration Act, 1991* ("*AA*") I may rule on my own jurisdiction to conduct the arbitration. Therefore, I heard argument from the parties on the jurisdiction issue at the outset of the arbitration hearing. In accordance with section 17 (7) AA I elected to deal with the question of my jurisdiction in my Award, rather than as a preliminary issue. I did so because I believe the balance of convenience favoured this method. The parties had prepared extensively for the hearing, and assembled significant amounts of material. In addition, two witnesses had been summoned to the hearing and were in attendance to testify. Under the circumstances, I felt that that it made more sense to proceed with a full hearing on all issues, and rule on the jurisdiction issue in my Award.

Regulation 283/95 provides a dispute resolution mechanism to deal with disputes between insurers as to who should pay SABS. Section 7 provides for arbitration under *AA* in the event that the insurers cannot agree. An arbitrator may be appointed by the court, or more commonly, upon agreement of the parties. In this case, both Lombard and TTC agreed to appoint me as sole arbitrator for this dispute. Once appointed, I have the jurisdiction to decide the dispute conferred upon me by *AA*, and the arbitration agreement entered into between the parties.

The essence of TTC's argument is that an arbitrator appointed pursuant to the Regulation 283/95 dispute process does not have authority to determine questions of law the answers to which may bear on whether a SABS claimant is entitled to benefits from a particular insurer. TTC submits that an arbitrator may only decide which of the insurers is highest in priority to pay.

I am unable to agree with this submission. First, the law is clear that an arbitrator appointed under Regulation 283/95 has authority to determine any question of law that arises in connection with the dispute. This authority is well articulated by Brown J. in *Primmum Insurance Co. v. ING Insurance Co. of Canada*[2] (*Primmum v. ING*).

Primmum v. ING dealt with a challenge to the jurisdiction of an arbitrator appointed pursuant to Regulation 283/95. The issue was whether the arbitrator had the jurisdiction to determine if a person was a "named insured" under a policy issued by Primmum. This was a pure question of law involving statutory interpretation.

[2] (2007) CarswellOnt 616, Ont. Sup. Ct.

In upholding the arbitrator's decision that she had authority to determine the question of law, Brown J. conducts a thorough review of the broad scope of an arbitrator's powers under AA.

It is noteworthy that he starts his analysis by citing section 1 of Regulation 283/95 and section 7, AA. He states as follows:

> *Section 1 of the Dispute Regulation provides that 'all disputes as to which insurer is required to pay benefits* ***under section 268 of the Act*** (arbitrator's emphasis) *shall be settled in accordance with this Regulation.' Section 7 goes on to provide:* (quotation of section 7 omitted) *On their face, these provisions give broad jurisdiction to an arbitrator to deal with questions related to a priority dispute. No restrictions are placed on the type of question that an arbitrator may consider in the course of dealing with a dispute.*[3]

Brown J. goes on to cite the provisions of section 8 (1) and (2), AA, which state that an arbitrator may determine "…***any*** (Brown J.'s emphasis) *question of law that arises during the arbitration*, and that questions of law are to be determined by the arbitrator unless the arbitrator applies to the court for determination.[4]

Brown J. concludes his analysis of the law by stating: *"When one combines the powers given to an arbitrator under the Dispute Regulation with those under the Arbitration Act, in my view an arbitrator appointed to deal with a SAB priority dispute possesses the jurisdiction to consider and decide any question regarding the dispute, including any question of law or mixed fact and law,* ***such as those that arise in the course of interpreting a statute***

[3] *Ibid.,* at para. 10.
[4] *Ibid.,* at para. 11.

(arbitrator's emphasis) *or contract. If a party disagrees with the arbitrator's determination of such a question, it may appeal to this Court."*[5]

In this case, TTC submits that I should simply choose between TTC and Lombard as insurers who both have a legal obligation to pay SABS, without addressing any legal issues that might be raised by section 268 of the *Insurance Act*. In my view, this begs the question as to whether there is a legal obligation to pay SABS. It must be established first that an insurer has liability to pay SABS under section 268, before it can be decided whether that obligation stands in higher priority to that of another insurer.

The dispute resolution process requires the arbitrator to examine the criteria set out in section 268. As noted by Brown J. in *Primmum v. ING*, the very first section of Regulation 283/95 refers to the requirement of an insurer to pay benefits **under section 268**. Section 2 (1) of Regulation 283/95, the pay and dispute section, also refers to the requirement of an insurer to pay benefits **under section 268**.

The references are to section 268 as a whole. Therefore, in my view, an arbitrator must consider the application of all parts of section 268 in resolving a section 283/95 dispute between insurers.

In this case Lombard submits that once TTC elected to pursue the pay and dispute mechanism set forth in regulation 283/95 in dealing with Ms. Charania's SABS claim, then consideration must be given to the provisions of 268 by the arbitrator in determining whether Lombard is liable to pay SABS.

[5] *Ibid.,* at para. 12.

I agree. Paraphrasing Section 268 (1), it states that every Ontario motor vehicle liability policy shall provide SABS, **subject to the terms, conditions, provisions, exclusions and limits** set out the SAB Schedule. In my opinion, this means that I must consider whether on the facts of this case the relevant conditions specified in the SAB Schedule exist that would render Lombard liable to pay SABS.

TTC submits that Lombard was obliged to take over the payment of SABS from TTC when it received TTC's Notice of Dispute Between Insurers. Then, if so advised, Lombard could have applied to FSCO or the courts for a determination of whether Ms. Charania was entitled to the payment of SABS.

I do not agree. In my opinion, Lombard's argument on this point (see p. 3, *supra)* is correct. When Ms. Charania's claim was presented to TTC, it was TTC who had a choice as to which course to pursue. It could have taken the position that Ms. Charania was not entitled to the payment of SABS and applied to FSCO or the courts to determine the issue. TTC could have disputed Ms. Charania's SABS entitlement at FSCO or in the courts while at the same time protecting any rights it might have against Lombard through its Notice of Dispute Between Insurers that was served on Lombard on or about July 27, 2009. Arbitration would not have had to have been commenced until July 27, 2010.

In the meantime, if FSCO or the court determined the entitlement issue in TTC's favour, there would be no need to arbitrate with Lombard. If FSCO or the court determined the entitlement issue against TTC, then it could have pursued priority arbitration with Lombard. It seems unlikely to me that Lombard would

have been permitted to re-litigate the same issues that FSCO or the court had decided since it would have been in exactly the same position as TTC. In that case, the essential elements of issue estoppel would have existed.

The situation would have been the same had Lombard been presented with Ms. Charania's claim. Lombard could have challenged Ms. Charania's entitlement at FSCO or through the courts. If Lombard had chosen instead to pay and dispute under Regulation 283/95, it would have had to prove that the requirements of 268 were satisfied *vis a vis* TTC in all respects to succeed in transferring the claim to TTC.

Regardless, I do not have to decide what might have happened had the facts been different. In this case Ms. Charania presented her claim to TTC. Both TTC and Lombard had a sufficient nexus to the claimant requiring a response in the event that either of them was presented with a SABS claim. By electing to pursue the pay and dispute mechanism set out in Regulation 283/95, TTC cannot foreclose any defence Lombard has based on the requirements of section 268, nor can it compel Lombard to assume responsibility for the claim, and make Lombard choose whether to dispute Ms. Charania's SABS entitlement at FSCO or through the courts.[6]

To successfully transfer this SABS claim to Lombard, TTC has the burden of proving on a balance of probabilities that the requirements of section 268 are met. This may involve an examination of the very same issue (was there an

[6] If Lombard did assume responsibility for the claim from TTC on the basis of a Notice of Dispute from the TTC without challenging whether the section 268 requirements had been satisfied, query whether it would then be estopped from disputing Ms. Charania's entitlement at FSCO or through the courts.

accident?) that TTC could have argued at FSCO or in the courts when presented with the claim, but in my view that is what the Regulation 283/95 procedure and section 268 require.

For the foregoing reasons, I conclude that I have jurisdiction to deal with any question of law, including questions of statutory interpretation, raised by Lombard in its defence to TTC's priority dispute application.

Was There an "Accident"?

I will now deal with the matters to be considered regarding the merits of the issue of whether Lombard is liable as the priority insurer to pay SABS to Ms. Charania.

The "*Application"* section of the SAB Schedule sets out in section 3 (2) that "…*the benefits set out in this Regulation shall be provided* ***in respect of accidents*** (arbitrator's emphasis) …". The various benefits available in the SAB Schedule require an insurer to pay SABS to an insured person who has sustained an impairment "…***as a result of an accident*** (author's emphasis)…".[7]

Therefore, in deciding whether Lombard has liability to pay SABS pursuant to section 268, it must be determined whether the event during which Ms. Charania sustained her injuries was an "accident".

"Accident" is defined in the SAB Schedule as, "…*an incident in which the use or operation of an automobile directly causes an impairment…"*[8]*.* The

[7] This wording applies to all available benefits set out in the SAB Schedule. *Cf.* sections 4, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 25, 26, 28,
[8] The SABS Schedule, section 2 (1).

question that will determine the result of this arbitration then is, did the use or operation of the Wheel Trans van directly cause an impairment to Ms. Charania?

The Evidence

The following exhibits were introduced into evidence at the arbitration hearing[9]:

Exhibit 1, A: Photograph taken from inside the lobby area showing close-up of front entrance doors to Ms. Charania's apartment building (shows Wheel Trans driver Nasir Zaidi standing just outside an open front entrance door).

Exhibit 1, B: Photograph taken facing the street showing view of ramp in front of Ms. Charania's apartment building (shows Wheel Trans driver Nasir Zaidi standing facing the camera near lower end of ramp).

Exhibit 1, C: Photograph taken facing the street showing close-up view of ramp in front of Ms. Charania's apartment building (shows Wheel Trans driver Nasir Zaidi in half-squat position at lower end of ramp gesturing downward).

Exhibit 1, D: Photograph taken facing the street showing view of ramp in front of Ms. Charania's apartment building (shows Wheel Trans driver Nasir Zaidi standing near lower end of ramp. Photo bears the mark of a hand-drawn, rectangle with an "X" inside).

[9] Exhibit 1, A – D located at tab 2 of the Respondent's Document Brief, Exhibit 2, A – C located at tab 6 of Respondent's Document Brief, Exhibit 3 located at tab 1 of Respondent's Document Brief, Exhibit 4 located at tab 4 of Respondent's Document Brief.

Exhibit 1, E: Photograph taken facing Ms. Charania's apartment building showing the entire entrance way to the building including the ramp.

Exhibit 2, A: Message from Doug Taylor, Quality Assurance Manager, Co-op Cabs, to Peter Huth of TTC, containing report of Co-op Cabs supervisor on duty January 4, 2009.

Exhibit 2, B: January 8, 2009, E-Mail message from Doug Taylor to David Lo Presti, Transit Planner – Contracted Services, Wheel Trans Operations, July 10, 2009 E-Mail message from David Lo Presti to Peter Huth forwarding the January 8, 2009 message.

Exhibit 2, C: January 4, 2009 E-Mail message from Bill Graham, Shift Supervisor, TTC Wheel Trans Operations to various recipients, January 6, 2009 E-Mail message from David Lo Presti to Doug Taylor.

Exhibit 3: Undated, handwritten, signed statement from Wheel Trans driver Nasir Zaidi.

Exhibit 4: Notice to Submit to Arbitration.

In addition to the exhibits, *viva voce* evidence was received from the SABS claimant, Anisha Charania, and from the Wheel Trans Driver, Nasir Zaidi.[10]

Ms. Charania testified that she had a prosthetic leg on the right side. She obtained the Wheel Trans telephone number when she was at St. Johns Rehabilitation Hospital. To be approved for Wheel Trans service she had to

[10] I have not summarized the evidence of the witnesses in its entirety, only those portions that in my view have relevance to the issue in this case.

register, be interviewed, and provide a medical reason supporting her need for Wheel Trans service. She successfully qualified for the service and she was logged into the TTC Wheel Trans dispatch system.

When she required service, she would telephone the TTC Wheel Trans reservation number to book an appointment. Ms. Charania would tell TTC Wheel Trans her desired time for pick-up, her destination, and the time she wished to return home. TTC Wheel Trans would decide what type of vehicle to send. She made sure to tell them that she used a manual wheelchair. Because of this she was not able to exit her building to be picked up without the assistance of the Wheel Trans driver. This meant that the Wheel Trans driver would have to come to the lobby of her apartment building to pick her up, wheel her to the Wheel Trans van, and load her into the van while she was in the wheelchair. When she returned home, the driver would unload her from the van in her wheelchair, and wheel her into the lobby of her building. She had traveled by Wheel Trans on a number of occasions before the January 4, 2009 incident, and the routine was the same on each occasion.

She testified that on January 4, 2009, the Wheel Trans driver (Nasir Zaidi) came to the lobby of her building to pick her up with the intention of wheeling her in her wheelchair to the Wheel Trans van. It was her evidence that Mr. Zaidi was pushing her wheelchair from behind as they descended the ramp shown in the Exhibit 1 photographs. She noted that the Wheel Trans van was parked at the street curb more or less in line with the low end of the ramp. The Wheel Trans van had its loading ramp down.

Ms. Charania testified that while Mr. Zaidi was pushing her "*fast"* in her wheelchair down the ramp towards the Wheel Trans van something occurred causing her to fall forward out of her wheelchair and onto the ground. Being a manual wheelchair she said it did not have a seat belt. She does not recall the ramp being icy. Her evidence was that "*it was very clear that day"*. She estimated that this event occurred when she was about 5 feet to 10 feet from the Wheel Trans van. She was shown Exhibit 1-D and confirmed that the hand-drawn rectangle containing the "X" was approximately where the event occurred.

Mr. Zaidi testified that he receives the schedule of clients to be picked up the night before the day of the scheduled pick up. In this case, Ms. Charania was on the schedule that he received. To pick up Ms. Charania, he knew that he would have to leave the Wheel Trans van, walk to the lobby of her apartment building, wheel Ms. Charania in her wheelchair to the Wheel Trans van, and load Ms. Charania in her chair into the van. This service was part of his job duties.

Mr. Zaidi stated that upon arrival at Ms. Charania's apartment building he parked the Wheel Trans van at the curb on the street in front of the apartment, more or less in line with the bottom of the ramp next to the outside stairs to the building. He set up the Wheel Trans van loading ramp at the designated door to the vehicle. Then he went to the lobby to get Ms. Charania. Before starting to wheel Ms. Charania from the lobby of her building he offered her his "posture belt", which is a seat belt for the wheelchair. He said that the Wheel Trans drivers carry these with them in case they are required. Ms. Charania declined the belt, according to Mr. Zaidi.

Mr. Zaidi's evidence was that he walked backward down the ramp in front of the apartment building pulling Ms. Charania in her wheelchair. He stated that he had handled "hundreds" of wheelchair transports and always moved the people backwards. This day while doing so he slipped on a patch of ice. He denied being in a rush. When this happened, Ms. Charania "stood" in her wheelchair, then she fell forward out of the wheelchair onto her knees on the ramp. He confirmed through the use of the Exhibit 1 photographs where these events took place. He identified photograph 1, B as his location when his foot slipped. He identified photograph 1, C and 1, D as showing the location where Ms. Charania fell onto the ramp out of her wheelchair. Mr. Zaidi estimated the distance from where Ms. Charania fell to the ramp out of her wheelchair, to the Wheel Trans van parked at the curb, to be approximately 10 metres (about 33 feet).

Mr. Zaidi testified that he assisted Ms. Charania back into her wheelchair, and then continued wheeling her to the Wheel Trans van. He loaded her into the van without further incident. At that point she requested that he call an ambulance and he did so.

There are some differences in the evidence of Ms. Charania and Mr. Zaidi with respect to the details of how she was wheeled down the ramp, whether she was offered a posture belt, the condition of the ramp, and what caused her to fall out of her wheelchair. For the purposes of the issue that I must decide I do not think that these differences are relevant.

Their testimony coincides on the important facts for the issue to be decided. They both agree that Mr. Zaidi had to come to the lobby of the building to collect Ms. Charania and then wheel her to the Wheel Trans van. They both agree that an incident occurred while Mr. Zaidi was wheeling Ms. Charania's wheelchair down the ramp in front of her building, their destination being the Wheel Trans van. They both agree on the location of the incident. Specifically, they both confirm that the incident occurred at the location identified in Exhibits 1, C, and Exhibit 1, D (clearly indicated by an "X").

Their estimates of the distance between the location of the incident and the Wheel Trans van parked at the curb differ. Ms. Charania estimated the distance as between 5 and 10 feet. Mr. Zaidi estimated the same distance as approximately 10 metres (about 33 feet).

I do not have available to me a precise measurement of the distance from the identified location of the incident to the position of the Wheel Trans van on the day of the incident. Referring to the photographs in Exhibit 1 I would say that the distance would be closer to Mr. Zaidi's estimate than Ms. Charania's, but in my view the result in this case does not turn only on the exact distance between these points. The result must be determined from an analysis of whether in all of the circumstances the incident that occurred can be said to have been directly caused by the use or operation of the Wheel Trans van.

The Law

The test set out above is, as Director's Delegate Draper has aptly noted, "*…easily stated, but difficult to apply. Causation is an elusive concept…each case will turn on its particular facts…*(and involves) *a line drawing exercise.*"[11]

The Ontario Court of Appeal has established guidelines to be followed in determining whether the use or operation of an automobile has directly caused an impairment. In *Chisholm v. Liberty Mutual Group*[12] the Court interpreted the effect of 1996 changes to the SAB Schedule whereby the word "indirectly" was eliminated from the definition of "accident". It concluded that this change which left only the word "directly" in the definition meant that:

> *An insured person seeking accident benefits…must meet a narrower or more stringent causation requirement…Legal entitlement to accident benefits…requires not just that the use or operation of a car be a cause of the injuries, but that it be a direct cause.*[13]

It cited with approval the Black's Law Dictionary test of direct cause used by courts and FSCO arbitrators, "*The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source.*"[14]

In applying the test to the facts in *Chisholm*, the Court found that the random shooting of Mr. Chisholm while he was driving his car was an intervening act, independent of the vehicle's use or operation, which broke the chain of causation.

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[11] *Saad* v. *Federation Insurance Co. of Canada,* 2004, Carswell 6040, paras. 12, 13.
[12] [2002] O.J. No. 3135.
[13] *Loc. Cit.* paras. 11, 26.
[14] *Loc. Cit.* para. 30.

In *Greenhalgh* v. *ING Halifax Insurance Company*[15] the Court of Appeal elaborated on its analysis in *Chisholm* and provided further guidance on how to determine whether the impairment was directly caused by the use or operation of an automobile.

The Court held that the definition of accident in section 2 (1) of the SABS sets out a test involving two questions:

1. Did the incident arise out of the use or operation of an automobile?
2. Did such use or operation of an automobile directly cause the impairment?

The first question is the "purpose" test. What purpose was the automobile being used for at the relevant time? Did the incident arise out of the well known activities to which automobiles are put?

The second question is the direct causation test. In addressing the question of direct causation the Court stated that, "*What will amount to direct causation will depend much on the circumstances*."[16] It noted three considerations that may provide useful guidance in determining whether direct causation has been established.

The first of these considerations is the "but for" test. This test screens out factors that are irrelevant to the outcome. A factor can be a factual cause for an event and satisfy the "but for" test; however, this will not necessarily make it a direct cause.

[15] 2004 CanLII 21045.
[16] *Loc. Cit.* para. 12.

Secondly, in some cases there may be intervening causes that cannot be said to be part of the ordinary course of use or operation of the automobile.

Thirdly, in other cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident. If not, the link between the use or operation of the automobile and the impairment is too remote to be direct.

In *Greenhalgh t*he Court notes its own caution from *Chisolm* against applying these considerations exactly as they have been used in earlier cases because they have been used in cases where the definition of accident was not as stringent as in 2 (1) of the SABS.

The facts of *Greenhalgh* were that the claimant's car became stuck on a rock after she made a wrong turn down a country road. The claimant and her companion left the vehicle to seek help. They became lost in the woods and some 9 or 10 hours later fell into a river. The claimant developed frostbite from exposure and later suffered traumatic amputations.

The Court held that the purpose test was met on the basis that it was an "ordinary and well known activity" in the use or operation of an automobile for it to become stuck while being driven. The Court then considered whether this use or operation was a direct cause of the impairment.

With respect to causation, the facts satisfied the but for test because but for the fact that the claimant's car got stuck on a rock, she would not have been wandering lost in the woods and fallen in the river, ultimately suffering frostbite.

The Court next considered whether the insurer could be absolved of liability to pay SABS because of an intervening act that could not fairly be considered a normal incident of the risk created by the use or operation of the car.

The Court reviewed three cases it found helpful in dealing with the intervening cause question.

The first case considered was *Hanlon* v. *Guarantee Co. of North America*.[17] The SABS claimant, Hanlon, was involved in a car accident with another vehicle. Both drivers exited their vehicles. Hanlon was injured when the other driver struck him in the head with a cell phone. The Court noted that the Directors Delegate determined that "*…the causal relationship…between the use or operation of the automobile and the* (incident in which Mr. Hanlon was injured) *was too incidental or remote to be covered by automobile insurance.*"[18]

The Court quotes the Director's Delegate's conclusion:

> …*The incident involving the use or operation of the automobile ended with no one being injured. No further consequences were inevitable or linked to any ongoing use or operation of an automobile. Sometime later, in a location removed from the 'incident', there was a verbal confrontation between the two men outside their vehicles. At that point, Mr. Daly attacked Mr. Hanlon. No automobile was the target of the attack, was used in the attack, or contributed to Mr. Hanlon's injuries. I conclude that…the connection between the use or operation of the automobile and the injury is not sufficient to be covered by automobile insurance.*[19]

[17] [1997] O.I.C.D. No. 43 (Ont. Ins. Comm., affirming [1995] O.I.C.D. No. 172.
[18] *Supra*. Note 15, para. 41.
[19] *Loc. Cit.* para. 41.

Next the Court considered *Alchimowicz* v. *Continental Insurance Co. of Canada.*[20] Mr. Alchimowicz was driven to a beach, left the car, and about twenty-five minutes later he dove off a dock and suffered serious injuries. As with the *Hanlon* case, this case was decided under the legislation that still included the broader "directly or indirectly wording". The Court of Appeal held that there was no question that the injuries were not directly caused by the use or operation of an automobile. The Court also concluded that the incident was not indirectly caused by the use or operation of an automobile.

In *Greenhalgh*, on the issue of intervening cause, the Court of Appeal also considered the FSCO arbitrator's decision in *Mahadan* v. *Cooperators General Insurance Co.*[21] The facts of that case were that the SABS claimant, Mahadan, parked in his parking spot at his condominium. He retrieved some grocery bags from the trunk. As he turned away from the vehicle his left foot twisted in a groove in the pavement. He fell and injured himself. The Court cites the following passage from the arbitrator's decision:

> *I find that while Mr. Mahadan's motor vehicle led him to the location of his injury, his injuries, nevertheless, were sustained from a new and independent source other than his car. I find that what caused Mr. Mahadan to trip and fall was the crack in the pavement. This crack in the pavement had nothing to do with the use and operation of a motor vehicle, but was there because of the construction work being done on the parking lot. I, therefore, find that the crack in the pavement was the intervening feature that ultimately caused his*

[20] [1996] O.J. No. 2989 (C.A.).
[21] FSCO A00-000489, March 15, 2001)

injury. Accordingly, I find that Mr. Mahadan was not involved in an 'accident' as defined in section 2 (1) of the Schedule.[22]

The Court of Appeal in *Greenhalgh* applied the reasoning in these cases to determine the direct causation issue. It concluded as follows on the intervening act consideration:

Here, as in Hanlon, Alchimowicz and Mahadan, the use of the car had ended without injury being suffered, the insured had physically left the car; no automobile contributed physically to the insured's injuries; and there was temporal distance between the end of the use of the car and the injuries. As in Hanlon, the problem with the car could be said to have led to the injuries, but one could not say that it caused the injuries. As in Mahadan, the factor that physically caused the injuries, in the present case the weather, was unrelated to the use or operation of the automobile.[23]

Lastly, on the dominant feature consideration, the Court of Appeal first observed that this factor had to be applied with caution. The case from which it emanated, *Heredi v. Fensom*[24], dealt with the much broader legislative wording, "*damages occasioned by a motor vehicle*". The Court stated that the cases dealing with this factor indicate that a factor is a dominant feature, "*where it is the aspect of the situation that most directly caused the injuries.*"[25] The court concluded that on the facts of *Greenhalgh,* the dominant feature of the insured's injuries was exposure to the elements, and that the use of the motor vehicle was ancillary to that injury.

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[22] *Supra*. Note 15, para 43.
[23] *Loc. Cit.* para. 44.
[24] 2002 SCC 50 (CanLII).
[25] *Loc. Cit.* para 49.

Subsequent cases have applied the direct causation test as articulated in *Chisolm, and Greenhalgh*. In *Connors* v. *Kingsway General Insurance Company*[26]. The court dealt with the situation similar to that in *Chisolm.* Ms. Connors was a passenger in a taxi. Ice was thrown in the direction of the taxi cab by a group of teenagers. Ms. Connors saw the ice coming and was injured when she violently turned her head. The ice hit the passenger window and shattered it, but she was not injured by the glass. The court concluded that the throwing of ice could not be said to have been directly caused by the use or operation of the motor vehicle. The direct cause of Ms. Connors' impairment was the throwing of the ice by the teenagers in the direction of the passenger window. This act was the dominant feature of causation and Ms. Connors' travel in the taxi was incidental or ancillary to the incident.

In *LaFond* v. *Allstate Insurance Company of Canada*[27], the Court dealt with a situation similar to that in *Hanlon*. The SABS claimant LaFond encountered another driver on the road whom he considered to be driving erratically. He pulled in behind the other driver when the driver entered a driveway, exited his vehicle and confronted the other driver. This confrontation led to the SABS claimant being severely beaten. In addressing the issue of whether an intervening act had occurred (the assault) breaking any connection between the use or operation of the automobile and Mr. LaFond's injuries, LaFond's counsel argued that "road rage" has become part of the "ordinary course of things" in today's driving environment. Hence counsel argued that it

[26] (2005) CanLII 36258 (ONSC)
[27] (2006) CanLII 40104 (ONSC)

was a normal incident to the risk created by the use or operation of a motor vehicle. The Court did not accept this argument. Instead, the analysis in *Connors* was applied. The Court found that he dominant feature of causation was the assault. The Judge emphasized the applicability of the *Greenhalgh* test, stating that one should look to "*the aspect of the situation that most directly caused the injuries*".

The Judge concluded that the fact that the use or operation of the vehicle may have precipitated or motivated the confrontation, there was insufficient connection between the use or operation by Mr. LaFond of his vehicle and his injuries, to say that they were directly caused by his use or operation of the vehicle.

Two recent cases involving assaults committed on SABS claimants while using their vehicles have resulted in different conclusions because the vehicle had direct connection to the injuries. In *Downe*r v. *Personal Insurance*[28], the SABS claimant, Downer, had pulled into a gasoline station to obtain fuel. He had returned to his vehicle after paying for the fuel. He was sitting in the driver's seat separating his money when suddenly he was accosted by men at the driver's and front passenger's side windows. At least one man entered his vehicle and struck him. He recalled at least two men attempting to pull him from the vehicle. He was able to change gears in his vehicle and escape the gasoline station. As he was driving out of the station he thought he might have run over one of the assailants. When he arrived home he noticed injuries to his face from where he had been struck. He was also scared and nervous.

[28] (2011) CanLII 4980 (ONSC)

In this case the Court concluded that Mr. Downer's use of his car had not ended before he suffered injury. His engine was running when he was assaulted. The Court found that Mr. Downer's injuries were connected to his use or operation of his vehicle because they were caused by assailants who were attempting to seize possession and control of his vehicle.

The Court also focused on the fact that Mr. Downer had developed depression, anxiety and post traumatic stress disorder. It noted that Mr. Downer was upset by the fact that he might have run over one of the assailants with his automobile while escaping.

On these facts the court found that there was a direct causal connection between Mr. Downer's use and operation of his automobile and his injuries sufficient to say that an "accident" had occurred within the meaning of the SABS.

A similar conclusion was reached in *Martin* v. *Freeze Night Club*[29]. In this case the SABS claimant, Martin, was accosted as he was standing behind his vehicle in the parking lot of a nightclub. He was physically assaulted, pepper sprayed, and forced into the trunk of his vehicle. When the assailants were unable to operate Mr. Martin's standard transmission vehicle they forced him into the front seat, struck him again, and made him assist them in shifting the gears. The vehicle was driven in this manner for a few minutes and then stopped at another parking lot. Mr. Martin was forced out of the vehicle. After a further assault by involving both a physical beating and pepper spraying, the assailants drove off, running over Mr. Martin's foot in the process. The issue in this case was two fold. There was a question whether Mr. Martin could pursue a tort claim

[29] (2011) Can LII 7145 (ONSC)

under the unidentified provisions of his own automobile policy. To meet the causation test to advance the claim it was necessary to demonstrate that his injuries arose *"directly or indirectly"* from the use or operation of his automobile.

The second question was whether he was entitled to SABS. A Court noted that the SABS causation test was stricter in that it required the use or operation of the automobile to be the *direct* cause of the injuries. Therefore, the Court proceeded with an analysis of the facts in relation to whether Mr. Martin satisfied the SABS test because if he could satisfy this stricter test then he would also qualify under the tort test.

The Court followed the approach *Downer* in finding that there was a sufficient connection between Mr. Martin's use and operation of his vehicle and his injuries to say that they were directly caused by such use or operation. The Judge noted that Mr. Martin's vehicle was "*part of the instrumentality through which the assaults were committed*".[30] The Judge also noted that he had been struck by his own car as the assailants were departing the scene of the last assault.

The case of *Kopas* v. *Western Assurance Company*[31], although not directly on point for the issue in this case, does provide some interesting analysis of the causation test and how that relates to the use or operation of vehicles.

In *Kopas* the facts were that a father and grandfather had driven to the parking lot of the location for a local Heritage Festival. The adults exited the vehicle and began unloading the vehicle. The young child who had accompanied

[30] *Loc. Cit.,* p. 639
[31] (2008) Can LII 53135 (ONSC)

his father and grandfather also exited the vehicle and walked some distance over to a chain link fence to watch a train pass. After the train passed the young boy started walking back to the vehicle when he was struck and killed by another vehicle backing from a parking space. A claim was advanced against Western Assurance as the insurer of the Kopas vehicle alleging that Western was responsible for the costs of defending a claim brought against the parent and grandparent. Western Assurance argued that its policy did not respond because the accident did not arise out of the "*use and ownership*" of the Kopas vehicle.

There were two issues in the case. The first was whether the unloading of the vehicle by the parent and grandparent was sufficiently connected to the child's death to constitute "*use and ownership*" of the vehicle, thereby engaging Western's policy. Justice Corbett concluded that it was not careless unloading, but the careless failure to watch the young boy that caused the accident.

With respect to the question of "disembarking passengers", Justice Corbett states that "*use and ownership of the vehicle includes taking reasonable care to ensure that passengers may disembark safely".* On the facts of *Kopas,* Justice Corbett concluded that the duty did not extend past the "*immediate area*" of the car in the parking lot. She noted that the young boy had navigated his way across the lot to a chain link fence and had stood there for awhile watching the train. Based on this, the duty of care associated with disembarking passengers had ended. She comments "*these circumstances occur on a continuum, and it may be very difficult to know precisely where the line will be drawn in any one case*." She concluded that the young boy had "*safely landed from the car, and*

supervising him thereafter was a duty that arose from general duties to take care of small children, and not a special duty imposed upon a motorist."

With respect to the causation test, Justice Corbett states that this can be "traced back" to *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd*.[32] Moore's Taxi was contracted to transport developmentally delayed children to and from school. The drivers were required to drop children off on the same side of the street as their homes so that the children would not have to cross the street after getting out of the taxi. The driver allowed a child to get off on the wrong side of the street and the child was struck while crossing the road.

The Supreme Court of Canada held that the incident did not arise from the use or operation of the taxi. Justice Ritchie stated as follows:

> *It is possible to have a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the use and operation of a motor vehicle … and the injuries sustained by the claimant … In this case the motor vehicle was stationary at the time of the accident and the chain of causation originating from its use was severed by the intervening negligence of the taxi driver whose failure to escort the boy across the street was the factor giving rise to … liability.*[33]

In describing what he found to be a break in the chain of causation, Ritchie J. stated the following:

> *It was after the boy had left the stationary vehicle and was standing unharmed on the sidewalk facing the potential peril of crossing the street alone that the taxi driver became seized with an entirely*

[32] (1960), 22 D.L.R. (2 d) 264.
[33] Loc. Cit. p.268

different kind of duty which had nothing to do with the use or operation of a motor vehicle but rather involved him getting out of it and conducting the boy safety to his home, and it is by reason of the breach of this duty that the law imposes liability on the respondent.[34]

It is noteworthy that Justice Corbett states that "*The Supreme Court of Canada has not expressly overruled the decision in Moore's Taxi, and has clearly adopted the 'causation principle' in the case.*" She goes on to state:

On the authority of this case, the taxi driver owed no duties to his passengers, as a "motorist", as soon as the passenger got out of the vehicle and was standing on the sidewalk. The driver and his employer did owe duties under the terms of the contract for providing this service, but not, apparently, as an insured "motorist".

In applying the law in Moore's Taxi to the facts before her, Justice Corbett concluded that the father and grandfather of the young boy "*… owed him common law duties to supervise him, independently of their status as "motorists*".

Justice Corbett goes on however, to analyze three subsequent cases which, on similar facts, distinguish *Moore's Taxi* and come to different conclusions.

In *Wu v. Malamas*[35], on facts strikingly similar to *Moore's Taxi* the British Columbia Court of Appeal came to a different conclusion, distinguishing *Moore's Taxi*. A mother was driving her two young children to school. She could not stop her car in the usual place, on the same side of the street as the school. She

[34] Loc. Cit. p.267
[35] (1985), 21 D.L.R. (4) 468 (B.C.C.A.)

double parked across the street from the school. Her youngest child got out of the car and started to cross the street on her own when she was struck by another vehicle. The mother, Ms. Wu was found 65% responsible. The issue was whether her automobile insurer was liable for her portion of the damages.

The British Columbia Court of Appeal distinguished *Moore's Taxi* by saying that "*the double-parking, the position of the vehicle, combined with the reasonable forseeability that the child would disobey instructions which had been impressed upon her, work together to bring about the unfortunate consequence*."[36]

The British Columbia Court of Appeal relied upon a Quebec case, *Legault v. Cie D'Assurance Generale de Commerce*[37] to distinguish *Moore's Taxi. Legault* distinguished *Moore's Taxi* on the basis that the child in *Moore's Taxi* had safely arrived at the sidewalk on the side of the street where he had disembarked before crossing the street. In *Legault*, the child left the vehicle and started directly across the street without "landing safely" on a sidewalk first. Justice Corbett's comment with respect to this distinction was "*with the greatest of respect, this is a distinction so fine that only a lawyer can love it."*

In *Lefor (Litigation Guardian) v. McClure* [38], the Ontario Court of Appeal was faced with facts similar to those in *Moore's Taxi and Legault*. Ms. Lefor was driving her 7 and 5 year old children to her mother's home where they were to be babysat for the evening. She parked on the street opposite her mother's home. She did not turn off the engine of her vehicle. She got out of her car, and walked

[36] Loc. Cit, P. 472
[37] (1967) 65 D.L.R. (2 d.) 230
[38] (2000), 189 D.L.R. (4) 89 (Ont. C.A.)

around the back of the vehicle with her two children. She was holding her son's hand who was holding his sister's hand. Disobeying instructions the youngest child proceeded to the middle of the road, stopped, and then started forward again when she was struck by the defendant's vehicle.

On these facts Justice Sharp found that:

> … *The accident occurred as a result of the use of Ms. Lefor's vehicle as a means of conveying passengers from one place to another. Ms. Lefor's decision to park her car on the opposite side of the road from her mother's house and leave it running while she and her children darted across the street placed Natasha in a situation of danger and triggered the sequence of events that resulted in Natasha's injuries.*[39]

Moore's Taxi, Lefor, Wu, and Legault, were considered by Justice Binnie in the Supreme Court of Canada's decisions, *Vytlingham v. Farmer,* and *Herbison v. Lumberman's Mutual Casualty Co.* [40]

The facts in *Vytlingham* involved two men who, high on drugs and alcohol, drove to an overpass above a highway carrying a large boulder in their pick-up truck. They threw the rock off the bridge catastrophically injuring the plaintiff Vytlingham who was riding in a vehicle on a highway below the overpass. In *Herbison*, the defendant drove into the woods in his pick-up truck. He exited his truck, leaving it running. He shot a gun at a target thinking it to be a deer while instead it was a hunting companion.

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[39] *Loc. Cit.*, p. 94.
[40](2007), 53 C.C. L.I. (4) 31, (2007), 53, C.C.L.I. (4) 31

In both of these cases the Supreme Court of Canada ruled that the incidents did not involve the use and ownership of a vehicle. In *Vytlingham*, the defendant's vehicle was not involved in the incident, it merely transported the perpetrators to the scene with the rock. Although one of the defendants could be deemed a "motorist", he was not at fault as a motorist in dropping the rock off of the overpass.

The same conclusion was reached in *Herbison* where the Court held that the shooting of the hunting companion was an act independent of use and ownership of the vehicle used to transport the hunter to the scene of the incident.

Justice Binnie notes with interest the difference in the results of *Moore's Taxi* on the one hand and *Lefor, Wu and Legault,* on the other hand. He comments that in *Moore's Taxi,* Moore's held a policy of insurance which would respond to the claim provided that the claim did <u>not</u> arise from the use or operation of the motor vehicle.

Justice Binnie notes that the court's finding in *Moore's Taxi* triggered liability on the part of the insurer. In the *Lefor, Wu, and Legault* cases, liability on the insurer was triggered by the opposite finding that the incident did involve the use and operation of a vehicle. After reviewing the cases and the basis for the findings of the various courts, Justice Binnie concludes as follows:

> *These cases are very fact specific. However, if the vehicles involvement is held to be no more than incidental or fortuitous, or "but for", and is ruled severable from the real cause of the loss, then the necessary causal link is not established… it is in the ordinary of course of things for a child dropped on the wrong side of the street to "dart" to the other side to get to her grandmother's*

> *house, with all the foreseeable risks that such a crossing entails. Lefor, in my view, is a very different case from the present case. In Derksen*[41]*… the Court accepted that an intervening act may not necessarily break the chain of causation if the intervention can be considered "a not abnormal incident of the risk" created by the use of the vehicle or is likely to arise in the "ordinary course of things" (para. 33). The same point is made by Laskin J.A. in Chisholm … at para. 29. This reasoning applies in Lefor. The mother's post-vehicle conduct was so closely intertwined with her negligent parking that from the perspective of causation, direct or indirect, the two were not severable.*[42]

In *Kopas,* after conducting a thorough review of this case law, Justice Corbett concludes as follows:

> *I conclude that the "causation test" from Moore's Taxi, as restated in Amos, is still good law. However, the precedential value of Moore's Taxi in cases involving automobile insurance is in doubt. Justice Binnie's wry observations about the "results-oriented" holding in the case, and Justice Binnie's references with approval to Wu, Lefor, and Legault, lead me to conclude that these latter three cases are a better guide than Moore's Taxi to the duties of motorists to their passengers. Justice Binnie's reference with approval to Greenhalgh also makes it clear that the ambit of insurance coverage will be limited temporally, spatially, and in terms of "direct or indirect" causative links.*[43]

In applying to the analysis of this case law to the *Kopas* facts, Justice Corbett concluded as follows:

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[41] *Derksen* v. *539938 Ontario Ltd., [2001] 3 S.C.R. 398*
[42] *Loc. Cit.*, at para. 13
[43] *Kopas* v. *Western Assurance Company*, *Supra*. Note 15, para 43

> *The case before me is closer to Greenhalgh than to Wu, Legault or Lefor. Jordan Kopas was safely out of the car. He had left the vicinity of the car and was at the fence, watching the train. By the time Jordan was returning from the fence, the duties owed to him by his father and grandfather were owed as guardians of children, and not as "motorists".*[44]

As I have stated, the *Kopas* case, and most of the cases referred to in that decision are not directly on point for the issue in this arbitration. With the exception of *Greenhalgh* and *Chisolm*, they do not deal with the "*directly causes"* and "*use or operation"* wording with which I am concerned. I do think however, that they provide some helpful analysis that is applicable to the use or operation, and causation concepts. In some instances the facts also have some general similarity to those in this arbitration.

I will now apply the principles of law that I have discussed to the facts of this case. Using the approach set forth in *Greenhalgh*, the first branch of the test to be applied is the purpose test. The question to be answered is whether the incident involving Ms. Charania arose out of the use or operation of an automobile. To answer this question I must determine the purpose for which the automobile was being used at the relevant time and whether the incident arose out of the well known activities to which automobiles are put.

I find that this branch of the test has been satisfied. The Wheel Trans van was being used for its intended purpose at the time the incident occurred. It was parked at the curb in front of Ms. Charania's residence. The loading ramp in the

[44] *Loc. Cit.,* para 44

vehicle had been set up by Mr. Zaidi and was ready for the arrival for Ms. Charania in her wheelchair. In my opinion there is no doubt that the Wheel Trans van was being used for exactly its intended purpose at the relevant time. Transporting a wheelchair patient in a wheelchair equipped van like the Wheel Trans van being used in this case is certainly a well known activity to which such automobiles are put. Therefore, I have no difficulty in concluding that the purpose test has been satisfied.

The second question involves the direct causation test, and this is much more difficult to resolve. It is trite to say, but the cases have made it very clear that whether direct cause has been established depends entirely upon the facts of each case.

The first matter I must consider is whether the preliminary hurdle of the "but for" test has been cleared. In this case, I think it is accurate to say that but for the requirement to transport Ms. Charania in a wheelchair equipped van, there would have been no need for the Wheel Trans van to have been parked at the curb awaiting Ms. Charania's arrival. Similarly, Mr. Zaidi would not have been wheeling Ms. Charania's wheelchair except to move her to the Wheel Trans van. As in the *Greenhalgh* case, here it can be fairly said that the involvement of the Wheel Trans van was sufficiently connected to the series of events leading up to Ms. Charania's injury that the preliminary hurdle of the but for test has been satisfied. As *Greenhalgh* establishes however, the "but for" test is only a screening mechanism to eliminate clearly irrelevant factors regarding an incident. A factor can satisfy the "but for" test, but not be a direct cause.

I must now consider whether the use or operation of the Wheel Trans van can be said to have set in motion a chain of events that brought about Ms. Charania's injury, without the intervention of a force coming from a new and independent source. In considering this question I may consider whether the use or operation of the Wheel Trans van was the dominant feature giving rise to the incident, or whether the link between the use or operation of the Wheel Trans van and Ms. Charania's impairment is too remote to be direct. It is also helpful to consider whether the use or operation of the Wheel Trans van was the aspect of the situation that most directly caused Ms. Charania's injuries, or was it merely ancillary or incidental to the activity being conducted when the injury occurred.

The arbitrators at FSCO have, in a series of cases, distilled the causation principles to be applied in these cases to the following list:

- The use or operation of a motor vehicle must directly cause the impairment.
- A direct cause is a cause which sets in motion a chain of events leading to a result without any later intervening act.
- Direct cause does not mean the only cause or the most immediate cause. There can be more than one direct cause of a victim's injuries, and one of the direct causes must be the use or operation of a motor vehicle.
- The motor vehicle need not come in direct physical contact with the accident victim.

- The role played by the motor vehicle must be more than just the location, opportunity or motive.
- Time, proximity, activity and risk are factors that are relevant in determining the causal connection between the use or operation of the automobile and the loss.
- The injury was a natural and reasonable incident or consequence of the use of a motor vehicle and a risk associated with motoring.[45]

In addition to the law previously discussed, I have considered this summary of how the causation principles are to be applied in coming to my decision.

Based on the findings of fact I have made from the evidence in this case, and applying the principles of law that I have set out, I find that Ms. Charania's impairment was **not** directly caused by the use or operation of the Wheel Trans van. I have set out below in my reasons for so concluding.

Mr. Zaidi had driven to Ms. Charania's apartment, parked the Wheel Trans van, and set up the loading ramp. His use or operation of the vehicle then ceased when he then left the vicinity of the van to retrieve Ms. Charania in the lobby of her building. At that point his activities were no longer those of a motorist, or the user or operator of an automobile. In leaving the parked van to take charge of Ms. Charania and wheeling her to the Wheel Trans van he was performing the function of an attendant or escort. Up to this point, as in *Hanlon,* any use or operation of the Wheel Trans van by Mr. Zaidi had not resulted in injury to Ms.

[45] *Mariano v. TTC Insurance Co (2006) Carswell Ont 5837 (Arbitrator Millar*)

Charania, and there were no “inevitable consequences” deriving from his use or operation of the Wheel Trans van that caused her injury.

In my view this case is similar to the *Kopas, Hanlon, Greenhalgh,* and *Mahadan* line of cases. It is not a *Lefor*, *Downer or Martin* type of case. There was no legally foreseeable risk associated with motoring that could have been anticipated here as in *Lefor*. One might expect a child to dart across the road to an intended destination from a car unsafely parked and in which the child had been a passenger. In this case however, the Wheel Trans van had been safely parked at the curb in front of Ms. Charania’s apartment building. She had not been in the vehicle. When the Wheel Trans van arrived and was parked, she was waiting safely in the lobby of her building nowhere near the Wheel Trans van. Her journey in the vehicle had not yet commenced.

This is not a case like *Downer* or *Martin*, where the vehicles were found to be part of the *instrumentality* of the claimants’ injuries. Here Ms. Charania had never been in the Wheel Trans van before her injury. The instrumentality of her injury was falling or being tipped out of her wheelchair onto the concrete ramp of her apartment building. The Wheel Trans van had no part to play in the event other than it was a “destination” for Mr. Zaidi and Ms. Charania when the incident occurred.

Therefore, to apply Justice Binnie’s reasoning in *Vytlingham* and *Herbison,* even though the “but for” aspect of the causation test is satisfied, the real cause of Ms. Charania’s injury was her falling from or being tipped out of her

wheelchair while being wheeled by Mr. Zaidi. The involvement of the Wheel Trans van was no more than incidental or fortuitous.

The real or direct cause arose from the condition of the ramp, Mr. Zaidi's walking speed, or perhaps both. Neither of these is related to the Wheel Trans van. The first factor is weather and/or maintenance related. The second factor relates to the manner in which he performed the aspect of his job duties as an attendant or escort, independent from any actions he had previously performed, or was going to perform as the operator of the Wheel Trans van.

As far as Ms. Charania is concerned, her use or operation of the Wheel Trans van had not commenced at the time that her injury occurred. In this respect the case is similar to *Fedrizzi v. TTC Insurance Co*.[46]

In *Fedrizzi* the claimant was walking towards a streetcar on an underground streetcar platform. The platform was slippery and she fell. There was no evidence that the streetcar played any role in the incident except that it was her destination at the time that she fell. In this case the Wheel Trans van played no role in the incident other than it was the destination of Ms. Charania and Mr. Zaidi when she fell from her wheelchair while being wheeled by Mr. Zaidi.

This latter point demonstrates that the facts of this case do not satisfy the "dominant feature" test. Being nothing more than a destination at the time of the incident, the Wheel Trans van was merely ancillary or incidental to the activity being carried on at the time of Ms. Charania's injury. It was not the aspect of the situation that most directly caused her injury.

[46] (1998), Carswell Ont 1228 (Ont. Insurance Comm.) (Directors Delegate Makepeace)

Although Ms. Charania required the assistance of Mr. Zaidi to get from the lobby of her apartment building to the Wheel Trans van, and Mr. Zaidi acknowledged that it was part of his job duties to do this, those duties do not directly connect Ms. Charania or Mr. Zaidi to the use or operation of the Wheel Trans van. Like the parent and grandparent in the *Kopacs* case, when Mr. Zaidi was wheeling Ms. Charania's wheelchair to the Wheel Trans van the duty owed by him was that of an attendant or escort, not as the user or operator of an automobile. The use or operation of the Wheel Trans van had not yet commenced as far as Ms. Charania was concerned.

The TTC has argued that once Mr. Zaidi took charge of Ms. Charania in the lobby of her building he was engaged in the act of "loading" Ms. Charania into the Wheel Trans van. TTC argues that the law is clear that loading and unloading a vehicle is part of its ordinary use and operation. TTC further submits that an incident which occurs during the course of such activities makes them a direct cause of the incident. I agree that loading an automobile is an activity that has been found in many cases to be use or operation of an automobile. I also agree that loading a vehicle could be a direct cause of an incident. I do not agree however, that loading had commenced in the circumstances of this case.

Like Madam Justice Corbett in *Kopacs*, I believe that a line must be drawn as to when loading (or unloading, as in *Kopacs)* has commenced. In my opinion, on the facts of this case, the only reasonable answer to the question of when loading of Ms. Charania into the Wheel Trans van could have commenced is to

say that it cannot have commenced in the absence of some direct contact with the Wheel Trans van or its appurtenances, such as its loading ramp.

For example, had Ms. Charania been injured while Mr. Zaidi was placing her wheelchair onto the ramp that was connected to the Wheel Trans van then I would have no difficulty in finding that her injuries were directly caused by the use and operation of the Wheel Trans van.

The TTC's urges me to find that loading commenced as soon as Mr. Zaidi took control of Ms. Charania's wheelchair in the lobby of her apartment building. In my opinion, this finding would require a far too expansive definition of loading.

Logic would compel the same finding in any case where the person with the title "operator" of a Wheel Trans van starts wheeling the intended passenger with the Wheel Trans van as the destination. This argument focuses on the control taken by the person who holds the status of operator of the Wheel Trans van. This ignores the spatial, temporal, intervening cause, and dominant feature factors the courts and arbitrators have stated must be considered for the "*directly causes"* analysis.

It also requires a finding that the operator is functioning as the user or operator of an automobile when he takes charge of the wheelchair. I have already stated that in my opinion, Mr. Zaidi was functioning in the capacity of an attendant or escort, not the user or operator of an automobile, when he was wheeling Ms. Charania's wheelchair.

The same finding the TTC seeks here would be required in every case as soon as the operator had assumed control of the wheelchair. It would make no

difference how far away from the Wheel Trans van they might be, how long the process might take, and significantly, what intervening events happened on the way.

In my view, this approach starts one down a slippery slope of trying to determine how far one can go in giving “loading” a sensible interpretation. For example, how far away from the Wheel Trans van could one be, and still be considered to be “loading” the van? What would the maximum distance be? Should it be five feet? Would five hundred feet be too much? How much time could go by from when the operator of the Wheel Trans van took charge of the person’s wheelchair before they were actually in the Wheel Trans van? What if the process was interrupted for two hours for some reason? Would “loading” still be underway? Would it be considered suspended or interrupted? What about events that happen from the time the operator takes control of the wheelchair passenger? What if the operator wheels the wheelchair passenger into an elevator that malfunctions and injury results to the wheelchair passenger as a result? Would it be reasonable to say that the injury occurred in the act of “loading” the Wheel Trans van? I think not.

In my opinion, on facts such as we have here, if one concludes that anything other than direct contact with the Wheel Trans van involving Mr. Zaidi and Ms. Charania is sufficient to find that “loading” is being performed, it is impossible to draw any line that respects the spatial, temporal, and causal requirements of the “*directly causes*” SABS wording. Therefore I find that this

incident did not occur during the course of loading Ms. Charania into the Wheel Trans van.

In summary, applying the *Greenhalgh* direct causation test, the aspect of this situation that most directly caused Ms. Charania's injuries was either the condition of the ramp (which depends on weather and maintenance factors), the manner in which Mr. Zaidi wheeled her down the ramp, or perhaps a combination of both.

Although Mr. Zaidi had previously "operated" the Wheel Trans van by driving it to Ms. Charania's apartment building and parking it at the curb, in retrieving Ms. Charania from the lobby and wheeling her wheelchair, Mr. Zaidi was performing the attendant or escort function of his job duties. He was not, at that time, performing duties connected with the use or operation of the Wheel Trans van. When the incident occurred, Ms. Charania's use of the Wheel Trans van had not yet commenced.

As Directors Delagate Draper stated in *Saad v. Federation Insurance Co. of Canada*[47], these cases involve "… a line drawing exercise."

In my opinion a slip on a possibly icy ramp by a person wheeling a wheelchair causing a person to fall out of the wheelchair some 30 feet from an automobile, is well outside the line that must be drawn to say that use or operation of the automobile directly caused any impairment suffered by the person falling out of the wheelchair.

I will conclude my analysis by returning to the case law and make reference to the Supreme Court of Canada's decision in *Heredi v. Fensom.*[48]

[47] (2004) CarswellOnt, 6040, at page 5

This case involved a passenger on a Paratransit bus. The passenger had been seat belted in place and had placed one end of her crutches beneath her right shoulder and braced the other end against the interior wheel well of the bus. The case proceeded before the courts on an agreed statement of facts which stated that the bus had been operated in a manner to cause the plaintiff's crutches to jar her right shoulder causing injury.

The question was whether this constituted "damages occasioned by a motor vehicle". It is from this case that the "dominant feature" test arose. I would pause here to remind the reader of Justice Laskin's comments in *Chisolm* whereby he cautioned careful application of the dominant feature test in SABS cases requiring direct causation because it arose from a case where the causation wording being interpreted was not nearly as strict.

In any event, I refer to this case now to reference some comments made by Mr. Justice Iacobucci who authored the Supreme Court's judgment. I believe they support my conclusion on the facts in this arbitration that there is no direct causal connection between the use or operation of the Wheel Trans van and Ms. Charania's impairments.

Justice Iacobucci stated the following:

> *The contract between the plaintiff and Trailways was alleged to contain an implied term of safe passage. I would note immediately that this alleged implied term itself is directly contingent on the proper operation of a motor vehicle. In other words, most of the imaginable breaches of this implied term would of necessity be "damages occasioned by a motor vehicle",* ***save perhaps***

[48] [2002] S.C.J. No. 48

accidents occurring while the driver was assisting the plaintiff down the sidewalk or into her home (arbitrator's emphasis).

While the case is distinguishable on its facts and the wording being considered, Justice Iacobucci's remarks are nevertheless indicative of how a Supreme Court of Canada Justice might opine on a postulated fact situation indistinguishable from the facts in this arbitration.

Conclusion

For the foregoing reasons I conclude as follows:

1. That I have jurisdiction to determine the question of law as to whether an "accident" occurred within the meaning of the SABS.
2. That the use or operation of the Wheel Trans van did **not** directly cause any impairment suffered by the SABS claimant Anisha Charania.

The consequence of my conclusions is that the TTC has not been successful in seeking to transfer responsibility for the handling of Anisha Charania's SABS claim to Lombard. Lombard is entitled to its costs of the arbitration, including the arbitrator's fees and disbursements. If counsel are unable to resolve the issue of costs I invite them to contact my Coordinator to arrange a post-arbitration conference to discuss the issue and, if necessary, to make arrangements to have me determine the costs issue.

Dated at Toronto, this 29th day of May, 2012

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Arbitrator Scott Densem