



Citation: Sambasivam v. Sonnet Insurance Company, 2022 ONLAT 20-014115/AABS - PM

Licence Appeal Tribunal File Number: 20-014115/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Visinthan Sambasivam

Applicant

and

Sonnet Insurance Company

Respondent

PRELIMINARY ISSUE MOTION DECISION

VICE-CHAIR:

D. Gregory Flude

APPEARANCES:

For the Applicant:

Visinthan Sambasivam, Applicant
Agal Lankeswaran, Paralegal

For the Respondent:

Courtney Sparks, AB Specialist
Mai Nguyen, Counsel

Heard by Videoconference:

May 5, 2022

REASONS FOR DECISION

BACKGROUND

- [1] There was an alleged incident on December 1, 2019. The applicant, Visinthan Sambasivam, alleges that the car in which he was a passenger was rear-ended and driven from the roadway, crashing into a post. He maintains that, as a result of the accident, he suffered an inability to perform the essential duties of his employment and applied to the respondent, Sonnet Insurance Company (“Sonnet”), for an income replacement benefit.
- [2] Mr. Sambasivam claims under his own insurance, not the insurance on the vehicle in which Mr. Sambasivam alleges he was a passenger. Sonnet has raised concerns about the information Mr. Sambasivam disclosed to induce it to issue a policy to Mr. Sambasivam. It also has concerns about Mr. Sambasivam’s description of how the alleged accident occurred. It has brought a preliminary issue motion to determine three questions:
- a. Was Mr. Sambasivam involved in an accident on December 1, 2019?
 - b. Did he make material representations to Sonnet either in the formation of the insurance policy or in the reporting of the accident?
 - c. Is he liable to repay Sonnet for accident benefits, and if so, how much?
- [3] In opening submissions, Sonnet stated that I would hear evidence overwhelmingly in support of its position. Having considered the parties’ evidence and submissions, I find myself in agreement with Sonnet.

PRELIMINARY ISSUES

- [4] At the outset of the motion, I expressed my almost complete confusion with the state of the file. The application to the Tribunal referred to an accident on April 3, 2017. The parties’ submission were directed at an event on December 1, 2019. The issues in dispute asked me to determine if Mr. Sambasivam was entitled to an income replacement benefit, but the case conference report and order also scheduled a hearing of that issue over two days in August 2022.
- [5] After discussion with the parties, I was advised that December 1, 2019 was the correct date, and the April 2017 date was an error. I was also advised that the issue of entitlement to an income replacement benefit was not before me except in the general sense that if I found for Sonnet then Mr. Sambasivam’s claims for any benefits would be totally or partially barred.

ANALYSIS

- [6] A chronological approach will highlight my serious concerns with the credibility of Mr. Sambasivam and his other witness, his sister. I will follow the evidence from the formation of the insurance contract through the examination under oath in January 2021 (“EUO”) and finally to the evidence before me at the motion hearing. I will deal with the alleged incident on December 1, 2019 separately.

Primary Residence

- [7] Sonnet alleges that Mr. Sambasivam misrepresented his primary residence when he applied for insurance coverage in 2019, He gave an address in Oshawa when he applied online to Sonnet when, in fact, his primary residence was in Scarborough. Jessica Chivers, a Sonnet product analyst, testified that for the 2019/20 coverage year, Mr. Sambasivam paid \$2,795 less for insurance than he would if he had correctly identified his primary residence. For the coverage year 2020/21 the saving was \$3,253. She outlined these amounts in an email to counsel dated April 5, 2022.
- [8] Ms. Chivers also noted that Mr. Sambasivam did not disclose that he used the insured vehicle, a 2006 Ford Econoline E250 cargo van, for business or commercially. It was her evidence that Sonnet does not underwrite commercial vehicle insurance but will permit some minor business use. She alluded to a “briefcase rule.” If the vehicle is used to carry work product that can fit in a briefcase, then the use is considered business use. If it is used to carry tools and machinery to and from jobsites, then it is considered commercial use. At the EUO, Mr. Sambasivam answered that he carried “machinery, tools and everything” to jobsites in the van.
- [9] Mr. Sambasivam attended at the EUO on January 4, 2021. Because it is important in respect of answers he gave during the hearing, I will set out his answers concerning his capacity to answer questions at the EUO.

7. Q. Are you on any medication right now that might interfere with your ability to give evidence?

A. No, I'm not on medication right now, but I do take some depression pill, and painkillers, and stuff like that.

8. Q. All right, well are you on any depression pills or painkillers right now?

A. Not -- Not at the moment, no.

9. Q. All right. You'll tell us if you're having any difficulties that would interfere with your ability to -- to continue to give evidence?

A. Yes, I'll let you guys know.

10. Q. And other than those -- those two subjects, do you have any other physical or psychological issues that might prevent you from giving evidence today?

A. Ah, not physical, because I do have a surgery coming up tomorrow on my head. And other than that, I should be able to tell you all you guys need.

[10] Mr. Sambasivam had to undergo head surgery to remove a piece of glass embedded in his head from an incident in and around 2016 or 2017. Following a discussion of the pending surgery, the EUO continued:

14. Q. All right, but that -- that issue is not interfering with your ability to give evidence today?

A. No, it's not -- it's not really. It's just a little like aching, but it's not like stopping me from speaking about that.

[11] There were numerous questions during the EUO about Mr. Sambasivam's primary residence. His answers make it clear that, at the time of the placing of the insurance contract and at the time of the incident his primary residence was 806 Brimorton Drive, Scarborough. For instance, at question 35 and following he stated:

35. Q. All right, so prior to the accident, and we're talking about the accident of December 1, 2019, what was your usual address?

A. My usual address, it is 806 Brimorton.

36. Q. All right. And out of the course of a week how many nights would you spend there?

A. Sorry?

37. Q. Out of the course of a week how many nights would you spend at 806 Brimorton?

A. Oh, at least you could say five days.

[12] At question 59, Mr. Sambasivam provides the explanation of why he sometimes uses the address on Simcoe Street North in Oshawa that he identified as his primary residence on his application to Sonnet. He explained that the Scarborough house is fully rented, and he doesn't want his mail getting mixed up with the tenant's mail. He used his sister's condominium address for mail and would go there from time to time to spend time with his niece and nephew, and sister.

[13] In terms of how long he had resided at the Scarborough address before the December 1, 2019 incident, Mr. Sambasivam answered:

38. Q. All right, so that's where -- you would sleep there most of the time also?

A. Ah yeah, majority of the time because I work -- my shifts are early morning and my shift -- so yeah, I sleep there through the day -- like daytime.

39. Q. So for how long had you been at this 806 Brimorton address before this accident?

A. I was there at least -- at least four to five years; four years, five years.

40. Q. And did you have a lease?

A. Yes, I was leasing there, correct.

[14] In reliance on his EUO answers, Sonnet notified Mr. Sambasivam on April 1, 2021 that it was denying his claim for benefits and seeking repayment of benefits paid and expenses incurred in its investigation. It appears from the record before me that this is the first time that Mr. Sambasivam was aware that his primary address was in issue although he was advised of "underwriting issues" after answering the questions at the EUO.

[15] In his evidence before me, and in the evidence of his sister, Mr. Sambasivam almost completely reversed the residence evidence. Instead of spending four or five days a week in Scarborough for four or five years before the accident, they testified that he spent most of his time at the Oshawa address and his stays in Scarborough were maybe two days a week. At every opportunity when the inconsistencies with EUO were pointed out to him, he would assert the answers

were wrong and that on that day he was not feeling well and was confused. Given his answers at the EUO on his capacity to answer questions, I reject his attempts to characterize his EUO answers as wrong.

- [16] There was other evidence in support of the Scarborough residence. Mr. Sambasivam adverted at the EUO to the need for surgery. He had several attendances at St. Joseph's Hospital in Toronto, one of which he identified as a visit for surgery. He identified his residence address as the Scarborough address, except on one occasion the address was that of his girlfriend, also in Scarborough.
- [17] The answers at the EUO establish clearly that Mr. Sambasivam's primary residence was 806 Brimorton Drive, Scarborough at the time he entered into the policy in 2019. Ms. Chivers confirmed that he never updated his address information from Oshawa to Scarborough, either by calling Sonnet or logging into his account and changing his address or updating it at renewal time. On this latter point, I note that renewal was automatic. His attempt to change the narrative in his evidence before me is simply not credible. Both Mr. Sambasivam and his sister tailored their hearing testimony to their recent realization that his address is a material factor. I reject their hearing testimony.

The December 21, 2019 Incident

- [18] My incredulity with respect to Mr. Sambasivam's evidence extends to the December 1, 2019 incident. According to both Mr. Sambasivam and his sister, they were driving east on Finch Avenue East on a snowy night. Mr. Sambasivam was resting reclined in the passenger seat. He felt a bump on the rear and the car departed the roadway, ran up on the curb and hit a post. Once the car came to a stop, Mr. Sambasivam exited the car and saw an SUV about 30 or 40 feet further up the roadway. The SUV took off. He called for a tow truck and when it arrived, he had it take him to work. This was also broadly similar to the evidence of his sister.
- [19] The evidence calls into question whether Mr. Sambasivam was present at the events he describes. Despite saying he got out of the car and saw an SUV, in his testimony at the hearing, he said he did not inspect and had no clue about the damage to the car, either immediately post-accident or while awaiting the tow truck. He did not know what type of object they hit, a street sign, a post, or a tree, despite it likely being imbedded in the front grill and hood, especially if it was a tree as later alleged by his sister. He was "pretty sure" that the airbags deployed. They did not. Finally, he did not remain with his sister, who one might expect was traumatized by the alleged events, because he was late for work. There is no

contemporaneous evidence of his being at the scene. The accident report stating there were two occupants in the car was not filed for four days.

[20] Sonnet commissioned a forensic engineering report from Kods Engineering Inc. The report was prepared by Shady Attalla, P. Eng. and Avery Chakravarty, M.A. Sc., following the EUO. In his testimony, Mr. Attalla noted that the damage to the rear of the vehicle was inconsistent with the reported accident mechanism. The trunk lid has a series of scratches made by a sharp object. The scratches were distinct and separate. There was no damage below approximately 1 metre above ground level. There was no damage to the bumper. On the left rear side, from the rear door back to the wheel well, there were similar deep scratches with one area of penetration of the sheet metal clearly made by a sharp object or a hard abrasive surface. In Mr. Atalla's opinion, this damage is inconsistent with the type of damage sustained by vehicle-to-vehicle sideswipe contact. The flat sheet metal surface of the side of a family vehicle produces relatively benign and indistinct scratch patterns.

[21] In looking at the front-end damage, Mr. Attalla accepted that the lower damage was not inconsistent with striking a post, but as the damage spread into the hood area, it widened. In his view this widening was indicative of the front of the car having under-ridden some object. Thus, while Mr. Attalla does not discount some form of accident, he concludes:

It is our opinion that:

- The damage exhibited by the Dodge was inconsistent with the reported collisions.
 - The damage to the left side indicated that the Dodge sustained a glancing impact, which was not included in the reported sequence of events.
 - As well, the sharp nature of this damage was consistent with contact with a rough-surfaced object, rather than another vehicle.
 - The damage to the rear end was too high and too sharp to be consistent with a rear-end impact from another vehicle.
 - The damage to the front end was wider than would be expected based on the reported sequence of events, and the fact that the damage extended onto the hood indicated that it

underrode [*sic*] an object, which was inconsistent with a pole or post impact.

- The provided damage documentation indicated that neither frontal airbags deployed, contrary to the information reported during Mr. Sambasivam's Examination Under Oath.

[22] Mr. Sambasivam's sister added two new glosses to the story. She stated that the scratch marks on the trunk were pre-existing damage. There is nothing in the record to suggest that she had ever alleged pre-existing damage before her testimony before me. She also stated the car hit a tree. In her report to the Collision Reporting Centre four days post-accident, she stated that the vehicle hit a post. There is no mention of a tree. As reviewed in the Kodsi report, Mr. Sambasivam stated at the EUO that he saw a thin sign post at an angle on the passenger side of the car. There is no mention of a tree.

Factual Findings

[23] The evidence clearly establishes that Mr. Sambasivam's primary residence was 806 Brimorton Drive, Scarborough in the four or five years prior to the accident and not on Simcoe Street North in Oshawa. It flows from that finding that he made a misrepresentation in the placing of the insurance policy. That the misrepresentation was material to the risk is evidenced by the much greater premium for his vehicle if he disclosed it was based in Scarborough. He paid \$1,849 for coverage in 2019/20 coverage period as opposed to \$4,643 for similar insurance for Scarborough residents.

[24] The evidence also clearly establishes that Mr. Sambasivam has misrepresented to Sonnet the circumstances of the accident. There was no rear-end collision with an SUV, nor did an SUV sideswipe the car Mr. Sambasivam was riding in. My difficulty is that something happened to the car, whether in one or more incidents, in and around December 1, 2019. While it would not be unreasonable on the evidence to conclude that Mr. Sambasivam wasn't actually in the car when whatever happened occurred, and Sonnet's submissions do extend to such a finding, they do so only in an indirect way. I need not decide whether Mr. Sambasivam was in the vehicle; however, I am certainly asked to conclude that Mr. Sambasivam misrepresented the material facts of the alleged accident and the evidence before me clearly establishes that he did so.

[25] The more subtle argument made by Sonnet is that, since Mr. Sambasivam carries the overall onus to show he was in an accident as defined by s. 3(1) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg

34/10 (“*Schedule*”), by misrepresenting the facts of the accident, he has failed to satisfy his onus that he was in an accident. [see *Shakur v. Pilot Insurance Co. (C.A.)*, 1990 CanLII 6671 (ON CA)]

[26] *Shakur* is not a case under the *Schedule*. It relates to a claim for theft of jewellery. However, the Court of Appeal set out a principle that an insured carries the onus of establishing that their claim falls within the policy coverage. It stated that “It is fundamental insurance law that the burden of proof rests on the insured to establish a right to recover under the terms of the policy.” Applying that doctrine, it is Mr. Sambasivam’s onus to show he is entitled to coverage. He has not led evidence on this motion about the true facts of the events of December 1, 2019, and I have found as a fact that he misrepresented those facts. Accordingly, he has failed to satisfy his onus of showing that on a balance of probabilities he was involved in “an incident in which the use or operation of an automobile directly caused an impairment.”

IMPACT OF THE MISREPRESENTATION

[27] Despite having found that Mr. Sambasivam has failed to satisfy his overall evidentiary burden, Sonnet still asks me to address his material misrepresentation in the placing of the policy coverage. Relevant to this motion, section 31(1)(b) of the *Schedule* addresses such misrepresentation. It states:

The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

...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 a risk material to the contract

[28] Since Mr. Sambasivam’s claim is solely for an income replacement benefit, by virtue of his material misrepresentation inducing Sonnet to issue the policy, he is disentitled to an income replacement benefit.

REPAYMENT

[29] Sonnet seeks repayment on two scales. The first is the repayment of benefits paid under the policy. That number is for return of income replacement benefits and is set out in a letter from Sonnet to Mr. Sambasivam dated April 1, 2021 at \$10,857.14. The authority is s. 52(1)(b) of the *Schedule*. There is a second amount, originally \$24,345 but now \$27,345, a number that includes the costs of

investigation and legal fees. The cited authority for the second amount is, in addition to s. 52, s. 233 of the *Insurance Act*.

[30] Section 52(1)(b) states:

Subject to subsection (3), a person is liable to repay to the insurer, ...any income replacement or non-earner benefit under Part II that is paid to the person if he or she, or a person in respect of whom the payment was made, was disqualified from receiving the benefit under Part VII [*Part VII includes s. 31*].

[31] In light of s. 52, I have no hesitation in ordering Mr. Sambasivam to repay the \$10,857.14 of income replacement benefits paid to him. The evidence discloses that Mr. Sambasivam wilfully misrepresented the facts of the accident. It quite simply did not happen in the manner he testified that it did. He knew he was not being truthful.

[32] I can see nothing in s. 52 or s. 233 of the *Insurance Act* that authorizes the repayment of the enhanced amount of \$27,345. Section 233 says no more than the Mr. Sambasivam's insurance claim is invalid, but even that invalidity does not negate entitlement under the *Schedule*. Section 233 is of no assistance to Sonnet. Sonnet's remedy must be found in the *Schedule*. Section 52 of the *Schedule* limits repayment to the income replacement benefit. I do not have jurisdiction to extend it further as urged upon me by Sonnet.

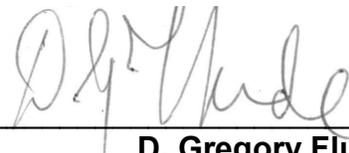
ORDER

[33] Based on my above findings, I grant Sonnet's motion in part. Mr. Sambasivam's claim is dismissed in its entirety as he has failed to establish that he was in an accident as that term is defined in the *Schedule*.

[34] I find that Mr. Sambasivam made a material misrepresentation to Sonnet within the meaning of s. 31(1)(b) of the *Schedule* and, pursuant to sections 52(1)(b) and 52(5), Mr. Sambasivam shall repay Sonnet the sum of \$10,857.14 plus interest at the bank rate in effect on April 16, 2021.

[35] The hearing dates set for August 15 through 17, 2022 are vacated.

Released: May 30, 2022

A handwritten signature in cursive script, appearing to read "D. Gregory Flude", written in black ink.

**D. Gregory Flude
Vice-Chair**