CITATION: Miceli v. TD Insurance, 2025 ONSC 496
DIVISIONAL COURT FILE NO.: 216/24
DATE: 20250123

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Faieta

BETWEEN:	)	
Lyndsay Miceli	)	
Appellant	)	*Shane He*nry and *Nitish Bali*, for the Appellant
– and –	)	
TD General Insurance Company	)	
Respondent	)	*Jaclyn C. Kram* and *Genevieve Madill*, for the Respondent
	)	
	)	**HEARD at Toronto:** January 6, 2025

H. SACHS J.

Overview

[1] This case concerns a coffee spill in a drive-through of a restaurant. Ms. Miceli (the "Appellant") was a rear seat passenger who ordered a coffee. The lid of the coffee cup came off and the coffee spilled over her, causing burns to her body. She applied for statutory accident benefits from TD General Insurance Company (the "Insurer"). The Insurer denied her claim on the basis that the Appellant's injuries were not caused by an "accident" within the meaning of s. 3(1) of the *Statutory Accidents Benefits Schedule-Effective September 1, 2010,* O. Reg. 34/10 ("*SABS*").

[2] The Appellant appealed the Insurer's denial to the Licence Appeal Tribunal (the "Tribunal"). In a decision dated March 5, 2024, the Tribunal upheld the Insurer's denial of benefits (the "Decision"), finding that the Appellant's injuries were not caused by an accident. The Appellant applied to the Tribunal for a reconsideration of the Decision. That application was dismissed on July 30, 2024 (the "Reconsideration Decision").

[3] This is an appeal of the Decision and the Reconsideration Decision. For the following reasons, I would allow the appeal, set aside the decisions of the Tribunal and find that the incident was an accident within the meaning of the *SABS*.

Background

Events Giving Rise to the SABS *Application*

[4] On December 6, 2020, the Appellant was a passenger in the back seat of a car driven by her husband. They went to the drive-through of a McDonald's restaurant, where the Appellant ordered some items, including an extra-large black coffee. The McDonald's employee passed the cup of coffee to the Appellant's husband. He then passed it to the Appellant. Coffee started to spill on the Appellant's hands. The heat of the coffee on the Appellant's hands caused her to drop the coffee onto her lap, where it pooled causing injuries to her right leg, thigh, stomach, right buttocks, and vaginal area. The Appellant expressed the belief that the lid on the coffee cup containing the coffee was not properly secured.

[5] The Appellant had an insurance policy with the Insurer when the incident occurred. She applied to the Insurer for accident benefits. Initially, the Insurer paid her some benefits, but they eventually denied her benefits on the basis that the Appellant's injuries were not caused by an "accident" within the meaning of the *SABS*.

[6] The Appellant applied to the Tribunal for a resolution of her dispute with the Insurer.

The Decision

[7] The Decision focuses on what the Tribunal appropriately identified as a preliminary issue – namely, whether the Appellant was involved in an "accident" as defined in s. 3(1) of the *SABS*. Under s. 3(1), an "accident" is defined as "an incident in which the use or operation of an automobile directly causes an impairment."

[8] The Tribunal set out the law as to what is required to qualify as an accident within the meaning of s. 3(1). First, an applicant must meet what is known as the "purpose test", which requires asking whether the incident giving rise to the claim arose out of the use or operation of an automobile. Second, an applicant must satisfy the "causation test", which requires establishing that the use or operation of an automobile directly caused their impairments.

[9] The Tribunal found that the purpose test had been met.

[10] With respect to the causation test, the Tribunal correctly identified that this required focusing on whether the Appellant had satisfied "the following considerations in sequential order:

a. The 'but for' consideration;

b. The ‘intervening act’ consideration, which may be used to determine if some other event took place that cannot be said to be part of the ordinary course of use or operation of the vehicle; and,
c. Finally, when faced with a number of possible causes, the ‘dominant feature’ consideration focuses on whether the ordinary and well-known activity is what ‘most directly caused the injury’”.

[11] The Tribunal found that the “but for” test had been met. In other words, it agreed that “‘but for’ the use of the vehicle, the [Appellant] would not have sustained these injuries”:

[12] However, the Tribunal found that “the improperly secured lid by an employee of McDonalds was an intervening act that caused the [Appellant’s] injuries and broke the chain of causation”. As a result, the Tribunal found that “the [Appellant’s] injuries were not a consequence directly caused by the use or operation of the automobile”. They were caused by the intervening act: the improperly secured lid.

[13] The Tribunal also found that “the use or operation of the automobile was not the dominant feature of the [Appellant’s] injuries”. In its view, “the dominant feature that caused the [Appellant’s] injuries was not the use or operation of an automobile, rather it was the improperly secured lid, which resulted in the coffee spilling on her. It is trite law that direct causation requires more than the motor vehicle simply being the reason or destination for why the applicant was present at this location where the incident occurred (cite omitted).

The Reconsideration Decision

[14] In the Reconsideration Decision, the Tribunal identified that the test for reconsideration requires meeting a “high threshold”. As put by the Tribunal, it “is not an opportunity for a party to re-litigate its position where it disagrees with the Tribunal’s decision or with the weight assigned to the evidence”.

[15] First, the Tribunal dealt with the Appellant’s submission that the Decision breached procedural fairness by failing to apply the Superior Court’s decision in *Dittmann v. Aviva Insurance Company of Canada*, 2016 ONSC 6429 (“*Dittmann SCJ*”), which was upheld by the Court of Appeal. The Tribunal found that this was not a breach of procedural fairness, but an allegation of an error of law. The Tribunal dismissed this argument by reiterating its conclusion in the Decision that the facts in the case before it were distinguishable from the facts in *Dittmann* where there was no issue as to whether the lid of the coffee cup at issue was improperly secured.

[16] The Tribunal also dismissed the Appellant’s submission that it breached procedural fairness by deciding the preliminary issue on the basis of written submissions. It found that

the hearing format was within the Tribunal's discretion and that the Appellant raised no objection to the Tribunal's choice of format at the time.

[17] In addition, the Tribunal dismissed the Appellant's argument that it made "an error of fact when I determined that the coffee lid was improperly secured as there is no evidence to support this". The Tribunal found that this was "an attempt to advance new arguments". It also reiterated its view that the fact that the Appellant made and settled a tort claim with McDonald's constituted some evidence that the McDonald's employee had improperly secured the lid in question. Further, the Tribunal found that the Appellant did not dispute this fact in her submissions.

[18] As already noted, the Tribunal dismissed the Appellant's request for reconsideration.

Jurisdiction and Standard of Review

[19] Section 11(1) of the *Licence Appeal Tribunal Act*, S.O. 1999, c. 12, Schedule G allows parties the right to appeal the Tribunal's decisions to the Divisional Court.

[20] Section 11(6) of the same act makes it clear that the appeal must be based on a question of law alone.

[21] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 questions of law in an appeal are to be determined on a standard of correctness.

Analysis

[22] The sole question before us is whether the Tribunal erred in its application of the test for causation under s. 3(1) of the *SABS*. In this regard, the Appellant alleged that the Tribunal erred in law in two fundamental ways. First, the Tribunal failed to apply the applicable jurisprudence on the issue. Second, the Tribunal failed to consider that jurisprudence from the fundamental perspective that governs the interpretation of the *SABS* – namely, that it is consumer protection legislation and, as such, is to be given a broad and remedial interpretation.

[23] In their factum, the Appellant argued that the Tribunal erred in law in making a finding of fact that the lid on the coffee cup was improperly secured by the McDonald's employee on the basis of no evidence. A finding of fact on a material issue where there is no evidence to support the finding is an error of law. However, the Appellant did not pursue this argument in oral submissions. Instead, the Appellant took the position that how the lid was secured was a "red herring". If we had been asked to determine this issue, I would have dismissed the argument. I agree with the Insurer that there was some evidence to support the finding and therefore, it does not raise an issue of law.

The Applicable Jurisprudence

The *Dittmann* Case

[24] The decision in *Dittmann SCJ*, which was upheld by the Court of Appeal at 2017 ONCA 617 ("*Dittmann ONCA*"), dealt with a similar set of circumstances.

[25] The facts of the case are summarized as follows in the Superior Court decision:

> [2] At about 5:25 a.m. on July 7, 2014 the Plaintiff left her house to purchase a coffee from a McDonald's Restaurant drive-through. When she arrived at McDonald's she ordered her coffee and then pulled alongside the drive-through window where she paid for and was handed her coffee. She attempted to transfer the cup of coffee across her body to the vehicle's cup holder while holding it by its lid. During this process the cup released from the lid, spilling scalding coffee on the Plaintiff's thighs.

[26] It was accepted that because Ms. Dittmann was seated in the vehicle and had her lap and shoulder harness on, she was unable to take "any reflexive action to avoid the spill or lessen the amount of coffee that spilled on her": *Dittmann SCJ*, at para. 3.

[27] Ms. Dittmann made an application for *SABS* benefits, which her insurer denied. She applied to the Tribunal, which upheld that denial. The Tribunal's decision was appealed and R.D. Gordon R.S.J.(as he then was) was asked to determine the same question that this Court is being asked to determine, namely, "whether the use of the vehicle was a cause of the Plaintiff's injuries (causation-in-fact) and if so, whether there was an intervening act that caused the injuries that cannot be said to be part of the 'ordinary course of things'": *Dittmann SCJ*, at para. 12. All parties agreed that this was a question of law.

[28] In *Dittmann SCJ*, as in this case, the court found that the "purpose test" had been met as "attending at a drive-through window at a fast-food restaurant to order food or beverage is within the range of the ordinary and well-known activities to which automobiles are put": *Dittmann SCJ*, at para. 11.

[29] On the "causation-in-fact" issue, the Superior Court in *Dittmann* found as follows:

> [13] Causation-in-fact is normally determined using the 'but for' test. I am content that but for the use of the vehicle the Plaintiff's injuries would not have occurred. I come to this conclusion because but for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee while in a seated position, would not have been transferring the coffee cup to the cup holder across her body, and would not have had the coffee spill on her lap. In addition, but for her being seated and restrained by a lap and shoulder harness she may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on her.

> [14] Given this finding, it falls to determine if there was an intervening act that resulted in the injuries that cannot be said to be part of the "ordinary course of things". This aspect of the test arises from the Court of Appeal's findings in *Chisholm v. Liberty Mutual Group* (2002), 2002 Can LII 45020 (ONCA), 60 O.R.(3d) 776 (C.A.) that an intervening act will absolve the insurer of liability if it cannot fairly be considered as a normal incident of the risk created by the use of the car.
>
> [15] In the case before me the automobile was being used to allow the Plaintiff to acquire a hot beverage at a drive-through window of a fast food restaurant. That the beverage might inadvertently spill is a normal incident of the risk created by that use. Accordingly it cannot be said to have been outside the "ordinary course of things" as would be the case with such intervening acts as a drive-through attendant deliberately throwing hot coffee on the claimant or the claimant falling ill due to impurities in the coffee that was served. Such intervening acts would not be a normal incident of the risk created by the use of the car and would effectively break the chain of causation.

[30] On this basis, the court decided that the use of the automobile was the direct cause of Ms. Dittmann's injuries and, therefore, her impairment was the result of an accident within the meaning of the *SABS*.

[31] The Court of Appeal upheld the motion judge's decision, finding that he "did not err in his application of the *SABS* causation test" as "the use and operation of the respondent's vehicle was a direct cause of the respondent's injuries": *Dittmann ONCA*, at para. 3. The Court of Appeal went on to find as follows:

> [4] We are satisfied that these findings are amply justified on the evidence, and that they meet the requirements of the direct causation test prescribed by s. 3 of the *SABS* regulation as this court laid out in *Greenhalgh v. ING Halifax Insurance*, 2004 CanLII 21045 (ONCA), [2004] O.J. No. 3485 (C.A.), at para. 38, and in *Downer v. Personal Insurance Co.*, 2012 ONCA 302, at paras. 34, 38 and 39.
>
> [5] We are also satisfied that, as pointed out in the respondent's factum, the restraint of the seatbelt increased the respondent's exposure to the scalding liquid and thereby increased the level of her impairment.
>
> [6] There was no intervening act, as that phrase has been interpreted in the case law, in the circumstances of this case.

> [7] As pointed out in *Salamone v. Aviva Canada*, 2016 OFSCD No. 191, at para. 31, the issue is not, what was the "triggering event" of the incident, but rather, what caused the impairment. In this case, the use of a running motor vehicle in gear to access the drive-through and the seatbelt restraint were direct causes and dominant features of the impairment the respondent suffered.

[32] The insurer in *Dittmann* sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada, which was denied: see *Aviva Insurance Company of Canada v. Erin Dittmann*, 2018 CanLII 12956 (SCC).

The Tribunal's Jurisprudence since *Dittmann*

[33] In the Decision, the Tribunal cites several previous Tribunal decisions where the Tribunal distinguished *Dittmann* on the same basis as the Tribunal did in this case. As put by the Tribunal in the case at bar:

> [51] Although not binding on me, I agree with the distinction made by the Tribunal in the above-referenced authorities, regarding the fact that the *Dittmann* decision does not mention the lid being improperly secured to the cup or that a restaurant employee was negligent in the securing of the lid. I also take that to mean these were not an issue in the *Dittmann case*.
>
> [52] The Court of Appeal also made clear in its decision to dismiss the appeal, that there was no intervening act, in the "circumstances of that case". However, once again, there was no mention of the lid being improperly secured to the cup or that a restaurant employee was negligent in the securing of the lid, here there are difference circumstances, (the improperly secured lid), thus, in my view, there was an intervening act.

[34] Since the Decision and Reconsideration Decision, the Tribunal has issued another decision, with very similar facts, that disagrees with the approach taken in the Decision and the authorities discussed within: *Thompson v. Certas Home and Auto Insurance Company*, 2024 CanLII 97891 (ON LAT). As described by the Tribunal in *Thompson*:

> [4] The Applicant sustained burn injuries to his thigh as a result of coffee spilling on him while in his vehicle. The Applicant was in the drive-through of a fast-food restaurant and received a coffee from an employee of the restaurant with an improperly secured lid. The coffee was spilled on the Applicant as he received the cup from the fast-food restaurant, which resulted in burn injuries to his thigh.

[35] The issue in that case was identical to the case at bar – did the incident meet the definition of "accident" within the meaning of the *SABS*? The arguments advanced were also the same. The insured emphasized what it pointed out as being the key feature in *Dittmann*, the fact that the insured was restrained by being in a vehicle rendered her unable to take evasive action to avoid the pooling of the hot coffee on her body. That action would have been possible if she was at a table. Thus, the use of the vehicle was the direct cause of the accident. The insurer submitted that the insured's position was "based purely on speculation" and that the intervening act and dominant feature of the incident was the improperly secured lid: *Thompson*, at para. 13.

[36] The Tribunal found that it was not bound by the Tribunal decisions that had accepted the argument put forward by the insurer, including the Decision in this case. It found that *Dittmann* was the binding authority: *Thompson*, at para. 19. According to the Tribunal in *Thompson*, while *Dittmann* contemplated that intervening acts could interrupt the chain of causation when a person is injured while getting coffee at a drive-through, it was also clear that to qualify as such an intervening act there had to be an unexpected event. The examples given in *Dittmann* were the drive-through attendant deliberately throwing hot coffee on a claimant or a claimant who fell ill because the coffee purchased at the drive-through was somehow contaminated. The Tribunal in *Thompson* found that there was no unexpected event that had occurred. As put by it:

> [20] I find no unexpected event occurred here that would disrupt the chain of causation. *Dittmann* found that an accident occurred because an automobile was being used to acquire a hot beverage at a drive-through window of a fast-food restaurant and that the beverage might inadvertently spill is a normal incident of the risk created by that use. The Applicant's case is similar in that it is a reasonable risk that hot beverage lids may be or become unsecured and hot liquid may be spilled as a result. The injury was compounded by the Applicant's inability to exit the vehicle in the drive-through lane.

[37] On this basis, the Tribunal in *Thompson* found that the "improperly secured lid is a normal incident of risk created by the use or operation of a vehicle. Accordingly, I find that the Applicant was involved in an 'accident' as defined in section 3 of the *Schedule*": *Thompson*, at para. 21.

[38] There is clearly a dispute in the Tribunal jurisprudence about the correct interpretation of *Dittmann*. On the *Thompson* interpretation of *Dittmann*, the Decision and the Reconsideration Decision are wrongly decided.

The Tribunal erred in law in failing to follow Dittmann

[39] Simply put, I agree with *Thompson*'s reasoning and result. What the Tribunal in the case at bar failed to appreciate and what *Dittmann* makes clear is that to qualify as an intervening act that breaks the chain of causation, the event must be an unexpected one. In the Decision,

the Tribunal identifies another act, the improperly secured lid, that contributed to the fact that the coffee spilled, but never went on to address whether that act took the incident out of what one would expect to occur as part of the ordinary use and operation of a vehicle. In failing to do so, it not only misinterpreted *Dittmann*, but it also misapplied the test for determining causation in fact.

[40] As the Tribunal correctly articulated in the Decision, the test for causation in fact requires considering three things in sequential order. First, the "but for" consideration about which there is no dispute. Second, the intervening act consideration which the Tribunal correctly articulated as follows:

> … [t]he 'intervening act' consideration, which may be used to determine if some other event took place that cannot be said to be part of the ordinary course of use of operation of the vehicle.(emphaisis added.

[41] In *Dittmann SCJ*, the court found that an inadvertent spill of hot coffee purchased from a drive-through was part of the ordinary use and operation of a vehicle. This is clear from the following excerpt from *Dittmann,* at para. 15 (quoted above at para. 29):

> In the case before me the automobile was being used to allow the Plaintiff to acquire a hot beverage at a drive-through window of a fast food restaurant. That the beverage might inadvertently spill is a normal incident of the risk created by that use.

[42] In *Dittmann,* the Superior Court provides examples of what could constitute an unexpected event that could qualify as an intervening act that could break the chain of causation, namely a drive-through attendant throwing coffee at a customer or a contaminated cup of coffee: at para. 15. Both events make it impossible to characterize the incident as an inadvertent spill. The fact that the lid may have been improperly secured in this case does not mean that the incident ceased to be an inadvertent spill of hot coffee purchased from a drive-through.

[43] The Tribunal also erred in its "dominant feature analysis" – the third consideration of the causation test. As outlined above, the Tribunal found that "the use or operation of the automobile was not the dominant feature of the [Appellant's] injuries". In its view, "the dominant feature that caused the [Appellant's] injuries was not the use or operation of an automobile, rather it was the improperly secured lid, which resulted in the coffee spilling on her. It is trite law that direct causation requires more than the motor vehicle simply being the reason or destination for why the applicant was present at this location where the incident occurred",

[44] This analysis both ignores the distinction between a "triggering event" and an "intervening act" that breaks the chain of causation delineated in *Dittmann ONCA* and contradicts the Tribunal's previous findings as to the role that the motor vehicle played in the incident.

[45] As set out above, at para. 7 of its decision the Court of Appeal in *Dittmann* states:

> As pointed out in *Salamone v. Aviva Canada*, 2016 OFSCD No. 191, at para. 31, the issue is not, what was the "triggering event" of the incident, but rather, what caused the impairment. In this case, the use of a running motor vehicle in gear to access the drive-through and the seatbelt restraint were direct causes and dominant features of the impairment the respondent suffered.

[46] At this point in its decision, the Court of Appeal is stating that while the "triggering event" that caused the injuries was the spill, this did not mean that it was the spill that was the direct cause and dominant feature of incident. The direct cause and dominant feature of the incident was the motor vehicle because the applicant was receiving the coffee while in a car and restrained from taking evasive action to avoid the spill when it occurred. The same is true in this case. Furthermore, the Tribunal made a finding that the same was true in this case when it stated the following in the Decision:

> [39] I find that the applicant has established that "but for" the use of her vehicle, the applicant would not have sustained these injuries. Similar to *Dittmann*, but for the use of the vehicle, she would not have been in the drive-through lane, would not have received the coffee while in a seated position, and would not have had the coffee spill on her. Moreover, but for her being seated and restrained by a seatbelt, she may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on her.

[47] This is a finding of far more than "the motor vehicle simply being the reason or destination for why the [Appellant] was present at this location where the incident occurred."

[48] The Insurer argues that there was no evidence before the Tribunal that the Appellant was wearing a seatbelt when the incident occurred. This argument ignores the fact that the Tribunal made an explicit finding to the contrary and the fact that the issue is whether the Appellant was in a situation where, seatbelt or not, she could not take evasive action to avoid the consequences of that spill. The Appellant was in a seated position in the back seat of a car when the coffee spilled and would not have been able to stand up or move in time to avoid the consequences of that spill.

[49] As pointed out by the Court of Appeal, the *Salamone* case is instructive on this issue. In *Salamone*, Mr. Salamone had a heart attack and lost consciousness while driving his van. The van went out of control and ended up off the road angled over a ditch. The damage to the van, its layout and position prevented a bystander who was trained in CPR from being able to access Mr. Salamone to give him immediate treatment. Mr. Salamone claimed that the delay in his treatment caused him to suffer severe neurological damage. He made a claim to his insurance company under the *SABS*, which was denied at arbitration because of a finding that the incident failed to meet the definition of "accident". According to the arbitrator, the heart attack was an intervening event that broke the chain of causation. Mr. Salamone appealed to the Financial Services Commission of Ontario (Appeal Division), which overturned the arbitrator's decision. It did so by finding that the arbitrator erred by

focusing on the fact that the heart attack was the "triggering event" that caused the injury. This did not detract from the fact that it was because Mr. Salamone was in his car that he crashed after his heart attack, and he was unable to obtain immediate treatment. The same is true in this case. It is because of the fact that the Appellant was in her car at a drive-through that she experienced an inadvertent spill (a normal incident of the risk created by that use according to *Dittmann*) and that she was unable to take the evasive action necessary to avoid the consequences of that spill.

[50] While not essential to my finding that the Tribunal made an error of law, I agree with the Appellant that the *SABS* are to be interpreted broadly and flexibly in a manner consistent with their consumer protection purpose. As found by the Divisional Court in *Davis v. Aviva General Insurance Co.*, 2024 ONSC 3054, at para. 78, this means that "[a] flexible approach must be taken for finding whether the use or operation of an automobile is a direct cause of an impairment to establish entitlement to accident benefits." The decisions in *Dittmann* (which the Tribunal erred in failing to follow) and *Thompson* interpret the definition of "accident" in a manner consistent with this direction, while the decisions under appeal do not.

Conclusion

[51] For these reasons the appeal is allowed, the Decision and the Reconsideration Decision are set aside. Since the result is inevitable, we also make a finding that the Appellant's impairments are as a result of an accident as defined in s. 3(1) of the *SABS*. In accordance with the agreement of the parties, the Appellant, as the successful party, is entitled to her costs of this appeal from the Respondent Insurer, fixed in the amount of $5,000, all inclusive.

_____
Sachs J

I agree _____
Backhouse J

I agree _____
Faieta J

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Lyndsy Miceli

Appellant

– and –

TD General Insurance Company

Respondent

REASONS FOR JUDGMENT

Released: 20250123