

...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,

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".

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.

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. Samworth 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