WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week April 20 - 25, 2009

Injury by Fruit Does Not Entitle Insured to Benefits . . . *How About Lemons*?

Myra Kennedy v. Gore Mutual Insurance Company: **FSCO A07-002444**
March 26 2009: Arbitrator Joyce Miller

MVC June 14, 2007. Insured stopped at red light and hit in the head by object which originated from a school bus. The object was thrown by an eleven year old student. The Insured alleged various personal injuries and impairments. The Insurer denied benefits on the grounds that the matter was not “an accident”.

To be identified as an accident an Insured must satisfy two tests:

1. The Purpose Test – Did the incident arise out of the use and operation of a motor vehicle? And,
2. The Causation Test – Did the use or operation of an automobile directly cause the impairment?

At the hearing on a preliminary issue before Arbitrator Miller, she acknowledged that the insured had been involved in an incident arising out of the use and operation of a motor vehicle. The Purpose Test had been met. The inquiry does not end there, as the Causation Test must also be met for an Insured to be entitled to benefits.

Much of the decision’s discussion dealt with whether the use and operation of a motor vehicle *caused* the Insured’s impairment. The Arbitrator disagreed with characterizations of the use and operation of a bus which included the supervision of the student who threw the object from the bus. There was some disagreement as to whether the object which hit the Insured was a piece of watermelon or a tomato. The parties settled on using the term ‘fruit’ for the arbitration. The arbitrator felt that the dominant feature of the incident was the throwing of the fruit and not the use or operation of a motor vehicle. The Insured’s impairments and injuries were caused by an assault. The automobile was merely the location from which from which the fruit was thrown, but that was not enough to satisfy the Causation Test. The Insured’s injuries were, therefore, not the result of an accident under the SABS.

Implications & Commentary:

This decision is one in a line of cases which restricts the scope of the SABS to events where the dominant purpose of the use of an automobile must be causally related to the impairment or resulting injury. It is often not a simple exercise to identify what is, or is not, an accident. For example, assume the same student

had his hand out the bus window with a piece of fruit in it. Also assume the bus comes to a sudden stop with the student losing control of the fruit which then hits a second person causing injury. It is likely the second person would be injured as the result of an accident under the SABS and would be entitled to benefits.

Finally, many lawyers are aware that in a United States court case, *Nix v. Heddon*, 149 U.S. 304 (1893), the lowly Tomato was ruled to be - a vegetable. And, in the State of Oklahoma, the Watermelon has been recognized and elevated to the status of that State's official vegetable. So perhaps the law on fruit is not as clear as it might be. My only concern is that when I finally get the lemon I drive out of the repair shop – will I be entitled to SABS benefits? The last time I looked, lemons were in the 'vegetable section' at the grocery store.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at http://www.fsco.ca/english/insurance/auto/drs/decisions/default.asp.
Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site. If you have questions or comments about this edition of the newsletter, contact Brian Murphy at Legate & Associates: bmurphy@legate.ca