COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Government and Consumer Services) v. Gore Mutual Insurance Company, 2023 ONCA 433
DATE: 20230619
DOCKET: COA-22-CV-0429

Lauwers, Huscroft and Zarnett JJ.A.

BETWEEN

His Majesty the King in Right of Ontario as represented by the Minister of Government and Consumer Services

Respondent/Appellant (Respondent)

and

Gore Mutual Insurance Company

Respondent/Respondent (Appellant)

Arthur Camporese, for the appellant

John Friendly and Drew Higginbotham, for the respondent

Heard: May 31, 2023

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated May 30, 2022, with reasons reported at 2022 ONSC 3188, allowing an appeal from a decision of Arbitrator Kenneth J. Bialkowski, dated June 6, 2018.

REASONS FOR DECISION

A. OVERVIEW

[1] The driver of an uninsured snowmobile was killed and a passenger was injured, after that vehicle, and an insured snowmobile that was accompanying it,

struck a tree at almost the same time. Statutory accident benefits were payable for the injured passenger and for the death of the driver. The question that divides the parties is about who is liable to provide those benefits, Gore Mutual Insurance Company ("Gore"), the private insurer of the insured snowmobile, or the publicly funded Motor Vehicle Accident Claims Fund (the "Fund").

[2] Section 268(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out rules for determining liability for statutory accident benefits. Under the rules pertinent to this appeal, even though the deceased driver and injured passenger were riding on an uninsured snowmobile, the liability would fall on Gore if the snowmobile it insured is properly considered to have been "involved in the incident from which the entitlement to statutory accident benefits arose". Otherwise, the liability would fall on the Fund.

[3] An arbitrator determined that the Fund was liable. On his view, the snowmobile insured by Gore was not involved in the incident from which the benefits entitlement arose. The injuries to the deceased driver and passenger of the uninsured snowmobile would have occurred whether or not the Gore-insured vehicle had been following it.

[4] On appeal by the Fund, a Superior Court judge reversed the Arbitrator's decision, holding that the Arbitrator had erred in law by applying the wrong legal

test to the question. In his view, the Arbitrator erroneously injected a causation requirement into the analysis.

[5] Gore appeals with leave of this court. For the reasons that follow, we dismiss the appeal.

B. FACTUAL CONTEXT

[6] On December 26, 2013, Christopher Ugulini, his fiancée, Lindsay Lance, and Christopher's brother, Casey Ugulini, went snowmobiling. Christopher and Lindsay rode Christopher's snowmobile, which was uninsured. Casey rode on his snowmobile, which was insured by Gore.

[7] Christopher's snowmobile took the lead, with Casey's snowmobile closely behind. Each snowmobile travelled too quickly on a route where this activity was not permitted.

[8] Tragically, and within a second of each other, both snowmobiles collided with a tree that had fallen across the trail they had been following. Both Christopher and Casey died. Lindsay survived but was injured.

[9] Lindsay applied for statutory accident benefits. A claim for death benefits was also made on behalf of Christopher. It was not disputed that the benefits were to be paid. The only issue was the identity of the payor.

C. THE STATUTORY SCHEME AND THE ISSUE

[10] Section 268(2) of the *Insurance Act* sets out rules for determining who is liable to pay statutory accident benefits to an occupant of an automobile. Automobile is defined in the *Insurance Act* to include a snowmobile.

[11] In descending order of priority, those rules are:

> 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. [Emphasis added.]

[12] In this case, subparagraphs (i) and (ii) were inapplicable. The only issue was whether, under subparagraph (iii), Gore had to pay as the insurer of Casey's snowmobile that was "involved in the incident from which the entitlement to statutory accident benefits arose". If Gore was not liable under subparagraph (iii), the Fund was liable to pay under subparagraph (iv).

D. THE ARBITRATOR'S DECISION

[13] The parties proceeded to arbitration. The Arbitrator concluded that Gore was not obliged to pay. In his view, the snowmobile insured by Gore (i.e., the one driven by Casey) was not "involved in the incident" from which the entitlement to benefits of those on the uninsured snowmobile arose.

[14] In reaching that conclusion, the Arbitrator found:

- The snowmobiles followed each other in a single file immediately prior to colliding with the tree. Christopher and Lindsay were travelling in the lead snowmobile.
- There was no contact between the two snowmobiles.
- There was proximity of time and space: the snowmobiles were some ten metres apart and there was only six-tenths of a second between impacts with the tree.
- The injuries sustained by Christopher and Lindsay on the lead snowmobile would have occurred whether the vehicle insured by Gore was following or not.

[15] The Arbitrator reviewed case law interpreting the phrase "involved in the incident", including cases decided under the priority provisions in s. 268(2) of the *Insurance Act* and cases involving loss transfer disputes and the interpretation of O. Reg. 668. He derived from those cases that for an insured vehicle to be

"involved in the incident" that injured an occupant of an uninsured vehicle, there had to be participation and proximity of time and space.

[16] The Arbitrator went on to hold that although these elements – participation and proximity of time and space – can be present where there is no contact between the vehicles, if there is an absence of contact there must be some action on the part of the driver of the alleged "involved" vehicle that "caused or contributed to the collision" for s. 268(2)1(iii) to be engaged. And he was of the view that the causal relationship was missing here:

> [O]n the established jurisprudence there does not have to be contact to be considered 'involved', in the incident. … In my view, for there to be 'involvement' in a priority dispute context not only must there be proximity of time and space, but there must still be some link or nexus between the actions of the operator of the alleged 'involved' vehicle to the injuries sustained by the claimants. In the case before me, there was clearly proximity of time and space, but the facts cannot support the participatory component. I am satisfied that the injuries sustained by the occupants of the lead snowmobile would have occurred whether the vehicle insured by Gore was following or not. The involvement of the snowmobile insured by Gore must be considered simply 'too remote' with regard to the injuries sustained by the claimants. Simply stated, I am of the view that in a priority dispute where there is an absence of contact between the vehicles, there must be some action on the part of the driver of the alleged 'involved' vehicle that caused or contributed to the collision giving rise to the injuries sustained by the claimants. There was no causal connection on the facts before me…. [Emphasis added.]

[17] The Arbitrator noted that the situation might have been different – there might have been a "causal relationship" – if the insured vehicle had been in the lead:

> Had the claimants been on the trailing snowmobile, an argument would have been available to show that the actions of the lead driver did contribute to the injuries sustained by those on the trailing snowmobile. It could be argued that had the lead vehicle been travelling at speed commensurate with the illumination provided by its headlights and a proper lookout kept, then the brake lights of the lead vehicle, had they been applied in a timely fashion, would have warned the driver of the following vehicle of an obstacle ahead and the collision possibly averted. In such circumstances, it might well be found that the lead vehicle's speed, the improper lookout of the operator and late application of brake lights gave the operator of the following vehicle little chance to avoid a collision. In such circumstances there very well may be a finding of a 'causal relationship' between the operation of the vehicles involved. That cannot be said on the evidence before me. On the facts before me, the result would have been the same whether the snowmobile insured by Gore was following or not.

[18] The Arbitrator emphasized that for an insured vehicle to be considered to have been meaningfully "involved" within the meaning of s. 268(2)1(iii), the driver of the insured vehicle must have engaged in conduct that caused or contributed to the injuries of those in the uninsured vehicle. This interpretation was required, in his view, as a matter of fairness in the distribution of responsibility for the payment of benefits under the priority provisions of the *Insurance Act*:

> I am of the view that the element of 'participation' is a required component in any 'involved vehicle' analysis in

> the context of a priority dispute to determine which of two or more insurers is responsible for payment of statutory benefits to a claimant. To hold otherwise could conceivably result in a situation where the insurer of a parked car could be held to be in priority to the insurer of a vehicle that caused an accident, which in my view would be an unfair balancing of responsibilities among insurers ... I cannot help but believe that third rung of the priority ladder was meant to be for vehicles meaningfully involved, that is a vehicle whose action caused or contributed to the injuries sustained by the claimant and connected in most circumstances by proximity of time and space. In the priority dispute context, the interpretation of the words 'involved in the incident' as contained in s. 268(2), is not to expand coverage to make benefits available to an insured as the insured already has access to such benefits, but to fairly distribute responsibility for payment of benefits among those insurers involved in the priority dispute. [Emphasis added.]

E. THE APPEAL JUDGE'S DECISION

[19] The Fund appealed the Arbitrator's decision to the Superior Court. Under s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, it was only permitted to do so on an issue of law.

[20] The appeal judge held that the Arbitrator had wrongly imported a causation requirement:

> The arbitrator engrafted a requirement for causation or fault for claimants' injuries into the no-fault payment priority ladder. He focused on injuries caused or contributed to by the accidents rather than mere involvement in the broader incident as directed by the statutory language.

He further explained that this was an error of law that drove the result the Arbitrator reached:

> The arbitrator engrafted a fault criterion into the priority ladder because he could not help but think that the Legislature meant to limit insurer's payment obligations to those whose insured vehicles caused or contributed to the claimant's injuries. Why? The statute does not mention fault or causation in s. 268 (2)(1) at all. This is neither a loss transfer nor a tort law determination of ultimate responsibility for the accident(s). Subparagraph 268 (2)(1)(iii) uses the word 'incident' rather than accident. The insured vehicle does not need to be involved in an accident at all. Recall that an accident is an incident in which injuries are caused. So, for the purpose of (iii), there needs only be an incident i.e. some event, occurrence, or happening. Moreover, involvement is a vague term that involves proximity or nexus in time or place.
>
> In my view the arbitrator made an error of law superimposing a causation requirement into the statutory definition before him. The two brothers and Ms. Lance went snowmobiling together. They drove on a path together where they were not allowed to be. They both drove too fast. They were sadly killed together – within a second of each other – by the same cause. There certainly were two different impacts. It is conceivable that there were two different accidents. But there was only one incident.

F. ANALYSIS

[21] Gore does not submit that causation is a legally required part of the test under s. 268(2)1(iii).

[22] Rather, Gore's principal argument is that the appeal judge misinterpreted the Arbitrator's decision, wrongly concluding that he had introduced a legal

requirement for causation into the analysis of s. 268(2)1(iii). In Gore's view, the Arbitrator actually applied a muti-factored analysis, and applied it, on a case-specific basis, to find an absence of "involvement" on the facts.

[23] Relatedly, Gore argues that even if the Arbitrator made statements concerning causation that were legally incorrect, his decision did not turn on those statements. Instead, it turned on his factual findings that the requisite amount of participation was not present to meet the test pursuant to s. 268(2)1(iii). Gore submits that what the Arbitrator really concluded was that the involvement of the snowmobile driven by Casey was "too remote" based on his findings that: (1) the uninsured snowmobile was the first to strike the tree limb; (2) there was no contact between the snowmobiles; and (3) the uninsured snowmobile would have struck the tree limb whether or not the insured snowmobile was present.

[24] On either basis, Gore argues, there was no question of law before the appeal judge, only a question of mixed fact and law from which no appeal was available.

[25] We disagree. In our view, the appeal judge was correct to conclude that the Arbitrator made causation part of the test he was to apply, and that the legal error affected the result the Arbitrator reached.

[26] At one point in his reasons, the Arbitrator referred to a number of cases that discuss factors that are relevant to "involvement". For example, he referred to a loss transfer decision where the factors were identified as including: (i) whether

there is contact between the vehicles; (ii) the physical proximity of the vehicles; (iii) the time interval between the relevant actions of the two vehicles; (iv) the possibility of a casual relationship between the actions of one vehicle and another; and, (v) whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

[27] However, leaving aside the question of whether that is the correct test, it is decidedly not the test the Arbitrator applied.

[28] The Arbitrator clearly articulated and applied a test in which causation is required, both for this case and as a general matter in the application of s. 268(2)1(iii) to cases where the vehicles do not collide. He did not simply look for a possibility of causation, nor did he consider it to be one factor among many. For the Arbitrator, causation was a *sine qua non* to a finding of involvement. Accordingly, he held that the absence of causation in this case meant that Casey's vehicle was not involved in the incident giving rise to the benefits entitlement. To repeat some of his principal findings:

> Simply stated, I am of the view that in a priority dispute where there is an absence of contact between the vehicles, there must be some action on the part of the driver of the alleged 'involved' vehicle that caused or contributed to the collision giving rise to the injuries sustained by the claimants. There was no causal connection on the facts before me….
>
> …

> I cannot help but believe that third rung of the priority ladder was meant to be for vehicles meaningfully involved, that is a vehicle whose action caused or contributed to the injuries sustained by the claimant and connected in most circumstances by proximity of time and space.

[29] The articulation and application of the incorrect legal test is an error of law: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 39, 41. The appeal judge did not err in his interpretation of the Arbitrator's decision, in determining that a question of law was involved, and reversing the Arbitrator's decision once he correctly concluded that the Arbitrator erred in law.

[30] We also see no error in the appeal judge's conclusion that, in the absence of the causation requirement imported by the Arbitrator, the other factors were sufficient to meet the requirements of s. 268(2)1(iii). As the appeal judge stated:

> The two brothers and Ms. Lance went snowmobiling together. They drove on a path together where they were not allowed to be. They both drove too fast. They were sadly killed together – within a second of each other – by the same cause. There certainly were two different impacts. It is conceivable that there were two different accidents. But there was only one incident.

[31] In other words, the temporal, spatial, and participatory factors were sufficient to conclude that there was involvement.

G. DISPOSITION

[32] Accordingly, the appeal is dismissed.

[33] In accordance with the parties' agreement, Gore shall pay costs of the appeal to the Fund of $10,000, inclusive of disbursements and applicable taxes.

"P. Lauwers J.A."
"Grant Huscroft J.A."
"B. Zarnett J.A."