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Licence Appeal Tribunal

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Ontario

Date: 2017-07-14
Tribunal File Number: 16-003674/AABS
Case Name: 16-003674 v Aviva Canada Inc.

In the matter of an Application pursuant to subsection 280(2) of the Insurance Act, RSO 1990, c. I.8, in relation to statutory accident benefits

Between:

J. T.

Applicant

and

Aviva Canada Inc.

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: **R. Tally Vanounou, Counsel**

For the Respondent: **Marnie E. Miller, Counsel**

HEARD: Written Hearing: March 15, 2017

BACKGROUND/OVERVIEW:

[1] This dispute involves an off-road vehicle operated on private property. The applicant was injured in an all-terrain vehicle ("ATV") incident on July 11, 2015, while he was a guest at a property in rural Ontario. He attended the property with his friend and his friend's parents, G.E. and L.S. ("Family A"), who had recently purchased the property from R.H. and S.H. ("Family B"). He suffered significant injuries and applied for accident benefits, under his father's insurance policy to Aviva Canada Inc. (the "respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*").

[2] The respondent paid accident benefits for a period of 11 months before terminating the benefits on the basis that the applicant's claim did not meet the definition of accident because the ATV is not an "automobile" under the *Schedule* due to the circumstances of the incident.

[3] The *Schedule* does not define the word automobile. The courts and adjudicators must go through the complicated exercise of interpreting the *Insurance Act*, the *Compulsory Automobile Insurance Act*, the *Highway Traffic Act*, and the *Off-Road Vehicles Act* to determine whether a particular vehicle is an "automobile," giving rise to a claim.

[4] The analysis relevant to this case requires me to focus on the ownership of the ATV at the time of the incident. The ownership of the ATV plays an important part in determining whether or not the ATV qualifies as an automobile as per the *Schedule*, as section 15(9) of the *Off-Road Vehicles Act* (ORVA) provides that insurance is not required for an ATV if it is driven on private property of the owner of the ATV. In this case, the question of ownership turns on whether there had been a verbal agreement for Family A to purchase the ATV from the Family B prior to the incident.

[5] The applicant submitted an application to the License Appeal Tribunal – Automobile Accident Benefit Services (the "Tribunal"). The parties were unable to resolve this dispute at a case conference held on January 30, 2017, and the matter proceeded to this written preliminary issue hearing.

PRELIMINARY ISSUES:

[6] I have been asked to make a decision on the following issues:

a) Was this incident an accident within the meaning of the *Schedule*?
b) Who owned the ATV on the date of the incident?
c) Is the respondent precluded ("estopped") from denying coverage to the applicant under the *Schedule*?

d) Is the applicant entitled to an award under Ontario Regulation 664, R.R.O. 1990?

RESULT:

[7] After reviewing the parties written submissions and evidence, my finding on the above issues are as follows:

a) The incident was not an accident as per section 3 of the *Schedule.*
b) The ATV was owned by Family B (R.H. and S.H.) on the date of the incident.
c) The respondent is not precluded ("estopped") from denying coverage to the applicant under the *Schedule*?
d) The applicant is not entitled to an award under Ontario Regulation 664, R.R.O. 1990.

ANALYSIS:

Was this incident an accident within the meaning of the Schedule?

[8] Section 3. (1) of the *Schedule* defines accident as follows:

> "…an incident in which the use of the operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device."

[9] The respondent argues that the ATV involved in the incident was not an "automobile" under the *Schedule*. Therefore, the applicant is precluded from making a claim for accident benefits.

[10] Both parties agreed that the leading authority for determining whether a vehicle is an "automobile" is set out in *Grummet v. Federation Insurance Co. of Canada* 1999 CarswellOnt 3907 (OSJ). *Grummet* was upheld by the Court *of* Appeal and is the basis for what is now commonly referred to as the *Adams test*.[1] To qualify as an automobile under the Adams test 1 of the following 3 components must be met:

1) The Ordinary Parlance Test: Is the vehicle an automobile within the ordinary sense of the word? If not, the court should proceed to parts 2 and 3 of the test;
2) Insurance Policy: Is the vehicle defined as an "automobile" in the wording of the insurance policy?

[1] *Adams v. Pineland Amusement Ltd.* 2007 CarswellOnt 7800 (ONCA)

3) Does the vehicle fall within any enlarged definition of "automobile" in any relevant statue?

[11] The parties agree that the ATV does not meet the ordinary parlance test. The parties disagree on part 2 and part 3 of the test.

[12] The applicant argues that the ATV meets part 2 of the test as the ATV was insured as a newly acquired vehicle under section 2.2.1 of Family A's Ontario Automobile Policy ("OAP"). Section 2.2.1 of the OAP defines a newly acquired vehicle as "an automobile or trailer that you acquire as owner and that is not covered under any other policy." In order to qualify as a newly acquired vehicle two conditions must be met: 1) The insurer must insure all automobiles owned by the individual; and 2) Any claim made for additional automobiles is made against coverage provided for all other automobiles.

[13] The applicant cited the Court of Appeal which confirmed that a newly acquired vehicle can be added to a policy 14 days retroactively after acquiring ownership.[2] Family A attempted to add the ATV to their automobile policy nine days following the incident. Because I have determined below that Family A were not the owners of the ATV, part 2 of the *Adams test* is not satisfied.

[14] The real issue is part 3 of the test, whether the ATV falls within a definition of "automobile" in any relevant statute. The parties provided a different perspective with respect to the facts of the case and how the relevant legislation applies. The relevant legislation is Section 224 of the *Insurance Act* and sections 15(1), (2) and (9) of the *Off-Road Vehicles Act ("ORVA")* which sets out the framework which applies to this case. In particular, with respect to the facts pertaining to the ownership of the ATV and whether it required insurance. If the ATV is exempt from being insured it does not qualify as an automobile under the *Schedule.*

[15] Section 224 of the *Insurance Act* defines an automobile as follows:

> "a) a motor vehicle required under any act to be insured under a motor vehicle liability policy; and
> b) a vehicle prescribed by regulation."

[16] Both parties agree that the ATV meets the definition of an off-road vehicle. Subsection 15(1) of the *ORVA* requires that off-road vehicles be insured when operated. Subsection 15(2) prohibits an owner of an off-road vehicle from permitting the vehicle to be driven unless it is insured. However, there is one exception to the rule and that is in subsection 15(9) which exempts an ATV from being insured where it is driven on land occupied by the owner of the off-road vehicle.

[2] *Hunter Estate v. Thompson*, [2003] O.J. No. 2395 (CA)

[17] In order to make a determination on whether the ATV qualifies as an automobile under part 3 of the *Adams* test a determination must be made about who owned the ATV on the date of loss. To resolve the ownership question, the parties made submissions regarding the *Sale of Goods Act* as it applies to this case.

Who owned the ATV on the date of loss?

[18] The respondent argues that the Family B owned the ATV at the time of the incident. Since Family B were the owners and occupiers of the property when the incident occurred, the ATV was neither insured, nor was it required to be insured as per the exemption in subsection 15(9) of the *OVRA.* Therefore, the ATV would not meet the definition of automobile under the *Schedule* and the applicant will not have recourse to accident benefits.

[19] The applicant argues that his friend's parents, Family A owned the ATV on the date of the collision. The applicant submits that if Family A owned the ATV it would have required insurance as the accident did not take place on their property but on the property of Family B. Hence, the exemption under section 15(9) of the *ORVA* would not apply and the incident would qualify as an accident under the *Schedule.*

[20] The complicating factors in this case are that prior to the incident, Family A purchased the property from Family B with a closing date of August 19, 2015, about a month after the accident. Significantly, the parties agree that on July 11, 2015 (the date of the incident) Family B were the sole owners of the property and that the trail where the incident took place was within the boundaries of that property. However, the parties disagreed on the ownership of the ATV at the time of the incident. The applicant submitted that Family A had a verbal agreement with Family B to purchase the ATV along with some other chattels on the property.

[21] I found the evidence submitted by the applicant with respect to ownership insufficient. For example, all evidence was submitted through the affidavit of Lisa Stark, Accident Benefit Supervisor with the applicant's representative's firm. Ms. Stark provided background information with respect to the incident, information pertaining to third party litigation arising as a result of the incident, and the applicant's version of the sequence of events. As part of the exhibits attached to Ms. Stark's affidavit was the affidavit of G.E. (Family A). However, this affidavit was not made in support of this application but in support of third party litigation against his insurance company. Affidavit evidence directly in support of this application from Family A and B may have been more compelling.

[22] For the above reasons and for the reasons that follow, I do not find that the applicant has met the burden of proof based on a balance of probabilities that Family A owned the ATV on the date of the incident.

[23] The applicant submitted affidavit evidence to support that prior to the accident Family A had a verbal agreement with Family B that they would purchase the ATV along with some other chattels. [3] Additionally, on July 11, 2015, Family A gave a $20,000.00 cheque to Family B prior to the incident for the purchase of the ATV, a backhoe and some other chattels.

[24] The applicant also submitted emails sent post-accident between the couples that discussed the purchase of the ATV.

[25] In the affidavit sworn by G.E.(Family A), he indicated that it was not their intention to take possession of the chattels until the closing date and transfer of ownership of the house from Family B to Family A which occurred on August 19, 2015, as they did not have any use for them prior to that date.

[26] The applicant argues that the verbal agreement between the couples formed the contract of the sale, and once payment of $20,000.00 was made the transfer of the ATV and other chattels occurred on July 11, 2015.

[27] The respondent submits that the memo line on the cheque for $20,000.00 lists only the backhoe and rent and thus is not evidence that the payment included the purchase of the ATV. In the alternative, the respondent argues that even if payment included the ATV, common sense dictates that the parties intended for the chattels to be transferred upon the closing of the sale of the house and property.

Application of the Sale of Goods Act

[28] For the reasons that follow, the applicant did not provide adequate evidence to demonstrate that Family A owned the ATV as per the rules set out in the *Sale of Goods Act*.

[29] The respondent argues that if there is an unclear intention of the transfer of chattels, one must look to the following rules outlined in section 19 of the *Sale of Goods Act* which states:

> Rule 1: Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when

[3] The respondent raised the issue of procedural fairness with respect to the applicant's submission of affidavit evidence pertaining to the ownership of the ATV. The respondent argued that at no time did the applicant provide notice that he would submit evidence by way of affidavit. As a result, the respondent had no mechanism to cross-examine on that evidence. I allowed the admission of this evidence as the Order of the case conference adjudicator made reference to affidavit evidence and the respondent could have addressed their concerns by way of affidavit evidence in response.

the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed."

Rule 2: Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

[30] The applicant argues that Rule 1 applies as the couples had a meeting of the minds which constituted an unconditional contract for the sale of the ATV. I disagree that Rule 1 applies to this case due to the inconsistencies in the evidence. For example, the memo line on the $20,000.00 cheque did not list the ATV as an item purchased. While this may be a small detail, the number of discrepancies in the evidence, do not add up. In addition, the applicant and his friend asked for S.H's (Family B) permission to ride the ATV on the date of the incident. If it was clear that the ownership had transferred to Family A on that date it does not make sense that they would ask S.H. (Family B) for her permission to drive it.

[31] Finally, the affidavit of G.E. (Family A) indicated that he did not intend to take ownership of the chattels along with the ATV until the date of closing August 19, 2015, after the incident. In the same affidavit, G.E. contends that shortly following the accident he tried to add the ATV as newly acquired vehicle, which is contradictory to his previous statement that he did not intend to take ownership of the ATV until August 19, 2015.

[32] These conflicts, in my view do not demonstrate "a meeting of the minds" as argued by the applicant in his submissions. Consequently, I find the respondent's application and interpretation of Rule 2 more convincing.

Was the ATV in a deliverable state?

[33] With respect to the application of Rule 2, I agree with the respondent that I must determine whether the ATV was in a deliverable state. To determine whether it was in a deliverable state I must look at Section 8 of the *ORVA* which sets out the conditions which must be met for the transfer of ownership:

a) Remove number plate from vehicle;
b) Upon delivery – complete transfer section of the vehicle portion of the permit and give to the new owner;
c) Retain the plate portion of the permit.

[34] The evidence demonstrates that none of the above conditions were met. For example, the ATV was not plated and Family B had not provided Family A with

the transfer section of the vehicle permit. For these reasons, I do not find that the ATV was in a deliverable state as per section 8 of the *ORVA.*

[35] While I appreciate the unfortunate and life changing impact on the applicant's life, the evidence and applicable analysis of the *OVRA* does not support that the Family A owned the ATV on the date of loss. Since the accident took place on the owner of the ATV's property it was not required to be insured as per the exemption of section 15(9) of the ORVA. The applicant did not submit sufficient evidence to support a finding that Family A owned the ATV on the date of the incident.

[36] Therefore, the ATV does not meet part 3 of the Adam's test and does not qualify as an automobile under the *Schedule*.

Is the respondent precluded ("estopped") from denying coverage to the applicant under the *Schedule*?

[37] The applicant argues that the respondent is estopped from denying accident benefits coverage under the *Schedule* as the respondent had a duty to investigate and advise the applicant of a potential denial of benefits immediately. Instead, the respondent paid him accident benefits for 11 months giving him a false sense of security. The applicant's suggestion that once an insurer accepts a claim based on the shared assumption that an insured person was injured as a result of an accident, it cannot afterwards review the facts and change its position.

[38] The applicant is essentially arguing that the Tribunal has jurisdiction to grant equitable relief because section 280 of the *Insurance Act* gives the Tribunal exclusive jurisdiction to resolve disputes regarding statutory accident benefits.

[39] The respondent contends that the Tribunal does not have jurisdiction to grant equitable relief. The only jurisdiction the Tribunal has is that conferred to it by statutory authority. The respondent further submits that it is entitled to terminate a benefit if it is determined that an incident is not an accident. I agree.

[40] The applicant has not succeeded in convincing me that the Tribunal has jurisdiction to grant equitable relief such as estoppel in this case. The applicant has not pointed to any legislation, rule or case law that confers this power to the Tribunal. The applicant argues that the jurisdiction to grant equitable relief is now vested in the Tribunal because of the change in the dispute resolution scheme.

[41] Previously, insureds had the option of disputing their accident benefits claim through arbitration or bringing an action before the Courts. Naturally, the courts have jurisdiction to deal with equitable remedies such as estoppel. The Tribunal, on the other hand, cannot simply step into the role of the courts and enjoy similar

jurisdiction because it is now the exclusive venue for resolving accident benefit disputes. The equitable remedy the applicant is seeking is not the type of remedy that can be implied in the context of administrative tribunals. If it was the intention of the legislature to include equitable relief such as estoppel as an allowable remedy, it would have expressly conferred it on the Tribunal in the enabling legislation. Therefore, I am unable to grant the applicant this remedy.

[42] In any event, the applicant's suggestion that once an insurer accepts a claim it is estopped from changing its position is contrary to the statutory accident benefits scheme. The onus is on the applicant to establish that he suffered an impairment as a result of an accident as defined in the *Schedule*. A fundamental component of any claim for benefits is that every applicant must show entitlement, and that duty is ongoing as per section 33 of the *Schedule.* The insurer also has obligations. It must pay benefits promptly and investigate and adjust claims on an ongoing basis, considering new evidence as it arises. I find that the respondent complied with the *Schedule* and is therefore, not precluded from denying coverage to the applicant.

Is the applicant entitled to an award?

[43] The applicant is seeking an award for bad faith as he alleges the respondent did not investigate the file properly or promptly.

[44] The Tribunal does not have the authority to make an award for bad faith. It does however, have the authority to make an award under Ontario Regulation 664, R.R.O. 1990 (O. Reg. 664) in addition to awarding the benefits and interest to which an insured person is entitled when an insurer unreasonably withholds benefits. Given my reasons above, I find that this award is not warranted in the circumstances in this case.

ORDER:

For the reasons noted above, the applicant's claim is dismissed.

Released: July 14, 2017

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Rebecca Hines, Adjudicator