

Case Name:

Beattie v. National Frontier Insurance Co.

Between

**Richard J. Beattie, plaintiff (respondent/appellant by way of cross-appeal) and
National Frontier Insurance Company, defendant
(appellant/respondent by way of cross-appeal)**

[2003] O.J. No. 4258

Docket No. C38420

Also reported at: 68 O.R. (3d) 60

Ontario Court of Appeal
Toronto, Ontario

Moldaver, Borins and MacPherson JJ.A.

Heard: October 15, 2003.

Judgment: November 14, 2003.

(27 paras.)

Insurance -- Automobile insurance, compulsory government schemes -- Bodily injury and death benefits -- Statutes -- Interpretation -- Construction where meaning is plain -- Where plain meaning inconsistent with purpose of statute.

Appeal by the defendant insurer from a determination that the plaintiff, Beattie, was not excluded from receiving income replacement benefits. Beattie cross-appealed from a determination that his entitlement to benefits was governed by the schedule in place at the time of his accident. Beattie was severely injured in a single vehicle accident. As a result of the accident, he was convicted of dangerous driving. Under Beattie's insurance policy, he was entitled to be paid statutory accident benefits, which included an income replacement benefit. Beattie was entitled to more generous benefits under the benefits schedule that was in place at the time he purchased the policy than the schedule that was in place at the time of his accident. Subsequent to Beattie's conviction, the insurer denied his application for accident benefits on the ground that his conviction was a complete bar to his entitlement to benefits. The motions judge determined that Beattie was not excluded from re-

ceiving income replacement benefits except for the period between when he was charged and when he was convicted of the offence.

HELD: Appeal and cross-appeal dismissed. A clear reading of s. 30(4) of Ontario Regulation 403/96 indicated that the benefits were only excluded from the time of the charge to the time of conviction. Although the section did not conform with the purpose of s. 30 in that it did not totally exclude the insurer's statutory obligation to pay accident benefits to an injured person convicted of a criminal offence, that did not result in an absurdity capable of resolution by resorting to recognized principles of statutory interpretation. Faulty drafting had likely created the gap in the legislative scheme. The correction of the error would involve a substantial exercise in impermissible judicial redrafting.

Statutes, Regulations and Rules Cited:

Automobile Insurance Rate Stability Act, S.O. 1996, c. 21.

Criminal Code, R.S.C. 1985, c. C-46, s. 249(1)(a).

Income Tax Act.

Insurance Act, R.S.O. 1990, c. I.8, ss. 121(1)9, 268(1).

Ontario Regulation 281/03.

Ontario Regulation 403/96 (Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996), s. 30, 30(1), 30(1)(b), 30(2), 30(4).

Ontario Regulation 776/93 (Statutory Accidents Benefits Schedule - Accidents on or after January 1, 1994).

Ontario Rules of Civil Procedure, Rule 22.

Appeal From:

On appeal from the order of Justice Richard G. Byers of the Superior Court of Justice dated June 5, 2002.

Counsel:

J. Claude Blouin and George Kanellakos, for the appellant/respondent by way of cross-appeal.
Roxanne G. Cooligan and Elizabeth A. Quigley, for the respondent/appellant by way of cross-appeal.

The judgment of the Court was delivered by

1 BORINS J.A.:-- In writing about gaps and oversights in legislation, in Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 134, Professor Sullivan states:

In a perfect world the legislature would create flawless legislation. Each statute would be drafted so that the effects of interpreting and applying it to an unfolding reality would match the goals sought by the legislature. In an imperfect world there is often a divergence between the purpose of legislation on the one hand and the effects of applying it on the other. The language of particular provisions may turn out to be over or under inclusive: there may be a lacuna in the legislative scheme.

That is what has happened in this case in respect to s. 30(4) of O. Reg. 403/96 (Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996) made under the Insurance Act, R.S.O. 1990, c. I.8, as amended.

2 To assist in the analysis of the main issue presented by this appeal, it is helpful to reproduce s. 30 of the regulation:

- 30.(1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22 in respect of a person who was the driver of an automobile at the time of the accident,
 - (a) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy;
 - (b) if the driver was driving the automobile without a valid driver's licence;
 - (c) if the driver is an excluded driver under the contract of automobile insurance; or
 - (d) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent.
- (2) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22,
 - (a) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in the risk material to the contract; or
 - (b) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent.
- (3) Clause (2)(b) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured.
- (4) If a person sustains an impairment as a result of an accident and,

- (a) at the time of the accident, the person was engaged in, or was an occupant of an automobile that was being used in connection with, an act for which the person is charged with a criminal offence; or
- (b) the person is charged under section 254 of the Criminal Code (Canada) with failing to comply with a lawful demand to provide a breath sample in connection with the accident,

the insurer shall hold in trust any amounts payable under an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22 until the charge is finally disposed of, at which time the amounts and any income on the amounts,

- (c) shall be returned to the insurer, if the person is found guilty of the offence or an included offence; or
- (d) shall be paid to the person entitled to the payment, if the person is not found guilty of the offence or an included offence.

(5) In clause (4)(a)

"criminal offence" means,

- (a) operating an automobile while the ability to operate the automobile is impaired by alcohol or a drug,
- (b) operating an automobile while the concentration of alcohol in the operator's blood exceeds the limit permitted by law,
- (c) failing to comply with a lawful demand to provide a breath sample, or
- (d) any other criminal offence, whether or not the offence is related to the operation of an automobile.

Facts

3 The relevant facts are brief. On November 21, 1996, Richard Beattie was severely injured in a single vehicle accident. As a result of the accident, he was charged with dangerous driving contrary to s. 249(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. On January 22, 1998, Beattie was convicted of the offence and was fined \$500 and prohibited from driving for 24 months.

4 At the time of the accident Beattie was insured for a one year term commencing in May 1996, pursuant to a standard automobile insurance policy issued by National Frontier Insurance Company. Under the policy, Beattie was entitled to be paid Statutory Accident Benefits (SABS) which included an income replacement benefit. At the time Beattie purchased his insurance policy, payment of SABS was governed by O. Reg. 776/93 (Statutory Accidents Benefits Schedule - Accidents on or after January 1, 1994). At the time of Beattie's accident, payment of SABS was governed by O. Reg. 403/96, made under the Automobile Insurance Rate Stability Act, S.O. 1996, c. 21 that came into force on November 1, 1996, and substantially amended the Insurance Act. Under O. Reg. 776/93, Beattie would have been entitled to more generous SABS than under O. Reg. 403/96.

5 By virtue of s. 30(4) of O. Reg. 403/96, while Beattie stood charged with dangerous driving, Frontier was precluded from paying him weekly benefits. Subsequent to his conviction, Beattie's application for SABS was denied by Frontier on the ground that his conviction for dangerous driving was a complete bar to his entitlement to SABS.

6 On a special case under Rule 22 of the Rules of Civil Procedure, the court was asked to decide: (1) whether Beattie's entitlement to SABS was governed entirely, or in part, by O. Reg. 776/93 or O. Reg. 403/96; (2) if his entitlement was governed by O. Reg. 403/96, whether s. 30(4) excluded him from recovering SABS for the period after the date of his conviction.

7 The motion judge held that (1) Beattie's entitlement to SABS was governed by O. Reg. 403/96 and (2) Beattie was not excluded from receiving income replacement benefits under s. 30(4), except for the period from November 21, 1996, when he was charged with dangerous driving, to January 23, 1998, when he was convicted of the offence.

8 Frontier appealed from the second part of the motion judge's order and seeks leave to appeal from a subsequent order awarding Beattie costs in the amount of \$30,000. Beattie has cross-appealed from the first part of the order, contending that his entitlement to SABS is governed by O. Reg. 776/93 because it was the regulation that was in force when he entered into the insurance contract. However, if he is unsuccessful in his cross-appeal, Beattie's position is that the second part of the motion judge's order is correct. For the reasons that follow, I would dismiss the appeal and the cross-appeal.

Section 30(4) of O. Reg. 403/96

9 The parties do not disagree with the apparent legislative purpose of s. 30 when read as a whole. That purpose is to exclude an insured person injured in an automobile accident from his or her statutory entitlement to SABS where the circumstances stipulated in s. 30(1), (2) and (4) apply to the injured person. As that person would be entitled to recover SABS from an insurer under the provisions of a standard automobile insurance policy, s. 30(1), (2) and (4) provide a number of exclusions in favour of an insurer that operate to remove its obligation to pay SABS. The language of both s. 30(1) and (2) is clear. The insurer is not required to pay SABS upon the occurrence of any of the factors stipulated in the two provisions, none of which is concerned with the commission of a criminal offence.

10 Section 30(4) addresses the commission of a criminal offence by the injured person. Where the injured person is charged with a criminal offence, he or she is not entitled to be paid SABS while the trial of the charge is pending. Rather, the insurer must hold in trust SABS otherwise payable until the outcome of the charge is known. If the injured person is found guilty of the offence, the SABS that were held in trust are to be returned to the insurer. If he or she is found not guilty, the SABS held in trust are to be paid to the injured person. However, unlike s. 30(1) and (2) which excludes the insurer from any statutory obligation to pay SABS, s. 30(4) excludes the insurer from its obligation to pay SABS to a person convicted of a criminal offence only for the period from when the person is charged until he or she is convicted, with the result that such person is entitled to the payment of SABS subsequent to conviction, and for whatever period he or she qualifies to receive payments. In the circumstances of this case, because Beattie suffered serious injuries in the accident and is totally disabled, counsel for the insurer was of the belief that Beattie would be entitled to be paid an income replacement benefit to at least age 65.

11 Counsel for the insurer concedes that the legislative purpose of s. 30 has not been achieved because s. 30(4) is not in harmony with s. 30(1) and (2) in that it fails to provide insurers the same exclusion contained in those provisions where the injured person has been found guilty of a criminal offence. Counsel points to the anomaly of the total loss of SABS by an injured person who was driving without a valid driver's licence as required by s. 30(1)(b) and the partial loss of SABS under s. 30(4) by one convicted of impaired driving causing death. In counsel's submission, this has created an absurd result that was not intended by the legislature. Where, as in this case, an injured person has been convicted of a criminal offence, counsel asks the court to "fix" s. 30(4) to ensure harmony with s. 30(1) and (2) by adding whatever language the court believes is required to achieve this result. In doing so, counsel quite properly informed the court that the legislature has taken steps to amend s. 30. He was of the view that the amendments, which had been drafted and approved, had not come into force. However, it would appear that at the time this appeal was heard, the amendments, which are in O. Reg. 281/03, were in effect.

12 In my view, although s. 30(4) does not conform with the purpose of s. 30 as evidenced by s. 30(1) and (2) in that it does not totally exclude the insurer's statutory obligation to pay SABS to an injured person convicted of a criminal offence, this does not result in an absurdity capable of resolution by resorting to recognized principles of statutory interpretation. Although s. 30(4) results in a situation that fails to advance the purpose of s. 30, as explained by Professor Sullivan in the passage that I have quoted at the outset of my reasons, this is likely because of faulty drafting that has created a lacuna, or gap, in the legislative scheme.

13 It is well-accepted that principles of interpretation may be used to resolve an absurd interpretation. However, this principle resolves conflicts where the words of a provision are reasonably capable of more than one meaning. The principle is explained by Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 29:

What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, [1976] 1 S.C.R. 108, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation" [emphasis in the original].

See also Sullivan and Driedger on the Construction of Statutes, at pp. 251-257.

14 Therefore, this is not a case in which accepted principles of interpretation permit the court to reject an interpretation that results in an absurdity in favour of a plausible alternative interpretation that avoids the absurdity and supports the legislative purpose of s. 30. The reason is that s. 30(4), although not furthering the legislative intent, is clear and unambiguous. It gives rise to but one meaning. Although an interpretation that leads to absurd consequences should be rejected in favour of an interpretation that avoids absurdity, the court cannot do so if, as in this case, because of the

clarity of the language used by the legislature there is no plausible alternative interpretation. In all likelihood, s. 30(4) represents an example of drafting oversight.

15 As Professor Sullivan points out at p. 129, legislation is presumed to be accurate and well-drafted consequent to the presumption that the legislature does not make mistakes. Thus, if the words of an Act are clear, they must be followed even though they lead to a manifest absurdity. As a majority of the Supreme Court of Canada commented in *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 704:

[W]here, by use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be ... The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

16 Section 30(4) uses language with the precision that one expects in modern legislation, yet s. 30(4) fails to achieve the legislative purpose of s. 30. Indeed, as a result of a likely drafting oversight, s. 30(4) has achieved the opposite purpose. While in some cases the court will come to the rescue of the legislature by correcting its drafting error, these cases involve minor and obvious errors that can easily be corrected, unlike this case in which the correction of the error as proposed by the insurer would involve a substantial exercise in impermissible judicial redrafting. Moreover, in asking the court to do so, the insurer recognizes that the textual meaning of s. 30(4) is plain and clear.

17 In *Friesen v. Canada*, [1995] 3 S.C.R. 103, the Supreme Court of Canada explained the rationale that precludes the court from engaging in redrafting legislation that has failed to achieve a legislative purpose. In *Friesen* the court was asked to add language to the definition of "inventory" in the Income Tax Act. At para. 27, Major J. explained why the court was precluded from doing so:

The principal problem with the respondent's interpretation is that the [proposed] words do not appear in the definition in the Income Tax Act. The addition of these words to the definition effects a significant change to the sense of the definition. It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.

18 In addition, it is helpful to consider Professor Sullivan's analysis of why courts do not have jurisdiction to fill legislative gaps. This is what she writes at p. 136:

While courts are willing to correct drafting errors, they are reluctant to fill gaps in legislation. This reluctance is grounded in two factors. First, unlike mistakes, which are always inadvertent, a gap in legislation may be deliberate. Gaps may result from faulty drafting but equally they may result from factual misconceptions, poor planning or even a considered policy choice. For this reason, gaps are taken to embody the actual intentions of the legislature, which courts are bound to respect. It is up to the legislature rather than the courts to effect any desired change. Second, whether inadvertent or not, gaps result from provisions or

schemes that are under-inclusive, and correcting under-inclusiveness would require courts to legislate.

19 Applying the presumption that the legislature does not make mistakes, if it had intended to completely exclude the insurer from its statutory obligation to pay SABS to injured persons convicted of a criminal offence, it would have inserted the necessary language to make that clear. That the legislature failed to do so as a result of a likely oversight does not permit the court to remedy the oversight by redrafting the regulation.

20 It follows that the motion judge was correct in his interpretation of s. 30(4) of O. Reg. 403/96.

The governing Regulation

21 The motion judge concluded that Beattie's entitlement to SABS was governed by O. Reg. 403/96 and not by O. Reg. 776/93. In reaching this conclusion, he rejected Beattie's contention that it was the 1993 regulation that governed because it was that regulation that was in force when Beattie purchased his contract of insurance from Frontier, which created for him vested rights in the payment of SABS that were not taken away by the 1996 regulation that came into force shortly before Beattie's accident.

22 As I understand the position taken by Beattie's counsel, she contends that his entitlement to SABS is governed by the regulation that was in force in May, 1996 when he contracted with Frontier for automobile insurance and not the regulation in force in November, 1996 when he was injured in the automobile accident. It is her position that the legislation that came into force pursuant to which the 1996 regulation was enacted did not have the effect of "amending" his existing insurance policy and thereby impairing his vested right to SABS under the 1993 regulation. She further contends that the Lieutenant Governor in Council exceeded its delegated authority by enacting a regulation that purports to apply retrospectively to vested insurance contracts.

23 In my view, the motion judge was correct in concluding that O. Reg. 403/96 governed Beattie's contractual right to SABS. On November 1, 1996, the Automobile Insurance Rate Stability Act, 1996, came into force. This Act changed the automobile insurance regime in the Insurance Act by granting broader tort rights to accident victims and enacting a new no-fault accident benefits, or SABS, schedule. Regulation 403/96 was enacted pursuant to this Act and was in force when Beattie's accident occurred. Section 268(1) of the Insurance Act contemplates that the legislature may, from time to time, amend or change accident benefits schedules. Section 268(1) reads as follows:

268.(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

24 In addition, s. 268(1) has the effect of amending every motor vehicle liability policy in force when the Statutory Accident Benefits Schedule is amended, which included Beattie's policy, to provide for the statutory benefits set out in an amended Schedule. Consequently, by virtue of s. 268(1), as O. Reg. 403/96 was in force at the time of Beattie's accident, his policy has been amended to incorporate the benefits and exclusions contained in the regulation. The power of the Lieutenant Gov-

error in Council to make regulations respecting Statutory Accident Benefit Schedules is contained in s. 121(1)9 of the Insurance Act.

25 I would not give effect to the cross-appeal.

Costs appeal

26 Frontier has appealed from the costs of \$30,000 awarded to Beattie by the motion judge. It has not sought leave to appeal costs. Moreover, in his submissions counsel for Frontier did not press the issue of costs. In my view, there is no proper reason on which I would grant leave to appeal costs. Consequently, I would deny leave to appeal the motion judge's costs award.

Result

27 For the foregoing reasons, I would dismiss the appeal and the cross-appeal. In the circumstances, as each party was unsuccessful, there will be no costs.

BORINS J.A.

MOLDAVER J.A. -- I agree.

MacPHERSON J.A. -- I agree.

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