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Licence Appeal Tribunal

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Ontario

Date: 2017-03-28
Tribunal File Number: 16-001683/AABS
Case Name: 16-001683 v State Farm Mutual Automobile Insurance Company

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:

S. C. L.

Applicant

and

State Farm Mutual Automobile Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION

ADJUDICATOR: **Chris Sewrattan**

APPEARANCES:

Counsel for the Applicant: **Paul J. Mariani**

Counsel for the Respondent: **Catherine Zingg**

HEARD: Written Hearing: January 5, 2017

Overview

[1] The applicant was struck by a golf cart on August 10, 2014. He applied for benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). State Farm Mutual Automobile Insurance Company ("State Farm") has denied some of his claims for benefits. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[2] This is a preliminary issue hearing. If the applicant is successful at this hearing, the matter moves to a substantive hearing in April 2017. If the applicant is unsuccessful at this hearing, he is not entitled to benefits under the *Schedule* for the golf cart incident that occurred on August 10, 2014.

The Preliminary Issue:

[3] The parties agreed that the sole issue to be decided is the following: Was the applicant injured in an accident as defined in section 3 of the *Schedule* on August 10, 2014?

[4] For reasons of procedural fairness, explained below, the preliminary issue is narrowed: Is the golf cart that struck the applicant an "automobile" as defined in section 3 of the *Schedule* on August 10, 2014?

Result:

[5] The golf cart that struck the applicant is not an "automobile" as defined in section 3 of the *Schedule* on August 10, 2014 because the alleged accident did not occur on a common and public driveway. The applicant is not entitled to benefits under the *Schedule*.

Facts:

[6] On August 10, 2014 the applicant was struck by a golf cart on the driveway of a golf course. The golf cart driver left the scene after the accident. The applicant was struck as he walked toward the club house while his wife was parking their car in the parking lot. The golf cart was travelling at a high rate of speed. It was travelling down a corridor the between club house and a shed, heading toward the parking lot area.

[7] To be clear, the golf cart was on a driveway when it struck the applicant. The applicant sustained injuries to his knee and wrists. He now claims accident benefits from his insurer.

Discussion:

The preliminary issue must be narrowed

[8] There appears to be confusion between the parties as to the scope of the issue in this preliminary issue hearing. Submissions were provided in writing. The applicant provided submissions exclusively on the issue of whether the golf cart in this matter is properly considered an automobile under s. 3 of the *Schedule*. State Farm provides submissions on this issue but also submits that the applicant must prove that the operation of the golf cart directly caused an impairment. This is a precondition within the term "accident" in s. 3 of the *Schedule*:

> "accident" means 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

[Emphasis added].

[9] This confusion raises a concern about procedural fairness. On the one hand, the preliminary issue hearing is to determine whether the applicant was "injured in an accident as defined in s. 3 of the *Schedule* on August 10, 2014". This would, on its face, include a requirement that the applicant prove on a balance of probabilities that the operation of the golf cart directly caused an impairment.

[10] On the other hand, I infer from the applicant's thoughtful written submissions that he did not expect to be put to his onus of proof on this aspect at the preliminary inquiry hearing. The central mandate of the Licence Appeal Tribunal is access to justice. I see no strategic or sharp practice from the applicant in not addressing the impairment issue. I see no prejudice to State Farm because the impairment issue can be litigated at the substantive hearing, if the applicant reaches at that stage. What I do see is a genuine misunderstanding between the parties on the scope of the issue to be litigated at this preliminary hearing.

[11] In the circumstances, I will answer the preliminary issue only to the extent that it asks whether the golf cart that struck the applicant was an "automobile" as defined in section 3 of the *Schedule* on August 10, 2014.

Was the golf cart that struck the applicant an "automobile" as defined in section 3 of the *Schedule*?

[12] The resolution of the preliminary issue turns on whether the golf cart required insurance at the time of the accident. If required insurance, it is properly considered an automobile. If did not require insurance, it is not an automobile and, therefore, the applicant was not involved in an accident.

[13] The analysis is cascading. The applicant was involved in an “accident” only if his alleged impairment was caused by an “automobile”. The golf cart which he alleges caused an impairment is an automobile in the circumstances of this case only if at the time that it struck that applicant it was required under a legislative Act to be insured under a motor vehicle policy. The analysis will proceed in sections examining each cascading step. I begin with the general question initially asked by the parties: what is an accident?

1. What is an accident?

[14] Under section 3 of the *Schedule*, an accident means:

> 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

[15] An accident only occurs if an automobile is involved. If the object which causes an impairment is not an automobile, the incident is not an accident under the *Schedule*. The question, then, is whether the golf cart involved in the circumstances of this case is an “automobile” within the meaning of the *Schedule*.

2. What is an automobile?

[16] The test for whether an object is an automobile under the Schedule is set out in *Grummett v. Federation Insurance Co. of Canada*, [1999] O.J. No. 4584 (S.C.J.), at para. 14. The test asks three questions:

> 1. Is the vehicle an "automobile" in ordinary parlance? If not, then,
> 2. Is the vehicle defined as an "automobile" in the wording of the insurance policy? If not, then,
> 3. Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

[17] The parties’ submissions appear to accept that the answer to the first and second question is “no”. I agree. A golf cart is not considered to be an automobile in ordinary parlance. ‘Golf carts’ were not defined as an “automobile” in the wording of the insurance policy.

[18] The analysis falls to the third question, asking me to consider the treatment of “automobile” in relevant legislation.

3. Do golf carts fall within any enlarged definition of "automobile" in any relevant statute?

[19] Under s. 224(1) of the *Insurance Act*, there are two instances in which a golf cart can be properly considered an automobile:

> First, if they are prescribed by regulation to be an automobile. Golf carts are not prescribed by regulation to be an automobile.
>
> Second, if they are properly considered a motor vehicle and required under any Act to be insured under a motor vehicle liability policy.

4. Are golf carts motor vehicles under the *Insurance Act*?

[20] I find that golf carts can be considered motor vehicles under the *Insurance Act*. Section 1(1) of the Insurance Act defines “motor vehicles" as having the same meaning as in the *Highway Traffic Act*. Section 1(1) of the *Highway Traffic Act* includes as part of the definition of "motor vehicle”, “any other vehicle propelled or driven otherwise than by muscular power.” Golf carts squarely fall within this part of the definition.

5. Are golf carts required under any Act to be insured under a motor vehicle liability policy?

[21] The preliminary issue hearing turns on the answer to this question. Both parties rely upon *Adams v. Pineland Amusements Ltd.*, 88 O.R. (3d) 321 (C.A.) which, citing *Copley v. Kerr Farms Ltd.*, [2002] O.J. No. 1644 (C.A.), reiterates the proper question in this analysis is whether the golf cart required motor vehicle insurance at the time and in the circumstance of the accident.

[22] A motor vehicle requires insurance if it is to be driven on a highway. This is set out section 2 of the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25., which prohibits the operation of a motor vehicle "on a highway unless the motor vehicle is insured under a contract of automobile insurance".

[23] I find that the golf cart was not driven on a highway when it struck the applicant. Section 1 of the *Compulsory Automobile Insurance Act* defines “highway” as having the same meaning as in the *Highway Traffic Act*. The relevant definition of highway in section 1 of the *Highway Traffic Act* is limited to a “common and public” driveway.

[24] The accident occurred on private property in the corridor between the club house and a shed, heading toward the parking lot. While I find this to be a driveway, I also find that it is not a *common and public* driveway. Quite the contrary. The driveway is intended for use by a limited population of golf course patrons and employees.

[25] As a result, the golf cart did not required motor vehicle insurance when it struck the applicant on the driveway of the golf course. It is not properly considered an automobile under the *Insurance Act*.

Conclusion:

[26] The golf cart that struck the applicant is, in the circumstances of this case, not an "automobile" as defined in section 3 of the *Schedule*. Given this decision, the applicant is not entitled to benefits in relation to the August 10, 2014 golf cart incident under the *Schedule*.

Released: March 28, 2017

Chris Sewrattan, Adjudicator