

KEEPING CURRENT

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Insurers should be aware that two vehicles independently colliding may still be considered part of the same incident for SABS purposes.

By Noah Bonis Charancle

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In the recent Court of Appeal decision of *Ontario (Government and Consumer Services) v. Gore Mutual Insurance Company*, 2023 ONCA 433 (CanLII), the Court upheld a lower Court ruling stating that two snowmobiles that were following each other in a single file and hit the same fallen tree where involved in the same incident.

In 2013, three individuals rode two snowmobiles in a single file down a path that did not allow for snowmobiling. The snowmobile riding ahead with two passengers was uninsured while the one behind with one occupant was insured. During this ride, the snowmobiles collided each in turn with a tree that had fallen across the trail. Neither vehicle caused the other to crash. Of the three riders, only one of the two passengers of the uninsured snowmobile survived.

The sole survivor applied for Statutory Accident Benefits under the *Insurance Act*. At issue was whether the benefits' payor would be the second snowmobile's insurance company or the Motor Vehicle Accident Claims Fund. As she was not

a passenger on the insured snowmobile, that issue was to be resolved based on whether the collisions could be considered to be part of the same incident. As discussed by the Court, the *Insurance Act* establishes a priority list for determining which insurer is liable to pay Statutory Accident Benefits.

[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 mine]

Priority iii above, or payment by “the insurer of any other automobile involved”, requires that the insured vehicle be a part of the same incident as the uninsured one. Both the Insurer and Insurance Fund proceeded to arbitration to determine which would be liable for payment based on whether the two collisions constituted the same incident. The arbitrator erroneously believed that the insured snowmobile was not involved in the same incident stating that there was no contact between the snowmobiles and that the survivor would have been injured whether the insured vehicle was following her or not.

However, the Court of Appeal, upholding the lower court’s decision, stated that vehicles could be involved in the same incident despite not colliding and that causation is not the sole factor to be considered when determining incident involvement. Rather, the Court said that the arbitrator erred in requiring a finding of causation to determine if an incident occurred in situations where vehicles do not collide with each other.

[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.

This case shows us that temporal, spatial and participatory factors can together glue ostensibly separate collisions into a single larger incident. Going forward, insurers should be cautious when responding to Statutory Accident Benefits claims where a single overarching incident caused an accident as they may find themselves involved in a Statutory Accident Benefits claim despite their insured not having collided with the other party nor directly caused the accident.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact Noah Bonis Charancle at 416.865.6661 or nbonischarancle@grllp.com.

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