

Indexed as:
Axa Boreal Assurances v. Co-operators Insurance Co.

Between
The Co-operators Insurance Company, applicant/respondent in
appeal, and
Axa Boreal Assurances, respondent/appellant in appeal

[2000] O.J. No. 3520

Docket No. C32635

50 O.R. (3d) 395

Ontario Court of Appeal
Toronto, Ontario

Carthy, Laskin and Goudge JJ.A.

Heard: August 25, 2000.
Judgment: September 25, 2000.

(22 paras.)

On appeal from the decision of The Honourable Mr. Justice Bruce A. Glass dated

July 5, 1999.

Counsel:

Todd J. McCarthy, for the appellant.

Philippa Samworth, for the respondent.

The judgment of the Court was delivered by

1 LASKIN J.A.:-- In this appeal the court is asked to decide which of two insurers is required to pay accident benefits to Stephen Hounsell, a truck driver, who was injured in a motor vehicle accident. The two insurers are the appellant, Axa Boreal Assurances, which insured the company truck Hounsell was driving when he was injured; and the respondent, The Cooperators Insurance Company, which insured Hounsell's own car.

2 Section 91(4) of the Statutory Accident Benefits Schedule deems Hounsell a named insured under the Boreal policy. The two questions on the appeal are, first, is Hounsell a named insured for the purpose of determining liability to pay accident benefits under s. 268 of the Insurance Act, and second, if so, is s. 91(4) authorized by the Act. The arbitrator, Bruce Robinson, and on appeal Glass J., answered yes to both questions and therefore held Boreal was required to pay Hounsell's accident benefits. Boreal now appeals to this court. For the brief reasons that follow I would dismiss the appeal.

BACKGROUND FACTS

3 The parties agreed on the relevant facts. On December 20, 1995, Hounsell, who lived in Ontario, was in a motor vehicle accident in the state of Ohio. He was driving a 1993 tractor truck owned by Pollock Rentals Limited and leased to Grant Transport National Inc. When the accident occurred Hounsell was employed by Grant Transport as a truck driver. He regularly used the tractor truck that was involved in the accident to make commercial deliveries. This tractor truck was insured by Boreal. Hounsell was not a named insured under the Boreal policy but he was a listed driver.

4 At the time of the accident The Cooperators insured Hounsell's own car, a 1984 Dodge. Hounsell was a named insured under The Cooperators policy. He applied to The Cooperators for accident benefits and The Cooperators paid the benefits pending determination of the priority dispute between it and Boreal.

ANALYSIS

5 The main issue on the appeal is whether Hounsell is a named insured under the Boreal policy for the purpose of determining which insurer is liable to pay him accident benefits. If he is, then Boreal is liable under s. 268(5.2) of the Act; if he is not a named insured under the Boreal policy and is a named insured only under The Cooperators policy, then under s. 268(5) of the Act The Cooperators is liable to pay his accident benefits. I will briefly set out the relevant statutory provisions that frame this issue.

6 The accident took place in December 1995 and therefore the accident benefits to which insured persons, their spouses and dependants are entitled is set out in the Statutory Accident Benefits Schedule for Accidents after December 31, 1993 and before November 1, 1996. O. Reg. 776/93 (the "SABS").

7 Section 1 of the SABS defines "insured person" in respect of a particular motor vehicle liability policy as:

- (a)

the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependent,

- (i)

is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile

8 Under this definition Hounsell is an insured person under The Cooperators policy because he is a named insured under that policy and he was in an accident outside Ontario involving another automobile. Hounsell is also an insured person under the Boreal policy because he is a specified driver of the insured tractor truck

that was involved in the accident. But Hounsell is an insured person under the Boreal policy for a second reason, which is critical to this appeal. He is deemed to be a named insured under s. 91(4) of the SABS, which provides:

- (4)

Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation.¹

9 Because the insured tractor truck was made available to Hounsell for his regular use by a corporation, Grant Transport, he is deemed to be a named insured under the Boreal policy.

10 The designation "named insured" is significant in determining which insurer is responsible for paying accident benefits. Liability for payment of accident benefits is provided for in s. 268 of the Act. The basic liability rules are in section 268(2). Section 268(2)1.i is relevant to this appeal:

- (2)

Liability to pay - 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,

Under this provision Hounsell has recourse against both The Cooperators and

Boreal. When an insured person has recourse against more than one insurer for the payment of accident benefits, under s. 268(4) ordinarily the insured may decide the insurer from which he or she shall claim the benefits. However, if a person is a named insured under a motor vehicle liability policy then under s. 268(5) he or she must claim benefits against that insurer:

- (5)

[Choice of insurer] - Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability 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.

11 If a person is a named insured under more than one policy, s. 268(5.2) resolves priority between the insurers. The named insured must claim benefits against the insurer of the automobile involved in the accident:

- (5.2)

[Choice of insurer] - If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependent of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

Thus, if Hounsell is a named insured only under The Cooperators policy, then under s. 268(5) of the Act, The Cooperators must pay his accident benefits. If, on the other hand, he is a named insured under both policies, then under s. 268(5.2) Boreal must pay his benefits.

12 Boreal's main submission on this appeal is that s. 91(4) of the SABS cannot make Hounsell a named insured under the Boreal policy for the purpose of determining which insurer is liable to pay accident benefits. Put differently, Boreal contends that "named insured" has a well understood meaning in the industry and that the SABS cannot alter this meaning when applying the legislative priority

rules.

13 Section 268(1) of the Act provides:

- 268.

(1) Statutory accident benefits - 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.

14 In *Warwick v. Gore Mutual Insurance Co.* (1997), 32 O.R. (3d) 76 at 83 (C. A.) this court held that "By making contractual entitlement to no-fault benefits subject to the terms, conditions, provisions, exclusions and limits in the Schedule, the legislature, in s. 268(1) of the Act, intended that entitlement to these benefits would be determined by regulation." In other words, "Contractual entitlement to no-fault benefits is determined by s. 268(1) of the Act and s. 2 of the Schedule. Section 268(1) adds the Schedule to every contract of automobile insurance but then delegates to the Schedule-maker authority to define the classes of persons insured under any particular contract. Therefore the definition of "insured person" in s. 2 of the Schedule governs Ms. Warwick's entitlement to no-fault benefits." (at pp. 82-83)

15 Boreal submits, however, that *Warwick* does not apply because it dealt with entitlement, not priority. I reject this submission. Distinguishing between entitlement and priority is artificial. Entitlement to benefits is meaningful only if an insurer is liable to pay these benefits.

And, in cases like the present one, liability to pay depends on determining priority. The underlying rationale of *Warwick* is that the Schedule and the statute must be read together to determine who receives accident benefits and who is responsible for paying them. That rationale applies to this case. In my view, because of s. 91 (4) of the SABS, Hounsell is a named insured under the Boreal policy for the purpose of determining which insurer must pay accident benefits under s. 268 of the Act. Boreal must therefore pay.

16 This conclusion is reinforced by comparing the wording of s. 91(4) with its predecessor, s. 3(1) of the pre-1994 Schedule, O.Reg. 673/90. Section 3(1) provided:

- 3(1) If the insured automobile is made available for the regular use of an individual, whether or not a resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Regulation applies to the individual and his or her spouse and their dependants as if the individual were a named insured.

For convenience I reproduce s. 91(4) of the SABS:

- (4)
Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation.

The changes in wording are significant. Section 3(1) states that "... this Regulation applies to the individual"; section 91(4) states that "... the individual shall be deemed to be the named insured under the policy". One could argue that under s. 3 (1) a person was a named insured only under the Schedule, not the Act. In contrast, under s. 91(4) a person is deemed a named insured under the policy and thus is a named insured for the purpose of claiming benefits under the Act.

17 If this was not clear, s. 91(4) adds that a person is deemed to be a named insured under the policy "for the purpose of the payment of statutory accident

benefits set out in this Regulation". These additional words are not in s. 3(1). I accept Ms. Samworth's submission that these changes in wording were intended to correct an anomaly under the previous Schedule. If the named insured under the pre-1994 Schedule was a corporation, then no accident benefits would ever be paid even though coverage was mandatory and the corporation paid a premium for it. Under s. 91(4) of the SABS, regular company drivers can obtain accident benefits under the company's automobile policy.

18 Most of the case law to date is against Boreal's position. However, Boreal relies on and draws comfort from the decision of our respected former colleague, The Honourable Patrick Galligan, sitting as an arbitrator in *Axa Insurance (Canada) v. Old Republic Insurance Company* (May 1997). Mr. Galligan held that s. 91(4) cannot define an expression - "named insured" - used in a statute. He wrote:

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The terms "named insured" and "insured" have long had specific meanings in the insurance industry. At their simplest the "named insured" is the person named in the contract of insurance as the insured. The "insured" means a person who, whether by statute or by contract, has some or all of the rights of the named insured. This distinction is recognized in the definition of "insured" contained in Section 224(1) of the Insurance Act.

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The statutory scheme contained in Section 268, indicates that in certain circumstances, the Legislature intended different consequences to flow from situations involving named insureds and from situations involving insureds. I am driven to conclude that the words were intended to have their ordinary meanings as used in the insurance industry. Section 91(4) of the Regulation purports to redefine the expression "named insured" by deeming that in certain circumstances an unnamed insured, or an insured, shall be a named insured. In doing so, in my opinion, it has purported to define an expression used in a statute. It is trite that a statute cannot be amended by regulation.

19 I cannot accept this reasoning because it fails to give effect to s. 268(1) of the Act or to the wording of s. 91(4) of the SABS. This case was reversed on appeal by Lax J. at (1998), 38 O.R. (3d) 630, who pointed out at 637 that the statute does not define "named insured" and s. 268(5) does not "fix the class of named insureds". Instead, she observed at 639, referring to Warwick: "... [I]f the statute could authorize a narrower definition of insured person' to apply to Ms. Warwick, there was no reason that it could not equally authorize a broader definition of named insured'. ... Section 91(4) is not inconsistent with s. 268(5) of the Insurance Act ..." I agree with Lax J.

20 For all these reasons Hounsell is a named insured under the Boreal policy for the purpose of determining liability to pay accident benefits under s. 268 of the Act.

21 The only other issue on this appeal is whether s. 91(4) of the SABS is authorized by the Act. Authority to make regulations is provided for in s. 121(1) of the Act. Section 121(1)9 states:

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121.(1) Regulations - The Lieutenant Governor in Council may make regulations

- 9.

establishing benefits for the purposes of Part VI that must be provided under contracts evidenced by motor vehicle liability policies and establishing terms, conditions, provisions, exclusions and limits related to such benefits;

This provision is broad enough to authorize s. 91(4). See Warwick.

22 I would dismiss the appeal with costs.

LASKIN J.A.

CARTHY J.A. -- I agree.

GOUDGE J.A. -- I agree.

cp/e/nc/qlfwb

1 Section 91(7) says that s. 91(4) applies in respect of accidents occurring on or after January 1, 1995. [Amended O. Reg. 781/94.]