

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A11-000560

BETWEEN:

ASHOK KUMAR EMMANUVEL

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Richard Feldman

Heard: March 27 and 28, 2012, at the offices of the Financial Services
Commission of Ontario in Toronto

Appearances: Muthu Annamalai for the Applicant
Nicholaus de Koning for the Insurer

Issues:

The Applicant, Mr. Ashok Kumar Emmanuvel, claims to have sustained impairments as a direct result of having been in a motor vehicle accident on September 20, 2009. He applied for statutory accident benefits from Economical Mutual Insurance Company (“Economical”), payable under the *Schedule*.¹ Disputes arose between the parties concerning the Applicant’s entitlement to the accident benefits she claimed. The parties were unable to resolve their disputes through mediation, and Mr. Emmanuvel applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The Insurer denies that the Applicant was involved in an “accident”. A preliminary issue hearing was conducted by me on March 27 and 28, 2012 to deal exclusively with this issue.

The preliminary issue is:

1. On September 20, 2009, was the Applicant involved in an “accident”, as that term is defined in the *Schedule*?

Result:

1. The Applicant has failed to prove, on a balance of probabilities, that he was involved on September 20, 2009 in an “accident” as defined in the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

This preliminary issue was heard by me together with the same issue raised by Economical in two other cases brought by persons who were allegedly in the vehicle with this Applicant on September 20, 2009. The applicants in these three cases are Nirogini Ashokkumar, Ashok Kumar Emmanuel and Chalet Victor Emmanuel (hereinafter referred to collectively as the “Applicants”). The story they have all told about the alleged incident on September 20, 2009 has been amazingly consistent.

According to the Applicants, on the evening of Sunday, September 20, 2009, they were all together in a 2003 Honda Pilot vehicle (the “Honda”). Mr. Emmanuel was driving. His wife, Mrs. Ashokkumar, was beside him in the front passenger seat. His sister, Mrs. Emmanuel, was sitting behind his wife. Their cousin, who is not a party to these proceedings, was sitting behind Mr. Emmanuel.

They were driving westwards along Munham Gate in Scarborough, approaching the intersection with Kennedy Road, travelling at approximately 60 kilometers per hour. Suddenly and without warning, a 1999 Mazda Protegé (the "Mazda") exited a gas station/carwash from their right side and entered the westbound lane of Munham Gate just in front of their vehicle. There was no time to apply the brakes or slow down. According to the Applicants, the Honda Pilot "T-boned" the Mazda Protegé, striking the driver's door of the Protegé, causing the front air bags to deploy in the Honda Pilot. No police or other emergency response personnel attended the scene.

The driver of the other vehicle had her vehicle towed to the Etobicoke Collision Reporting Centre. Later, Mr. Emmanuel had his vehicle towed to the same reporting centre. At the collision reporting centre, Mr. Emmanuel advised the police that neither he nor any of the passengers in his vehicle had been injured. These Applicants have also consistently maintained (both to the police and to Economical) that there was no damage to the Honda Pilot vehicle prior to September 20, 2009.

Mr. Emmanuel then had the Honda Pilot towed to a facility where it was stored for about 245 days.

The Applicants share the same family doctor, Dr. Chanmugan Mahendira. He has been their doctor for many years. According to the Applicants, they each went to a walk-in clinic within one to two days and then went to see Dr. Mahendira within one week of September 20, 2009.

Mr. Emmanuel and Mrs. Emmanuel are claiming that, as a result of this incident, they suffered primarily soft-tissue injuries that have developed into chronic pain. For Mr. Emmanuel, back and knee pain are the most serious lasting problems. Mrs. Emmanuel is claiming that her migraine headaches are more severe and more frequent than they were prior to September 20, 2009. In the case of Mrs. Ashokkumar, in addition to chronic pain, she also claims to have developed psychological impairments (including post-traumatic stress disorder and serious depression) as a result of allegedly suffering a miscarriage as a direct result and within two days of this incident.

When the incident was reported to Economical, the Insurer took statements from the Applicants, began its investigations and had the two vehicles inspected. Economical's staff quickly became suspicious because the location and extent of damage to the Mazda Protegé seemed inconsistent with the damage to the Honda Pilot. It was also inconsistent with the reported speeds, direction of travel and mechanics of the accident. As a result of these investigations, Economical concluded that there was no "accident" on September 20, 2009 and requested a hearing to put the Applicants to the strict proof (on a balance of probabilities) that they were in fact involved in an "accident".

Engineers' Opinions

According to Sam Kodsi, the engineer who testified on behalf of the Insurer, the description that the Applicants have given as to how this incident occurred is completely at odds with the physical evidence.

The report from Kodsi Engineering Incorporated concludes as follows:

It is our opinion that the damage to the front end of the Honda was inconsistent with the damage to the driver side of the Mazda. This was evident by the inconsistent damage heights, profiles, severities and paint transfer marks.

It is also our opinion that the damage sustained by both vehicles was inconsistent with the reported sequence of events. If the Honda struck the Mazda at a speed of 60 km/h as reported, we would expect to see much greater damage to the driver side of the Mazda. Furthermore, the damage along the driver side of the Mazda suggested that this vehicle was stopped at impact, not travelling at 15 km/h as reported.²

During his testimony, Mr. Kodsi explained this conclusion.

First, there is inconsistency in the extent of the damage to the two vehicles. The Mazda sustained relatively mild deformation (denting) on the front driver's side panel and on the

²Exhibit 2, Tab 12, p. 1.

driver's side front door. The Honda sustained major damage to the entire front end and undercarriage.

Second, the length of the damage to the Honda (the entire length of the front end) does not match up with the shorter length of the damage to the Mazda.

Third, the height of the damage on the two vehicles is inconsistent. The damage to the front end of the Honda is significantly higher (above the ground) than the damage to the driver's side of the Mazda.

Fourth, there is significant abrasive damage underneath the front end of the Honda that cannot be explained by the mechanics of the collision as reported (no one has reported the Honda driving on top of the Mazda).

Fifth, there is no paint transfer from either vehicle to the other. There does not appear to be any paint from the Honda transferred onto the Mazda. There does not appear to be any paint from the Mazda transferred onto the Honda. Both vehicles have paint transfers of other colours which suggests, according to Mr. Kodsi, that both vehicles may have been involved in other collisions.

Sixth, if the Mazda was in the process of turning right as it entered the intersection, it is Mr. Kodsi's expert opinion that one would expect the Honda to have struck the Mazda at an angle (i.e., the vehicles would not have been perfectly perpendicular), which would have resulted in different damage to both vehicles, including some scraping as one vehicle slid past the other.

Seventh, according to Mr. Kodsi, given the relatively minor damage to the Mazda, even in a T-bone type collision, the forces involved would have been insufficient to have caused the airbags to deploy in a vehicle that struck the Mazda. When Mr. Kodsi's associate went to inspect the Honda, he found that both front seat airbags have clearly deployed. The vehicle was locked, however, and he could not gain access to the interior. His photographs reveal that a portion of the cover around the steering column has been removed and a 9-volt battery is lying

nearby on the driver's seat. According to Mr. Kodsi, it is possible to cause the airbags to deploy by applying a 9-volt battery to the part of the steering column that has been exposed in the Honda.

Finally, given the *reported* speed of the Honda (60 km/h), Mr. Kodsi would have expected much more severe damage to the Mazda than is actually present.

The Applicant's own engineer, Scott Walters, never had the opportunity to inspect the vehicles in question. He has reviewed the report from Kodsi Engineering Incorporated and has examined photographs of the vehicles taken at the collision reporting centre and photographs taken by Kodsi Engineering Incorporated.

Mr. Walters does not contest most of the conclusions of Mr. Kodsi. For instance, Mr. Walters agrees that not all of the damage on the Honda could have been caused by the accident as it has been described by the Applicants; Mr. Walters reports that Mr. Emmanuel admitted to him that much of the damage (including the damage to the underside of the right front end and on the right side of the front bumper) was pre-existing (i.e., pre-date September 20, 2009).

Mr. Walters has concluded, however, that under very specific conditions, it is possible to explain at least one of the inconsistencies in the physical evidence. According to Mr. Walters, at least *some* of the damage *could* have been caused in a T-bone type collision between these vehicles. His conclusion is based primarily upon the imprint of the number "9" on the Mazda.

Virtually the only physical evidence that is consistent with a collision between these vehicles is what appears to be an imprint of a number "9" on the side of the Mazda and some blue paint transfer consistent with an Ontario licence plate. The licence plate on the Honda includes the number "9". There is, however, a significant difference in the height of the licence plate on the Honda and the imprint of the number "9" on the Mazda; the licence plate on the Honda is about five inches higher than the imprint on the Mazda. Mr. Kodsi concluded that, given this height

difference, it was unlikely that this imprint on the Mazda was caused by an accidental collision with the Honda.

Mr. Walters responds by stating that, if the driver of the Honda applied the brakes just before impact, it might have caused the nose of the Honda to dive by about five inches and could account for the difference in the height of the imprint on the Mazda and the normal height of the licence plate on the Honda. Mr. Walters failed to mention in his report, however, that he had met and interviewed the driver (Mr. Emmanuel) several times and Mr. Emmanuel consistently denied applying the brakes prior to impact. This theory also does not resolve the other inconsistencies identified by Mr. Kodsi.

In response to the report from Mr. Walters, Mr. Kodsi states that, even if the driver of the Honda had applied the brakes just before impact (something that has always been denied), it would not have reduced the speed of the vehicle by much. In the opinion of Mr. Kodsi, this particular vehicle, loaded with four people, travelling at a speed of about 60 km/h (or slightly less), would have had a much greater impact and caused much greater damage than is evident in this case. Furthermore, the perfect imprint of the number "9" suggests that, if a vehicle with a number "9" in the licence struck the Mazda, the two vehicles were perfectly perpendicular and the Mazda was stationary (not moving at 15 km/h as reported to the police) as any forward movement would have led to a smudging of the image. Mr. Kodsi testified that a crisp imprint of the number "9" is inconsistent with both the reported direction and speed of travel of the Mazda.

Having considered all of the evidence, I find that there are simply too many unexplained inconsistencies to accept the version of events put forward by the Applicants. The width, height and depth of the damage is not consistent between the two vehicles and the nature and extent of the damage is not what one would expect given the reported direction of travel and relative speeds of the vehicles. In addition to that, there are other suspicious circumstances that I shall outline below.

Suspicious Circumstances that Raise Concerns about the Applicant's Credibility

There are a number of other suspicious circumstances that came out during this hearing. While none are conclusive of the issues in dispute, the accumulated effect is to raise serious concerns about the credibility of the Applicants -- concerns that the Applicants failed to adequately address. Examples include the following:

1. Pre-existing Damage to Honda

It is now undisputed that much of the damage to the Honda pre-existed any incident on September 20, 2009. However, that was not admitted by Mr. Emmanuel (or any of the other Applicants) until the eve of this hearing. Prior to that, all three Applicants reported to Economical and others that the Honda had no pre-existing damage.³ Clearly, this was untrue.

2. Storage of the Honda

Mr. Emmanuel had the vehicle taken to a facility that, according to the testimony of its owner, was not a body shop and could not repair vehicles. It seems suspicious to me that the vehicle was taken to a facility that could not repair it and was left there for 245 days. The owner of the facility, who testified at the hearing, could produce no paperwork concerning this transaction. These circumstances raise further concerns about the legitimacy of the Applicants' story and these concerns have not been adequately addressed by the Applicants during this proceeding.

³In fact, in November 2010, Mr. Emmanuel commenced an action in the Superior Court of Justice against The Economical Insurance Group (see Exhibit 5) for, amongst other relief, \$17,097.11 for "property damage to the Plaintiff's vehicle from the September 20, 2009 motor vehicle accident" (as well as \$15,435.00 for the cost of storing the vehicle from September 22, 2009 until May 24, 2009).

3. Reporting of Injuries/Impairments

No emergency medical or other services were called to the scene on September 20, 2009. Mr. Emmanuel reported to the police that neither he nor any of his passengers were injured in the accident. The Applicants all testified that within a day or two they all attended at a walk-in clinic but no records from that clinic have been put into evidence.

Dr. Mahendira, who testified at this hearing, has been the Applicants' family physician for many years. Dr. Mahendira testified that he saw all of the Applicants within a week of September 20, 2009. This supports at least part of the Applicants' story (i.e., the fact that they sought medical attention). I find, however, that I can give little weight to the testimony of Dr. Mahendira.

Dr. Mahendira, offered no objective evidence to corroborate that the Applicants were in fact involved in a motor vehicle accident on September 20, 2009. His notes and his testimony represent merely a "parroting" of what he was told by the Applicants. I find that Dr. Mahendira tended to accept, rather uncritically, whatever the Applicants reported to him and he simply recorded their statements and complaints in his clinical notes.

For instance, one of the more serious allegations is that Mrs. Ashokkumar has developed depression because of a miscarriage that occurred two days after and as a direct result of the motor vehicle accident on September 20, 2009. There is no actual evidence, however, that she was pregnant on September 20, 2009. The pregnancy tests that were conducted around that time are negative. A pregnancy test done by Dr. Mehendira on September 18, 2009 is negative. Mrs. Ashokkumar testified that she had to go to a clinic because of heavy bleeding on or about September 22, 2009 and suffered a miscarriage. There is no medical evidence before me to support this. Also, although she saw Dr. Mehendira just a few days later on September 25, Mrs. Ashokkumar does not mention any of this to Dr. Mehendira. She did ask him to do another pregnancy test on September 25, 2009 and it was also negative.

On October 6, 2009, she asked Dr. Mehendiria to give her a third pregnancy test and it was also negative. She never mentioned to Dr. Mehendiria any possible miscarriage when she saw him on September 25 or October 6, 2009. On November 10, 2009, Mrs. Ashokkumar advised Dr. Mehendiria that she had an abortion. Dr. Mehendiria could not confirm that Mrs. Ashokkumar was pregnant during the autumn of 2009 or that any such pregnancy was terminated, voluntarily or otherwise. In his testimony before me, Dr. Mehendiria could not explain this sequence of events or offer any medical evidence in support of Mrs. Ashokkumar's allegation that she was pregnant and lost the pregnancy because of an incident on September 20, 2009.

4. Consistency of Reporting

While consistency amongst witnesses is often a good thing, too much consistency can create the impression that a story has been manufactured and rehearsed. For example, Ms. Emmanuel was purportedly a rear-seat passenger at the time of the alleged accident. When she testified before me, she admitted that she was not paying much attention and did not see the accident about to happen. Therefore, as a somewhat distracted rear-seat passenger, one would *not* expect Ms. Emmanuel to know the exact speed of the vehicle in which she was travelling or whether the driver (her brother) applied the brakes just before the collision. Yet, exactly as reported by her brother and sister-in-law, Ms. Emmanuel has given several statements in which she states that they were travelling 60 km/h and that her brother did not apply the brakes before the collision.

5. Lack of Independent Witness

While it is not always necessary for everyone involved in an accident to testify, in a case where the Insurer is alleging misrepresentation on the part of the Applicants and is challenging whether there was an "accident" at all, one might have expected the Applicants to call the driver of the other vehicle to corroborate their story. They did not do so in this case.

CONCLUSION:

Ultimately, the onus rests upon this Applicant to establish, on a balance of probabilities, that he was involved in a motor vehicle accident on September 20, 2009. Given all of the inconsistencies in the physical evidence, the opinions of the two engineers and the numerous suspicious circumstances that raise doubts as to the credibility of this Applicant and of the other two applicants, I find that the Applicant has failed to meet his onus of proof in this case. He has failed to prove, on a balance of probabilities, that he was involved on or about September 20, 2009 in an “accident” as defined in the *Schedule*.

Richard Feldman
Arbitrator

June 8, 2012

Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is determined that:

1. The Applicant has failed to prove, on a balance of probabilities, that he was involved on or about September 20, 2009 in an "accident" as defined in the *Schedule*.

Richard Feldman
Senior Arbitrator

June 8, 2012

Date