

CITATION: Austin Benson v. Belair Insurance Co. Inc., 2018 ONSC 2297  
DIVISIONAL COURT FILE NO.: 118/17  
DATE: 20180409

ONTARIO

SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

MORAWETZ RSJ, THORBURN and TZIMAS JJ.

BETWEEN: )

AUSTIN BENSON )

Applicant )

) *Ian Furlong*, for the Applicant, Austin  
Benson

- and - )

BELAIR INSURANCE COMPANY INC. )

) *Eric Grossman* and *Patrick Baker*, for the  
Respondent, Belair Insurance Company Inc.,

- and - )

FINANCIAL SERVICES COMMISSION  
OF ONTARIO )

) *Deborah McPhail* and *Reesha Hosein*, for the  
Respondent Financial Services Commission  
of Ontario

Respondents )

) HEARD at Toronto: April 9, 2018

**THORBURN J. (Orally)**

[1] The Applicant, Austin Benson was a resident of Ontario who was living in British Columbia.

[2] On June 23, 2013, he was a passenger on an all-terrain vehicle (“ATV”) in British Columbia. While on a public trail owned and occupied by the Northern Rockies Regional Municipality, he fell off the ATV. He suffered a severe brain injury as a result of the accident.

[3] The ATV was owned by a resident of British Columbia. The owner of the ATV was not required and did not insure his ATV.

[4] At the time of the accident, the Applicant held a standard Ontario automobile insurance policy. That policy does not list an ATV as an insured vehicle.

[5] On August 20, 2013, he applied for accident benefits pursuant to the Ontario *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“SABS”). The SABS is a regulation made pursuant to the Ontario *Insurance Act*.

[6] On October 9, 2015, Financial Services Commission of Ontario (“FSCO”) Arbitrator Musson held that the Applicant was not involved in an “automobile accident” covered by the SABS because the ATV was not an “automobile” within the meaning of the insurance laws of British Columbia and British Columbia legislation governs.

[7] The Applicant appealed. The Director’s Delegate of FSCO upheld the arbitrator’s decision.

[8] The Applicant seeks judicial review of Director’s Delegate Evans’ order dated February 15, 2017, and a declaration that he was involved in an automobile accident within the meaning of s. 3(1) of the SABS. He claims he was unreasonably denied SABS benefits from Belair.

[9] The Respondent Belair contests the Applicant’s right to benefits.

[10] The issues in this case are:

- (a) Was the ATV an “automobile” such that the Applicant was involved in an “automobile accident” within the meaning of the SABS? and,
- (b) Should British Columbia or Ontario legislation apply?

### **THE POSITIONS OF THE PARTIES**

[11] The Applicant asserts that the ATV was in an “automobile accident” within the meaning of s. 3(1) of the SABS because ATVs must be insured in Ontario and ATVs therefore fit within the definition of automobile provided in the *Insurance Act* of Ontario. Moreover, because the Applicant is here, the insurance policy was entered into in Ontario, the insurance company head office is in Ontario and the insured is a permanent resident of Ontario, the provisions of Ontario legislation regarding ATVs should govern. The Applicant therefore claims entitlement to benefits under the SABS.

[12] The Respondent Belair claims the ATV is not considered an automobile under British Columbia law as the ATV was not insured, and was not required to be insured. British Columbia legislation regarding ATVs must govern as the accident took place in British Columbia on a vehicle owned by a person in British Columbia. The Applicant is therefore not entitled to benefits.

## **JURISDICTION**

[13] Pursuant to ss. 2 and 6(1) of the *Judicial Review Procedure Act*, the Divisional Court has jurisdiction to hear applications for judicial review and to grant any relief that an Applicant would be entitled to, in proceedings by way of an application for an order in the nature of certiorari or proceedings by way of an action for a declaration.

## **STANDARD OF REVIEW**

[14] This is a matter of statutory interpretation. The appropriate standard of review is reasonableness.

[15] FSCO decisions are made in a specialized and independent administrative regime established under the *Insurance Act* and in this case, the Arbitrator and the Director's Delegate were engaged in statutory interpretation and application of their enabling legislation (the *Insurance Act*) and closely-related legislation (SABS and the *Off-Road Vehicles Act*), such that the standard of reasonableness applies.

[16] Judicial authority provides that reasonableness is the appropriate standard of review on an application for judicial review of a Director's Delegate's decision that involves the interpretation of statutes regarding entitlement to no-fault motor vehicle accident benefits in Ontario. This includes the *Insurance Act* and the SABS.

[17] In *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 (CanLII), at para 53, the Court held that even if the review involves an extricable question of law regarding SABS, a reasonableness standard of review will still generally be applied. (*Whipple v Economical Mutual Insurance Co.*, 2012 ONSC 2612 (Div Ct) at para 3; *Kumar v Coachman Insurance Co.*, [2004] OJ No 2494 (Div Ct) at para 2; *Allstate Insurance Co. of Canada v. Klimitz*, 2015 ONCA 698 at para 4; *Francis v Dominion of Canada General Insurance Co.*, 2016 ONSC 6566 (Div Ct) at para 3.)

[18] Moreover, as noted by the court in *State Farm Mutual Automobile Insurance Co. v. Federico*, 2014 ONSC 109 at para. 7, once an insured chooses FSCO arbitration, the arbitrator has exclusive jurisdiction, and thereby becomes "solely tasked" with considering the matter in the first instance.

[19] Where the standard of review is reasonableness, deference is warranted. This means the decision must fall within the range of possible conclusions which are defensible in respect of the facts and the law. (*Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190).

## **ANALYSIS AND CONCLUSION**

### ***Background of Auto Insurance and the SABS regime***

[20] An insured can purchase automobile insurance in Ontario to protect the insured's property, injury to the insured resulting from an accident in which the insured was at fault, or injury to an insured caused by another who is underinsured or uninsured.

[21] Liability insurance can also be purchased to protect an insured from claims by a third party.

[22] Rates are set based on the assessment of risk.

[23] Since 1990, motor vehicle accident compensation in Ontario has been premised on an "exchange of rights" principle. The legislature restricted the right of innocent accident victims to maintain a tort action against the wrongdoer in exchange for enhanced no-fault accident benefits from their own insurer. (*Meyer v. Bright* (1993), 1993 CanLII 3389 (ON CA), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354 (C.A.) and *Sullivan Estate v. Bond* (2001), 2001 CanLII 8584 (ON CA), 55 O.R. (3d) 97, 202 D.L.R. (4th) 193 (C.A.).)

[24] Section 268(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 provides that,

268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[25] Section 2(1) of the SABS provides that benefits set out in it "shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010."

[26] Section 3(1) of the SABS defines "accident" as:

[A]n incident in which the use or operation of an automobile directly causes an impairment...

[27] There are two threshold requirements for SABS benefits:

- (a) that a claim for statutory accident benefits be with respect to an "accident", and
- (b) that the harm be caused by the use or operation of an "automobile".

[28] The term "accident" is defined in the SABS but the term "automobile" is not.

***What is an automobile?***

[29] Whether the ATV is an automobile is determined by looking at the common meaning of the word, whether the term is defined in the insurance policy between the insurer and the insured, and whether the term is defined in any relevant statute. (*Adams v. Pineland Amusement Ltd.* (2007) 88 O.R. (3d) 321 (C.A.))

[30] The parties agree that an ATV is not an automobile in "ordinary parlance"; nor is a definition of automobile included in the insurance policy or in the SABS.

[31] Section 224(1) of Ontario *Insurance Act* is a relevant statute. It defines “automobile” as a “motor vehicle required under any Act to be insured under a motor vehicle liability insurance policy”. ATVs are automobiles within the meaning of the Ontario *Insurance Act* because owners of ATVs are required to purchase liability insurance pursuant to an Ontario Act. (See: *Off-Road Vehicles Act*, R.S.O. 1990 c. O.4.)

[32] ATVs are not however considered to be automobiles in British Columbia, because ATV owners (other than dealers) are not required to purchase liability insurance in British Columbia. (See: *Motor Vehicle (All Terrain) Act* [RSBC 1996] Chapter 319.)

***Does the Ontario or the British Columbia legislation regarding ATVs apply in this case?***

[33] The question is whether an ATV that was owned, registered and operated in British Columbia is an automobile covered by the Ontario SABS.

[34] The words in the Ontario *Insurance Act* are that “an automobile is a motor vehicle required *under any Act* [emphasis added] to be insured under a motor vehicle liability insurance policy”.

[35] The Applicant claims that the Ontario *Insurance Act* is “any Act” and the *Insurance Act* defines automobile to include an ATV. The Applicant submits that “any Act” should mean any Ontario Act, and that Ontario legislation not British Columbia legislation should apply as the Applicant is a resident of Ontario, the insurance policy with Belair is an Ontario policy, and the insurer’s headquarters are in Ontario. He further submits that “Act” is defined in the *Legislation Act* of Ontario S.O. 2006, Ch. 21 Schedule F where Act is defined as “an Act of the Legislature”.

[36] The Respondent Belair concedes that if the accident had taken place in Ontario, it would be required to pay SABS benefits to the Applicant because an ATV owner who operates an ATV in Ontario would have to purchase liability insurance thus meeting the definition of “automobile”.

[37] However, Belair submits that the legislation to be applied is British Columbia legislation.

[38] We agree. The ATV was operated and the accident happened in British Columbia. The decision to have or not to have insurance for this vehicle was taken in British Columbia. British Columbia legislation must determine whether there is an entitlement to benefits resulting from this accident.

[39] The Ontario Court of Appeal in *Adams* (*supra* at paras. 16 and 17) held that when determining a case of liability insurance, “the proper question is whether the vehicle [involved in the accident] required motor vehicle insurance at the time and in the circumstance of the accident.”

[40] This ATV (“the vehicle”) was not required to be insured under any motor vehicle liability insurance policy because this ATV was operated in British Columbia where ATVs need not be insured. At the time and in the circumstances of this accident, this ATV was not insured.

[41] Moreover, there is no basis to assert that the Applicant had a legitimate expectation that his insurer would cover an accident involving ATVs, as ATVs are not included under this insured’s policy.

[42] Finally, although Ontario's *Off-Road Vehicles Act* states that "no person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy" under the *Insurance Act*, it is reasonable to assume that this provision only requires this of ATVs in Ontario, not ATVs in British Columbia. Accordingly, although an ATV in Ontario is required by Ontario's *Off-Road Vehicles Act* to be insured under a motor vehicle liability policy, the same cannot be said of the particular ATV in this case because it is an ATV located in British Columbia.

### **SUMMARY OF CONCLUSION**

[43] The Arbitrator's decision and the Director's Delegate's decision to uphold must fall within the range of possible conclusions which are defensible in respect of the facts and the law.

[44] In order to receive benefits, the Applicant must establish that he was in an automobile accident within the meaning of the SABS. The word automobile has no common meaning, the word is not defined in the Belair insurance policy or the SABS but it is defined in s. 224 of the *Insurance Act* which provides that an automobile is a "motor vehicle required under any Act to be insured under a motor vehicle liability insurance policy". The Ontario Act requires an ATV to be insured while the British Columbia Act does not.

[45] The British Columbia legislation prevails as the motor vehicle was owned and operated in British Columbia and it was not required to be insured in British Columbia. The Applicant had no legitimate expectation that his insurance would cover this ATV accident, as ATVs are not included under his policy and it is reasonable to assume the Ontario legislation only requires insurance for ATVs in Ontario, not those in British Columbia.

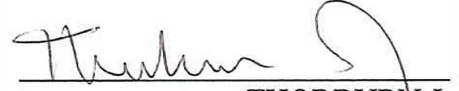
[46] For these reasons, the Director's Delegate's decision that the relevant legislation to consider is British Columbia legislation and the ATV did not therefore fall within the definition of an automobile for the purpose of the SABS, was reasonable.

[47] For these reasons, the Application for judicial review is dismissed.

[48] On the consent of both parties, costs are payable to the Respondent Belair in the amount of \$4,000.00 all inclusive.

**MORAWETZ RSJ**

[49] I have endorsed the Application Record as follows: "For oral reasons given, the Application for judicial review is dismissed with costs payable in the agreed upon amount of \$4,000 by the Applicant to the Respondent Belair. FSCO did not seek costs."

  
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THORBURN J.

I agree   
\_\_\_\_\_  
MORAWETZ RSJ.

I agree   
\_\_\_\_\_  
TZIMAS J.

**Date of Reasons for Judgment: April 9, 2018**

**Date of Release:**

APR 10 2018

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**ORAL REASONS FOR JUDGMENT**

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**THORBURN J.**

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