CITATION: Unifund Assurance Company v. Security National Insurance Company, 2016 ONSC 6798
COURT FILE NO.: CV-16-00544324-0000
DATE: 20161103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
UNIFUND ASSURANCE COMPANY Appellant	*Brenda Cuneo,* for the Appellant
- and -	
SECURITY NATIONAL INSURANCE COMPANY Respondent	*Stuart Norris and Fergal Murphy,* for the Respondent
	HEARD: October 28, 2016

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] This is an appeal from the arbitration decision of Arbitrator Kenneth J. Baikowski dated December 9, 2015. Leave to appeal was granted on April 6, 2016.

[2] The arbitration decision raises the issue of the proper legal approach to a priority dispute between insurance companies when it must first be determined whether or not there was an "accident" under the *Statutory Accident Benefits Schedule, 0.* Reg. 34/10 to the *Insurance Act,* R.S.O. 1990, C. 1.8 (the *"SABS").*

[3] An underlying issue is whether the all-terrain vehicle (ATV) driven by the claimant is an "automobile" for the purposes of the *SABS* definition of "accident".

[4] The claimant had a general automobile policy from the appellant, but the owner of the ATV had a policy from the respondent that specifically insured the ATV. The Arbitrator determined that it was sufficient that the respondent's policy fulfilled the criteria for an "accident" under the *SABS* based upon the terms of the recreational vehicle coverage provided by that policy. Even though the appellant's policy did not meet the criteria for an accident, the Arbitrator ruled that the claimant had access to the priority provisions of s. 268(2) of the *Insurance Act.* In doing so, the Arbitrator opened the door to priority being given to the appellant's general automobile policy, along with the obligation to indemnify, even though it did

not meet the *SABS* requirements for coverage. I conclude that in doing so the Arbitrator erred in law.

Brief Background

[5] The dispute arises from an incident on October 5, 2012. The claimant was injured while operating an ATV that was owned by her boyfriend, Piotr Sidorowicz. The incident took place while the claimant was operating the ATV on private property, specifically in the backyard of Sidorowicz's home in Gloucester, Ontario. The claimant lost control of the ATV, causing it to overturn, and as a result was injured.

[6] Mr. Sidorowicz had insured the ATV under an automobile policy with the respondent Security National. The policy was valid at the relevant time.

[7] The Security National policy included a standard O.E.F. 32 Recreational Vehicle Endorsement. The endorsement reads, in part, as follows:

> "recreational vehicle" includes an automobile of the type referred to as snowmobile, trail bike, midget automobile, motorscooter, mini cycle, snow plane, motorized toboggan, moped, motor assisted vehicle, all terrain vehicle, dune buggy or similar automobile. [Emphasis added.]

[8] At the relevant time, the claimant was a named insured under a valid automobile insurance policy with the appellant, Unifund. That policy did not include a definition of "automobile" that expressly encompassed recreational vehicles generally or ATVs in particular. It included only the standard references to "automobile" that form part of the legally mandated standard terms for all Ontario automobile insurance, also known as O.A.P. No. 1.

[9] The claimant made an accident benefits claim. There is no issue that the claimant is entitled to receive statutory accident benefits. In keeping with the overall regime for statutory accident benefits, the claimant has continued to be paid benefits throughout the relevant time. The only issue is which of these two insurance companies is obligated to pay them. At first, the appellant insurer paid the benefits but it then deflected the payments to the respondent insurer.

[10] In April 2015, Security National served Unifund with a notice of initiation of arbitration to determine which insurer is responsible for the payment of benefits to the claimant.

[11] A preliminary issue hearing was conducted in writing before the Arbitrator to determine the issue of whether the October 5, 2012 incident was an "accident" as defined by s. 3(1) of the *SABS* and in turn whether there was access to the priority scheme as set out in s. 268(2) of the *Insurance Act.*

[12] There is a second issue before the Arbitrator, which has yet to be determined in the arbitration. The second issue is whether or not, as asserted by the respondent, the appellant wrongly deflected the claimant's accident benefits claim to the respondent.

Arbitration decision

[13] The Arbitrator found that the claimant was involved' in an "accident" on October 5, 2012, as defined by the *SABS.* He then found that there was therefore access to the priority provisions of s. 268(2) of the *Insurance Act.*

[14] The relevant definition is found in s. 3(1) of the *SABS,* and requires the involvement of an "automobile":

> "accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage ... [Emphasis added.]

[15] "Automobile" is not defined in the *SABS.* In reaching his conclusion, the Arbitrator applied an accepted test from *Adams v. Pineland,* 2007 ONCA 844, 88 O.R. (3d) 321 that has been used to determine whether a vehicle is an "automobile" for the purpose of the definition of "accident" in the *SABS.* The *Adams* test sets out a three-part test through which a finding is made that something is or is not an automobile. The satisfaction of any one part of the test is sufficient to find that the vehicle is an automobile.

[16] The Arbitrator found that two of the three parts were not satisfied. Those findings are not at issue on this appeal. However, the Arbitrator found that the remaining part of the definition of automobile was satisfied, based only upon the terms of the respondent's specific recreational vehicle policy. The appellant's standard automobile insurance policy did not satisfy that part either, and, if considered alone, did not provide coverage for statutory accident benefits.

[17] The Arbitrator then moved to the priority dispute. He indicated that the "real issue" was whether Security National could seek indemnity from Unifund by way of the priority provisions of s. 268(2) of the *Insurance Act.* The Arbitrator then applied the priority scheme in s. 268(2) as if there was recourse against both insurers.

Analysis

[18] This appeal concerns questions of law regarding the proper interpretation of provisions of both the *SABS* and s. 268 of the *Insurance Act.*

[19] The parties have raised some issues regarding the appropriate standard of review. The appellant submits that the standard of review is correctness. The respondent would characterize this appeal as raising issues of mixed fact and law, to be determined on a reasonableness basis. However, the respondent also submits that the standard of review is reasonableness in any event.

[20] The respondent relies upon a recent decision of the Ontario Court of Appeal regarding the appropriate standard of review in an appeal from an insurance arbitration regarding a priority dispute. In *Intact Insurance Company v. Allstate Insurance Company of Canada,* 2016 ONCA 609, at para 53, the Court held that even if the appeal involves an extricable question of law regarding *SABS,* a reasonableness standard of review will still generally be applied. I have applied a reasonableness standard, in keeping with this decision.

[21] There is no question that the issues on this appeal arise within a sophisticated and complex statutory regime. I have therefore given due deference to the Arbitrator. I nonetheless conclude that his decision was not reasonable.

[22] The respondent has also submitted that the appeal is premature given that there remains another issue to be determined in the arbitration. While I do not, as a general matter, encourage appeals in these circumstances, I am not prepared to dismiss this appeal based on prematurity. As noted in the leave decision, this appeal raises important issues for the insurance industry.

[23] Moving to the merits, the issues on this appeal arise not only from the definition of "accident" in the *SABS,* but also the interrelationship between the *SABS,* that definition, and the statutory scheme for the determination of priority disputes under s. 268 of the *Insurance Act.*

[24] As acknowledged by both parties, the modern rules of statutory interpretation apply to this case: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[25] Accordingly, I begin with the statutory context within which these issues must be considered.

Statutory context

[26] The *SABS* forms part of a statutory regime under which no fault benefits are available for people injured in motor vehicle accidents. The no fault statutory accident benefits are set out in the *SABS.*

[27] Subsection 268(1) of the *Insurance Act* provides that all motor vehicle liability insurance policies are deemed to provide for the statutory accident benefits set out in the *SABS.* However, this deeming provision is not unrestricted. The subsection provides as follows:

> Every contract evidenced by a motor vehicle liability policy, including every such contract enforced when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule. [Emphasis added.]

[28] Accordingly, the restrictions within the *SABS* must be considered when determining whether statutory accident benefits are available under a specific policy.

[29] In turn, s. 2(1) of the *SABS* provides that with one exception not relevant here, the benefits set out in it "shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010." Thus, there is a threshold requirement that a claim for statutory accident benefits be with respect to an

"accident." That term, as defined in s. 3(1) of the *SABS,* requires that harm be caused by the use or operation of an "automobile".

[30] There is therefore also a threshold requirement that a claim for statutory accident benefits involve the use or operation of an "automobile." The term "automobile" is not defined in the *SABS.*

[31] Insurers cannot avoid their obligation to pay statutory accident benefits by claiming that another insurer should pay. As long as there is some connection between the insurer receiving an application for benefits and the insured, the insurer must pay pending the determination of its obligation to do so: *Zurich Insurance Company v. Chubb Insurance Company,* 2015 SCC 19, [2015] 2 S.C.R. 134, adopting the dissenting reasons below, at 2014 ONCA 400, 120 O.R. (3d) 161; *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* 2007 ONCA 62, 84 O.R. (3d) 507, at para. 20.

[32] The statutory regime provides a process for resolving disputes between insurers, found in O. Reg. 283/95. All disputes regarding which insurer is required to pay benefits must be settled in accordance with that regulation. If the insurers cannot agree, the dispute is resolved through arbitration. It is this process that gave rise to the arbitration decision at issue here.

[33] If recourse is available under more than one policy, s. 268(2) of the *Insurance Act* sets out the priority rules for determining which insurer must pay the statutory accident benefits. This section distinguishes between occupants of automobiles and non-occupants. An occupant is defined to include a driver and therefore includes the claimant here.

[34] The priority list in s. 268(2) requires an occupant's own automobile insurer to pay in priority to the insurer of the owner of the vehicle that was in the accident, as follows:

> 1. In respect of an occupant of an automobile,
>
> > 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 subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,... [Emphasis added.]

[35] Resort to the priority list in s. 268(2) is only available, and only needed, if more than one policy provides statutory accident benefits: *Security National Insurance Co. v. Markel Insurance Co.,* 2012 ONCA 683, 117 O.R. (3d) 1, at paras. 40 and 41.

[36] In accordance with the above statutory scheme, the starting point is whether statutory accident benefits are available at all. Under s. 268(1), this requires a consideration of the *SABS* "terms, conditions, provisions, exclusions and limits." Therefore, the threshold in s. 2(1) of the *SABS* must be met. Under s. 2(1), statutory accident benefits under the *SABS* shall be provided "under every contract evidenced by a motor vehicle liability policy in respect of accidents."

[37] This threshold must be considered for every policy at issue before concluding that the policy provides recourse to statutory accident benefits under the *SABS.* Under each policy, there must be an "accident" within the meaning of the *SABS.*

SABS definition of "accident"

[38] In this case, the only aspect of the definition of "accident" at issue is the requirement that an "accident" involve the use or operation of an "automobile." Subsection 3(1) of the *SABS* defines "accident" as follows:

> "accident" means an incident in which the use or operation of an automobile directly causes an impairment ... [Emphasis added.]

[39] There have been a number of decisions interpreting "automobile" in the context of this definition. These decisions generally involve a vehicle that is not ordinarily called an automobile, such as a golf cart, an off-road motorized bike or pocket bike or a motorcycle: see *Bouchard v. Motor Insurance Corp.,* 2013 ONSC 2205, 44 M.V.R. (6th) 256 (Div. Ct.); *Motor Vehicle Accident Claims Fund v. Buckle,* [2012] 0.F.S.C.D. No. 161, 2012 CarswellOnt 16973; *Motor Vehicle Accident Claims Fund v. Therrien,* [2012] O.F.S.C.D. No. 167, 2012 CarswellOnt 16974.

[40] In each of these cases, the claimant was seeking to establish that the vehicle used was an automobile in order to obtain statutory accident benefits. None of these decisions discuss that question under more than one insurance policy.

[41] There is no dispute before me that the *Adams* test is the appropriate test to apply under the *SABS:* see also *Bouchard,* at para 16; *Rougoor v. Co-operators Insurance Company,* 2010 ONCA 54, 99 O.R. (3d) 139, at para. *5; Grummett v. Federation Insurance Co. of Canada* (1999), 46 O.R. (3d) 340 (S.C.J.), at para. 14. The vehicle at issue in *Adams* was a go-kart.

[42] The three-part test set out in *Adams,* at para. 7, provides for the following questions to be asked and answered:

> (i) Is the vehicle and "automobile" in ordinary parlance? If not, then,
>
> (ii) Is the vehicle defined as an "automobile" in the wording of the insurance policy? If not, then,
>
> (iii) Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

[43] If any of these criteria are satisfied, then the vehicle is an automobile under the *Adams* test.

[44] The first and third parts of the *Adams* test are not at issue on this appeal. An ATV is not described as an automobile in ordinary parlance, removing the first part. There is also no issue that the ATV falls within an enlarged definition in relevant statutes, which include the definition

of automobile in s. 224(1) of the *Insurance Act. It* does not. Although the appellant disputes the Arbitrator's reasons for decision under the third part, his conclusion is not disputed.

[45] In this case, only the second part of the test is at issue. It requires a consideration of the specific terms of each insurance policy.

[46] There is no question that the specific terms of the respondent's insurance policy expressly include an ATV as an automobile. The standard Recreational Vehicle Endorsement includes "all terrain vehicles" among other recreational vehicles described as "automobiles". The second part of the *Adams* test is therefore satisfied for the respondent's policy. Statutory accident benefits are therefore available and mandated under that policy. The Arbitrator made no error in that regard.

[47] The *Adams* test must also be applied to the appellant's policy. Again, only the second part of the test is at issue. However, the appellant's policy was a general automobile policy on the claimant's car. It had no recreational vehicle endorsement. The insured vehicle was not an ATV. Its only terms that arguably define "automobile" are those found in the statutorily required terms for all automobile insurance, that is, in O.A.P. No. 1.

[48] The respondent submits that the general language in O.A.P. No. 1 is broad enough to include ATVs. The Arbitrator found that it was not, and I agree.

[49] O.A.P. No. 1 does not contain a specific definition of the term "automobile." The respondent relies upon the introduction to O.A.P. No. 1, and references to automobile in s. 2 of O.A.P. No. 1. Those references refer generally to automobiles. However, they do define the insured vehicle and other automobiles, as follows:

> 2.2.1 Described Automobile
>
> A described automobile is any automobile or trailer specifically shown on your Certificate of Automobile Insurance. ...
>
> 2.2.3 Other Automobiles
>
> Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you. ... [Emphasis added.]

[50] As shown by the reference in s. 2.2.3 to the Certificate of Insurance, these general terms must be read in the context of the Described Automobile under the specific policy at issue. If the Described Automobile was itself an ATV, Other Automobiles under the same policy would also include an ATV: *Rougoor,* at para. 10. If, as is the case here, the policy is not for an ATV, the general terminology would not extend to an ATV since ATVs are not, in normal parlance, automobiles.

[51] I therefore conclude that part two of the *Adams* test — that the vehicle is defined as an "automobile" in the wording of the insurance policy — is not satisfied with respect to the appellant's policy. The Arbitrator reached the same conclusion.

[52] It is at this point that the Arbitrator erred. Rather than following through with a finding that there was no recourse to statutory accident benefits under the appellant's policy, and therefore only one policy that provided coverage, the Arbitrator moved to s. 268. Specifically, the Arbitrator concluded as follows:

> I have no difficulty in finding that the ATV was not defined in the Unifund policy as an "automobile" but do not accept that Unifund would not be subject to the priority scheme as set out in s. 268 of the *Insurance Act.*

[53] Essentially, the Arbitrator found that determination of whether there was an accident and therefore recourse to statutory accident benefits could be determined by considering the terms of any of the policies at issue. In doing so he erred.

[54] The requirement to provide statutory accident benefits is policy-specific. Subsection 268(1) of the *Insurance Act,* which deems coverage for statutory accident benefits subject to terms, conditions, provisions, exclusions and limits in the *SABS,* speaks of insurance contracts in the singular. Subsection 2(1) of the *SABS,* when describing when benefits must be provided, also speaks about insurance contracts in the singular.

[55] The *Adams* test also underscores the need to consider each policy separately. That case did not consider multiple insurance policies. However, by describing the second part of the test as whether the vehicle is defined as an automobile in the wording of *the* insurance policy, it properly focused on a single insurance policy. Otherwise, and this is the effect of the Arbitrator's decision, the terms of *another* insurance policy are permitted to meet the second part of the test and require coverage.

[56] The respondent relies on *Bray v. ING Insurance Co. of Canada,* [2010] O.F.S.C.D. No. 136, 2010 CarswellOnt 10109, at para. 9, where the Arbitrator described the second part of the test as referencing "any" policy. However, that statement of the test misquoted *Adams* and *Grummett* and the second part of the test was not at issue in *Bray* in any event. I do not find that the passing reference to "any" policy in *Bray* was a statement of changed or proper principle.

[57] The issue of whether a policy provides statutory accident benefits must be considered based upon the specific policy at issue, not another policy.

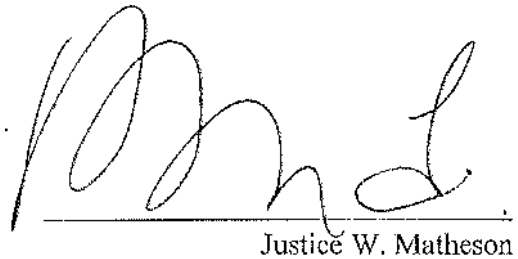
[58] The effect of the Arbitrator's decision was essentially to import the coverage for ATVs from the respondent's policy into the appellant's policy. This is contrary to the required statutory regime, and not reasonable. The threshold for statutory accident benefits under the appellant's policy was not met. Specifically, in this case, the requirement that there was an automobile involved in the accident was not met in relation to the appellant's policy. This lack of coverage is not altered by the terms of an entirely different insurance policy.

[59] In that there is only one policy that provides recourse to statutory accident benefits, the respondent's policy, the Arbitrator erred in finding that there was access to the priority scheme in s. 268(2). That scheme is only available, and only needed, if both policies provide statutory accident benefits. In this case, there is only one policy that provides recourse to statutory accident benefits.

Conclusion

[60] This appeal is therefore granted.

[61] The appellant shall have its costs fixed at the amount agreed between the parties, specifically $10,000.



Justice W. Matheson

Released: November 3, 2016

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