

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I.8.as amended, s. 268 and ONTARIO REGULATION 283/95

AND IN THE MATTER OF THE ARBITRATIONS ACT,
S.O. 1991;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AMERICAN HOME ASSURANCE COMPANY

Applicant

- and -

HALIFAX INSURANCE COMPANY

Respondent

AWARD

APPEARANCES:

D'Arcy McGoey for the applicant
Thomas J. McEwen for the respondent

ISSUE:

Is American Home Assurance Company or Halifax Insurance Company responsible to pay accident benefits to or on behalf of Mr. Trevor Gosselin?

ORDER:

American Home Assurance Company is responsible for paying statutory accident benefits to or on behalf of Mr. Trevor Gosselin.

HEARING:

This matter was heard before me, M. Guy Jones, arbitrator, on May 28, 2003 in the city of Toronto, in the province of Ontario.

THE FACTS:

The basic facts in this matter are not in dispute. On December 3, 1999, Mr. Trevor Gosselin was involved in a serious motor vehicle accident. At the time of the accident, Mr. Gosselin was an occupant of a motor vehicle insured by the applicant, American Home Assurance Company (“American”). As of the date of the accident Halifax Insurance Company (“Halifax”) had issued a motor vehicle liability policy to Linda and Giles Gosselin, Trevor Gosselin’s parents, insuring a 1986 Ford Econoline motor vehicle.

Trevor Gosselin submitted an application for accident benefits to American who has since been paying accident benefits to Mr. Gosselin, however it takes the position that the 1986 Ford Econoline motor vehicle (“the van”) had been made available to Trevor Gosselin for his regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, as set out in section 66 (1)(a) of the statutory accident benefits schedule. That section states:

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.

If this was in fact the case, Halifax would stand in higher priority under section 268(2) of the Insurance Act and therefore be responsible for payment of the accident benefits to or on behalf of Trevor Gosselin.

It is American's position that the van was being made available for Trevor Gosselin's regular use by the unincorporated association, partnership, or sole proprietorship "Trevor's Carpet Care", despite the fact that the vehicle was actually registered in the name of Mr. and Mrs. Gosselin.

Halifax on the other hand, takes the position that the van in question was simply lent by Mr. and Mrs. Gosselin to their son Trevor in their capacity as parents, for his use in his own carpet business "Trevor's Carpet Care". As such, they submit that section 66 does not apply and accordingly American should pay the accident benefits.

In order to resolve this issue it is necessary to have a further understanding of the facts of this case. In 1990, Trevor Gosselin started a carpet cleaning business known as "Trevor's Carpet Cleaning" which was registered in his name. In or about 1998 Trevor declared bankruptcy, and Trustee in Bankruptcy seized all of the business' assets including the

carpet cleaning equipment. Despite the bankruptcy, Trevor wanted to continue in the carpet cleaning business, however he could not register another business because of the bankruptcy. Accordingly, Trevor and his parents developed a plan whereby Linda and Giles Gosselin would purchase the machinery from the Trustee in Bankruptcy and Linda would register a business under the Business Names Act in the name of “Trevor’s Carpet Care”. As Trevor did not have a vehicle to transport the cleaning equipment, Linda and Giles temporarily lent him their Econoline van which had been previously used by Mr. and Mrs. Gosselin for recreational purposes.

Trevor used the van exclusively for the carpeting business from 1998 until the accident on December 3, 1999. His parents did not use it during that time.

There was no evidence led at the hearing to suggest that the van was used at the time of the accident for any purpose other than Trevor’s regular use, and as such the only real issue remaining is whether the van was made available by an unincorporated association, sole proprietorship, or other entity.

American argues that the fact that the van was registered to Linda Gosselin personally does not automatically mean that it was not provided to Trevor by an unincorporated association, etc.. I agreed with this submission. It is possible for a vehicle to be registered to an individual and in fact be provided to another party by an unincorporated association, etc.. – see: Co-operators vs. Lloyds (August 16, 2002, Arbitrator Jones, affirmed November 27, 2002, unreported decision of Mesbur, J).

Counsel for American has pointed to a number of facts which he says supports the proposition that the vehicle was, in essence, provided by an unincorporated association, sole proprietorship, or other entity. These include the fact that Mrs. Gosselin was registered as the owner of Trevor's Carpet Care, and the fact that the van was to be used for no other purpose than the carpet care business. He also points out that the van was always registered as a commercial vehicle.

American basically takes the position that Linda Gosselin owned Trevor's Carpet Care and that Trevor was, in essence, an employee of the business. In further support of this position, they point to the "Statement of Business Activities" filed with Linda Gosselin's 1998 and 1999 Income Tax Returns which show various expenses for the business, including motor vehicle expenses.

In addition to the above, Linda Gosselin and Trevor Gosselin made statements when questioned at Examinations for Discovery that support American's position. Linda Gosselin, at her Examination for Discovery, stated:

Question: Okay, Did you consider this van to be a company van, sort of a business van?

Answer: Yes.

Mrs. Gosselin also testified that she worked at a gas bar and she acted like an advertiser for Trevor's Carpet Care business.

Linda Gosselin, in a signed statement for an adjuster for American, stated:

We [Linda and Gilles] purchased the cleaning machine and reopened the company under a different name. . . Trevor is the only employee.

Trevor Gosselin, at the hearing indicated during cross-examination by counsel for American that he treated the van as being owned by Trevor's Carpet Care. Trevor also gave a signed statement to a representative on March 24, 2000. In that statement he stated that he:

was working for a company owned by my mother, known as Trevor's Carpet Care." In that employment, I had built up a clientele, and I serviced that clientele using a van, a 1986 Ford Cube van, to get myself and my carpet cleaning equipment to and from clients' residences.

While counsel for American has constructed a compelling case for his position, I am in agreement with Halifax's position that the van was not made available by an unincorporated association, partnership, sole proprietorship, or other entity. In my view, the van was provided to Trevor by his mother and father solely in their capacity as caring

parents. While it is true that the business was registered in Linda Gosselin's name, this is not determinative of the issue just as the registration of ownership of the van was not determinative. It is clear that the only reason Linda Gosselin registered the new business was to avoid the problems created by the bankruptcy. Neither Linda or Giles Gosselin played any real part in the business. Linda did encourage people who came into her gas bar where she worked to use her son's cleaning business, but I find that she did so in her role as a parent trying to help her son rather than someone working for her own business. It is clear from the evidence of Mr. and Mrs. Gosselin that Trevor was the person who ran the business. Trevor developed clients, did the cleaning, collected the accounts, and hired additional staff as required. The testimony at the hearing of all the Gosselins was that Trevor was the one who would make money or lose it. Trevor was the equitable owner of the business.

While it is true that Linda Gosselin filed a "Statement of Business Activities" for Trevor's Carpet Cleaning in 1998 and 1999, her evidence at the hearing was that this was done simply at the suggestion of her accountants. Linda Gosselin testified at the hearing that the statement was factitious in the sense that she did not earn or spend any of the money referred to in the Statement. It was simply part of the entire plan to allow Trevor to get back into business.

All three of the Gosselins were questioned at length during the hearing with regard to the ownership of the business. Despite having developed a plan to avoid the restrictions of the Trustee in Bankruptcy, I find that the Gosselins were essentially honest, simple and

forthright witnesses. When cross-examined by counsel for American, Mrs. Gosselin did not agree that she was the owner of the business but rather stated that “it was in my name”. She also indicated at the hearing that “Trevor worked for himself. He was self employed”.

In summary, I am of the view that when looked at in its entirety, the business was really owned and operated by Trevor Gosselin. The registration of the business in Linda Gosselin’s name was simply a matter of expediency. Director’s Delegate Sachs, in the case of Cattrysse vs. West Minister Mutual Fire Insurance Company [1998] O.I.C.D. No. 68, dealt with a situation where Mr. Cattrysse was injured in a motor vehicle accident. He and his family lived on a tobacco farm which was owned as a partnership. A question arose as to whether the vehicle in question was owned by the partnership or by the individual. Director’s Delegate Sachs found that the intention of the parties was very relevant and a legal fiction created simply for a matter of expediency ought not to be determinative of the issue. I agree with Director’s Delegate Sachs in this regard. In our case I am of the view that the business was, in fact, Trevor’s, and thus the van was not provided by the business.

While American submitted that the van was provided to Trevor by Linda Gosselin in her capacity as the owner of the business, I think that this submission fails for two reasons. I have already found that Linda Gosselin did not really own the business, and so the argument fails on that ground alone. However, even if the business was owned by Linda Gosselin, the vehicle was, in my view, provided by the Gosselins in their capacity as

caring and helpful parents, not as part of a business proposition. The evidence led at the hearing made it clear that the van registered in Mrs. Gosselin's name had been used prior to the creation of Trevor's Carpet Care by Mr. and Mrs. Gosselin for pleasure purposes only – to transport skidoos, etc.. When Trevor was restarting his business after the bankruptcy he was without a vehicle to transport the equipment and his parents agreed to lend him the van for the purpose of transporting the equipment. All the Gosselins agreed that Trevor was simply going to use the van until he got on his feet financially and that when he could afford it, he would buy a motor vehicle of his own and return the van to his parents. While the Gosselins were unsophisticated witnesses and could easily be led on cross examination, it is clear to me that the intent of Mr. and Mrs. Gosselin was simply to loan the van, as caring parents to a son who required their assistance. As such the van was provided not by an unincorporated association, partnership, sole proprietorship or other entity.

Counsel for Halifax pointed out that when Mr. Gosselin had taken out the policy of insurance with Halifax he declared that the motor vehicle was to be used for personal use only and not for business purposes. Mr. Gosselin, on cross examination, agreed that this was so and suggested that he was aware of this problem when he lent the motor vehicle to Trevor. He indicated that the loan was going to be for a short period of time, but as the length of time that Trevor had the van increased, he had thought that he should change the use provision under the policy but had never done so.

Mr. John Sankey, a Senior Claims Consultant with Halifax testified that if the Gosselins had declared the van was to be used for a business purpose then Halifax would have charged a higher premium.

In my view the fact that Mr. Gosselin had declared the van to be insured by Halifax for personal use rather than business use is not determinative of the question as to whether or not the van was provided by an unincorporated association or other entity. It is some evidence of the intent of the parties, but nothing more.

In conclusion I find that the van was provided to Trevor Gosselin by his parents in their personal capacity and accordingly American is responsible to pay accident benefits to or on behalf of Trevor Gosselin.

COSTS:

In the event that the parties cannot agree on the question of costs, I may be spoken to.

**M. Guy Jones
Arbitrator**

Dated this _____ day of July, 2003.