You're on First! No, You're on First! Priority Disputes of Sole Proprietorship SABS Insurers

In a recent Court of Appeal decision, Pepall J.A. clarified the priority of insurance companies having to pay accident benefits in situations where sole proprietorships enter into owner-operator agreements with transportation companies that have their own insurance policy for the fleet. Deciding *Security National Insurance Company v. Markel Insurance Company* and *Kingsway General Insurance v. Gore Mutual Insurance Company* together, Pepall J.A. concluded that in those situations, s.66(1)(a) of the Statutory Accident Benefits Schedule (SABS) allows the sole proprietor of a sole proprietorship to designate an otherwise personal-use vehicle as a vehicle for regular-commercial-use. Therefore, the insurance policy of the commercial transportation company takes priority over the individual's personal insurance policy if the sole proprietor is an occupant of a vehicle designated for regular-commercial-use involved in a motor vehicle accident.

In *Security National v. Markel*, Pinnacle Transport operated a transport company where Markel was its motor vehicle liability insurer. Duncan McKerchar, who carried on business as "The Tidy Scot" bought a 1998 GMC truck from Pinnacle and entered into an independent contractor agreement, also with Pinnacle. As part of the agreement, The Tidy Scot agreed to enrol in Pinnacle's "fleet public liability and property damage and cargo insurance coverage."[1] Mr. McKerchar was not a named insured or listed driver on Pinnacle's insurance policy.

On April 4, 2006, Mr. McKerchar attempted to jump onto the moving truck while another driver was driving the truck. Mr. McKerchar fell and was run over by the truck.

Security National, the insurer for Mr. McKerchar's personal-use vehicle, paid the statutory accident benefits but then launched a claim against Markel stating that they ought to pay the benefits as Pinnacle's fleet insurer.

At arbitration, Arbitrator Samis concluded that Security National was required to pay since the meaning of s.66 would be strained if he were to conclude that Mr. McKerchar provided a vehicle to himself. He also concluded that Mr. McKerchar and Pinnacle were not a joint venture under s.66(1).

In *Kingsway General v. Gore Mutual*, Trowbridge Transport Ltd. operated a transport company insured by Kingsway General. William Higgs, the sole proprietor of Bill Higgs & Sons, owned a freightliner tractor. Despite the business name expiring in August 2007, Mr. Higgs entered into an owner-operator agreement with Trowbridge as Bill Higgs & Sons on January 1, 2008. Trowbridge obtained insurance on behalf of Bill Higgs & Sons where Bill Higgs & Sons was responsible for paying all the deductibles. In February 2008, Mr. Higgs was injured in a motor vehicle accident while driving the freightliner tractor. Mr. Higgs applied to Kingsway General for statutory benefits.

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[1] *Security National Insurance Company v. Markel Insurance Company*; *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, 2012 ONCA 683 at para 7.

Kingsway general brought a claim against Gore Mutual, Mr. Higgs' insurer for his personal-use vehicle, to pay the accident benefits.

At arbitration, Arbitrator Bialkowski concluded that the legislative intent of s.66(1) was to place the insurer of the fleet in priority to the personal-use vehicle insurer.

The two decisions were appealed to the Superior Court. The judge dismissed the appeal of *Kingsway v. Gore* but allowed the appeal of *Security National v. Markel*. The judge concluded that sole proprietors can make an insured vehicle available to the individual of a sole proprietorship and satisfy s.66(1) of the SABS. Both decisions were appealed.

At the Court of Appeal, the issue before the Court was whether "an insured vehicle maybe made available for an individual's regular use by that individual's sole proprietorship."[2]

Pepall J.A., first considered the language of s.66(1). He concluded that there is nothing subsection (a) that prohibits a sole proprietorship from making a personal-use vehicle available to the sole proprietor for commercial use. S. 66(1) does not require the two parties to be at arm's length from each other in order for a vehicle to be made available to a sole proprietor under the SABS.

Also, Pepall J.A. considered the legislative intent behind s.66(1). Pepall J.A. agreed with arbitrator Bialkowski that the legislative intent was that the commercial insurer should be responsible to pay the accident benefits arising from the operation of the commercial vehicle.[3] Arbitrator Bialkowski in *Kingsway v. Gore* stated that commercial vehicles travel longer distances which puts them at a higher risk of an accident.

The section 66(1) heading is also entitled "Company Automobiles and Rental Vehicles." While recognising that the heading was not determinative, Pepall J.A. stated that it does provide context.

Pepall J.A. concluded that the insurers for Mr. Higgs and Mr. McKerchar's personal-use vehicles should not be required to pay the accident benefits. The insurers of the commercial vehicles take priority because of the language and legislative intent of s.66(1) of the SABS.

Since Pepall J.A. found that sole proprietorships were able to make regular-use vehicles available to the sole proprietor for commercial use, he did not consider joint ventures and whether the owner-operator agreements could be considered an "other entity" for the purposes of s.66(1).

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[2] *Ibid*., at para 27.
[3] *Ibid.*, at para 52.