

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 283/95

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEICO INSURANCE COMPANY

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA and ACE INA INSURANCE

Respondents

AWARD

Counsel Appearing

J.C. Rioux for the Applicant

Robert H. Rogers for the Respondent

Michael J.L. White for ACE INA

Introduction

This matter comes before me as an arbitration under the *Arbitration Act* and pursuant to Ontario Regulation 283/95 under the *Insurance Act*.

The parties to this arbitration are insurance companies carrying on business providing automobile insurance. In this matter these insurance companies are engaged in a dispute as to which insurer has the obligation to pay statutory accident benefits to an individual who is involved in a motor vehicle accident. The individual, Simone W.¹ ("W"), was injured in a car accident which occurred on February 15, 2006. The parties entered into an arbitration agreement in the latter part of 2007 and that document has been marked as Exhibit 1 to these proceedings. The parties engaged in various pre-hearing conferences with me and ultimately

¹ In consideration of the privacy interests of non parties who were required to provide information about their personal affairs, I have deleted reference to surnames.

this matter came before me for determination of a preliminary issue which might have the effect of determining the entire dispute. The preliminary issue has been characterized as follows:

If W was, at the time of the accident, principally dependent upon one or more social welfare programs funded or administered by the Government of Ontario, is she then an insured person for the purpose of the Statutory Accident Benefits Schedule, under any motor vehicle liability policy which has, as a named insured, the Government of Ontario?

This issue has been stated and restated differently throughout these proceedings but essentially comes down to the question of whether or not a person dependent on support from a government source can be considered as principally dependent for financial support on that government as a person within the meaning of the SABS, with the outcome that the automobile insurer of the government source is responsible for the payment of statutory accident benefits.

The factual background of this case is not in dispute. There is no factual controversy. The parties agreed that I can take the facts as put to me in the submissions of counsel as agreed upon for this purpose.

From those submissions, I discern that W suffered multiple injuries in the motor vehicle accident in question. As she was entitled to do, she applied for statutory accident benefits. Apparently, she submitted her application for benefits to Geico Insurance Company who is the Applicant. Geico was the insurer of the vehicle in which W was a passenger at the time of the accident. In accordance with the definitions applicable, W would have been an insured person in respect of that coverage, but not necessarily the highest ranking coverage applicable to her. At the time of the accident, W was receiving welfare benefits from the City of Toronto under a program operated by the City, at least part of which was reimbursed by the Province of Ontario. Aviva was the automobile insurer for the Province of Ontario under two policies of insurance. I infer that ACE INA was the insurer of the City with respect to automobile insurance.

The issue which the parties have put before me is a preliminary issue in the context of the arbitration. If the SABS do not contemplate dependency on a government organization that is the source of funds for financial support, then W would not be principally dependent for financial support on either Aviva's insured or ACE INA's insured within the meaning of the Statutory Accident Benefits Schedule ("SABS")². Accordingly, pursuant to the priority rankings set out in the *Insurance Act*, the obligation to pay statutory accident benefits would appear to rest with Geico, the insurer of the vehicle in which W was an occupant at the time of the accident.

Some of the materials put before me describe the nature of the Ontario Works Program in which W was a participant at the time of the accident. There was some argument put forth about the character of the program and whether or not the funding that emanates is a kin to a scholarship, an employment, or an entitlement.

I do not find this issue to be particularly germane to the problem that I am asked to resolve. Essentially, the question comes down to legal interpretation of whether or not the legislative scheme contemplates dependency on a governmental organization that is the source of funding for an individual's support.

² O. Reg. 403/96

Legislative Background

The statutory accident benefits scheme in Ontario is a mandatory program of automobile injury compensation. All vehicles in the Province of Ontario are required to have insurance. All policies of insurance are required to include statutory accident benefits.

The terms and conditions of the statutory accident benefits are prescribed by regulation under the *Insurance Act*.

The regulation contemplates a broad range of individuals who might be insured persons entitled to claim those benefits from any given insurer. The regulation recognizes claims emanating from an insured, the spouse of an insured, a dependant of an insured, an occupant of a vehicle, a regular user of a vehicle, spouse and dependants of regular users, and persons who are involved in accidents that involve the insured automobile. No doubt this very broad array of insured persons is intended to make it likely that an accident victim will be able to claim statutory accident benefits from an insurer that has some proximity to the accident or the people involved in the accident.

The priority rules are set out in the *Insurance Act*. The *Insurance Act*, by regulation, sets out the terms and conditions of the benefits program including some definitions of dependency relationships.

Ontario Regulation 283/95 issued under the *Insurance Act* requires disputes between insurers concerning the obligation to pay statutory accident benefits to be resolved by arbitration in the courts with the *Arbitration Act*, 1991. This is the legislative foundation for the proceeding that is before me.

Dependency As an Entitlement Concept

Throughout the long and varied history of first party injury benefits for automobile accident victims, there has been entitlement to benefits by reason of dependency in connection with a person who is the named insured under a policy of automobile insurance.

In its simplest form the concept is easily understood. When a person purchases automobile insurance which includes indemnity for losses that the person may suffer, it is to be expected that the purchaser will wish to extend the umbrella of protection to family members, such as a spouse and dependants. Accordingly standard policy wordings have extended coverage to these categories. The net effect is to provide benefits in respect of these individuals even though they are not named as contracting parties in the policy of insurance.

It is not surprising that use of concepts such as "spouse" and "dependant" might give rise to some controversy in a limited number of cases. The opportunities for this kind of controversy have increased since the advent of a significant Statutory Accident Benefits program in 1990. At that time the legislature changed the priority scheme applicable to accessing these benefits. Along with other changes, the effect was to set the insurer of a person who has dependants as the highest priority insurer to deal with benefits in respect of the person's dependants.

In most accident circumstances an injured individual will be entitled to claim benefits from a number of insurers³. The priority rules set out in the *Insurance Act*, and the procedures set out in the regulations, will allow the injured individual to access benefits and will shift the obligation to sort out priority to the implicated insurers.

As a result, we commonly see "priority disputes" between insurers. Typically the applicant insurer is, or has been, paying benefits to an individual. That insurer asserts that some other insurer has a higher priority as defined by statute. The paying insurer commences a priority dispute in accordance with the regulations and in accordance with the *Arbitrations Act*. Very often, these disputes are determined by the status of the injured individual seen from a dependency viewpoint. Typically, if the injured individual is considered to be principally dependent for financial support or care on a person who is an "insured", or spouse of an "insured", then the benefits priority follows from that status.

Over the two decades that we have grappled with these priority rules we have seen a large number of disputes about dependency issues. The case law, consisting largely of decisions of arbitrators and appeals from those decisions, has helped focus those disputes. Nonetheless, the determination of dependency continues to have troublesome aspects which give rise to occasional dispute resolution processes.

A recurring issue in dependency cases is the question of how to treat support that emanates from, or might be traced back to, institutional sources such as government agencies.

Conceptually it is not difficult to understand dependency relationships between individuals. This is within the normal experience of all of us. But when this legislatively imposed concept is applied to such things as statutory entitlements, unexpected results may follow.

In the context of priority disputes between automobile insurers, the question of such dependency arises in two ways. Firstly, we see cases where it is asserted that the injured individual is principally dependent for financial support on an institution that is the source of funding. Secondly, we see cases where it is argued that the injured individual is not dependent on proximate individuals, because the injured individual has access to funding from institutional sources.

³ Under the SABS a broad range of people who might be eligible for benefits. The effect is that an injured person might have the status of being an insured person under more than one policy of insurance. The operative definition is:

"insured person", in respect of a particular motor vehicle liability policy, means,

- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
 - (i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or
 - (ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,
- (b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, and
- (c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident;

With respect to the first category there is a problem in the drafting of the SABS insofar as it refers to dependency in relation to "persons". It has been argued that the concept of "persons" includes individuals and other entities such as corporations and governmental bodies. Truly, the law has generally recognized the concept of "person" to include organizations as well as individuals. Therefore, there is logic to the suggestion that the accident benefits regime contemplates dependency on organizations.

Without doubt, an organization might be the provider of financial support or care for an individual. Even if removed from an immediate relationship with the individual, the organization might be the source of such support. Hence the argument that the regulation should be interpreted to include dependency relationships with non-individuals is not in any way hypothetical. It is a reality of many, many, cases that injured individuals can trace financial or other support back to a government source or some other organization.

The starting point for analysis of this issue is necessarily a reference to the language of the SABS. It is language which is mandated by regulation. As between the parties to a priority dispute there is no reason to interpret the language in favour of, or against, either party. Neither is more responsible than the other for the language, nor would I conclude that "reasonable expectation" theory has any role in this analysis. Recognizing that the SABS is a complex document which incorporates subtle concepts defined with occasional imprecision, I am mindful of the mandate that the language should be interpreted in a way which is sensitive to the context. We should consider the nature of the statutory scheme implemented and the role of the language under consideration with a view to giving effect to the legislative intent in a way which is just and reasonable.

Can a Person Be Principally Dependent on a Governmental Source for Financial Support?

Factually, it is unquestionable that an individual might be sustained by financial support from a governmental source. The determinative question is whether or not this relationship is such a relationship as to cause the person to be considered a "dependant" of the organization for the purposes of the SABS. If so, under a policy of automobile insurance issued to the organization, all such individuals would be persons entitled to insurance coverage under that single policy of insurance.

In my view, this is a rather surprising, indeed shocking, result. There might be one such policy and hundreds of thousands of "dependants".

The Legislative Text

The legislative text is instructive. Section 2 of the SABS addresses a number of the interpretation issues that might arise with respect to these claims. The definitions grant coverage to the dependant of an insured person. With respect to the concept of SABS dependency, subsection (6) provides as follows:

(6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse.

There is much in this provision which suggests that the legislature did not intend to include organizations as "persons". The first reference to "person" is a reference to the injured individual which necessarily could not be an organization or other legal entity. Hence the reference to "another person" suggests that the legislature intended to make reference to "person" as that term had already been used in the very same sentence. Furthermore, the definition contemplates an indirect dependency by virtue of dependency on the other person's spouse. This language is highly suggestive of a non-organizational concept of "person".

In my view, it is not impossible that the legislature might have intended the term "person" to include organizations, based on this language. Indeed s. 87 of the *Legislation Act* contemplates that "person" includes non natural persons - subject to the context. However given the immediate context and the other use of the term "person" in the section, I find it appropriate and necessary to look to the broader context, to look for legislative intent and an outcome which is just and reasonable.

The uncertainty about the meaning of this provision is highlighted by the conflicting arbitral decisions that have considered similar cases. In *ING v Guarantee*⁴ and *Allianz v Guarantee Company*⁵ two experienced and respected arbitrators have come to opposite conclusions.

Context – The Movement Towards A Contractual Nexus

When the legislature reformulated compensation for motor vehicle accident victims in 1990, it required injured individuals to claim accident benefits from the insurance company with whom they had a contractual relationship. No longer was the insurer of the occupied automobile to be the highest-ranking coverage. Instead, victims were expected to deal with the insurer who engaged in the issuance of a policy to them. Therefore, for the overwhelming majority of cases, the legislature mandated that the predominant insurance relationship for the purpose of benefits is a relationship between the insured person and an insurer, a contractual relationship. Whereas, prior to 1990, a person would claim benefits from the insurer of the vehicle in which they were an occupant, a relationship of status irrespective of contractual nexus.

Subsection 268 (2) of the *Insurance Act* provides the direction:

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

- 1. In respect of an occupant of an automobile,**
 - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,**
 - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,**
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.**
- 2. In respect of non-occupants,**

⁴ Arbitrator Craig Brown January 21, 2009.

⁵ Arbitrator Guy Jones November 2005.

- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
- ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
- iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
- iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

This signals an important legislative intent: benefits should primarily be paid by the insurer of a person, to that person with whom they are in a contractual relationship. This was a shift from the earlier programs (pre 1990) where the highest priority of coverage was with the insurer of the vehicle occupied by the person, or that struck the person.

I am also mindful of the fact that the benefits scheme contemplates optional increased coverages with respect to accident benefits. Notionally an insured person could, at the point-of-sale, choose to have a higher level of benefit coverage applicable in the event of an accident injury. Once again this demonstrates that the scheme contemplates a contractual relationship between the insurer and the insured person which defines entitlement by that relationship.

Context – The Public Interest In Rate Predictability And Stability

From 1990 forward, the government has played a role in rate setting for automobile insurance. The *Insurance Act* creates a regulatory framework that highlights concern about insurance costs and rate classification systems⁶. In my view, prudent regulatory supervision of insurance pricing evidences the government's intention that insurance prices should be predictable, stable and justifiable. The limitations on underwriting criteria serve to emphasize the public interest in this process.

It is my view that this aspect of legislative intent is inconsistent with an interpretation that would have all organizational "dependants" eligible for benefits from the organization's automobile insurer. It is mind-boggling to contemplate how such an insurance program could be underwritten, fairly priced, and paid for.

Not only would the effect be to make a multitude of injured victims claimants under government insurance policies, the corresponding effect would be to remove these people from the pool of individuals claiming benefits from policies issued in respect of vehicles that they occupied, were struck by, or were involved in the accident. This shift towards accessing the insurance coverage of the governmental source, is matched by a shift away from other sources that would otherwise respond. The problems of unpredictability and instability would ripple through insurance markets, well beyond the insurers of government.

⁶ Part XV of the Insurance Act R.S.O. 1990 c.18 and O. Reg. 664 are the key provisions.

Conclusion

The interpretive mandate is to pay heed to the text, the intent, and the outcome in order to interpret the regulation's provisions with appropriate sensitivity to context. Based on the previously discussed view of the automobile injury scheme, I conclude that:

- The meaning of the text is doubtful,
- the intention of the legislature evidenced by the context would be frustrated if we include dependants upon a governmental organization, and
- the outcome, to shift coverage for many people to a government's automobile insurer, is clearly an unreasonable result that would flow from reading the word "person" in section 2 of the SABS as inclusive of governmental organizations.

Therefore, within the meaning of the SABS definition of insured persons, it is my conclusion that a person cannot be principally dependent for financial support upon a governmental organization.

At this juncture it may be important to make a distinction about the circumstances in which this kind of problem might be encountered. Many dependency cases are analyzed in the context of looking at the status of an individual vis-à-vis another individual for determination of financial support. While the regulation would ask us to determine whether or not the injured person is principally dependent for financial support on that second individual, it is sometimes convenient for the problem to be approached from the other direction, asking whether the injured individual is principally dependent for financial support on some source of support, other than the second individual. By identifying such other support, principal dependency on a referenced individual is negated. Hence it may well be relevant to analyze whether a person is benefiting from support from an institutional source, but without necessarily considering whether the support creates a dependency in SABS terms.

This is quite a different issue. When there is financial support flowing from that other source we are not asking whether or not the other source is a "person" within the meaning of the SABS. It does not matter. When, at the time of the accident, the injured individual was receiving support, that support might well be measured in determining the level of dependency on other individuals, whether or not that collateral support came from an individual or some entity/organization.

Institutionally sourced support may be relevant to negate the existence of a SABS dependency, but does not create a SABS dependency.

In considering the possibility that the regulation mandates a SABS dependency in relation to organizational sources of support, I have been troubled by the observations made by Arbitrator Guy Jones when considering this question in *Allianz v Guarantee Company* in November of 2005. Mr. Jones has extensive experience in dealing with SABS claims and associated priority disputes. But in this instance I cannot follow his lead. In particular he points out that section 66 of the SABS engages the concept of "individual" to more precisely define the referenced persons/entities in a way which excludes corporate and governmental bodies. He points out that the legislature could have used the same language in section 2 to limit dependency to relationships between natural persons. The legislature did not employ the more precise wording, which it could have done "very easily".

When faced with a problem of interpretation of legislation we are too often presented with this “could have” argument. Indeed it is sometimes advanced as an argument by both sides of a single case. The adjudicator is asked to conclude that the absence of specific language forcing the outcome advocated by an opponent is a justification for discarding the opponent’s position. In truth, almost all legislation could be more specific. Drafters of complex laws must craft rules that can be applied to a multitude of situations, not just the scenario that has found its way into a dispute resolution proceeding that day.

To say simply that the legislature could have used more direct language to achieve an end is a weak argument in most cases. When legislation is designed to have application to many cases, with many different characteristics, it is not realistic to put any weight on the drafter’s failure to more specifically address only some of the affected fact scenarios. Such analysis, at best, is an indirect method of attempting to divine legislative intent. The argument is not compelling except in the rare case where the fact pattern is such that the legislature would have been expected to address primarily that fact pattern, and is not seen as prescribing a rule of broad application.

Accordingly it is my view that the legislative decision not to use the term “individual” is but one of many factors that might be considered when looking for intent, but in this case I find it to be overshadowed by the context of the scheme as described.

I do not find persuasive the argument that an organization can be a named insured, and therefore every use of the term “person” in the policy or regulation should be interpreted to include organizations. In this respect I agree with the comments of arbitrator Craig Brown in the *ING v Guarantee* case, January 21, 2009.

I am in agreement with the outcome in *R. L. v. Harkness*⁷, where the Ontario Court of Appeal was looking at a provision similar to section 2 (6) of the SABS. In brief reasons the court adopted a similar view about the effect of the SABS provision at that time.

In my view, for purposes of determining priority and status as an insured person, dependency between an actual person and a corporate/governmental entity is not contemplated by section 2(6) of the SABS or the other sections of the SABS. Therefore, the fact that W derives financial support from one or more government entities does not entitle her to be treated as a dependant insured person for the purpose of access to statutory accident benefits under policies of insurance issued to the governmental entities.

If counsel wish to make any submissions with respect to costs, I would ask that they contact me within 30 days of this decision.

Dated at Toronto this 19th day of April, 2010.



LEE SAMIS
Arbitrator

⁷ *Lebeau (Litigation Guardian of) v. Harkness*, 1998 CarswellOnt 2441 (OA).