A TOMATO WAGON?
DEFINING "AUTOMOBILES" UNDER ONTARIO'S INSURANCE LEGISLATION

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> *To the uninitiated, it might seem that defining the word "automobile" ... should be a relatively simple matter. Those familiar with the byzantine nature of insurance legislation know better.*
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> - Justice Doherty, speaking for the Court of Appeal for Ontario in *Copley v. Kerr Farms Ltd.*[1]

To be entitled to statutory accident benefits under Ontario's no-fault legislation, also known as the *SABS*,[2] the individual seeking benefits must have been involved in an accident. An accident, under section 3(1) of the *SABS*, is defined as:

> 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.

This seemingly simple definition is actually extraordinarily complex. For example, what constitutes *use or operation* of an automobile?; what qualifies as an *impairment*?; what does it mean for an impairment to be *directly caused* (which in turn begs the question of what it means for an impairment to be *indirectly* caused)? Each of these legal terms has generated their own body of case law, both before the Financial Services Commission of Ontario and before the civil court system.

This paper will deal with what could be considered the precursor to all of these questions: what is an *automobile*? While often the answer is so obvious that this question does not arise, decision-makers have struggled with how far the definition could stretch ever since the implementation of no-fault benefits in Ontario.

Qualifying a Vehicle as an Automobile: An Overview

The *SABS* was created by the provincial Cabinet pursuant to the *Insurance Act*.[3] While automobiles are not defined under the *SABS* itself, Part VI of the *Insurance Act* (entitled "Automobile Insurance") contains a definition within section 224(1):

> **224.** (1) In this Part,
> "automobile" <u>includes</u>,

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[1] 59 O.R. (3d) 346, [2002] O.J. No. 1644 at para. 10.
[2] *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, s. 3(1).
[3] *Insurance Act*, R.S.O. 1990, c. I.8., paragraphs 9 and 10 of subsection 121 (1).

(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
(b) a vehicle prescribed by regulation to be an automobile …[4]

Justice Doherty looked at this section in *Copley v. Kerr Farms Ltd*.[5] He noted that because the Legislature had chosen to use the word *includes* rather than *means*, the Legislature was sending a signal to the courts that the section was meant to expand the ordinary definition of automobiles.[6]

Since there is no statute that provides a definition of an automobile, that definition defaults to the common law. The common law three-part test for determining if a vehicle is an automobile under section 224 was set out in the Ontario Superior Court of Justice decision of *Grummet v. Federation Insurance Co*.:

1. Is the vehicle an "automobile" in the ordinary parlance? If not,

2. Is the vehicle defined as an "automobile" in the wording of the insurance policy? If not,

3. Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?[7]

The Court of Appeal for Ontario recently upheld the use of this three-part test in its 2007 decision of *Adams v. Pineland Amusements Ltd*.[8] Since this decision, the test has been referred to as the *Adams* test by the Court.[9]

Step 1: The Ordinary Parlance Test

The first step of the *Adams* test is known as the *ordinary parlance* test. That is to say, "it must be determined whether the vehicle in issue is an automobile within the ordinary sense of the word".[10] Justice Somers in *Grummett* adopted the reasoning of Justice McCart in *McFarland v. Storm*,[11] in that an automobile, in its ordinary sense, is a vehicle designed for and capable of transportation of passengers on streets and highways.[12]

Generally there is little case law that addresses this stage in-depth. The reason is that an automobile, in the ordinary sense of the word, is a restricted term that typically refers to

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[4] There is also a different definition of automobile under section 1 of the *Insurance Act*, however, the Court of Appeal in *Regele v. Slusarczyk* (1997), 33 O.R. (3d) 556, 147 D.L.R. (4th) 294 held that because no-fault benefits fall under Part VI, this is the definition that should prevail.
[5] *Copley*, *supra* note 1.
[6] *Copley*, *supra* note 1 at para. 12. Also see *R. v. Mansour*, [1979] 2 S.C.R. 916, citing Maxwell on Interpretation of Statutes, 12th ed., p 270.
[7] (1999), 46 O.R. (3d) 340. This test was originally suggested by Justice Hogg of the Ontario General Division in *Bergsma v. Canada*, [1994] O.J. No. 2572.
[8] *Adams v. Pineland Amusements Ltd*., 2007 ONCA 844.
[9] See e.g., *Rougoor v. Co-Operators General Insurance Co.*, 2010 ONCA 54.
[10] *Copley*, *supra* note 1 at para. 13.
[11] (1998), 28 C.C.L.I. 128 (Ont. Gen. Div.)
[12] *McFarland*, *supra* note 11 at para. 16.

passenger vehicles seen on highways. For example, a truck would obviously be considered an automobile in ordinary parlance.[13]

Justice Somers in *Grummett* accepted that a race car was not in ordinary parlance an automobile, due to the fact that "they do not have brake lights, they do not have doors and they carry no passenger except the driver".[14] Mr. Grummett was eventually disentitled to accident benefits.

In *Morton v. Rabito*,[15] the Court of Appeal for Ontario held that a backhoe was not an automobile. Similarly, in *Regele v. Slusrczyk*,[16] the Court similarly held that a farm tractor was not an automobile.

In *Copley*, the defendant Kerr Farms conceded that a flatbed trailer used to haul tomatoes, which has no motor and is hooked to a transport truck to move, is not in ordinary parlance an automobile.[17] In *Rougoor v. Co-Operators General Insurance Co.,*[18] the plaintiff conceded before the Court of Appeal that her dirt bike was not an automobile in ordinary parlance for the purpose of entitlement to accident benefits.

Step 2: Wording of the Insurance Policy

If a vehicle is not an *automobile* in ordinary parlance, then the court will look to whether the vehicle is defined as an automobile in the wording of the insurance policy. Typically, if a vehicle is not an automobile in ordinary parlance, it is not covered by the standard O.A.P. 1.

For example, in *Motor Vehicle Accident Claims Fund v. Buckle*,[19] Ms. Buckle was injured while riding a golf cart as a passenger on a highway. Director's Delegate Evans skipped the first two stages of the *Adams* test as the parties agreed that "the only relevant test is whether it falls within any enlarged definition of automobile in any relevant statute". Director's Delegate Evans clearly felt that golf carts were not automobiles in ordinary parlance, nor would they fall within the scope of statutorily-mandated automobile coverage.

Similarly, Justice Somers in *Grummett* refused "any suggestion that the racing car could be considered an 'automobile' within the meaning of the subject policy",[20] and referred to the definition of automobile found in the standard O.A.P. 1:[21]

- A *described* automobile (one listed on the certificate of automobile insurance);[22]
- A *newly acquired* automobile;[23]

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[13] See e.g., *Life & Casualty Ins. Co. v. Cantrell* (1933), 57 S.W. 2d 792 (Sup. Ct. Tenn.); *Wiese v. Polzer* (1933), 248 N.W. 113 (Sup. Ct. Wisc.); and *Combined American Insurance Company v. Ganzer* (1961), 350 S.W. 2d 211 (Ct. Civ. App. Tex.).
[14] *Supra* note 11 at para. 16.
[15] (1998), 42 O.R. (3d) 161, [1998] O.J. No. 5129.
[16] *Supra* note 6.
[17] *Copley*, *supra* note 1 at para. 14.
[18] 2010 ONCA 54.
[19] [2012] O.F.S.C.D. No. 161, Appeal P11-00009 (FSCO December 13, 2012), *per* David Evans, Director's Delegate.
[20] *Supra* note 7 at para. 16.
[21] O.A.P. 1, s. 1.3.
[22] O.A.P. 1, s. 2.1.
[23] O.A.P. 1, s. 2.2.1.

- A *temporary substitute* automobile;[24]
- Other automobiles driven by you, or driven by your spouse, or your same-sex partner, who lives with you;[25] and
- Trailers, in certain circumstances.[26]

This stage of the *Adams* test only arises in unique circumstances in the context of accident benefits. However, an example of where this stage was at issue was the Court of Appeal for Ontario's recent decision in *Rougoor v. Co-Operators General Insurance Co.*[27]

Ms. Rougoor had purchased a policy of automobile insurance with Co-Operators, which listed Ms. Rougoor as the principal driver for an off-road dirt bike (as well as the secondary driver for another off-road dirt bike). While operating her friend's dirt bike in Florida, which happened to be the same make and model as the ones she owned and insured, she was seriously injured. Ms. Rougoor applied to Co-Operators for accident benefits.

The question before the Superior Court, and eventually on appeal before the Court of Appeal for Ontario, was whether or not the policy, in covering a dirt bike as a described automobile, expanded the definition in the policy to cover all dirt bikes Ms. Rougoor operated. The Superior Court denied Ms. Rougoor's application for a declaration that she was entitled to benefits.

The Court of Appeal, in allowing the appeal and granting the declaration, stated that:

> It is clear that the appellant's own dirt bike is covered as an "automobile" under the terms of her policy. In our view, the word "automobile" when used in the policy must be given a consistent meaning. As the appellant's dirt bike is an "automobile" for the purpose of coverage under the policy, the dirt bike in Florida must also be considered to be an "automobile" under the terms of the policy. Simply put, the appellant purchased insurance to cover the risk of riding a dirt bike. The policy provided that coverage by treating the dirt bike as an "automobile" and extended coverage for any other "automobile" driven by the appellant in Canada or the United States.[28]

If a vehicle is neither an automobile in ordinary parlance, nor falls within the scope of the policy, the Court will then look to see whether the impugned vehicle falls into any statutory definition of automobile. In actions and arbitrations for statutory accident benefits, this stage is by far the most contentious.

Step 3: The Enlarged Statutory Definition of Automobile

Fitting a vehicle into a statutory definition of an automobile has been nothing short of a logical quagmire for both counsel and the Bench alike. To build on the quote at the beginning of this paper, Justice Doherty in *Copley* candidly remarked on the bureaucratic nature of the reasoning:

> To the uninitiated, it might seem that defining the word "automobile" in Part VI of the Insurance Act dealing with automobile insurance should be a relatively

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[24] O.A.P. 1, s. 2.2.2.
[25] O.A.P. 1, s. 2.2.3.
[26] O.A.P. 1, s. 2.2.4.
[27] *Rougoor*, *supra* note 18.
[28] *Rougoor*, *supra* note 18 at para. 10.

> simple matter. Those familiar with the byzantine nature of insurance legislation know better. To determine what an automobile is for the purposes of s. 267.1(1) of the Insurance Act, one must begin with that Act, travel through the Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, as amended, and proceed on to the Highway Traffic Act, R.S.O. 1990, c. H.8, as amended. Even then, the meaning is far from obvious.[29]

The starting place is section 224(1)(b) of the *Insurance Act*. This defines an automobile as:

> … a motor vehicle required under any Act to be insured under a motor vehicle liability policy.

As stated by Director's Delegate Evans in *Buckle*,[30] the possible Acts under which insurance may be required of a motor vehicle are the *Off-Road Motor Vehicles Act* ("*ORMVA*")[31] and the *Compulsory Automobile Insurance Act* ("*CAIA*").[32] If a motor vehicle is required to be insured under section 2(1) of the *CAIA* or section 15(1) of the *ORMVA*, then it meets the definition of an automobile under section 224(1)(b) of the *Insurance Act*.

Section 15(1) of the *ORMVA* states that no off-road vehicle shall be operated off a highway unless insured. The *ORMVA* defines an off-road motor vehicle under section 1 as a vehicle propelled or driven otherwise than by muscular power or wind and designed to travel:

> (a) on not more than three wheels, or
> (b) on more than three wheels and being of a prescribed class of vehicle.

Prescribed vehicle classes (i.e. vehicles under subsection (b), above) are found in R.R.O. 1990, Regulation 863, section 3:

> 1. Dune buggies.
>
> 1.1 Vehicles designed for use on all terrains, commonly known as all-terrain vehicles, that have steering handlebars and a seat that is designed to be straddled by the driver.
>
> 1.2 Vehicles designed for utility applications or uses on all terrains that have four or more wheels and a seat that is not designed to be straddled by the driver.
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> 2. Suzukis, Model Numbers LT125D, LT50E, LT125E, LT185E, LT250EF and LT250EFF.
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> 3. Hondas, Model Numbers FL250 series and TRX200.
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> 4. Yamahas, Model Number YFM 200N.

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[29] *Copley*, *supra* note 1 at para. 10.
[30] *Buckle*, *supra* note 19 at para. 17.
[31] *Off-Road Vehicles Act*, R.S.O. 1990, c. O.4.
[32] *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25.

On the other hand, the Regulation also *exempts* specific vehicles from the *ORMVA* under section 2 (meaning that they are not required to be insured):

1. Golf carts.
2. Road-building machines.
3. Self-propelled implements of husbandry.
4. Wheelchairs.
5. Off-road vehicles driven or exhibited at a closed course competition or rally sponsored by a motorcycle association.

Section 2(1) of the *CAIA* states that no motor vehicle shall be operated on a highway unless insured. The *CAIA* adopts the definition of a motor vehicle from the *Highway Traffic Act*, which includes:

> … an automobile, a motorcycle, a motor-assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine.[33]

The *CAIA* therefore only requires *motor vehicles* as defined in the *HTA* to be insured *while they are operated on a highway*.

In *Beattie and Unifund Assurance Company*,[34] Mr. Beattie was injured while operating a Genie Boom Crane in a private parking lot when the ground floor collapsed. A boom crane is four-wheeled, motorized, and has a crane arm for lifting individuals. They are more commonly known as "cherry-pickers". The parties requested a ruling from Arbitrator Kelly to determine whether the Genie was an "automobile" for the purpose of determining entitlement to accident benefits.

Arbitrator Kelly was satisfied that the Genie was a motor vehicle under the *HTA*. This was because the Genie was "propelled otherwise than by muscular power". However, a parking lot is not a highway under the *HTA*, and therefore, is not required to be insured by the *CAIA*.

However, Arbitrator Kelly held that a Genie was an off-road vehicle pursuant to section 3(1.2) of the Regulation, as it was a vehicle "designed for utility applications or uses on all terrains that have four or more wheels and a seat that is not designed to be straddled by the driver". While the word "utility" is not defined, Arbitrator Kelly ascribed the ironic Webster's dictionary definition of "the capacity of being useful for some purpose" (the irony being that the definition applies so broadly that it is in turn useless).

As it was not operating on a highway, the Genie was required to be insured as per section 15(1) of the *ORMVA*. According to the FSCO decision database, this decision is currently under appeal to a Director's Delegate.

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[33] *Highway Traffic Act*, R.S.O. 1990, c H.8, s. 1(1).

[34] Arbitration A13-005289 (FSCO September 30, 2014), *per* Michael Kelly, Arbitrator.

In *Buckle*, Ms. Buckle was injured when, as a passenger, she fell off a golf cart that was being driven on a highway. Not having a policy of automobile insurance available, she applied to the Motor Vehicle Accident Claims Fund.[35]

Since golf carts are vehicles propelled otherwise than by muscular power, it was therefore considered a vehicle within the definition of the *CAIA/HTA*. Had the golf cart been driven off a highway when the accident occurred, it clearly would not have been required to be insured (due to the fact golf carts are specifically exempted from the *ORMVA*). The golf cart, however, was being operated *on a highway*. Therefore, it was required to be insured by the *CAIA* and therefore, met the definition of an automobile in section 224(1) of the *Insurance Act*.

Counsel for the Fund countered this argument with the fact that there are no insurers in Ontario that will underwrite policies of insurance covering golf carts. Director's Delegate Evans dismissed this argument, holding that

> … the issue is not whether a policy could have been in place, but whether the law says it should have been in place. The CAIA says that a motor vehicle on a highway is supposed to have automobile insurance.[36]

Conclusion

Unless a motor vehicle is found to be an *automobile*, then the incident will not be considered an *accident* within the meaning of section 2(1) of the *SABS*. While the courts could benefit from clear legislative direction regarding what constitutes an automobile, the common law, along with section 224(1) of the *Insurance Act*, continues to fill the void.

Until then, the statutory accident benefits regime will continue to be stretched by those injured by the Genie Boom Crane equivalents of Ontario. With the byzantine nature of Ontario's insurance regime becoming ever more cumbersome, perhaps even a tomato cart could entitle someone to accident benefits.

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[35] Section 268(2) of the *Insurance Act* states who is liable to pay accident benefits. If no insurer is liable, occupants and non-occupants alike have recourse to the Motor Vehicle Accident Claims Fund.

[36] *Buckle*, *supra* note 19 at para. 39.