COURT FILE NO.: 00-CV-197195
DATE: 20001016

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
LOMBARD GENERAL INSURANCE COMPANY OF CANADA	*Albert M. Conforzi*, for the Applicant
Applicant	
- and -	
ALLSTATE INSURANCE COMPANY OF CANADA	*Todd McCarthy*, for the Respondent
Respondent	

COURT FILE NO.: 00-CV-192010

B E T W E E N:	
AXA INSURANCE COMPANY	*Greg Abogado*, for the Applicant
Applicant	
- and -	
GORE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	*Michael J. Huclack*, for the Respondent, Gore Mutual Insurance Company
Respondents	

COURT FILE NO.: 00-CV-198080

B E T W E E N:	
CGU GROUP (CANADA) LTD.	*Kenneth J. Coulson*, for the Applicant
Applicant	
- and -	
LOMBARD CANADA INSURANCE COMPANY	*Albert M. Conforzi*, for the Respondent
Respondent	
	HEARD: October 12, 2000

REASONS FOR DECISION

NORDHEIMER J.:

[1] I have before me three appeals from the decisions of three arbitrators which all involve the same issue, that is, whether a person, who is injured while driving a company vehicle, is to be paid Statutory Accident Benefits by the insurer of the company vehicle or by the insurer of the injured person's personal vehicle. Two of the arbitrators have decided that the Statutory Accident Benefits should be paid by the insurer of the company vehicle and the other arbitrator has decided that they should be paid by the insurer of the personal vehicle.

[2] I will briefly set out the factual background of each appeal.

Lombard General v. Allstate Insurance

[3] Jorge Fernandez was involved in an accident on September 14, 1997. At the time of the accident, he was operating a tractor-trailer owned by Southern Express Lines of Ontario which was insured by Lombard. At the time of the accident, Allstate insured a vehicle owned by the spouse of Mr. Fernandez on which Mr. Fernandez was a listed operator. It is agreed that the

[8] Arbitrator Guy Jones ruled that CGU Group had to pay the Statutory Accident Benefits to Mr. Beaulieu. Arbitrator Jones ruled that the language of section 66(1) under Bill 59 only constituted Mr. Beaulieu as the "named insured" for the purposes of the Regulation and not for the purposes of the *Insurance Act*. In so ruling, Arbitrator Jones disagreed with the approach taken by Arbitrator Malach and also with an earlier arbitration decision reached by Arbitrator Robinson in *Unifund v. Commercial Union Assurance Company*, which had been upheld on appeal by Mr. Justice Ferrier (unreported, June 30, 1999), in which Arbitrator Robinson reached the same conclusion regarding the application of the determination of the named insured under the Regulation to the priorities under the *Insurance Act*, as had Arbitrator Malach.

Analysis

[9] In considering this issue, it is important to trace the history of the corresponding sections of the Statutory Accident Benefits Schedule under the various no-fault regimes which have been enacted by the Legislature.

[10] The starting point is what is commonly referred to as the OMPPA which governed accidents before January 1, 1994. The relevant section of the Statutory Accident Benefits Schedule (or No-Fault Benefits Schedule as it was then known) under the OMPPA scheme is section 3(1) which states:

> "3(1) If the insured automobile is made available for the regular use of an individual, whether or not a resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Regulation applies to the individual and his or her spouse and their dependants as if the individual were a named insured."

[11] The application of that section was considered by Mr. Justice Roberts in *Axa Home Insurance Co. v. Western Assurance Co.* (1994), 21 C.C.L.I. (2d) 120 (Ont. Gen. Div.). Mr. Justice Roberts concluded that section 3(1) did not extend the definition of "named insured" beyond that which was necessary for the Regulation and specifically did not extend the definition for the purposes of determining issues under section 268(5) of the *Insurance Act*. In so concluding, Roberts J. said, at p. 125:

> "I have considered the provisions of s. 3(1) of the Regulation as that provision is written and in light of the scheme of the *Insurance Act* as a whole. I find that s. 3(1) deals solely with the identification of persons covered by the no-fault provisions. It does not extend the definition of 'named insured' for any other purposes and, in particular, does not extend the definition of '*named insured*' under s.268(5) to include those persons eligible for no-fault benefits as defined in s. 3(1)." (original emphasis)

[12] The approach taken by Mr. Justice Roberts prevailed through the next regime which was covered by Bill 164 for accidents occurring between January 1, 1994 and December 31, 1994. The relevant section of the Statutory Accident Benefits Schedule is section 91(1) which states:

> "91(1) Subject to subsection (3), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or an insured automobile is rented to an individual who is living and ordinarily present in Ontario, the individual shall be deemed for the purpose of this Regulation to be the named insured."

[13] The situation changed, however, with respect to the third of the four regimes I must consider, namely, the period covered by Bill 164 for accidents occurring between January 1, 1995 and November 1, 1996. The relevant section of the Statutory Accident Benefits Schedule is section 91(4) which states:

> "91(4) Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation."

[14] The important change to the wording of the section was the deletion of the words "for the purpose of this Regulation" and the addition of the words "under the policy". The significance of these changes was considered by Madam Justice Lax in *AXA Insurance (Canada) v. Old Republic Insurance Co.* (1998), 38 O.R. (3d) 630 (Gen. Div.). Madam Justice Lax concluded that this change in the wording resulted in the individual not only being a named insured for the purposes of the Regulation but also for the purposes of the *Insurance Act* and, in particular, for

the purpose of determining priorities under section 268. Madam Justice Lax said, at pp. 637-638:

> "Section 91(4) now provides that the individual 'shall be deemed to be the named insured *under the policy* insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation' (emphasis added). I do not think that this language is susceptible to any interpretation other than that the legislature intended that regular users of company cars were to be treated as if they were owners (who invariably are 'named insureds') and that priorities as between insurers would be determined accordingly."

[15] The issue then came before the Court of Appeal in *Warwick v. Gore Mutual Insurance Co., supra.* Mr. Justice Laskin agreed with the approach taken by Mr. Justice Morin, the judge of first instance in *Warwick*, who had said in the course of his reasons (quoted at p. 82):

> "In my view in determining matters of conflict between two or more insurers it is incumbent upon the court to consider not only the provisions of the Act but rather the entire scheme of automobile insurance legislation."

[16] Mr. Justice Laskin considered the issue of the determination of priorities under section 268 and said, at pp. 82-83:

> "Contractual entitlement to no-fault benefits is determined by s. 268(1) of the Act and s. 2 of the Schedule. Section 268(1) adds the Schedule to every contract of automobile insurance but then delegates to the Schedule-maker authority to define the classes of persons insured under any particular contract. Therefore the definition of 'insured person' in s. 2 of the Schedule governs Ms. Warwick's entitlement to no-fault benefits."

and later, at p. 83:

> "By making contractual entitlement to no-fault benefits 'subject to the terms, conditions, provisions, exclusions and limits' in the Schedule, the legislature, in s. 268(1) of the Act, *intended that entitlement to these benefits would be determined by regulation.*" (emphasis added)

[17] The issue that confronts me deals with the fourth regime, namely, Bill 59. The relevant section of the Statutory Accident Benefits Schedule under this regime is section 66(1) which states:

> "66(1) 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 an 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."

[18] It will be seen that section 66(1) contains the wording "under the policy" but has added back into it the wording "for the purpose of this Regulation". The applicants in the *Lombard v. Allstate* and *AXA v. Gore* cases and the respondent in the *CGU v. Lombard* case submit that the re-introduction of the words "for the purpose of this Regulation" into section 66(1) operate to restore the interpretation that applied under the first and second regimes and not that which applies under the third regime. Consequently, they submit that the decision of Arbitrator Jones is correct and the two decisions of Arbitrator Malach are in error. This submission, if correct, would necessarily mean that the decision of Arbitrator Robinson, as affirmed by Ferrier J., is also in error.

[19] I do not accept this submission. I have concluded that the approach taken by Madam Justice Lax in *AXA Insurance (Canada) v. Old Republic Insurance Co., supra* and by the Court of Appeal in *Warwick v. Gore Mutual Insurance Co., supra* is equally applicable to the proper interpretation of section 66(1). There is nothing in the material before me that would suggest that the Legislature intended to restrict or constrain the interpretations that had been given to section 91(4) under the immediately preceding regime. While that is not determinative of the issue, since if the language has that result then effect must be given to it, it does seem to me that if the Legislature had so intended it would have been the matter of some comment when Bill 59 was introduced and, as I have said, there is nothing has been put before me that such was the case. More importantly, however, as I read the decision of the Court of Appeal in *Warwick*, even if the individual is considered to be the named insured only for the purpose of the Regulation, Mr. Justice Laskin has clearly said that it is the Regulation that determines the entitlement to Statutory Accident Benefits. Consequently, it would appear that it should form the basis for the determination of priorities under section 268(5) of the *Insurance Act*.

[20] The counter argument to this latter point, and one which played a central role in the conclusion reached by Arbitrator Jones, is that there is a difference between determining entitlement and determining priorities. Arbitrator Jones said, at p. 13:

> "In arriving at this conclusion, I first note that the key restrictive phrase 'for the purpose of this Regulation' reappears in the new section. It is precisely this wording that led the earlier judges and arbitrators to restrict the use of the section to the question of entitlement rather than the question of priority."

and later at p. 15:

> "With respect, I do not read *Warwick* to stand for the proposition that section 66 applies to the priority rules. In *Warwick*, the Court of Appeal held that the plaintiff was not an insured under the State Farm policy. The Court held that the definition of insured under the Statutory Accident Benefit Schedule determined *entitlement* to statutory accident benefits. The Court did not deal with the issue of priority, as priority does not become an issue unless coverage exists under two separate policies." (original emphasis)

[21] I do not agree with Arbitrator Jones' interpretation of the *Warwick* case. In this regard, I have the benefit, which Arbitrator Jones did not have, of the very recent decision of the Court of Appeal in *Axa Boreal Assurances v. Co-operators Insurance Co.*, [2000] O.J. No. 3520 (C.A.). In that decision, Mr. Justice Laskin deals with this very point and says, at para. 15:

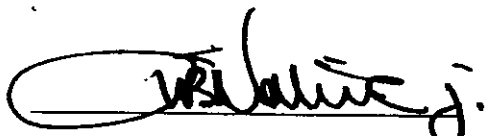
> "Boreal submits, however, that *Warwick* does not apply because it dealt with entitlement, not priority. I reject this submission. Distinguishing between entitlement and priority is artificial. *Entitlement to benefits is meaningful only if an insurer is liable to pay these benefits. And, in cases like the present one, liability to pay depends on determining priority.* The underlying rationale of *Warwick* is that the Schedule and the statute must be read together to determine who receives accident benefits and who is responsible for paying them. That rationale applies to this case. In my view, because of s. 91(4) of the SABS, Hounsell is a named insured under the Boreal policy for the purpose of determining which insurer must pay accident benefits under s. 268 of the Act. Boreal must therefore pay." (emphasis added)

I also note that in the course of this decision, Mr. Justice Laskin expressly agreed with the approach taken by Madam Justice Lax in *AXA Insurance (Canada) v. Old Republic Insurance Co., supra.*

[22] In the end result, therefore, I conclude that the changes in the wording seen in section 66 do not change the approach to be taken in determining the entitlement to Statutory Accident Benefits under the Regulation or the obligation to pay those benefits under the *Insurance Act*. Relying on the decisions in *Warwick* and in *Axa Boreal*, I find that the insurer of the company vehicle is, in each of these three cases, responsible for the payment of the Statutory Accident Benefits.

[23] Consequently, the appeals in *Lombard v. Allstate* and *AXA v. Gore* are dismissed. The appeal in *CGU v. Lombard* is allowed, the ruling of Arbitrator Jones is set aside and in its place an order is granted that Lombard General Insurance Company is the insurer liable to pay the Statutory Accident Benefits to Mr. Beaulieu and that Lombard shall reimburse CGU Group (Canada) Ltd. for the amounts which it has paid Mr. Beaulieu for such benefits. If there is any issue as to the amounts so due or other issues arising from the arbitration, the matter is remitted back to Arbitrator Jones to deal with those issues.

[24] I cannot see any reason why Allstate, Gore and CGU would not be entitled to their costs of these appeals from Lombard, AXA and Lombard respectively. However, if there are matters which counsel wish to draw to my attention that might alter my view in this regard they may do so by making written submissions to me. Also, if the parties cannot agree on the quantum of costs to be paid and wish me to fix them, I am prepared to do so on receipt of appropriate submissions in that regard. Allstate, Gore and CGU shall file their submissions within 10 days of the release of these reasons and Lombard and AXA shall file their responding submissions within 10 days thereafter.



NORDHEIMER J.

Released: October 16, 2000