



FSCO A05-001174

**BETWEEN:**

**EUSTACHIO (STEVE) GIORDANO**

**Applicant**

**and**

**ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA**

**Insurer**

## **DECISION ON A PRELIMINARY ISSUE**

**Before:** William J. Renahan

**Heard:** February 21, 2006, at the offices of the Financial  
Services Commission of Ontario in Toronto.  
Written submissions were received on February 28, 2006.

**Appearances:** Stacey Stevens for Mr. Giordano  
Jean-Claude Rioux for Royal & SunAlliance Insurance Company of  
Canada

**Issues:**

The Applicant, Eustachio (Steve) Giordano, was injured in a motor vehicle accident on May 13, 2003. He applied for statutory accident benefits from Royal & SunAlliance Insurance Company of Canada, payable under the *Schedule*.<sup>1</sup> Royal claimed that s. 30(1)(b) of the *Schedule* precluded Mr. Giordano from claiming certain weekly benefits. The parties were unable to resolve their disputes through mediation, and Mr. Giordano applied for arbitration at the

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Does section 30(1)(b) of the *Schedule* preclude Mr. Giordano from proceeding to arbitration for income replacement benefits and housekeeping expenses?

**Result:**

1. Section 30(1)(b) of the *Schedule* does not preclude Mr. Giordano from proceeding to arbitration for income replacement benefits and housekeeping expenses.

**EVIDENCE AND ANALYSIS:**

**Background:**

Section 30(1)(b) provides that the insurer is not required to pay certain weekly benefits if at the time of the accident the driver was driving the automobile without a valid driver's licence.

"Valid driver's licence" is defined in Ontario Regulation 340/94 made under the *Highway Traffic Act*,<sup>2</sup>

"valid driver's licence" means a driver's licence that is not expired, cancelled or under suspension.

The parties agree that at the time of the accident, Mr. Giordano was driving without a valid driver's licence. Mr. Giordano claims that he did not know that his licence had expired and that he had an honest mistaken belief that it was valid. Royal claims that Mr. Giordano's state of mind is irrelevant to a determination of whether the exclusion applies. In the alternative, it

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<sup>2</sup>R.S.O. 1990, c. H.8

argues that if it is relevant, the burden was on Mr. Giordano to prove that he took reasonable steps to ensure that his licence was valid and that he did not take those steps.

The first question is a question of statutory interpretation and is whether an insured's state of mind is relevant to this exclusion.

***The Law:***

Section 30(1) provides as follows:

- 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.

On its surface, it appears that the insured's state of mind is only relevant to the exclusions in paragraphs (a) and (d) where the words "knew or ought reasonably to have known" are used. By leaving out those words in paragraphs (b) and (c), the legislature intended that the insured's state of mind was irrelevant to those exclusions.

However, the insured provided me with a number of cases dealing with the interpretation of similar provisions dealing with driving with an expired, cancelled or suspended licence in the context of offences under Provincial *Highway Traffic Acts* and in the context of driving contrary to statutory conditions in automobile insurance policies. In those cases, the Courts found that the driver's state of mind was relevant to the issue of whether he was driving with an expired, cancelled or suspended driver's licence.

The question is the relevance of those cases.

I found the following excerpts from *Driedger and Sullivan on the Construction of Statutes*<sup>3</sup> helpful in determining the relevance of these cases.

At page 327 the author wrote:

Often two or more statutes enacted by a legislature touch on the same subject without actually constituting a single integrated scheme. Statutes that deal with the same subject or are analogous to each other are presumed to operate together harmoniously.

At page 330 she wrote:

In interpreting legislation the courts often find it helpful to look at the enactments of other jurisdictions. It is standard practice to consult the legislation of other provinces when interpreting provincial legislation . . .

At page 334 she wrote:

In any circumstances where it is appropriate to consult another statute, including a statute of another jurisdiction, it also is appropriate to take into account any official or authoritative interpretations of the statute. For the most part the courts look to judicial interpretations.

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<sup>3</sup>R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4<sup>th</sup>), Butterworths, 2002.

I reviewed those cases keeping in mind the issue of how they touched upon the subject of driving without a valid driver's licence.

Many of the cases refer to the case of *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299 in which the Supreme Court of Canada described three categories of offences. First is the true criminal offence where the Crown must establish a mental element, namely that the accused who committed the prohibited act did so intentionally or recklessly. At the other end of the spectrum, is the absolute liability offence which entails conviction on proof merely that the defendant committed the prohibited act. It is no defence that the accused was entirely without fault.

In the middle, is the strict liability offence in which the accused can avoid liability by proving that he took all reasonable care.

This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or he took all reasonable steps to avoid the particular event.

As an example of the "due diligence defence," the court used "permitting an unlicensed person to drive, or lacking a valid licence oneself..."

The parties referred me to several cases where the "due diligence defence" was considered as a defence to charges under provincial highway traffic acts. In these cases the words in the offence which the courts considered were driving a motor vehicle while not "the holder of a subsisting operator's licence"<sup>4</sup>, "driving while suspended"<sup>5</sup>, driving "while his license or privilege of obtaining a license is cancelled or suspended."<sup>6</sup>

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<sup>4</sup>*R. v. Christman* [1984] A.J. 675 (Alberta Court of Appeal, October 1, 1984).

<sup>5</sup>*R. v. Bellomo* [1995] O.J. No. 313 (Ont. Ct. of Justice, Prov. Div., February 13, 1995).

<sup>6</sup>*R. v. MacDougall* [1982] 2 S.C.R. 605 (S.C.C., February 18, 1982).

The parties also referred me to cases dealing with breach of statutory condition: “The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.”<sup>7</sup> In these cases the courts considered the driver’s state of mind in determining whether they should grant relief from forfeiture.

In a case considering a similar statutory condition<sup>8</sup>, the court considered whether the insured made reasonable and prudent inquiries that his son’s licence was reinstated.

These cases all deal with the issue of whether the driver was driving an automobile while his licence was expired, cancelled or suspended. In all the provincial Highway Traffic Act offence cases, the courts consider the driver’s state of mind and whether the due diligence defence applies. In the breach of statutory condition cases, the courts consider whether the insured knew or ought to have known that his licence was expired or suspended.

The term “valid driver’s licence” is defined in the Ontario *Highway Traffic Act*. I find that the words “the driver was driving the automobile without a valid driver’s licence” used in section 30(1)(b) of the *Schedule* are similar to the words used in offences under provincial Highway Traffic Acts. In cases dealing with those offences, the courts have determined that the offences described by those words include a consideration of the driver’s state of mind and whether he reasonably ought to have known that his driver’s licence was expired, cancelled or suspended, even though the words in the offence do not refer to the driver’s state of mind. Having regard to the principle that statutes are presumed to operate together harmoniously and to reflect a consistent view of the subject in question, I find that the driver’s state of mind is subsumed within the notion of driving an automobile without a valid driver’s licence. It is therefore a

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<sup>7</sup>*Spezzano v. Spezzano* [2002] O.J. No. 225 (Ont. Sup. Ct. of Justice, June 4, 2002), *Henckel v. State Farm Mutual Automobile Insurance* 33 O.R. (3d) 253 (Ont. Ct., Gen. Div., April 9, 1997) and *Quarrie v. State Farm Mutual Automobile Insurance Company* 32 O.R. (3d) 421 (Ont. Ct., Gen. Div., January 17, 1997).

<sup>8</sup>*Ratajczak v. Hemstra*, [1985] O.J. No. 1784 (Ontario District Court, March 7, 1985).

criteria I must consider to determine whether the exclusion in paragraph 30(1)(b) of the *Schedule* applies to the facts of this case. Having regard to the test formulated in *R. v. Sault Ste. Marie*, I find that the exclusion does not apply where the insured proves that he reasonably believed that his licence was valid, or he took all reasonable steps to avoid the expiry of his licence.

This conclusion does not offend the principle that the legislature, by the use of the words “knew or ought to have known” in paragraphs (a) and (d) of subsection 30(1), deliberately chose to make the insured’s state of mind an issue only with respect to those paragraphs and not paragraph (b) where the words “knew or ought to have known” were deliberately omitted.

Exclusions are strictly construed and the onus is on the party invoking them to prove the elements of the exclusion. Therefore, under paragraphs (a) and (d) the onus is on the insurer to prove that the driver knew or ought reasonably to have known certain facts for those exclusions to apply. However, in paragraph (b) the onus is not on the insurer to prove that the driver knew or ought reasonably to have known any facts. The insurer need only prove that the driver’s licence was not valid. Once the insurer proves that the driver’s licence was not valid, the onus is on the driver to prove that he reasonably believed that his licence was valid or that he took all reasonable steps to avoid the expiry of his licence.

Having regard to this test, I now consider Mr. Giordano’s state of knowledge. In the words of *R. v. Sault Ste. Marie*, I consider what a reasonable man would have done in his circumstances and whether Mr. Giordano took all reasonable steps to avoid the expiration of his licence.

Royal claims that a reasonable person with Mr. Giordano’s medical and driving history would have read his licence when he received it and would have known when it expired.

**Evidence:**

Mr. Giordano is 60 years old. He attained a grade 8 education in Italy. His most recent work was that of a real estate agent. He has had an Ontario driver's licence since 1967.

Mr. Giordano has had a seizure disorder since he was young and takes medication daily to treat it. Mrs. Giordano testified that Mr. Giordano is not aware of when he has a seizure. It lasts about 20 seconds during which he is glassy eyed and unresponsive. His arm may move involuntarily. He can go a month or two without a seizure and then have two within a few weeks. Mr. Giordano testified that he cannot tell when he is about to have a seizure. Mr. Giordano's neurologist reported in July 2003, that Mr. Giordano's seizures were generally well controlled and generally infrequent. A rehabilitation facility which Mr. Giordano attended after this accident reported that Mr. Giordano had an "absence-type seizure" which lasted about two minutes.

Mr. Giordano had a motor vehicle accident in July 1997. He saw his family doctor the following day who told Mr. Giordano not to drive. The doctor wrote to the Ministry of Transportation and advised it that Mr. Giordano could not drive. On April 6, 1998, Mr. Giordano's driver's licence was suspended by the Ministry of Transportation for medical reasons. It was reinstated on March 4, 1999.

On August 10, 2000, Mr. Giordano was involved in a collision. He saw his family doctor the following day whose notes reveal that he questioned whether Mr. Giordano had a seizure while driving. On October 23, 2000, Mr. Giordano's licence was again suspended for medical reasons.

By letter dated January 28, 2002, the Ministry of Transportation advised Mr. Giordano that after a medical review, it had decided to reinstate his licence. It issued a temporary driver's licence which expired on March 20, 2002. It then issued the permanent replacement licence. On the back, the expiry date was noted as May 16, 2002. This date was computer generated and was Mr. Giordano's birthday and five years from the issuance date of his last licence. Mr. Giordano



did not read the expiry date. He placed the licence in his wallet and assumed that it was valid for four or five years.

Ms. Jenny Laurenza is employed by the Ministry of Transportation and testified as to the practices for renewing driver's licences. Although the Ministry is not under any statutory duty to remind driver's when their licences will expire, the policy of the Ministry is to mail renewal notices to drivers 60 days before their licences expire. The expiry date is usually, but not always, the driver's birthday. The renewed licence is for a period of three or five years. Under normal circumstances, the Ministry would have sent a renewal notice to Mr. Giordano on March 16, 2002. However, the notice was not sent to Mr. Giordano or other drivers whose licences expired at this time because the public service was on strike from March 13, 2002 to May 3, 2002.

To deal with the situation, the government passed a regulation which extended expiry dates. All licences which would have expired during the strike were deemed valid until August 3, 2002. Ms. Laurenza testified that this information was published in the paper and the radio and that the Ministry did not send out any notices of renewal for this period.

I accept Mr. Giordano's testimony that he thought he would receive a notice of renewal before his licence expired.

In January 2003, a policeman stopped and charged Mr. Giordano with speeding. The policeman returned Mr. Giordano's licence to him without noticing that it had expired.

Mr. Giordano was involved in the motor vehicle accident in this case on May 13, 2003. The policeman who completed the accident report noted that Mr. Giordano may have had a seizure.

I accept that Mr. Giordano did not know the expiry date on his licence until a policeman told him in hospital following the accident and that he was not aware of the Ministry's announcement extending driver's licences.

**CONCLUSION:**

In *Quarrie*, Salhany J. agreed with counsel that few people are aware of the expiry dates on their driver's licence. I find that the reason for this is that people rely on the Ministry of Transportation to mail out the renewal notices which it sends out as a matter of policy. In the past 35 years, Mr. Giordano renewed his driver's licence several times on the basis of renewal notices sent out by the Ministry of Transportation.

The only evidence I heard to indicate that Mr. Giordano could not rely on the Ministry of Transportation to mail out a renewal notice was Ms. Laurenza's testimony that the Ministry's notice to drivers that expiring licences were deemed valid until August 2 was "in the paper and on the radio." I have no evidence of the extent of this publicity nor any evidence as to what portion of drivers with expiring licences responded to this publicity. On the evidence I heard, I am not satisfied that a reasonable person would have known about this policy.

I accept that if Mr. Giordano was aware of this publicity he would have taken the administrative steps necessary to renew his licence.

In my view, nothing in Mr. Giordano's driving record, medical history or dealings with the Ministry of Transportation changed the fact that he relied on the Ministry of Transportation to send him a renewal notice prior to the expiry of his licence. I find that a reasonable person in Mr. Giordano's circumstances would have done what Mr. Giordano did and put the licence in his wallet without reading the expiry date.

I find that Mr. Giordano acted reasonably and that a reasonable person in his position would not have known that he was driving with an expired licence. Therefore, the exclusion in s. 30(1)(b) does not apply to Mr. Giordano and he is not precluded from claiming weekly benefits.

**EXPENSES:**

The parties did not address the issue of expenses and I defer this issue to the hearing arbitrator.

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William J. Renahan  
Arbitrator

April 12, 2006

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Date



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**EUSTACHIO (STEVE) GIORDANO**

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**and**

**ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA**

**Insurer**

## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Section 30(1)(b) of the *Schedule* does not preclude Mr. Giordano from proceeding to arbitration on the issues of his entitlement to income replacement benefits and housekeeping expenses.

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William J. Renahan  
Arbitrator

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April 12, 2006

Date