

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17, as amended

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant
- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Robert Plate for the Applicant

Daniel Strigberger for the Respondent

ISSUES:

1. Were E.S., B.S. and C.S. principally dependent for financial support upon their father, J.S. or their mother P.S., and which insurer would accordingly be responsible for payment of accident benefits to or on behalf of E.S., B.S. and C.S.?

DECISION:

1. E.S., B.S. and C.S. were principally dependent for financial support upon J.S. and accordingly The Economical Insurance Company is responsible for payment of accident benefits in this regard.

HEARING:

The hearing in the matter took place in the City of Toronto in the province of Ontario on March 16, 2010. No witnesses were called and the hearing proceeded on the basis of documentary evidence alone.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on June 16, 2006. At that time three children, E.S., B.S., and C.S. were in a car driven by their father J.S. when it was involved in a single car motor vehicle accident. All three children were injured. The father's car was insured with The Economical Mutual Insurance Company ("Economical"). The children's mother, P.S., who was divorced from J.S. at the time of the accident, had a motor vehicle liability policy with ING Insurance Company of Canada ("ING") at the time of the accident. As a result of suffering injuries in the accident, all three children applied to their mother's insurer, ING, for accident benefits. ING, as is appropriate in these circumstances, paid the benefits and served a Notice of Intention to Dispute upon the husband's insurer, Economical, alleging Economical was the appropriate insurer to pay benefits. ING takes the position that children were financially dependent upon their father at the time of the accident and therefore his insurer, Economical, should pay the benefits. In order to fully understand their position it is necessary to review the facts briefly.

P.S. and J.S. had been married and had three children who were 11, 9, and 6 years of age at the time of the accident. Their parents had separated approximately 3 years before the accident and were officially divorced in January of 2005.

Prior to the accident all three children were living with their mother. They would visit their father every other weekend and have a two hour dinner with him once per week.

The parties agreed for the purposes of the arbitration that the children were primarily dependent for care upon their mother.

Section 268 of the Insurance Act sets out the priority rules for the purposes of the payment of accident benefits. It states as follows:

(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.

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named

insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

The term “insured person” is defined in Section 2 (1) of the Statutory Accident Benefits Schedule as follows:

(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...

In order to determine if the children were dependants of the named insured one must look at Section 2 (6) of the Statutory Accident Benefits Schedule which states:

(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.

As indicated above, the parties agree that the children were dependent upon their mother for care and this would make them “insured persons” on their mother’s policy. That is not the end of the analysis however. If the children were financially dependent upon their father, Section 268 (5.2) would apply.

Thus, if the children were financially dependent upon their father, the insurer of the vehicle they were in at the time of the accident, Economical, would be responsible for payment of the benefits.

The test for dependency was set out by the Ontario Court of Appeal in Miller vs. Safeco, (1986), 13 C.C.L.I. 31, (ONT. C.A.), affirming (1984) 9 C.C.L.I. 1 (O.H.C.).

The criteria to be considered are:

1. Amount of dependency
2. Duration of dependency
3. Financial need to the alleged dependant
4. The ability of the alleged dependant to be self supporting

The financial information that was available at the arbitration was somewhat limited. However, a number of facts emerged. In a statement given by P.S. on August 3, 2006, to a representative of ING, P.S. indicated that she moved out of the matrimonial home in January 2005 and was officially divorced from J.S. in July 2005. P.S. indicated in her statement that there was a court order for her husband to pay "child support and alimony" in a combined amount of \$8,000.00 per month plus the cost of private schools, medical expenses, a nanny and half of the extra curricular expenses. She further stated, "Since October 2005 my ex husband has paid \$3,881.00 per month for child support. He pays for some extra curricular activities."

P.S. went on to state that she was a stay at home mom who had not worked in the previous 12 years. She indicated that she and the children were totally dependent on her ex husband for financial support. She added, however, that her boyfriend had moved in with her in September or October of 2005 and that he shared in the household expenses.

Unfortunately there was little or no indication of what the household expenses for P.S. or the children were.

From P.S.'s statement one is left with a number of impressions. Clearly, the children were not old enough to support themselves. In addition, P.S. herself earned no money to support the children and her boyfriend contributed some unknown amount to the household expenses. The ex husband had been providing \$8,000.00 plus other financial support in 2005 which was reduced to \$3,881.00 plus the cost of some extra curricular events.

Based on the evidence before me, I find that J.S. did provide at least 50% of the financial needs of the three children.

Counsel for Economical submitted that while J.S. may have provided money, he gave it to P.S. and that it was then up to her to decide how to spend it. She could spend it on herself, her house, her children or whatever she chose to. Once received from J.S., it became her money and if she spent it supporting the children then it was P.S. who was providing them with their financial support.

Counsel for Economical pointed out despite P.S.'s signed statement, a review of the court file did not reveal any court orders for support payments prior to the accident. Counsel for Economical submitted that if there were an actual court order saying that the husband must pay monies for support of the children, then the monies might be properly attributable to the husband but this was not the case here. In his submission, what we have in our case is a possibly voluntary payment that was made to the wife and once she received it she could do what she wanted with it. It was in effect her money to use as she wished.

Counsel for Economical refers to the arbitration decision of Co-operators General Insurance Company vs. The Economical Insurance Company, a decision of myself, released November 2004. In that case I dealt with the issue of whether a child was financially dependent upon her grandparents or her mother. The question arose as to whether or not to include in the mother's income, \$ 700.00 per month that her husband had been ordered to pay as child support. Despite the court order, the husband failed to make the payments. Accordingly, I did not include the court ordered payments to be included in the mother's income.

Counsel for Economical suggests that since payments were made in our case, following my comments in Co-operators, the payments made by J.S. to P.S. should be considered P.S.'s payments and she was therefore providing financial support to the children.

I do not agree with counsel for Economical's position. In Co-operators I decided that one should certainly not include monies that were never paid, as revenue for the wife. I did not address whether the monies would be attributable to the wife, if they were in fact received.

In our case , it is not clear if there was a court order. After reviewing all the facts, I do not think that it matters if there was a court order or not. What I take from P.S.'s statement is that the husband agreed whether it is by court order or not, to pay monies for the benefit of the three children. Interestingly, in her signed statement, P.S. refers to the first payment of \$8,000.00 per month "to pay child support and alimony". Subsequent to this, apparently after her boyfriend had moved in, P.S.'s payments were reduced to \$3,881.00 and they were referred to by P.S. as "for child support".

While I do not wish to put too much emphasis in a change of wording in a statement given to an adjuster sometime ago, I am struck with a change from "child support and alimony" to "child support". This certainly suggests that the reduced amount was for the benefit of the children. Furthermore I am not persuaded by the fact that the monies were paid to mother that it is sufficient to say that she could spend it as she wished and she was therefore the one providing the support. It is reasonably clear, on all the evidence, that the family was dependent upon J.S. for financial support. The fact the monies were actually paid to P.S. rather than the children does not matter. It would be unrealistic to expect that the monies would be paid directly to the young children or into their bank accounts. The monies were to be used by the mother who was primarily responsible for their care in order to pay their expenses etc.

In light of the above, I am satisfied that the three children were primarily dependent for financial support upon their father, J.S. at the time of the accident. Accordingly Economical is responsible for payments of accident benefits to or on their behalf.

In the event that the parties cannot agree with regard to the issue of costs I may be spoken to.

Dated at Toronto, this _____ day March 2010.

M. Guy Jones

Arbitrator