

Awards

- **Kim Thomassin**, managing partner of *McCarthy Tétrault's* Quebec region, has been awarded the Medal of the National Assembly of Quebec. Thomassin was honoured for her leadership and her dedication to helping women achieve better employment conditions.
- The Canadian Bar Association's Canadian Corporate Counsel Association (CCCA) announced its roster of award winners for 2016. The Quebec section won the Professional Contribution Award for its dedication to showcasing the contributions of the in-house profession and the CCCA within the Canadian legal and business landscape. **Jonathan Cullen** of *Pfizer Canada Inc.* won the Up and Comer Award. This recognizes a CCCA in-house member with less than 15 years in-house who demonstrates strong participation at any level within the profession, the CCCA and the organization that they serve. **Paul Jonathan Saguil** of Toronto won the Community Builder Award. Saguil has demonstrated long-term commitment to a number of community programs and organizations, including the Law Society of Upper Canada's Equity Advisory Group. BMO Financial's Legal and Compliance Group in Toronto won the Innovation Award. And Ryerson University general counsel **Julia Shin Doi** has won the R.V.A. Jones Award for her achievements, leadership and over 22 years of hard work, both professionally and on a volunteer level.
- *Who's Who Legal* has named **Fasken Martineau** Global Mining Law Firm of the Year for 2016. This is the eighth time that *Fasken Martineau* has been recognized by the publication as the leading law firm for mining worldwide.

Court says parked motorcycle meets test

KIM ARNOTT

Tripping over a parked motorcycle amounts to an accident as defined by the Statutory Accident Benefits Schedule (SABS), the Ontario Court of Appeal has confirmed.

In *Economical Mutual Insurance Co. v. Caughy* [2016] ONCA 226, the appellate court dismissed the insurance company's appeal of a 2015 ruling by Ontario Superior Court Justice Robert Nightingale.

That ruling had found that Patrick Caughy was involved in an accident in 2012, when he tripped over a motorcycle parked on a pedestrian pathway at a campsite, while playing tag in the dark with his daughter.

Justice Nightingale found the incident satisfied both the purpose test and the causation test required to deem it an accident as defined by SABS.

On appeal, the insurance company argued that the application judge erred in finding the incident satisfied the purpose test, which requires the incident to arise as a result of "the ordinary and well-known activities to which automobiles are put." It did not challenge the judge's finding under the causation test that the motorcycle was the direct cause of the injuries suffered by Caughy.

Writing for a unanimous panel, Justice William Hourigan agreed with the application judge that parking a vehicle is an ordinary use or operation of it that satisfies the purpose test.

Guidance on applying the purpose test was provided by the Supreme Court of Canada in *Citadel General Assurance Co. v. Vytlingam* 2007 SCC 46 (CanLII), [2007] 3 S.C.R. 373, he noted.

In that case, the court offered examples where "a vehicle is not being used as a vehicle but for some other purpose," wrote Justice Hourigan, including the use of an automobile as a diving platform, permanent building



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Joseph Campisi
University of Toronto

prop or storage facility.

"A vehicle is designed to be parked. Indeed, it is safe to say that most vehicles are parked the most of the time," he wrote. "I would conclude, therefore, that parking a vehicle is an ordinary and well-known activity to which vehicles are put."

In rejecting the insurance company argument that the parked motorcycle was simply "the venue for the incident, in the same way a tree trunk would be if someone tripped over it," Justice Hourigan noted that active use of a vehicle is not necessary to meet the purpose test.

"The sole question for determination under that test is whether the incident in issue resulted 'from the ordinary and well-known activities



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Adam Wagman
Howie, Sacks & Henry LLP

to which automobiles are put," he wrote. "While the active use of an automobile (e.g. driving) would qualify under this test, there is no requirement that the vehicle be in active use."

It's a decision that insurance defence lawyer Eric Grossman believes expands the scope of an accident under SABS.

"If you take a look at this decision, you'd have to think that if someone was walking down the street with their head down looking at their iPhone and they walked into the side view mirror of a parked car, they'd be entitled to statutory accident benefits," he said.

A senior partner with Zarek Taylor Grossman Hanrahan LLP, Grossman said he thinks the purpose and causation tests should be

read in tandem. "To the extent that there is potentially some ambiguity in the definition of use or operation, then you have to look at what the context is.

"This is not a car accident," added Grossman. "And with great respect for the Court of Appeal, I have difficulty with their analysis, and I do think it creates all kinds of potential broadening of the types of claims that are now going to be obliged to be covered."

But Joseph Campisi, a Toronto area personal injury lawyer and adjunct professor who teaches insurance law at Osgoode Hall Law School, sees the decision as consistent with existing case law and unlikely to significantly expand the definition of an accident.

"In this case, I think it makes pretty good sense that the parking of the vehicle constitutes the type of behaviour that we would put an automobile to," he said.

Decisions such as *Economical Mutual Insurance Company v. Whipple* [2012] ONSC 2612, which found that cavorting around a "stripper pole" in a party bus was an ordinary use of that vehicle, highlight the importance of the factual context of a case, said Campisi.

"It really depends on the facts and whether you can maintain that direct causal link between the injuries sustained and a motoring activity."

Adam Wagman, a personal injury lawyer with Howie, Sacks & Henry LLP and president-elect of the Ontario Trial Lawyers Association, also believes the decision is rooted in established principles.

"I think it reinforces our notion of what vehicles are used for and the circumstances in which the insurance contract is going to be enforced."

"It's the right result put in context of an accident benefit system which was, in some form, created in the early '90s as a trade-off for really limiting an injured victims rights in tort," he added.

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