

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended

AND IN THE MATTER of the *Arbitration Act*, 1991,
S.O. 1991, c.17, as amended

AND IN THE MATTER of an Arbitration between:

ST. PAUL FIRE AND MARINE INSURANCE COMPANY/
TRAVELERS INSURANCE COMPANY OF CANADA

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

St. Paul Fire and Marine Insurance Company/Travelers: Ruth Henneberry

Wawanesa Mutual Insurance Company: Kevin D. H. Mitchell

Introduction:

This matter came before me pursuant to the *Arbitrations Act*, 1991, to arbitrate a dispute as between two insurers with respect to a claim for priority pursuant to the *Insurance Act* and its Regulations arising out of a claim for accident benefits of one Shirley Kadiran flowing from her motor vehicle accident of September 27, 2012.

The parties selected me as their Arbitrator on consent and the matter proceeded to a single day hearing in Toronto on November 19, 2013.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated September 13, 2013

Exhibit 2: Agreed Statement of Facts dated October 18, 2013

Exhibit 3: Document Brief of the Respondent, Wawanesa Mutual Insurance Company

Counsel also submitted Factums and Books of Authority. There was no viva voce evidence.

The Issue in Dispute:

The Arbitration Agreement identified the following issue for my determination:

“Which of the two insurer parties herein has priority for payment of the Statutory Accident Benefit claims of the claimant, Shirley Kadiran, arising out of injuries she sustained in the September 27, 2012 motor vehicle accident?”

The issue is very broadly worded but essentially it was narrowed down to an analysis of what the effect was of an amendment to the definition of “insured person” and more particularly Section 3 (1) effective September 1, 2010 *Insurance Act* R.S.O. 1990, c. 1.8 O. Regulation 34/10 hereinafter referred to as “the SABS”. At issue is how this provision interacts with the regular use provision relating to company vehicles found at Section 3 (7) (f) of the SABS.

The two relevant Sections are reproduced below:

Section 3 (7) (f) of the post September, 2010 SABS

“an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

- (i) the insured automobile is being made available for the individual’s regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or
- (ii) the insured automobile is being rented by the individual for a period of more than 30 days;”

Definition of Insured Person: Section 3 (1) of the post September, 2010 SABS

“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 name insured is an individual, the spouse of the named insured and a dependent 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;"

Facts:

There were no facts in dispute in the arbitration. The following summary sets out the relevant facts:

1. On September 27, 2012 Domenic Tamburrini was driving a 2010 GMC Sierra pickup truck with his spouse, Shirley Kadiran, as his passenger. While stopped at a red light the pickup truck was rear ended by another car and Ms. Kadiran suffered various injuries.
2. The pickup truck was provided to Mr. Tamburrini by his employer, Robert S. Somerville Company Limited., and it was agreed that Mr. Tamburrini had regular use of the pickup truck at the material time. St. Paul Fire and Marine Insurance Company, the Applicant herein, insured the pickup truck at the material time and admitted that Mr. Tamburrini would be a deemed named insured under their policy pursuant to the provisions of the Statutory Accident Benefits Schedule post September, 2010 (hereinafter called "the SABS"). St. Paul Fire and Marine Insurance Company insured the pickup truck under a standard commercial fleet auto policy bearing number 277JG3974 issued to Robert B. Somerville Company Limited.
3. At the time of the accident Ms. Kadiran did not have a driver's license and did not own any automobile. However her husband, Mr. Tamburrini, owned a 2002 Volkswagen Jetta for his personal use. That vehicle was insured by the Respondent herein: Wawanesa Mutual Insurance Company under policy number 7680599. Mr. Tamburrini was the named insured under that policy.
4. Ms. Kadiran applied to St. Paul Fire and Marine Insurance Company for Statutory Accident Benefits and they have been paying her accident benefits pending the result of this priority dispute.

Position of the Parties:

The Applicant takes the position that while they accept that Mr. Tamburrini would be a deemed named insured their policy based on his regular use of the pickup, they argue that that coverage no longer extends to the spouse by virtue of the change in wording under the definition of insured person under the SABS. They point to Section 3 (1) (a) and specifically the added words "if the named insured is an individual" and argue that as in this case the named insured is Robert B. Somerville Company Limited, not an individual, that under the amended definition that coverage no longer extends to the spouse as it did under the previous Section 66 (1) of the former SABS: Ontario Regulation 403/96. Therefore St. Paul argues that Wawanesa must be the priority insurer as Mr. Tamburrini is the individual named insured under their policy and coverage would therefore extend to his spouse.

Wawanesa, on the other hand, argues that while there was a change to the wording of the SABS in September, 2010, that has not changed the effect of the "deemed named insured" provisions. Wawanesa points out that a "deemed named insured" is a named insured and as this is always an individual, coverage would be extended to the spouse.

Analysis:

Pursuant to the provisions of the *Insurance Act* R.S.O. 1990 c.I.8, as amended: Section 268 sets out following priority rules that would apply with respect to Ms. Kadiran who was an occupant of the motor vehicle at the time of the accident:

Section 268 (2)

Liability to Pay:

"the following rules apply for determining who is liable to pay Statutory Accident Benefits:

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,"

This leads us to a two fold analysis for Ms. Kadiran. She was an occupant of the Robert B. Somerville pickup truck and therefore absent her being an insured with respect to any other automobile she would be covered the under the St. Paul Fire policy. We know Ms. Kadiran is not a named insured under a certificate of insurance of any other policy. Therefore we must look to see whether she is an "insured person" under any other policy by virtue of her relationship with her spouse. This then leaves us to the examination of the two policies under which her spouse, Mr. Tamburrini, is a named insured (the Wawanesa policy) and a deemed named insured pursuant to Section 3 (7) (f) of the SABS: St. Paul's policy.

Before embarking on that analysis it is helpful to look at the prior legislation relating to the “deemed named insured”.

The previous Section 66 (the previous regular use/deemed named insured Section) has remained relatively unchanged over the course of the years. Immediately before September, 2010 Section 66 read as follows:

“an individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of the accident, if at the time of the accident,

- (a) the insured automobile is being made available for the individual’s regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or
- (b) the insured automobile is being rented by the individual for a period of more than 30 days.

Insurance Act R.S.O. 1990 C. 1.8 O. Regulation 403/96: Section 66

When you compare the wording of Section 66 (1) to the revised wording under Section 3 (7) (f) there is, in my view, no significant change. While the words are moved around and it would appear that the drafter has tried to make it more “readable” the Section still in my view extends coverage for a person who is living in Ontario who has been provided regular use of a “company automobile” to be the deemed named insured under the policy. I do not find the change of wording from “shall” to “is” to have any significance.

Therefore whether we are pre or post September, 2010 what has been generally known as the “regular use”/deemed named insured under company automobile wording has remained the same.

No argument was presented to me that the change in wording under Section 3 (7) (f) on its own had any significance to the priority dispute relating to Ms. Kadiran.

The next step is to examine the meaning or definition of “the named insured”. Neither the pre nor post September, 2010 SABS provides a definition as to what is a named insured. There is no definition of named insured under the *Insurance Act*. The Applicant argues that there is a difference between a “deemed” named insured and the named insured who is on the declaration page of the policy. I do not accept that argument. While certainly the term “named insured” generally is understood to mean that it is the person specified in the contract or certificate of insurance as the insured person, there is an abundance of case law interpreting Section 66 of the Ontario Regulation 403/96 which confirms that the “deemed named insured” under the company automobile and regular use provision is the same as a named insured (see *ACE INA Insurance v Co-operators General Insurance Company* 2009 Carswell Ont. 1668, 71 CCLI (4th) 272 paragraph 2 and *AXA Boreal Assurances v Co-operators General Insurance Company* 136 O.A.C. 324 [2000] O.J. No. 3520 (Ontario Court of Appeal) paragraphs 15 to 19).

Therefore for the purposes of my analysis of this issue I find that there is no difference between a “named insured” and a “deemed named insured”.

This then bring us to the ultimate question as to whether the change in the definition of “insured person” in September, 2010 affects this priority dispute.

Again the analysis should start with the definition of insured person immediately prior to September, 2010. The relevant Sections are reproduced below:

Pre September, 2010: Definition of Insured Person

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

- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
 - (i) is involved in an accident in our outside Ontario that involves the insured automobile or another automobile,”

Post September, 2010: Definition of Insurance Person

“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 on the named insured or of his or her spouse, (emphasis added)
 - (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,”

The only change in the wording in comparing the two Sections is that the words “if the named insured is an individual” was added into the Section. The question is what was the purpose of that and what, if anything, was accomplished by that amendment.

Before turning to my conclusion on that it it helpful to outline the legislative intent of the company vehicle provisions. The Court of Appeal in the case of *Security National Insurance Company v Markel Insurance Company* (117 O.R.) 3d 1 approved of Arbitrator Bialkowski’s comment with respect to the intent of the “company vehicle section”. They agreed that the purpose of the Section is that the commercial insurer should be responsible for accident benefits arising from the operation of the commercial vehicle. The court notes at paragraph 64 and I quote:

“The substance of the subsection is consistent with that conclusion. The Section is headed “Company Automobiles and Rental automobiles”. While not determinative, the heading does provide some context. As with a company or rental automobile, if a vehicle is made available for regular use by any of the listed entities, the risk is to be borne by the insurer of that vehicle. This, in my view, makes sense and should be show in spite of any past practice in the insurance industry.”

Applying that legislative intent to this particular case arguably the purpose of the regular use Sections have not changed as a result of September, 2010 (as I noted there was no significant change to the wording of the “regular use”) and therefore one must look at the regulatory wording with that intent in mind. In other words it was intended that the commercial insurer of Robert B. Somerville Company Limited should accept the risk when their vehicle was being driven by an individual to whom it was provided for regular use: Mr. Tamburrini. In my view that intent extends to his family.

The Applicant however argues that the adding of the words “if the named insured is an individual” operates to deny coverage to Mr. Tamburrini’s spouse. They accept that Mr. Tamburrini would be the deemed named insured but state that the actual named insured is not an individual but is Robert B. Somerville Company Limited. Therefore they argue that as the named insured under the certificate is not an individual that coverage cannot extend to the spouse. I do not agree with this analysis.

I have already found and I feel there is an abundance of law to support the Respondent’s proposition that the words “named insured” cannot be limited to the entity (individual or company) that is shown on the certificate of insurance or the declaration page. There is nowhere in the *Insurance Act* or in the Regulation that limits the definition of named insured to the entity on the certificate. I therefore find that “the named insured” refers not only to the entity listed on the certificate of insurance but also refers to the person who has been found to be a “deemed named insured” pursuant to Section 3 (7) (f) of the SABS. The deemed named insured in this case is Mr. Tamburrini and he is an individual and therefore his spouse and his dependants would also be covered under the Robert B. Somerville Company Limited policy. I can see no other interpretation that makes sense both in the context of the history of this legislation, the case law interpreting it and the legislative intent.

In coming to my conclusion I am cognizant of the interpretative rules that apply with respect to the Statutory Accident Benefits Schedule as follows:

1. The legislative regime must be read in its entire context. One must look at the *Insurance Act* and the Regulation and any interpretation should work harmoniously with the scheme of the Act, the object of the Act and the intention of the Ontario Legislature (*Rizzo v Rizzo Shoes Ltd. (Re)* 1 S.C.R. 27 [1998] SCJ);
2. When interpreting the *Insurance Act* one must make reference not only to the provisions of the SABS with respect to definitions but one must also look at the *Insurance Act* as it is presumed that the statutory and regulatory provisions will work together (*Warwick v Gore Mutual Insurance Company* 1997 Carswell Ont. 566 Ontario Court of appeal);
3. The *Interpretation Act* Sections 17 and 18 (*Interpretation Act* R.S.O. 1990, c. 1.11) which is as follows:
 - (a) Section 17: “The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as the previous state of the law” and;

- (b) Section 18: "The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended".

Finally I note that counsel did refer to the report on the 5 Year Review of Automobile Insurance dated March 21, 2009 issued by the Financial Services Commission of Ontario and specifically to page 20 where there was a recommendation that under the 5 Year Review (which resulted in the SABS September, 2010 amendments) that it was recommended that the Statutory Accident Benefits Schedule should be reviewed to identify provisions that overly complex and could be simplified without changing the intent of the Regulation. The September, 2010 SABS reflect numerous changes to the setup of the Regulation. While many provisions remain the same they were moved into different locations and clearly efforts are made to make that version of the SABS more readable and better organized. I have also considered this in coming to my decision.

Award:


The following is therefore my ruling on the issue:

St. Paul Fire and Marine Insurance Company/Travelers Insurance Company of Canada is the insurer who has priority for payment of the Statutory Accident Benefits claims of the claimant, Shirley Kadiran, arising out of the injuries she sustained in the September 27, 2012 motor vehicle accident.

Costs:

Pursuant to Section 13 of the Arbitration Agreement the unsuccessful party is to bear the costs. Accordingly costs are awarded in favour of Wawanesa Mutual Insurance Company. If the parties are unable to agree on costs within the next 60 days we will arrange a brief phone hearing to hear submissions on expenses.

DATED THIS 15th day of January, 2014 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP