Insurance & Reinsurance - Canada

Ontario arbitrator rules on normal uses of an abnormal vehicle

Contributed by **McMillan LLP**

July 05 2011

Author

Hartley Lefton

A recent case heard by the Financial Services Commission of Ontario demonstrates the importance to insurers of understanding their clients' businesses and the importance to insureds of setting clear policies and rules for their clients. Failure to do so left the Economical Mutual Insurance Company liable for damages resulting from Daniel Whipple's paralysis.

After a day of golfing, drinking and partying as part of a group of 12 golfers, Mr Whipple and others engaged in various antics in a luxury limousine coach. The coach was a form of luxury bus, replete with large-screen televisions, high-end sound systems, mood lighting and mirrored ceilings. The specific coach also had a pole in the centre of the rear of the vehicle that the owner and the driver of the vehicle referred to as a "stripper pole".

Whipple and the others proceeded to engage in a game of "one-upmanship" involving the pole installed in the coach, mimicking the dance moves of exotic dancers, each attempting to outdo the other. This playful game, conducted in the moving vehicle, ended when Whipple broke his neck after a failed attempt at performing a headstand. He suffered injuries resulting in incomplete quadriplegia.

The insurer refused to pay statutory accident benefits, arguing that Whipple did not suffer an 'accident' as defined in legislation as "an incident in which the use or operation of an automobile directly causes an impairment". Specifically, the insurer argued that an inebriated, 62-year-old man would not be expected to perform a headstand in a moving vehicle. Whipple appealed this refusal, arguing that he was entitled to statutory accident benefits. He specifically stated that his behaviour was within the normal use and operation of the limousine coach, which was marketed as a "party bus", and that this allegedly normal behaviour was the direct cause of his injury.

The key question underlying the claim by Whipple for benefits was whether his injuries amounted to an 'accident'. This would turn on whether the use or operation of the limousine coach directly caused his impairment according to the tests of 'purpose' (whether the incident resulted from the ordinary and well-known activities to which automobiles are put) and 'causation' (whether the use or operation of the automobile directly caused an impairment).

On the issue of 'purpose', the arbitrator found that as the limousine coach was designed, marketed and operated as a "mobile party room", Whipple's activities within it were in accordance with its purpose. The arbitrator reasoned that Ontario's no-fault system did not require looking into questions such as foreseeability and levels of risk. In addition, the arbitrator found the group's broader dancing and drinking activities to be within the normal scope of the bus's function and design as a "mobile party room". As a result, she viewed Whipple's headstand as falling within the vehicle's ordinary features and scope.

On the issue of 'causation', the arbitrator noted that Whipple's attempted headstand was the:

"*culminating activity in a series of antics where the participants, all occupants of the motor vehicle, were entertaining each other by using an obvious amenity in the vehicle, while the vehicle was in use on a highway, exactly as the vehicle was intended to be used.*"

The arbitrator rejected the insurer's view that the dominant feature of the incident was Whipple's misjudgment - as opposed to the use or operation of the bus - and instead found the headstand to be a natural progression in a series of activities which centered around the main internal feature of the vehicle: the pole.

Accordingly, the arbitrator determined that Whipple was entitled to statutory benefits as

a result of his accident. As a post-script, the insurer radically increased the insurance premiums charged to the owner of the limousine coach, which suggested that the insurer was either unaware of the activities taking place within such coaches or unaware of its potential liability for such activities.

While the Whipple decision is under appeal, insurers and insureds can take a number of lessons from the case:

- It is important to discuss any expectations placed on clients and restrictions on activities permitted on the insured premises or within an insured vehicle. It is likely that the limousine coach owner and the insurer had different conceptions of permitted activities.
- It is important to work together to develop a written policy or contract dictating how the insured vehicle or premises should be used by clients. No rules or policies were communicated to Whipple when he rented the bus, nor was there any evidence of any express or implied waiver.
- It is important to review the marketing by insureds of their premises or vehicles. The fact that the vehicle was referred to as a "Party Bus" designed to provide "service and transportation needs to fit the client requests" weighed heavily on the arbitrator in her determining that Whipple's activities were not outside of the scope of the vehicle's use and operation.
- It is important to review the insured premises and vehicles. The arbitrator found that the freedom, privacy and amenities within the limousine coach were viewed as provided, permitted or tolerated by the owner. Specifically, the stripper pole was seen by the arbitrator to be an invitation to the exact forms of activities that occurred, although the performance of a headstand was admittedly somewhat unusual. As a result, insurers should be warned that almost any behaviour that seems 'unpredictable' and 'unreasonable' in another context could be deemed to be an 'accident' within a context similar to Whipple's.
- It is important to consult with legal counsel if in doubt about potential liability and policy terms.

For further information on this topic please contact Hartley Lefton at McMillan LLP by telephone (+1 416 865 7000), fax (+1 416 865 7048) or email (hartley.lefton@mcmillan.ca).