

Page: 2

[5] The Claimant suffered a brain injury and was determined to be catastrophically impaired pursuant to the *Statutory Accident Benefit Schedule* (“the Regulation”).

[6] The Claimant was not a named insured under any auto policy, nor was she a spouse or dependent of a named insured, at the date of loss.

[7] In the circumstances, the Claimant applied for payment of accident benefits to the Motor Vehicle Accident Claims Fund (“the Fund”).

[8] The Fund conducted an investigation and determined that the driver of the uninsured vehicle, Munir Saraj (“the driver”), was a “listed” driver on a policy of insurance issued by Intact Insurance Company (“Intact”) to his mother, Lula Salah Yusuf (“the named insured”). The policy covered the named insured’s Toyota Corolla, which was not the vehicle that was involved in the accident that injured the Claimant.

[9] The Fund accepted the Claimant’s application and has been paying benefits to her. However, the Fund put Intact on notice of its intention to dispute its obligation to pay benefits to the Claimant in accordance with section 3 of *Regulation 283/95*.

[10] The Fund contends that notwithstanding the fact that the vehicle involved in the accident was uninsured, the “other automobile” provision in section 2.2.3 of the OAP 1 should extend coverage under the Intact Policy, through the driver, to the Claimant. Moreover, that Intact is, therefore, higher in priority to pay the claim pursuant to section 268(2) of the *Insurance Act*. (“the Act”).

[11] Intact contends that the “other driver” provision does not extend coverage for accident benefits provided under its policy through a “listed driver”, who was neither a “named insured” on the policy or a “spouse of the named insured” living in the same household.

[12] Against this factual matrix the matter came before Arbitrator Novick for a decision with respect to the following issue:

If the notice provided is sufficient, does the “other automobile” provision in section 2.2.3 of the OAP 1 extend accident benefits coverage through a “listed driver” on the Intact policy to Mohd-Amin?

Standard of Review

[13] The standard of review in an appeal from an arbitrator’s decision on a question of law is “correctness” and on a question of mixed fact and law is “reasonableness¹.”

¹ *Personal Insurance Co. v. Allstate Insurance Co.*, [2010] I.L.R. 1-4921

Issue

[14] Did Arbitrator Novick err in finding that the “other automobile” provision contained in section 2.2.3 of the OAP 1 does not extend accident benefits coverage to the Claimant through the driver, who was neither a named insured or the spouse of a named insured living in the same household?

Reasons of Arbitrator Novick

[15] Arbitrator Novick’s Reasons begin on page 14 of her decision, where she said:

“Section 1.3 of the OAP 1 specifically defines the word “you” as the “the person...shown on the Certificate of Automobile Insurance as the named insured.” Section 2.2.3 then clearly states that automobiles other than the one covered by the policy are “also covered when driven by you, or driven by your spouse who lives with you.” When the section 1.3 definition of “you” is plugged into section 2.2.3, a plain reading of the provision restricts the extension of coverage for the operation of the other vehicles to the named insured under the policy, or his or her spouse living in the same household. In this case, that would be Ms. Yusuf, or her spouse.

I have addressed the applicability of section 2.2.3 of the OAP 1 to the situations in which pedestrians were injured when they were struck by drivers driving uninsured vehicles who were either named insureds or spouses of named insureds under policies issued by an insurer in two previous cases. (*Economical Insurance v. HMQ*, unreported decision dated January 30, 2009, and *Perth Insurance Company v. State Farm Mutual Insurance and HMQ*, unreported decision dated May 29, 2009). In both cases, I found that section 2.2.3 applied, and extended coverage for accidents benefits under the policies to an uninsured pedestrian, either through the named insured or his spouse. While I expressed concern that such a finding was contrary to the general rule (and legal requirement set out in the *Compulsory Automobile Insurance Act*) that drivers are expected to place insurance on each vehicle that they drive, I found that I was bound by the Court’s finding in *Co-operator’s General Insurance v. Pilot Insurance Co.*,² supra, on similar facts.

The circumstances in this case are clearly distinguishable from those in the *Co-operator’s* case. As stated above, I find that on its face, section 2.2.3 does not extend coverage to listed drivers in the same way that it does to named insureds. I do not feel compelled to interpret it more broadly for either policy reasons or reasons of statutory interpretation.

² *Co-operators General Insurance Col. V. Pilot Insurance Co.*, 1998 Carswell Ont 3115, 127 O.A.C. 62

In the result, Ms. Yusuf's policy with Intact does not extend coverage to the Claimant for accident benefits in the circumstances. I therefore find that it is not the "insurer of the automobile that struck the non-occupant" pursuant to section 268 (2)(2)(ii) of the *Act*, and that the Fund is therefore responsible to pay accident benefits to Ms. Mohd-Amin."

Position of the Parties

Applicant/Appellant

[16] The Appellant concedes that it is only the "other automobiles" category of "the automobile" as defined by section 1.3 OAP 1 that applies in the circumstances of this case, if any.

[17] The Appellant further concedes that the entitlement to accident benefits is purely contractual.

[18] The Appellant contends that section 2 of the *Regulation* defines "insured person" to include not only the "named insured" but "...any person specified in the policy as a driver of the insured automobile" if the "specified driver" is involved in an accident that involves the insured automobile or "another automobile", as defined therein.

[19] The Appellant contends that Arbitrator Novick erred by incorrectly concluding that statutory accident benefits coverage could not be extended to the driver of the uninsured automobile (Mr. Saraj) or to a pedestrian struck by him (the Claimant), because he was merely a "listed" driver and not a "named" insured under the policy (his mother's policy).

[20] The Appellant contends that Arbitrator Novick reached her conclusion by narrowly interpreting the provisions of section 2.2.3 of the OAP 1, which determines what "other automobiles" are covered by accident benefits. Moreover, Arbitrator Novick incorrectly interpreted and applied the provisions of section 4.1 of the OAP 1 (who is covered) and section 1.3 of the OAP 1, which defines "you" and "your" and "insured persons".

[21] The Appellant further contends that Arbitrator Novick relied on the wording of section 1.3 of the OAP 1 where "you" and "your" are defined as the person shown in the Certificate of Automobile Insurance as the "named insured". Given that the driver was a "listed" driver under his mother's policy, but not "named" as an insured, Arbitrator Novick wrongly concluded that coverage is not extended to him in the same way that it would have been, had he been "named" on the policy.

[22] In the result, the Appellant contends that Arbitrator Novick failed to consider that as a person "specified" on the policy as a driver of the insured automobile (i.e. a listed driver), he was an "insured person" for purposes of the *Regulation*.

[23] Finally, the Appellant contends that the driver falls under the expanded definition of "you" and "your" in section 1.3, which includes "other people" "under certain conditions". Accordingly, the Appellant asserts that Arbitrator Novick should have taken the next logical step

to find that this is one of those circumstances when the provisions of the *Regulation*, the *Act* and the wording of the Policy should be read together, expansively and harmoniously to promote the legislative purpose.

Respondent

[24] The Respondent contends that in order for the Court to engage in the expansive and harmonious reading of the *Regulation*, the *Act* and the Policy, as the Appellant asserts, the Court must first find some ambiguity in the OAP 1.

[25] To that end, the Respondent contends that the terms, section and definitions in the OAP 1 are clear, unambiguous and logical to follow. Further, it is clear from the various decisions that the “other automobile” coverage outlined in section 2.2.3 is purely contractual.

[26] In effect, the driver of the uninsured vehicle must be the named insured, or a spouse who lives with the named insured, to be entitled to coverage under the policy. The driver (Mr. Saraj) was neither at the date of loss. Rather, he is the son of the named insured.

[27] The Respondent asserts that the definition of “you” is clear and unambiguous. The OAP 1 defines “you” as the individual or corporation identified in the Certificate of Automobile Insurance as the “named insured”.

[28] The Respondent contends that the expansive and harmonious approach asserted by the Appellant would not alleviate confusion. Rather, it would create confusion where none currently exists.

[29] The Respondent contends that where Parliament meant for a definition to apply across legislation (as the Appellant proposes that the definition of “insured person” should be imported from Section 2 of the *Regulation* to expand the definition of “other people” in section 1.4 of the OAP 1), it clearly says so. For example, the Respondent points to Section 2 of the *Regulation* wherein the definition of “spouse” is to have the same meaning as in Part VI of the *Act*.

[30] Accordingly, the Respondent asserts that Parliament clearly intended to restrict the definitions contained within the *Act*, *Regulation* and the OAP 1 to the specific documents in which they are contained, unless otherwise stated.

[31] Finally, the Respondent contends that the expansive and harmonious approach proposed by the Appellant would go strictly against the principles of statutory interpretation and would be tantamount to altering the terms of the insurance contract insuring every automobile in Canada, which the underwriters could never have anticipated.

Analysis

[32] The terms, sections and definitions in the OAP 1 are clear and unambiguous.

[33] In order for insurance coverage to extend to an uninsured vehicle, the precondition set out in section 2.2.3 must be met. In effect, the driver of the uninsured vehicle must be the named insured, or a spouse who lives with the named insured, in this case Ms. Yusuf or her spouse.

Page: 6

[34] Accordingly, Arbitrator Novick did not err where she concluded that when the section 1.3 definition of “you” is plugged into section 2.2.3, a plain reading of the provision restricts the extension of coverage for the operation of “other vehicles” to the “named insured” under the policy, or to his or her “spouse living in the same household”.

[35] While it is true that *Co-operator's v. Pilot* stands for the proposition that a claimant, who is struck by either a named insured or the spouse of a named insured, would be extended accident benefits coverage under the Intact policy in these circumstances, there is no authority to extend coverage one step further to a “listed” driver. In reaching that conclusion Arbitrator Novick committed no error of law. Indeed, Arbitrator Novick decided the issue to the extent that the current state of the jurisprudence allows.

[36] In effect, the Appellant takes the position that there is no distinction to be drawn between a “named insured” or his or her “spouse” living in the same household and a “listed” driver.

[37] The Appellant contends that the Court should interpret the coverage under the Intact policy broadly in favour of the driver while narrowly and strictly interpreting any exclusions against the private insurer, Intact. With respect, this is not a case where an insured is potentially prejudiced by a failure on the part of the Arbitrator to apply the traditional, legal principles in respect of interpreting private insurance policies. Rather, this is a case dealing with the narrow issue of who, as between the Fund and Intact, stands higher in priority to pay the Claimant pursuant to section 268 (2) of the *Act*. To that end, coverage for the Claimant is the same and there is no prejudice to the uninsured driver. For the same reason, application of the *contra proferentum* rule and the principle of deciding any ambiguity in favour of the insured are equally inapplicable to decide this dispute between two insurers. Accordingly, Arbitrator Novick committed no error of law where she concluded: “As stated above, I find on its face, section 2.2.3 does not extend coverage to listed drivers in the same way that it does to married insureds. I do not feel compelled to interpret it more broadly for either policy reasons or reasons of statutory interpretation. (emphasis added)

[38] If coverage under the OAP 1 is to be extended to a “listed” driver in these circumstances, that is a matter for the provincial legislature, if indeed that is the legislative purpose, as the Appellant asserts.

[39] In summary, I find Arbitrator Novick’s decision to be both correct and reasonable.

[40] Appeal dismissed. If counsel are unable to agree on costs, the issue may be dealt with by way of written submissions, not to exceed two pages, double spaced, to be forwarded to me within 30 days.



The Honourable Mr. Justice Abrams

Released: March 12, 2013

CITATION: R. v. Intact Insurance Co., 2013 ONSC 1457
COURT FILE NO.: 12-55197
DATE: 2013/03/12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT ON
ONTARIO AS REPRESENTED BY THE MINISTER
OF FINANCE

Applicant/Appellant

- and -

INTACT INSURANCE COMPANY

Respondent

REASONS ON APPEAL

Abrams J.

Released: March 12, 2013