

**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 :

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Daniel Strigberger – Miller, Thomson LLP
Lawyer for the Applicant, The Dominion of Canada General Insurance Company
(hereinafter referred to as “Dominion”)

Mark Donaldson – Dutton Brock LLP
Lawyer for the Respondent, State Farm Mutual Automobile Insurance Company
(hereinafter referred to as “State Farm”)

ISSUE

Does the term “insured person” under section 3 of the SABS include an excluded driver having executed an OPCF 28A with respect to both vehicles insured pursuant to a policy of motor vehicle liability insurance yet shown on the face of the Certificate of Insurance as a “Listed Driver”?

PROCEEDINGS

The arbitration of this matter took place on May 20, 2015. Oral evidence of only one witness, namely Paul Wilson of Dominion’s underwriting department, was heard with the balance of evidence being introduced through Document Briefs introduced by both parties followed by oral submissions.

FACTS

On February 6, 2012, Umberto Rupolo was involved in a motor vehicle accident in Toronto, Ontario. He was a passenger in his girlfriend Bianca Girimonte's vehicle, which was insured by State Farm.

On March 22, 2012, Rupolo applied to Dominion for accident benefits under his parents' policy with Dominion, policy number: APP 111726. Dominion continues to pay him benefits pending the outcome of this priority dispute with State Farm.

On June 23, 2008, Pasquale and Giuditta Rupolo (parents of Umberto Rupolo) applied to Dominion for automobile insurance via Brokers Trust insurance Group. The broker completed an Ontario Application for Automobile Insurance Owner's Form (OAF1), dated June 23, 2008. At Part 3, the Application described two vehicles that would be covered on the policy: a 1997 Mazda Truck Van and a 2003 Chevrolet/Geo Truck.

At Part 4, the Application listed the names of all the drivers of the described automobiles in the household:

4 Driver Information - List all drivers of the described automobile(s) in the household or business.												
Driver No.	Name as shown on Driver's Licence			Driver's Licence Number			Date of Birth			Sex	Marital Status	
							Year	Month	Day			
1	PASQUALE RUPOLO			R9323-61606-20802			1962	08	02	M	M	
2	GIUDITTA RUPOLO			R9323-29166-75507			1967	05	07	F	M	
4	ROCCO RUPOLO			R9323-66008-90824			1989	08	24	M	S	
3	UMBERTO RUPOLO			R9323-75508-71003			1987	10	03	M	S	
Driver No.	Licence Training Certificate Attached?	Date First Licensed in Canada or U.S. (Class G or equivalent)			Other class of licence, if any			Percentage Use by Each Driver			Are any other persons in the household or business licensed to drive?	Do any drivers qualify for Retiree Discount (See Note 2)?
		Class	Year	Month	Class	Year	Month	Auto. 1	Auto. 2	Auto. 3		
1	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	G	1978	08				60			Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
2	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	G	1985	09					90		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
4	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	G2	2006	08					10		If yes, provide complete details in the Remarks section.	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
3	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	G	2006	05							Remarks section.	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>

Part 5 of the Application gave details of three previous convictions involving Umberto (Driver No. 3):

5 Previous Accidents and Insurance Claims													
Give details of all accidents or claims arising from the ownership, use or operation of any automobile by the applicant or any listed driver during the last 6 years. The coverages are: BI - Bodily Injury, PD - Property Damage, AB - Accident Benefits, DCPD - Direct Compensation - Property Damage, UA - Uninsured Automobile, Coll - Collision, AP - All Perils, Comp - Comprehensive, SP - Specified Perils													
Driver No.	Auto No.	Date			Coverage Claim Paid Under							Amount Paid or Estimate	Details (Use Remarks section if necessary)
		Year	Month	Day	BI	PD	AB	DCPD	UA	Coll/AP	Comp/SP		
3	1	2004	10	10								0	Insured hit 3rd party
3	1	2006	02	15								16760	Non-responsible Collision
3	1	2005	05	13								0	Insured hit 3rd party

The Application was signed and the risk was bound on June 23, 2008.

A Certificate of Insurance was issued showing Umberto Rupolo in a list of "Drivers Insured".

After binding the risk, Dominion's underwriting department determined that Umberto's past driving history was too risky to insure. Accordingly, the broker advised the Rupolos in a letter dated September 30, 2009 that Dominion required an OPCF 28A - Excluded Driver Endorsement for Umberto to prevent the cancellation of the policy.

Umberto and his parents signed two OPCF 28A forms: One on August 20, 2008 and the other on October 1, 2008 when one of the vehicles on the policy was replaced with another.

Both OPCF 28A forms excluded him as a driver of all the vehicles listed on that policy. The effective date of the change was September 24, 2008.

Over the years, Dominion issued various renewal Certificates of Automobile Insurance. The Certificates listed Umberto's name under the heading of "Drivers Insured" until the May 2010 renewal and shown thereafter in a list of "Listed Drivers" on the front page of the Certificate of Insurance. However, all of the Certificates – including the one material to the accident – indicated in the "Rating Information" section that Umberto was excluded from driving the vehicles described on the policy.

According to the evidence of Paul Wilson of Dominion's underwriting department and pursuant to section 232 (1) of the *Insurance Act*, when Dominion receives a completed and bound OAF1 Application, Dominion issues the policy and embodies, endorses upon, or attaches the Application to the policy. The standard process used to exclude a driver from a policy is first to list all drivers who are eligible as a consequence of sharing an address with the policy holders, and then second, to specifically and individually exclude any eligible drivers who are not intended to be insured under the policy. Third, the insurer completes the OPCF 28A by affixing an "excluded" rating to the excluded driver. Finally, the insureds endorse the completed OPCF 28A. The completed OPCF 28A merges with the insurance policy.

So at the time of the subject accident, Umberto Rupolo was an excluded driver with respect to both vehicles insured by the policy yet shown on the front page of the Certificate of Insurance as a "Listed Driver".

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (i) *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
- (ii) *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*

If he was an insured under the Dominion policy, Dominion would have priority over his claims, pursuant to paragraph 1(i) of section 268 (2) of the *Insurance Act*. If he was not an insured under the Dominion policy, State Farm would have priority over his claims, pursuant to paragraph 1(ii).

Section 224 (1) of the *Insurance Act* defines “insured” as follows:

224. (1) In this Part,

“insured” means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person;

In *Warwick v. Gore Mutual Insurance Co.*, the Court of Appeal affirmed that an automobile insurance policy insures those persons who conform to the definition of “insured persons” according to the SABS and not according to the *Act*.

***Warwick v. Gore Mutual Insurance Co.*, 1997 CanLII 1732 (ON CA), <<http://canlii.ca/t/1g2m4>> retrieved on 2015-05-04, – Dominion’s Book of Authorities – Tab #1**

***Fisher v. Pilot Insurance Co.*, [1996] O.I.C.D. No. 120 (FSCO App.] at para 27, Dominion’s Book of Authorities – Tab #2**

Section 3 (1) of the SABS defines “insured person”, as follows:

3. (1) In this Regulation, ...

“insured person” means, in respect of a particular motor vehicle liability policy;

(a) the named insured, **any person specified in the policy as a driver of the insured automobile** and if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse;

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or;

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or;

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; (“personne assurée”) [emphasis added];

Section 3 (1) defines “insured automobile”, as follows:

“insured automobile” means, in respect of a particular motor vehicle liability policy, an automobile covered by the policy.

ANALYSIS AND FINDINGS

Dominion takes the position that Umberto only has recourse against Dominion if he fits the SABS definition of “insured person”. If Umberto does not meet any of the criteria listed in the definition of “insured person” in section 3 of the SABS, he is not an “insured person” under the policy and he is not an insured of Dominion.

According to Dominion, criterion (b) of section 3 set out above does not apply to Umberto because he was not involved in an accident involving the insured automobile. Criterion (c) does not apply to Umberto because the accident happened in Ontario.

According to Dominion, criterion (a) in the definition of “insured person” does not apply to Umberto because he was not a named insured (deemed or actual) or spouse or dependant. The only criterion remaining in the definition of “insured person” is “*any person specified in the policy as a driver of the insured automobile*”.

Dominion acknowledges that the definition of “insured person” in section 3 of the SABS seeks to extend insurance coverage to a wide class of individuals. As of January 1, 1994, an “insured person” also includes a *person specified in the policy as a driver of the insured automobile*. This definition in effect has two parts: (1) *a person specified in the policy as a driver*, and (2) *of the insured automobile*. Dominion argues that if this phrase required only that a person be listed on the policy as a driver, the second half of the definition would be meaningless.

The plain meaning of the words, “*person specified in the policy as a driver of the insured automobile*” is that the person must be specified on the policy as (1) a driver of (2) *a vehicle that is covered by the policy*. He or she must be listed as a driver *and* listed as a driver of a covered vehicle.

Dominion points out that although Umberto’s name appears on the Certificate under “Listed Drivers”, the policy states that he was excluded from driving the vehicles described on the policy. He was excluded from driving the 1997 Mazda and he was excluded from driving the 2003 Chevrolet. He was not *specified in the policy as a driver of an automobile covered by the policy*. He was not simply omitted from the policy, but he was explicitly “excluded” as a driver of any vehicles covered on the policy.

Accordingly Dominion suggests that Umberto was not an “insured person” under his parents’ policy with Dominion.

State Farm’s response to Dominion’s assertions is simply that Umberto meets the definition “insured person” as being “any person specified in the policy as a driver of the insured automobile”. In support of this contention they point out that Umberto was at all times shown on the initial Certificate of Insurance back in 2008 (the subject accident having occurred on February 6, 2012) and all subsequent renewals leading up to the accident date as a initially

as “Drivers Insured” until the May 2010 renewal and those thereafter when the form of the Certificate of Insurance was changed to show him as a “Listed Driver” even though Umberto signed an OPCF 28A in 2008 with respect to both listed vehicles.

The OPCF 28A – Excluded Driver Endorsement is a Superintendent of Insurance approved form for an endorsement allowing insurers to identify certain drivers as being excluded pursuant to s. 249 of the Insurance Act which reads:

249. A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract.

The OPCF 28A endorsement itself states in unequivocal language:

WARNING - BY SIGNING THIS FORM YOU AGREE THAT IF THE EXCLUDED DRIVER DRIVES ANY AUTOMOBILE DESCRIBED BELOW:

THIS POLICY WILL NOT PROVIDE THE INSURANCE REQUIRED BY LAW;

1. Purpose of This Change - This change is part of the policy. Except for certain Accident Benefits, it excludes all **coverage when the person (the “Excluded Driver”) named in paragraph 3 below drives the automobile(s)** described in paragraph 2 below.

2. Exclusions from Coverage - Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage while the Excluded Driver is driving the automobile(s) listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy.

3. Acknowledgment of Excluded Driver - **I promise that I will not drive the automobile(s) described in paragraph 2 above. I understand that if I do,**

**- there is no coverage under the policy for:
- most Accident Benefits;**

(underline emphasis mine)

One of the questions which arises is whether an individual executing this Endorsement ought expect the availability of certain accident benefits while not operating the vehicles listed in the policy. I cannot help but think that Umberto having read the endorsement above before signing it would expect availability of certain accident benefits, if not all benefits, if not operating one of the vehicles he was excluded from driving and therefore full benefits if not operating an excluded vehicle. Dominion’s argument is that Umberto was not an “insured person”. If not an “insured person” why would the OPCF 28A suggest to him that he would be entitled to certain accident benefits if driving the vehicles he was excluded from driving? The simple answer is that an individual driving someone else’s vehicle does have accident benefits available from the insurer of the owner of that vehicle, but from the viewpoint of the

layperson signing the Endorsement, their expectation might well be that the policy and Endorsement provide them with the benefits of an “insured person”.

On all of the evidence before me I am satisfied that although excluded from driving both vehicles listed on the Certificate of Insurance he was nevertheless specified in the policy as a “listed driver” on the face of the Certificate in place at the time of the accident so as to entitle him to certain coverages while not operating the listed vehicles. This exposure could have been avoided if Dominion had simply not shown Umberto Rupolo as a “driver” on the face of the Certificate of Insurance in a situation where he was excluded from driving all the vehicles listed on the Certificate. It may have been their custom to do so but was it necessary? The government regulated Ontario Application for Automobile Insurance requires a listing of all drivers of the described automobiles in the household or business. I am not satisfied that excluded drivers of all vehicles identified in the policy issued need be shown as a “Drivers Insured” or “Listed Drivers” on the covering page of the Certificate of Insurance. The Certificate of Insurance is not a form issued by the Superintendent of Insurance to be used by all insurance companies. Mr. Wilson testified that he knows other companies do not use the format used by Dominion. He did state though that the form used by Dominion had to be approved by the Superintendent of insurance. I find that being “specified in the policy as a driver” provides Umberto with certain coverages, and in particular statutory accident benefits coverage, provided he was not driving a vehicle that he was excluded from driving. In the subject accident he was a passenger in his girlfriend’s automobile.

It was clear to me through the evidence of Mr. Wilson that it was not the intention of Dominion to treat Umberto Rupolo as an “insured person” on their policy where he was an “excluded driver” with respect to the operation of both insured vehicles. How could they avoid the ramifications of accident benefits entitlement in such circumstances? There are two ways which come to mind. Firstly, as suggested above, Umberto did not need to be shown as a “listed driver” on the face of the policy. Secondly, the form of the Certificate could be changed to show a list of “listed drivers” and a separate list of “excluded/non-specified drivers in the household or business”. Unfortunately, no evidence was introduced in the proceeding to show how other insurance companies deal with the situation of the type we have here and avoid the accident benefits coverage arising from the expanded definition of “insured person” to include those “specified in the policy as a driver of the insured automobile”.

What may well have happened here is that when the definition of “insured person” was expanded in 1994 to include “any person specified in the policy as a driver of the insured vehicle”, the form used by Dominion was not changed to avoid the interpretation that I have found here. There was no evidence adduced as to the etiology of the wording Dominion used for its Certificate of Insurance.

I am moved by the body of jurisprudence which holds that the accident benefits legislation is remedial in nature and as such should be accorded a broad and liberal interpretation. In my view there is sufficient ambiguity to an individual reading the OPCF 28A to think there would still be full accident benefits if not driving the excluded vehicle and even limited accident benefits if driving the excluded vehicle. The ambiguity must be interpreted in favour of the insured.

It appears to me that the reason why Dominion required the OPCF 28A was to address the risk of Umberto Rupolo driving the insured automobiles. That risk was addressed by the execution of the Endorsement by Umberto Rupolo and his parents. In my view, no other

rights or entitlements were taken away by the OPCF 28A. Umberto was a passenger in his girlfriend's vehicle. He was not violating the terms of the Excluded Driver Endorsement.

The clear language of the Endorsement states that Umberto would only be excluded from claiming certain accident benefits if he was *driving* either of the vehicles identified in the policy. There is no bar to his right to claim SABS if he is a *passenger* in his girlfriend's vehicle. Equally, there would no bar if he were a passenger in someone else's vehicle or simply a pedestrian on the street. He is only barred if he is *driving* the automobile identified in the Endorsement, and then, he is only barred from receiving *most* accident benefits. In fact, in cross examination, Mr. Wilson seemed to admit that the OPCF 28A only applied if driving his parents vehicles but as a passenger accident benefits coverage would not be reduced.

The denial of *most accident benefits* in the event where an excluded driver actually *drives* the insured vehicle is also addressed in the SABS at section 31(1) which states:

Circumstances in which certain benefits not payable:

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

(a) in respect of a **person who was the driver of an automobile** at the time of the accident,

(iii) **if the driver is an excluded driver** under the contract of automobile insurance, or ...

It would seem odd that a listed but excluded driver would be entitled to certain accident benefits if driving a vehicle in which he was excluded from driving and entitled to no benefits if a passenger in someone else's vehicle or pedestrian and not in breach of the OPCF 28A.

Taken together, there can be no other interpretation of this Endorsement other than that argued by State Farm, specifically that the Excluded Driver Endorsement only bars a claim for *some* SABS if the excluded driver is driving the insured automobile. Otherwise the full scope of accident benefits is available to the listed driver.

I find that as a "person specified in the policy as a driver of the insured automobile" (as evidenced by the fact that Umberto is shown on the face of the Certificate of Insurance) Umberto was an "insured person" as defined in s.3 (1) of the Statutory Accident Benefits Schedule. Applying the priority scheme set out in s.268(2) of the *Insurance Act*, Dominion would stand in priority to State Farm and responsible for paying statutory accident benefits to Umberto Rupolo.

ORDER

I hereby order that the priority claim of Dominion is dismissed with costs payable to State Farm on a partial indemnity basis.

I hereby order that Dominion pay the costs of the arbitrator.

DATED at TORONTO this 26th)
day of June, 2015.)

KENNETH J. BIALKOWSKI
Arbitrator