Citation: Hagopian v. Allstate Insurance, 2022 ONLAT 20-000998/AABS

Licence Appeal Tribunal File Number: 20-000998/AABS

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:

John Hagopian

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant:	Nairy Hagopian, Litigation Guardian of the Applicant Adam K. Wagman, Counsel D. Joel Dick, Counsel
For the Respondent:	Patrick M. Baker, Counsel Eric K. Grossman, Counsel

HEARD: In Writing

OVERVIEW

[1] John Hagopian, ("the Applicant"), was involved in an incident on **August 21, 2016**, and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*").

[2] After first accepting the claim, the Respondent denied that it was liable for the incident and refused the Applicant's claims. The Applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of this dispute.

ISSUE

[3] Was the Applicant involved in an "accident" as defined by the *Schedule*?

RESULT

[4] I find that that Applicant was involved in an "accident" as defined by the *Schedule.*

BACKGROUND

[5] The Applicant was the driver of an all-terrain vehicle ("ATV") which collided with an off-road motorcycle ("dirt bike") driven by Curtis Agemian ("Curtis") on private property in the middle of the night. The Applicant suffered a severe brain injury as a result of the collision and, at the time of this hearing, is in a vegetative state due to the incident.

[6] A police report of the incident suggests that the subject ATV is registered to Edmund Moss ("Moss") and that the dirt bike is registered to Sauren Agemian Sr. ("Agemian Sr."), Curtis' grandfather. The Respondent submits that, instead, the dirt bike may be registered to Sauren Agemian Jr. ("Agemian Jr."), Curtis' father, but in any event, neither vehicle was insured under a motor vehicle insurance policy.

[7] The property where the incident occurred is owned by 2 corporations: Soucar Investments Ltd. ("Investments Ltd.") and A. Alexanian Engraving Ltd. ("Engraving Ltd"). Corporate filings show that Agemian Sr and Agemian Jr. are directors of the Soucar and J. Alexanian and S. Alexanian are the directors of Engraving Ltd.

[8] The Respondent submits that the property is akin to a cottage and that it does not appear that anyone lived there on a full-time basis. The property is fenced and accessed through a password-controlled gate.

[9] The Applicant claims that the incident meets the definition of an "accident," thus entitling him to claim accident benefits. A key part of the definition of "accident" is that it must involve an "automobile." At issue in this matter is whether either of the vehicles involved in the incident is an "automobile," as the term is defined in the *Insurance Act.*

RELEVANT LAW

[10] Section 3 of the *Schedule* defines "accident" as an "incident in which the use or 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."

[11] "Automobile" is not defined in the *Schedule* but is in section 224(1) of the *Insurance Act.* There, "automobile" includes "(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and (b) a vehicle prescribed by regulation to be an automobile." (my emphasis added). As it will become clear later, section 224(1)(a) is of particular relevance to this matter.

[12] The ATV and dirt bike were being used on private property and are subject to the *Off-Road Vehicles Act*, R.S.O. 1990, c. O.4 ("*ORVA*"). The *ORVA* defines an "off-road vehicle" as a "vehicle propelled or driven otherwise than by muscular power or wind and designed to travel, (a) on not more than three wheels, or (b) on more than three wheels and being a prescribed class of vehicle." Section 15(1) stipulates that no person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy and section 15(2) provides that the owner may not permit the vehicle to be driven unless it is insured. Section 15(9) provides an exemption to the rule for persons who operate an off-road vehicle on their own property.

[13] With the above legislation in mind, it follows that the Applicant is entitled to claim accident benefits if I find that either the ATV or the dirt bike was required to be insured under section 15 of the ORVA. If so, it would make one or both vehicles an "automobile" as defined in section 224(1) of the *Insurance Act* and, therefore, satisfy a key component of "accident" in section 3 of the *Schedule.*

POSITIONS

[14] To the Respondent, the incident fails to meet the definition of an "accident" as outlined in the *Schedule* and, as a result, the Applicant is not entitled to accident benefits. It submits that insuring and licensing the ATV and dirt bike are governed by the ORVA. It submits that the ATV and dirt bike were not required to be insured because they were being used on the owners' private property, pursuant to section 15(9) of the ORVA. Thus, the vehicles are excluded from the *Insurance Act* definition of an "automobile" and do not meet a key component of an "accident" as described in the *Schedule*.

[15] The Applicant submits that section 15(9) of the ORVA does not apply because the owners of the ATV and dirt bike are not the owners of the property where the vehicles were being used. To him, the vehicles ought to have been insured pursuant to section 15(1) of the *ORVA*.

[16] If either the ATV or dirt bike were required to be insured, that vehicle would meet the definition of "automobile" as defined in s. 224(1) the *Insurance Act.* Thus, the incident meets a key component of "accident" as defined in the *Schedule* and the Applicant would be entitled to claim accident benefits.

ADAMS TEST

[17] The parties agree that the relevant test for this matter is the *Adams* test.[1] According to the *Adams* test, a vehicle is an "automobile" when:

- It is an "automobile" in common parlance; or
- It is defined as an "automobile" in a policy of insurance; or
- It falls within any enlarged definition of "automobile" in any relevant statute.

[18] The Respondent submits that ATVs and dirt bikes are not "automobiles" in ordinary parlance and, thus, do not meet the first branch of the test. It further submits that no ATVs or dirt bikes are insured under the Applicant's mother and father's motor vehicle insurance policies and there is no evidence to suggest that the ATV and dirt bike are insured under any motor vehicle policy taken by the owners. Thus, the second branch of the *Adams* test is not met. The Applicant does not dispute that the first two branches of the *Adams* test are not met.

[1] *Adams v. Pineland Amusements Ltd.*, 2007 ONCA 844 at para. 7.

[19] At issue is whether the third branch of the *Adams* test is met and one of the vehicles involved in the incident falls within the definition of "automobile" in any relevant statute.

[20] The Respondent raised this preliminary issue of whether this incident is an "accident" as defined in the *Schedule*. As discussed above, a key component of "accident" is whether one or both of the vehicles involved are an "automobile". As the Applicant is the one claiming accident benefits from the Respondent, he must satisfy me on a balance of probabilities that at least one of the vehicles is an "automobile". As part of his proof, the Applicant must show that the owner of the ATV or dirt bike, or both, are owners, occupiers, or controllers of the land where the incident happened.

[21] I find that the Applicant has made his case and, for the following reasons, find that the dirt bike owned by Moss meets the definition of an "automobile".

Does Moss Occupy the Property?

[22] The parties agree that this matter turns on my interpretation of what it means to occupy a piece of property. They agree that the relevant case is *Haliburton (County) v. Gillespie* ("*Haliburton*").[2]

[23] In *Haliburton*, the Court of Appeal for Ontario dealt with the *ORVA*'s definition of "occupier," as it applies to a person's legal obligations and exemptions. There, the Court determined that to occupy a piece of property, a person must meet one of the following four criteria:

- Be in physical possession of the land; or
- Be responsible for and have control of the condition of the land; or
- Be responsible for and have control over the activities carried out on the land; or
- Have control over who is allowed to enter the land.

[24] Notably, the *ORVA* states that there may be more than one occupier of a property. Further, in *Haliburton*, the Court determined that a corporation may be an occupier and that a corporation is distinct from its shareholders. Thus, shareholders are not occupiers. That matter dealt with a property owned by a

[2] 2013 ONCA 40 at para. 23

corporation whereby shareholders were considered to be leaseholders on the property and not occupiers of the property.

[25] The Respondent submits that Moss, the owner of the ATV, is an occupier of the subject property. It bases this argument on the belief that Moss previously attempted to re-zone the subject property. The belief, it seems, stems from a letter by H. Swan of Dillon Consulting Group to “York Region Council”, dated November 18, 2015 (“the letter”). The letter states that Moss retained the company as planning agent with the objective of re-zoning the property for future development and refers to a previous attempt to re-zone the property by Moss.

[26] The Respondent also submits that Moss had control over persons allowed to enter the land. It submits a report by a third-party adjuster which states that it is his understanding that Moss is married to Sauren Sr.’s daughter and had access to the gate code to enter the property. To the Respondent, these examples are evidence that Moss has control over the condition or activities carried out on the land.

[27] The Applicant contends that the letter is not proof that Moss is in control over the property by any means. He submits that the letter mistakenly identifies Moss as the owner of the property in question and is not signed by Moss or anyone else on behalf of the Corporations who own the property. He reiterates that the only evidence of ownership is the Land Titles Entry, submitted by the Respondent. That documents states that Investments Ltd. and Engraving Ltd. are the owners of the property.

[28] For the following reasons, I find that Moss is not an occupier of the subject property and thus, the ATV required insurance coverage in compliance with section 15 of the *ORVA*. As a result, I find that the ATV falls within the larger category of “automobile” as referred to in the *Adams* test, which in turn triggers both section 224(1)(a) of the *Insurance Act* and section 3 of the *Schedule*.

[29] Moss is not in physical possession of the land. The Land Titles Entry confirms that Investments Ltd. and Engraving Ltd. own the land.

[30] There is no compelling evidence showing that Moss is responsible for or have control over activities on the property. Contrary to the Respondent’s submissions, there is no evidence to show that Moss is a shareholder or member of either of the corporations that own and control the land. Thus, I need not analyze whether Moss is in control over the property through his roll within a corporation.

[31] The letter does not convey ownership or control over the subject property. The letter opens by stating that the consulting firm is planning agent for Moss and identifies Moss as the owner of the subject property. However, this does not mean that Moss is the owner of the subject property, nor that he is responsible for or have control over activities on the property. As previously noted, the subject property is owned by two corporations, according to the Land Titles Entry. Further, any person can self-identify as someone in control of a property but that does not mean that they own or are in control of a property. Here, there is no other evidence or information before me that support the claims in the letter that Moss is an owner, occupier, or controller of the property. It is possible that Moss, at some point at as the Applicant suggests, was tasked by the property owners to attempt to have the property re-zoned. But this does not mean that Moss owns or is in control of the subject property. For this reason, I give significantly more weight to the Land Titles Registry information when assessing whether Moss is an owner or occupier of the subject property and find that Moss is not an owner, occupier, or controller of the subject property.

[32] Moss does not control access to the subject property. I agree with the Applicant, and with *Haliburton*, that access to the land does not establish that Moss had the right to exclude persons for the property.[3] Having access to the gate code does not mean that Moss is responsible for or have control over the property. As noted in *Haliburton*, referring to *Davies v. Clarington (Municipality)*, access to the property – such as knowing the gate code - does not establish the right to exclude persons from it. In the end, there is no evidence that shows that Moss has the right to invite or exclude people from the property. To me, this right is reserved for the corporations who own the property and there is no evidence to show that Moss was provided that right by the corporations which own the property. Similarly, Moss' relationship with the director of the corporation does not mean he is an owner, occupier, or controller of the land, just as leaving an ATV on a property does not mean that the owner of the ATV is an owner, occupier, or controller of the property.

[33] The evidence and Moss' alleged actions on behalf of the owners of the subject property do not make him an occupier of the land. As a result, it is incumbent upon him to have insurance for the ATV as required by section 15 of the *ORVA*. Thus, the ATV meets the definition of an "automobile" as outlined in section 224(1) of the *Insurance Act.*

[3] 2013 ONCA 40 at paras. 35 and 37

[34] Having found that the ATV meets the definition of an “automobile,” an analysis of the ownership of the dirt bike is not required. Only one of the two vehicles involved in the incident need be an “automobile” for the incident to qualify as an “accident.”

Public Policy Provision

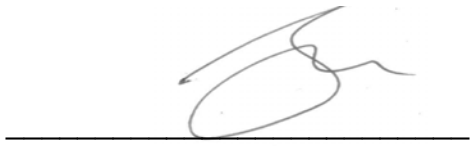
[35] Contrary to the Respondent’s position, I find that coverage in this situation is within the public policy behind the *ORVA* and the *Schedule.* Mandatory insurance provisions, such as those in the *ORVA*, are made to protect the persons and property by ensuring there is coverage in the event of an injury caused by the use or operation of the off-road vehicle. Similarly, the consumer-protection aspect of the *Schedule* provides that it ought to be interpreted in favour of the Applicant here. Excluding the Applicant’s claim in this situation would require a narrow interpretation of the term “automobile” and would be contrary to the spirit of consumer-protection legislation.

CONCLUSION

[36] The Applicant was involved in an incident whereby two off-road vehicles collided on private property. The ATV involved in the incident is owned by Moss, who is not an owner, occupier, or controller of the subject property where it was being used. Thus, at least one of the vehicles involved in the incident was required to be insured pursuant to section 15 of the *ORVA*.

[37] Accordingly, the incident meets the third branch of the *Adams* test and is an “accident” as defined in the *Schedule* in that the use or operation of an automobile directly caused the Applicant’s impairments.

Released: January 19, 2022



Brian Norris
Adjudicator