

CITATION: Gore Mutual v. The Guarantee Company, 2010 ONSC 3826
COURT FILE NO.: CV-09-381-301
DATE: 20100708

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
GORE MUTUAL INSURANCE	)	<i>Philippa G. Samworth, for the Applicant</i>
COMPANY	)	(Appellant)
)	
	)	Applicant
	)	(Appellant)
)	
- and -)	
)	
THE GUARANTEE COMPANY OF	)	<i>Maura Thompson, for the Respondent</i>
NORTH AMERICA	)	(Respondent in Appeal)
)	
	)	Respondent
	)	(Respondent in Appeal)
)	
)	
)	
	)	HEARD: June 28, 2010
	)	DECISION RELEASED: July 8, 2010

REASONS FOR DECISION

Echlin J.:

1. INTRODUCTION:

[1] The Swiss philosopher, poet, and critic, Henri Frederic Amiel (1821-1881), has observed:

Common sense is the measure of the possible; it is composed of experience and prevision; it is calculation applied to life.

[2] The American essayist, Agnes Repplier (1855-1950), once wrote:

People who cannot recognize a palpable absurdity are very much in the way of civilization.

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[3] In this motion, the applicant/appellant has urged a statutory interpretation which the respondent has asserted is contrary to common sense and would result in absurdity.

2. BACKGROUND:

[4] During the early hours of February 22, 2006, 16-year old Clayton Mayne suffered serious personal injuries, including moderate brain injury and a fractured clavicle, in a stolen Dodge Caravan on the Hamilton Mountain when this vehicle slammed into a tree. It has been agreed that he was dependent upon his mother, Lisa Mayne, for financial support and care.

[5] Neither Lisa Mayne nor Clayton Mayne possessed a driver's licence or owned a car. It has been agreed that Lisa mostly used the Hamilton Street Railway ("HSR"), the municipal transit system, to travel to and from work. She owned monthly passes and paid cash fares.

[6] There is a dispute between The Gore and The Guarantee as to which insurer is obliged to pay statutory accident benefits. The Gore insured the stolen Dodge Caravan and has paid some benefits. It seeks to recover its outlay and to establish that priority rests with The Guarantee, the insurer of the HSR.

[7] The parties placed this dispute before Lee Samis, a highly respected arbitrator, under the *Arbitration Act*, 1991, S.O. 1991, c. 17.

[8] On May 22, 2009, Arbitrator Samis issued a decision concluding that neither Clayton, nor his mother, Lisa Mayne, were deemed to be a named insured under The Guarantee policy, and therefore it was not obligated to pay any statutory accident benefits in the circumstances.

[9] The Gore has appealed Arbitrator Samis' decision alleging that he erred in law in concluding that Clayton and Lisa Mayne were not deemed "named insureds" under The Guarantee HSR policy and in particular s. 66(1) of the *Statutory Accident Benefits Schedule*. The parties consensually agreed to reserve their rights to appeal the Arbitrator's decision to the Superior Court of Justice (Ontario) without leave, on a question of law or mixed fact and law.

3. THE STATUTORY FRAMEWORK:

[10] As articulated by the memorable five (5) judge panel of the Court of Appeal for Ontario in 1993, in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.) at paras. 6 and 7:

...prior to 1990, Ontario's automobile accident compensation system consisted essentially of a third-party liability system, in which there was an unrestricted right to sue tortfeasors for bodily injury claims including death. Limited no-fault benefits payable on a first-party basis (i.e., from the victim's own insurer) were also available as a mandatory part of all automobile insurance policies. In 1990, the Ontario legislature enacted the Ontario Motorists' Protection Plan, a scheme which centred around s. 266 [now 268] of the Act and the no-fault benefits...

...The Ontario legislature enacted s. 266 (which is now s. 268), and other related amendments to the Act for the purpose of significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first-party benefits, regardless of fault, from his or her own insurer. The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault.

[11] Sections 268(1) and 268(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 set up the Statutory Accident Benefits regime and provide:

Statutory accident benefits
268(1) – not applicable

Liability to pay
268(2) – 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,
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
2. In respect of non-occupants,

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i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund, R.S.O. 1990, c. 1.8, s. 268(2); 1993, c. 10, s. 1; 1996, c. 21, s. 30(3,4).

Liability

268(3) – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. 1.8, s. 268(3); 1993, c. 10, s. 1.

Choice of insurer

268(4) – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. 1.8, s. 268(4); 1993, c. 10, s. 1.

268(5) – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26(2); 1999, c. 6, s. 31(9); 2005, c. 5, s. 35 (13).

268(5.1) – Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26(2).

[12] Under Ontario Regulation 403/96, a Statutory Accident Benefits Schedule (“S.A.B.S.”) has been set up. The Gore argues that section 66 governs the instant factual circumstances and asserts that this Court ought to impose all liability for accident benefit payments on The Guarantee. This regulation provides:

COMPANY AUTOMOBILES AND RENTAL AUTOMOBILES

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.

66(2) – An individual who is not 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; and

(b) the individual, his or her spouse or any dependant of the individual or spouse is an occupant of the insured automobile.

[13] Arbitrator Samis made the specific finding that the HSR buses were not "made available" to the Maynes and further that it is doubtful that being a passenger on a public transit vehicle is "use" within the context of the regulation. He therefore concluded that neither the injured Clayton Mayne, nor his mother, Lisa, were "named insureds" under the policy. I agree with his finding that The Guarantee, as HSR's insurer, is not obligated to pay statutory accident benefits in the circumstances.

4. THE ARGUMENT ADVANCED BY THE GORE:

[14] In order to determine whether The Gore or The Guarantee bears the responsibility to pay statutory accident benefits, Arbitrator Samis was required to determine whether Lisa or Clayton Mayne were "named insureds".

[15] Ms. Samworth argued that the provisions of section 66 of S.A.B.S. compel the arbitrator to find that Mr. Mayne or his mother is a "named insured", and that in failing to do so, he erred in law.

[16] Simply put, Ms. Samworth's argument is that HSR buses are "motor vehicles required to be insured", as they are "vehicles propelled or driven otherwise than by muscular power".

[17] This analysis proceeds to assert that under section 66 (which is entitled "Company Automobiles and Rental Automobiles") where an insured automobile is "made available for an individual's regular use" at "the time of the accident" and where an individual who is "living" and "ordinarily present" in Ontario, such individual shall be deemed to be the "named insured". Such finding would result in The Guarantee becoming liable for S.A.B.S. under s. 268(5) of the *Insurance Act*.

5. THE STANDARD OF REVIEW:

[18] Much has been written about the appropriate standard of review in circumstances such as this. It has been well settled and agreed by both counsel, in keeping with the Ontario Court of Appeal's decision in *Oxford Mutual v. Co-operators General* (2006), 83 O.R. (3d) 591 (C.A.), that for the determination of a question of law, the standard is "correctness" and for a question of mixed fact and law, it is "reasonableness".

[19] While I am inclined to believe that this determination involves a mixed question of fact and law, I am of the view that Arbitrator Samis' decision is both reasonable and correct and ought not to be disturbed.

6. ARBITRATOR SAMIS' AWARD AND CONCERNS:

[20] A careful review of the Award in question discloses that Arbitrator Samis had difficulty finding that HSR buses were "made available" for the "regular use" of the Maynes. He observed:

In respect of passengers, the vehicles of a public transit system are either made available for no one's use or everyone's use. Everyone is entitled to be a passenger on a scheduled route, simply by payment of a fare. If this means that the vehicles are made available for regular use in accordance with the regulation, the result is that all of those persons (and spouses and dependents) are entitled to SABS benefits from the transit's insurer – and such entitlement would apply to accidents that do not involve transit vehicles, that are outside the Hamilton area, and indeed may be outside of Canada.

[21] He was also troubled that The Gore's interpretation of s. 66 of the S.A.B.S. would subject the insurer of the HSR to virtually limitless and unquantifiable risk of liability for accident benefit payments for which they have not been paid and for accidents which, in many cases, would not involve a transit bus. Such a priority determination would undermine the priority determination intended by the Legislature under s. 268(2) of the *Insurance Act*:

Such a conclusion would mean that potential users of transit systems would enjoy the very substantial benefits of being consider[sic] a "named insured" under a

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program of insurance that they have paid nothing for. The insurer of the transit system is in no position to consider or underwrite the risk involved. This would amount to a transfer of an astonishing amount of risk to the insurer. From a public policy perspective, this would make no sense, as the ultimate effect would be to increase the cost of transit in order to pay benefits to persons injured in accidents that do not involve transit vehicles or transit activities.

[22] In addition, Arbitrator Samis specifically found that the language of the regulation is imprecise, ambiguous, and requiring of interpretation. The use of such terms as "available", "regular", and "use" make the search to remedy the inherent uncertainty, a factually sensitive exercise involving both fact and law.

[23] Arbitrator Samis found that the HSR either made its services "available" to everyone or no one. Any member of the public may use HSR's buses. "Any member of the public" has no control over the operations of the HSR, its routes, or the timing of its routes.

[24] Arbitrator Samis also observed that if the interpretations urged by The Gore were to be adopted, then users of the HSR (and presumably any other Ontario transit system or taxi service) and their spouses and dependants (and for that matter, those who regularly use public transit, bus lines, taxi services, and others) would be considered "named insureds" under insurance for which they have paid nothing and involving accidents which have no involvement with such public transit services. In short, such members of the public would enjoy very substantial benefits, which the insurer would have had no opportunity to consider or otherwise underwrite the risk.

[25] The Court of Appeal for Ontario in *Fraczek v. Pascual* (2003), 64 O.R. (3d) 437 (C.A.), has observed that if the Legislature intends to materially increase the risk exposure of insurers, it must clearly signify such intention.

[26] In this instance, there is a striking absence of any indicia that the Ontario Legislature intended any such expansion of coverage and consequent risk exposure. In addition, reference was made to the fact that all McMaster University students receive a bus pass for the HSR. The Gore's position could result in all students, and their spouses and dependants, having access, on a preferred basis, to The Guarantee policy of HSR for accidents which have no connection to the HSR.

[27] In short, the position urged by The Gore would make the system of priorities set out in the *Insurance Act* meaningless.

[28] In interpreting s. 66 of S.A.B.S., the words must be read in the context of the entire legislative scheme.

[29] While The Gore conceded that the principles of interpretation may be used to resolve an absurd interpretation, it argued that the interpretation it urges did not result in an absurdity.

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Clearly, an interpretation of the legislation which leads to an absurd result or defeats its purpose is to be avoided.

[30] In these circumstances, Arbitrator Samis had no alternative but to make the determination that he did. His award is both correct and reasonable and ought not to be modified.

[31] Arbitrator Samis was justified in "recoiling from" the suggestion that users of public transit ought to be deemed to be "named insureds" in an instance in which they have paid nothing for such coverage. Indeed, it appears that he found that it made no sense to impose an "astonishing amount of risk" on insurers which could result in an increase in the cost of transit, in order to pay benefits to people injured in accidents which, in no way, involved transit vehicles or associated activities.

[32] The significant and far-reaching ramifications of holding otherwise would result in nearly every time a public transit authority presumably anywhere in Ontario, sells a token, ticket or bus pass, it would also be seen to be including a policy of insurance as an "added extra bonus premium" to members of the public.

[33] Access to a ride on the HSR (or any Ontario transit or taxi system) is triggered by a temporally proximate intent and evidenced by the purchase of a ticket, token pass, or cash fare. Theoretically, the position taken by The Gore could open the door to the argument that anyone involved in a motor vehicle accident who had in the recent past ridden public transit, (or whose spouse or parent had) would be entitled to receive accident benefits payments as "named insureds" of the transit system's insurance carrier, if they, or their parents or spouses had sufficient change in their pocket at the time of the accident, to cover the cost of the fare.

[34] The application of age old principles of statutory interpretation leads to the inescapable conclusion that The Gore's position is flawed, problematic, and out of keeping with legal norms. A review of other cases such as *Dominion of Canada General Insurance Company v. Co-Operators General Insurance Company* (February 9, 1999 Award of Arbitrator Malach); *Aza Insurance Company v. Gore Mutual Insurance Company v. State Farm Mutual Insurance Company* (May 4, 2000 Award of Arbitrator Malach) and *Zurich Insurance Company v. Personal Insurance Company*, [2009] I.L.R. 1-4836 (Ont.S.C.) all involved cases in which the accident benefits claimant had some indicia of control over the automobile, unrestricted access to the vehicle, or some form of personal connection, often arising out of the employment relationship.

[35] Notably, in this instance, none of these factors were present.

[36] It has long been accepted that the Legislature cannot be presumed to have acted unjustly or unreasonably. The interpretation process resulting from The Gore/The Guarantee dispute is not an academic exercise. It can have a widespread, highly consequential, and dramatic impact on one of the most important insurance regimes in this province.

[37] As Iacobucci J. wrote in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at p. 43:

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It is a well established principle of statutory interpretation that the Legislature does not intend to produce absurd results.

[38] In my respectful view, to adopt the interpretation urged by The Gore would be to proceed at variance with common sense and would result in enormous modifications to a long established system of insurance. Such changes were not intended by the Legislature.

7. **CONCLUSION:**

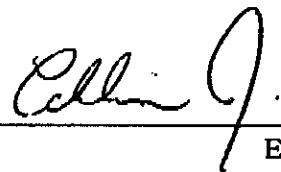
[39] This case was most ably argued by both Ms. Sanworth and Ms. Thompson. I have no alternative but to affirm Arbitrator Samis' Award in all respects.

8. **COSTS:**

[40] Counsel have jointly submitted that the successful party should receive \$6,500.00 inclusive of applicable taxes and disbursements. I have considered this proposal and find it to be reasonable (having regard for the high quality of both written and oral submissions by both parties), to have been in the contemplation of the parties, and is in keeping with the principles referenced in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.).

9. **ORDER:**

[41] I therefore order that The Gore's appeal be dismissed, Arbitrator Samis' Award be confirmed, and that The Gore shall pay to The Guarantee the sum of \$6,500.00 in costs.



Echlin J.

Released: July 8, 2010

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GORE MUTUAL INSURANCE COMPANY

**Applicant
(Appellant)**

- and -

**THE GUARANTEE COMPANY OF NORTH
AMERICA**

**Respondent
(Respondent in Appeal)**

REASONS FOR DECISION

Echlin J.

Released: July 8, 2010