2016 ONSC 3110
Ontario Superior Court of Justice

Intact Insurance Co. v. Old Republic Insurance Co.

2016 CarswellOnt 7645, 2016 ONSC 3110, 131 O.R. (3d) 485, 266 A.C.W.S. (3d) 458

Intact Insurance Company, Applicant (Respondent in Appeal) and Old Republic Insurance Company, Respondent (Appellant in Appeal)

R.F. Goldstein J.

Heard: April 15, 2016
Judgment: May 12, 2016
Docket: CV-16-546107

Counsel: Joseph Lin, Connor O'Neil, for Respondent, Intact Insurance Company
Catherine A. Korte, Anthony H. Gatensby, for Appellant, Old Republic Insurance Company

Headnote

Insurance --- Automobile insurance — No-fault benefits — Miscellaneous

Priority dispute between insurers — Injured person B worked as short-haul truck driver for trucking company employer — B suffered injuries in car accident on his way to work while driving his mother-in-law's car, insured by applicant insurer I Co. — B was not insured under his own insurance policy but was listed as driver on employer's fleet insurance policy with respondent insurer O Co. — B applied for statutory accident benefits from I Co. — I Co. initiated priority dispute with O Co. — Arbitrator found that employer made vehicle available to B at time of accident, so employer's insurer O Co. was responsible for paying benefits to B — O Co. appealed — Appeal dismissed — Standard of review was correctness because case only involved application of established legal principles — B had regular use of employer's vehicles — Arbitrator correctly applied s. 3(7)(f) of Statutory Accident Benefits Schedule - Effective September 1, 2010 — Arbitrator correctly found that while actual use may be evidence of availability at time of accident, availability did not necessarily require actual use — B had authority to go to lot at time of his own choosing, pick up keys to vehicle, and sleep in it night before he was required to drive, which meant B had vehicle available at time of accident.

***R.F. Goldstein J.*:**

1 Alan Bourassa worked as a short-haul truck driver. His employer was Conroy Truck Line, a trucking company. On January 7, 2012 he was driving to work in on Highway 11B near Temiskaming Shores, Ontario. He was driving his mother-in-law's car, a Chevy Malibu. He was involved in a two-vehicle accident. He suffered injuries as a result of the accident.

2 Mr. Bourassa's mother-in-law insured her Malibu with a policy from Intact. Mr. Bourassa did not own a car and was not specifically insured under a policy of his own. Mr. Bourassa therefore applied for statutory accident benefits from Intact.

3 Conroy, Mr. Bourassa's employer, had an insurance policy from Old Republic. Intact initiated a priority dispute with Old Republic. Intact's position was that under s. 3(7)(f)(i) of the *Statutory Accident Benefits Schedule*, 2010 (commonly referred to as the SABS) Conroy "made available" a vehicle for Mr. Bourassa's regular use. Old Republic, not surprisingly, disagreed.

4 The two insurance companies went to arbitration. Vance Cooper, the mediator, identified the key issue as whether a Conroy vehicle "was available to Allan at the time of the accident." Arbitrator Cooper found that it was. He found that Old Republic was responsible for paying benefits to Mr. Bourassa. Old Republic appeals.

5 I agree with Arbitrator Cooper. Old Republic has the higher priority. For the reasons that follow, the appeal is dismissed.

Facts

6 Neither party suggests that Arbitrator Cooper made an erroneous finding of fact or misapprehended the evidence. This is a case of statutory interpretation. The facts (which I take from Arbitrator Cooper's decision) are nonetheless still relevant.

7 Mr. Bourassa worked full time for Conroy. He drove short-haul transport trucks. Conroy had a fleet insurance policy issued by Old Republic. Mr. Bourassa was listed as a driver on Conroy's fleet insurance policy. His usual work hours were Monday to Friday with some weekend work if required. His boss usually informed him the day before when he was required to work. He would load as well as drive the trucks. He did not always drive the same truck.

8 Mr. Bourassa was not permitted to take a truck home, or use a truck for personal errands. He was required to make his own way to and from work. Since he did not have a car, sometimes he borrowed one or took the bus. He sometimes came the night before and slept in the truck before he commenced deliveries in the morning. He had permission to do that. He would show up at the dispatch office, take the keys to his assigned truck, and then use his discretion as to how he wished to complete his deliveries.

9 On January 6 2012 (a Friday) Mr. Bourassa's boss informed him that he would be required to work the next day. His work assignment was to load a trailer in Englehart, Ontario. As I have mentioned, Mr. Bourassa was driving his mother-in-law's car on Saturday January 7 2012 when he was involved in an accident and injured. January 7 2012 was a Saturday. He was on his way to the Conroy yard to pick up his truck for the day and commence his work assignment.

Arbitrator Cooper's Decision

10 After setting out the facts, Arbitrator Cooper defined the issue as:

> Whether Allan [Mr. Bourassa] was a deemed named insured under the policy of insurance issued by Old Republic at the time of the accident. This issue turns on an interpretation and application of section 3(7)(f) of the *Statutory Accident Benefits Schedule* [the so-called "company car" provision]. This requires a consideration of the phrases "regular use" and "at the time of the accident".

11 The Arbitrator noted that there seemed to be agreement that Mr. Bourassa had "regular use" of automobiles under Conray's insurance policy. The heart of the issue, therefore, was whether he had that use "at the time of the accident".

12 He then analyzed the term "regular" and decisions where the term had been considered. He examined other arbitral decisions, as well as the only judicial authority on point, the decision of my colleague Belobaba J. in *ACE INA Insurance v. Co-operators General Insurance Co.*, [2009] O.J. No. 1276 (Ont. S.C.J.). He then examined the position of the parties and the case law, most of which consisted of the rulings of other arbitrators. His penultimate finding was this:

> If the claimant in *Dominion of Canada General Insurance v. Federated Insurance* can be thousands of miles from the company vehicle at the time of the accident and still be found to have control over or authority to use the company vehicle, then I have no difficulty finding that Allan [Mr. Bourassa], who was only minutes from his employer's yard, had authority to use the company vehicle at the time of the accident.

Analysis

13 There are two issues to be determined in this case. The first question involves the appropriate standard of review, although I must say that I believe that the application should be dismissed regardless of which standard applies.

14 The second issue is the key point of this application: whether the arbitrator erred in his application of s. 3(7)(f) of the SABS.

(a) What is the appropriate standard of review?

15 This question has been the subject of a spirited debate and extensive analysis in this Court. It has been addressed, but not analyzed in a detailed way, in two cases in the Court of Appeal.

16 Mr. Lin, for Intact, argues that the appropriate standard of review is reasonableness: *Zurich Insurance Co. v. Chubb Insurance Co.*, 2014 ONCA 400, 120 O.R. (3d) 161 (Ont. C.A.) at para. 14. This being the latest word from the Court of Appeal, he says, it is obviously binding.

17 In my view whether reasonableness or correctness is the appropriate standard of review depends on the circumstances of the particular case. In this particular case the decision of Arbitrator Cooper should be reviewed on a standard of correctness, for reasons I will set out.

18 The *Arbitration Act* leaves the question of the nature of an appeal up to the parties. Thus, a reviewing court should look first to the arbitration agreement between the parties. Appeals are dealt with in s. 11 of this particular agreement:

> The parties expressly reserve the right of an automatic appeal to a single Judge of the Superior Court of Justice on issues of law or mixed fact and law.

19 There is a long line of cases in this Court dealing with the standard of review from arbitral decisions. Although there are certainly well-reasoned judicial views to the contrary, these cases strongly suggest that the standard of review in insurance priority disputes is correctness. Is that still the case in light of *Zurich Insurance Co. v. Chubb Insurance Co.*?

20 The two leading cases prior to the Supreme Court of Canada's decision in in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) were generally considered to be *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1995), 35 C.P.C. (3d) 323, [1995] O.J. No. 936 (Ont. Gen. Div. [Commercial List]) and *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230, 186 D.L.R. (4th) 347 (Ont. S.C.J.).

21 The *Pizza Pizza* case arose as a result of a disagreement between Pizza Pizza Ltd. and its franchisees. The case was referred to R.E. Holland, a former judge of this court and private arbitrator. After several weeks of hearing evidence Arbitrator Holland rendered several interim and one final decision. Pizza Pizza appealed. The franchisees cross-appealed. One of the issues was the appropriate standard of review. The arbitration agreement provided for "the right to appeal any binding decision". MacPherson J., as he then was, rejected the argument that the arbitrator was entitled to deference. He first analyzed the arbitration agreement and found that the appeal clause simply did not immunize any aspect of the decision with the equivalent of a privative clause. In other words, the parties themselves contemplated a "full and clean" appeal on the merits. He then examined the factors identified by courts in analyzing the type of appeal available. He found that none of those factors was present.

22 In the *National Ballet* case Ms. Glasco was a principal dancer. The ballet decided not to renew her contract. She sued the ballet for wrongful dismissal. She also launched a labour grievance and a human rights complaint. An arbitrator was appointed under the *Arbitration Act*. The arbitrator issued an interim award in which he reinstated Ms. Glasco — in effect granting a mandatory injunction. The ballet appealed.

23 Swinton J. noted that under s. 45(1) of the *Arbitration Act* that a party may only appeal on a question of law. She noted that when considering the appropriate standard of review, the court should consider whether there is a privative clause, the expertise of the tribunal, the purpose of the legislation, and whether the review is with respect to a question of law or fact. She found that the appeal only raised a question of law. Accordingly, the standard was correctness.

24 *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* (2006), 83 O.R. (3d) 591 (Ont. C.A.) was the first Court of Appeal decision to deal with the standard of review until *Zurich Insurance Co. v. Chubb Insurance Co.*. Lang J.A. stated, for the Court of Appeal at para. 23:

> In those circumstances, the question became one of applying the correct legal principles to his factual findings about the particular circumstances of Mr. Williams's relationship with his mother. Accordingly, the question before the arbitrator was one of mixed fact and law and was closer to a factual determination. See *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, [2000] O.J. No. 1234 (C.A.). Given the special expertise of arbitrators in evaluating facts for a

determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it was entitled to deference. In any event, in my view, the arbitrator's decision was also correct.

25 The Supreme Court of Canada dealt comprehensively dealt with the question of appeals from and judicial reviews of administrative tribunals in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.). There are now two tests: correctness and reasonableness: see para. 45. Reasonableness recognizes that some questions do not lend themselves to a specific result, but rather to a range of possible, reasonable results: *Dunsmuir* at para. 47. Correctness, on the other hand, recognizes that some questions have a definitive answer. Reasonableness attracts deference from a reviewing court. Correctness does not. Where the question is one of fact, deference usually applies. Reasonableness also usually applies to questions of mixed fact and law: *Dunsmuir* at para. 53.

26 In *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.* (2008), 94 O.R. (3d) 62 (Ont. S.C.J.) Strathy J. (as he then was) considered whether *Dunsmuir* had changed the standard of review in priority disputes. He examined the authorities in some detail, including *National Ballet* and *Pizza Pizza*. He analyzed the problem and conducted the contextual analysis mandated in *Dunsmuir*. He summarized that analysis this way (at para. 37):

> The Supreme Court tells us in *Dunsmuir* that to determine the appropriate degree of deference, we should look first to whether the issue has been determined by the existing jurisprudence. If so, the inquiry need not go further. If there is no clear guidance in the existing case law, it is necessary to undertake a standard of review analysis, which is contextual and which looks to, among other things: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by the interpretation of the enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal.

27 He ultimately determined that the proper standard was correctness (at para. 42):

> Considering all these circumstances, there would be much to be said for a deferential standard of review that would look to the reasonableness of the arbitrator's decision, particularly on questions of mixed fact and law, such as those at issue here. For two reasons, I do not think that "reasonableness" is the appropriate standard in this case. First, in both the Act and the Arbitration Act 1991, the Legislature has left it to the parties to define their appeal rights. It is reasonable to conclude, as did Mr. Justice MacPherson in *Pizza Pizza*, above, that the parties intended that there would be a "full and clean appeal on the merits" when they stipulated that either party could appeal on a question of law or of mixed fact and law. Their intentions in that regard should be respected. Second, the long and generally consistent line of authority on these issues has applied the "correctness" standard applicable to appeals in private arbitrations. The parties are entitled to have the appeal heard according to the standard of review - correctness - that has almost universally been applied to cases of this nature.

28 In *Zurich Insurance Co. v. Personal Insurance Co.*, 2009 CarswellOnt 2968, [2009] O.J. No. 2157 (Ont. S.C.J.) D. Brown J. (as he then was), conducted a detailed review of the cases that have considered this question, including Justice Strathy's decision in *Lombard*. At the time, the only appellate authority directly on point was Lang J.A.'s decision in *Oxford Mutual*. Justice Brown distinguished *Lombard* and the other cases that found a correctness standard applied. He doubted that *Pizza Pizza* still applied in light of the fact that it pre-dated *Oxford Mutual*. He also doubted it in light comments in *Dunsmuir* regarding privative clauses. He further doubted that Justice MacPherson's comments about a "full and clean appeal on the merits" still held after *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.). He ultimately concluded:

> By way of summary, I conclude that the applicable standard of review of decisions by arbitrators under the Insurance Act is that articulated by the Court of Appeal in *Oxford Mutual* - on questions of law, correctness is the applicable standard of review; a reasonableness standard applies to questions of fact and to questions of mixed fact and law. In paragraph 23 of her decision in *Oxford Mutual* (quoted above), Lang J.A. engaged in a standard of review analysis for questions of mixed fact and law, so there is no need for me to repeat that exercise: *Dunsmuir*, para. 57.

29 *Zurich Insurance Co. v. Chubb Insurance Co.*, as noted, is a more recent decision. The Court of Appeal determined whether a particular insurer was a "motor vehicle liablity" insurer as defined by the Insurance Act, and the application of the

"nexus" test that had been developed in the case law. Pardu J.A. for the Court found that the characterization of the insurer was a question of statutory interpretation. That part of the application judge's decision was therefore to be determined on a standard of correctness. The application of the "nexus" test was a question of mixed fact and law, and therefore reviewable on the reasonableness standard. She did not conduct an extensive analysis. [The Supreme Court of Canada overturned the Court of Appeal's decision for the dissenting reasons given by Jurianz J.A. The dissent did not discuss the standard of review.]

30 In my respectful view, Justice Strathy's decision in *Lombard Canada* remains good law and is not overturned by *Zurich Insurance Co. v. Chubb Insurance Co.*. The standard of review still depends on the context of the appeal. Justice Strathy's analysis set out in paragraph 37 very succinctly summarizes the principles in *Dunsmuir*. Correctness usually remains the appropriate standard for priority decisions of an arbitrator under the Insurance Act where there is no significant factual issue to be decided. In the *ACE INA* decision, the leading authority dealing with the provision of the SABS at issue here, Belobaba J. agreed with the reasoning of Justice Strathy in *Lombard Canada* and applied a standard of correctness.

31 Turning to this particular case, under the arbitration agreement an appeal is available on a question of law, or on a question of mixed fact and law. Arbitrator Cooper proceeded on an agreed statement of facts, supplemented by a statement taken from Mr. Bourassa by an insurance adjuster, and the transcript of Mr. Bourassa's examination under oath. Neither party seriously contests any of the findings of fact made by the arbitrator. This particular case only involves the application of established legal principles. Neither party raises a factual issue. There is no need to go further. Correctness is the right standard of review.

32 Individual arbitrators may, and usually do, have great experience and knowledge of this complicated area of the law. Undoubtedly that is the case with Arbitrator Cooper. Arbitral decisions may be persuasive, and contribute to the development of the law, but arbitrators are ordinarily not in any better position than courts to interpret the law.

33 I will make one other point. There is generally no policy reason that would justify deferring to arbitral decisions that are simply priority disputes. Justice MacPherson noted in *Pizza Pizza* that where an administrative tribunal has some responsibility for policy development a court will show greater deference, at least in that area. An insurance arbitrator dealing with a priority dispute has little, if any, responsibility for developing policy. The insurance industry is highly regulated. The *Insurance Act* has many policy objectives, the chief one of which is that everyone will have access to private insurance insofar as is possible. Another objective is to properly apportion financial risk among the institutions issuing insurance policies. The private arbitration scheme for dealing with priority disputes among these institutions is an instrument of policy. It is not a developer of policy.

(b) Did the arbitrator err in his application of s. 3(7)(f) of the SABS?

34 There appears to be no dispute that Mr. Bourassa had regular use of Conroy vehicles. The issue here is whether the Arbitrator was correct in finding that he had regular use of Conroy vehicles "at the time of the accident".

35 The only judicial authority on point is the decision of Belobaba J. in *ACE INA Insurance*. Ms. Korte, for Old Republic, argues that Arbitrator Cooper failed to properly apply *ACE INA*. She argues, in effect, that in order for the word concept of accessibility as interpreted by Belobaba J. to apply Mr. Bourassa had to be in a position to use the vehicle at the moment of the accident. She argues that the Arbitrator should have looked to the conditions of employment. It was a condition precedent that the employee had to be working at the time of the accident. Mr. Bourassa's employment conditions, she says, restricted his use of company vehicles. Accordingly, Arbitrator Cooper erred in his interpretation of the *ACE INA* test.

36 I agree that it is implicit that Mr. Bourassa had to be in a position to use the vehicle, but I respectfully disagree that the Arbitrator erred. Mr. Bourassa was, in fact, in a position to use the vehicle as of the night before the accident since he could have slept in it. In light of that fact, it is simply a question of applying s. 3(7)(f). Arbitrator Cooper did so correctly.

37 Section 3(7)(f) of the SABS states:

> (7) For the purposes of this Regulation,

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity...

38 At the time Belobaba J. decided *ACE INA* an earlier version of the SABS was in force. The parties agree that there is no material difference between the versions.

39 In *ACE INA* the claimant was employed by Enterprise Rent-a-Car as a customer service representative. ACE INA was Enterprise's insurer. The claimant was injured in an accident. He was not actually in a company car. He was in a friend's car. They were heading downtown on a Saturday night. Co-operators insured the friend's car. The arbitrator found that ACE INA was solely responsible for paying benefits. He made this finding because the claimant was an employee of Enterprise, and Enterprise regularly made a company car available to him during the course of his workday and while carrying out work duties. He was not, for example, permitted to take the car home with him. At the time of the accident he had not worked for nine days.

40 Belobaba J. found that the arbitrator made an error of law in interpreting the phrase "at the time of the accident". He framed the question this way:

The question is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car.

41 Belobaba J. noted that the provision may apply even if the claimant was not actually driving the vehicle at the time of the accident. He provided three examples: first, if, while driving the company vehicle, the claimant stops to buy coffee and is struck by another car while crossing the street then he has a vehicle made available "at the time of the accident" and the employer's policy would apply. Second, if he used a company car as a sales representative and was permitted to the car home and drive it for personal use, the employer's policy would apply even if he were in his friend's car on a Saturday night. Third, if an employee is at work and able to drive a vehicle for work purposes (like the Enterprise claimant) but is struck by a different car while crossing the street to buy coffee then the employer policy would also apply.

42 Belobaba J. found that the arbitrator in that case erred by essentially finding that the status of being insured under a company policy "remains" with the claimant. That was an error because that status only applies at the time of the accident.

43 There is a line of arbitral decisions that have interpreted and, in some ways, expanded s. 3(7)(f) of the SABS and its predecessor. Ms. Korte points to two in particular that, she says, have unreasonably expanded the scope of s. 3(7)(f) of the SABS.

44 In *Dominion of Canada v. Lombard Insurance*, a decision of Arbitrator Kenneth J. Bialkowski dated September 11 2013, the claimant was on a cycling vacation in Oregon. She was struck by a car and injured. She did not own a car. The claimant's mother had a motor vehicle insurance policy with Dominion so she applied for benefits on that policy. At the time the claimant worked as a supervisor at Community Living Mississauga. She spent a great deal of time on the road and had use of a van for work purposes. She was not able to use the van for personal purposes. As a supervisor, she regularly dealt with the use of the vehicle by other employees. She used her Blackberry while away to do so. Lombard insured the van. Applying the "control and authority" test rather generously, Aribitrator Bialkowski found that the Lombard policy covered the claimant. He noted that the factual situation was rare, and that if Lombard did not provide benefits, it was possible that the claimant, who had suffered catastrophic brain injury, might well have no benefits.

45 The "control and authority" test had been developed in *Chieftain Insurance v. Federated Insurance*, a decision of Arbitrator Scott Densem dated November 16 2011. An 11 year-old boy was injured. His father, Inderjit Mangat, was a 50% owner as well as a director and officer of a car dealership. The young boy was injured in a car owned by the dealership. Federated insured the car vehicles owned by the dealership. Inderjit normally drove one of the dealership's vehicles to and from work, but otherwise

used his personal vehicles. Chieftain insured his personal vehicles. The accident occurred while the wife of Inderjit's business partner was driving. Inderjit was not in the car.

46 Arbitrator Densem had little difficulty finding that the vehicle was being made available to Mr. Mangat. The issue was whether the vehicle was made available to him "at the time of the accident". Applying *ACE INA*, he found that whether vehicles were made available at the time of the accident required an analysis of the nature of the individual's control over the vehicle, or his or her authority to use that vehicle. Applying that test, he found that Inderjit had authority and control over the van. He was not only an employee, but a co-owner of the car dealership. Accordingly, even though the boy was not insured by Federated, Inderjit, the father, was. Federated had the higher priority.

47 Ms. Korte argues that Arbitrator Cooper, in following *Dominion* and *Chieftan*, followed cases that have unreasonably stretched the scope of s. 3(7)(f). There is merit in the argument that the interpretation of the scope of s. 3(7)(f) has gone too far. For example, I have little difficulty finding that authority and control could well be evidence that a claimant had a vehicle available at the time of an accident, but I do agree that to elevate it to the level of a test goes too far. As another example, Arbitrator Bialkowski's finding can only be understood as an admirably humane attempt to ensure that the severely injured claimant received benefits. Otherwise, it is very difficult to reconcile a finding that a claimant, thousands of miles away from Ontario on vacation, had "authority and control" over a vehicle because she could regulate its use by employees by blackberry.

48 That said, I do not think that Arbitrator Cooper employed "authority and control" as a test but rather as evidence. In the same vein, Arbitrator Cooper found that it was not necessary for Mr. Bourassa to have used a Conroy vehicle at the time of the accident. As Justice Belobaba pointed out, actual use is not necessary. Arbitrator Cooper found, correctly in my view, that "while actual use may be evidence of availability at the time of the accident, availability does not necessarily require actual use." In this case, Mr. Bourassa had authority to go to the lot at a time of his own choosing, pick up the keys to a vehicle, and sleep in it the night before he was required to drive. For Arbitrator Cooper, it was a critical point that Mr. Bourassa was permitted to sleep in the vehicle the night before. To him, this brought him will within the spirit of the examples set out by Belobaba J. in *ACE INA*. Mr. Bourassa could have taken the bus to the yard the night before and slept in the truck — which means he had the vehicle available at the time of the accident. This was the case even though he was not in it and was a few minutes away from work. Arbitrator Cooper therefore correctly interpreted s. 3(7)(f) of the *SABS*.

Disposition

49 The appeal is dismissed.

Costs

50 The parties may each submit a bill of costs and costs submissions of no more than two pages within 30 days of the release of this ruling.

Appeal dismissed.