

**IN THE MATTER OF REGULATION 283/95 TO THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and *THE ARBITRATION ACT*,
S.O. 1991, c. 17;**

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Kathleen O'Hara for the Applicant

D'Arcy McGoey for the Respondent

ISSUE:

1. Was the Claimant a "spouse" of the Economical named insured at the time of the accident, and therefore an insured under the Economical policy?

BACKGROUND:

1. Nieura Manoharan was injured when the rental vehicle in which she was an occupant was involved in an accident on June 7, 2008. That vehicle was insured by ACE INA.

2. Sarmilan Krishnar was also an occupant of that vehicle at the time of the accident. He was a named insured under a policy issued by Economical Mutual Insurance Company (“Economical”), and submitted an application for payment of accident benefits under the *Schedule* to them.

3. The Claimant, Ms. Manoharan, also submitted an application for benefits to Economical, claiming that she was Mr. Krishnar’s spouse. Economical accepted her application and paid benefits to her, but contends that she does not meet the definition of “spouse” in the *Insurance Act*. It asserts that ACE is in higher priority to pay her claim under section 268(2)(1)(ii) of the *Act*, as it was the insurer of the vehicle that she was in at the time of the accident.

4. The focus of this proceeding was on whether or not Ms. Manoharan was legally married to Mr. Krishnar. The parties agree that they neither lived together for the requisite three years prior to the accident in a conjugal relationship, nor were the parents of a child together, so would not qualify as spouses under the other branches of the definition in the *Act*.

5. While the question of whether or not two people are legally married is often a simple fact to determine, it was not in this case. The documentary evidence that the parties were able to obtain was inconsistent, and neither the Claimant nor Mr. Krishnar, who is now married to someone else, were co-operative with the process. The lack of sworn testimony raised the further question of whether the Applicant insurer (Economical in this case) in a priority dispute bears the onus to disprove a Claimant’s contention that she was a spouse of its named insured.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act - Section 268:

(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.

Insurance Act – Section 224(1):

(1) “spouse” means either of two persons who,

(a) are married to each other,

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or

(c) have lived together in a conjugal relationship outside marriage,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child;

Regulation 403/96:

2. (1) In this Regulation,

“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,

THE EVIDENCE:

6. The parties filed an Agreed Statement of Facts setting out some basic facts relating to the accident and the relevant insurance particulars. It provides that both Mr. Krishnar and the Claimant were occupants of an ACE insured rental vehicle on June 7, 2008, when it was involved in a collision. Mr. Krishnar was twenty-five years old at the time, and Ms. Manoharan was twenty. He was a named insured under a policy issued by Economical. The Claimant was not a listed driver on that policy.

7. Following the accident, Ms. Manoharan applied to Economical for accident benefits. She indicated on her OCF 1 Application for Accident Benefits form that that her marital status was “common-law” at the time of the accident, and that she was claiming benefits under her spouse’s policy. Mr. Krishnar also submitted an application for benefits to Economical following the accident. He indicated on his OCF 1 form that he was “single”.

8. I note that neither of them ticked off the box that appears on that part of the form indicating “married”.

9. The list of agreed facts also indicates that a marriage search was conducted through the Ontario Ministry of Government Services in June 2010, which confirmed that no registration of marriage existed for Nieura Manoharan and Sarmilan Krishnar for the period of 2005 to 2009.

10. As mentioned above, neither the Claimant nor Mr. Krishnar provided any direct evidence in this dispute. Counsel for Economical advised that her client had made many efforts to locate the Ms. Manoharan, without success. Mr. Krishnar was contacted and summoned to appear at an Examination Under Oath, but failed to attend. Neither party testified at the arbitration hearing.

11. A few other documents were submitted by the parties. Counsel filed a short, handwritten letter dated August 13, 2008, signed by both Ms. Manoharan and Mr. Krishnar, addressed to an Independent Adjuster at Crawford Adjusting, who was retained to adjust the file for Economical. It states – “As per your letter dated July 29, 2008 – we are living in common law for more than one year”.

12. A copy of the front page of a hospital record was filed, indicating that the Claimant appeared at Southlake Regional Hospital after the accident. Mr. Krishnar was indicated as the “person to notify”, and his relationship to the patient was described as “other”.

13. Interestingly, the Claimant also provided a signed statement dated September 28, 2009, in which she states that she and Mr. Krishnar “got married” on November 15, 2007. She states that she “resides with her husband at 356 Highglen Avenue in Markham”, and makes repeated references to Mr. Krishnar being her “husband” in that document. The statement was apparently provided to an adjuster from ACE, at their request.

14. Counsel for Economical also filed two reports authored by Vince Giorno, identified as Manager of Special Investigations at Reed Research Limited. Mr. Giorno was retained by Economical to locate Ms. Manoharan and Mr. Krishnar, to identify any vehicles they owned at the time of the accident and to determine whether or not they were legally married at that time. He was also called to testify as a witness at the arbitration by counsel for Economical.

15. Counsel for ACE objected to Mr. Giorno's evidence being tendered at the hearing, arguing that he could only provide hearsay evidence, and that the prejudice caused by his statements would outweigh their benefit. Counsel for Economical stated that she was not asking that Mr. Giorno's testimony be accepted for the truth of its contents, but rather to give him the opportunity to confirm the statements that he made in his reports. Relying on section 21 of the *Arbitration Act*, which provides that section 15 of the *Statutory Powers Procedure Act* applies (providing me with the discretion to admit relevant evidence that would not be admissible in court), I ruled that I would allow Mr. Giorno to testify, and that I would entertain counsels' submissions in their closing arguments about what weight, if any, to attach to his evidence.

16. Mr. Giorno testified briefly, and referred to the two reports he had produced, dated September 14, 2012 and October 30, 2012. He confirmed that he was not able to locate the Claimant. He stated that he did locate Mr. Krishnar, and met with him at his workplace in August 2012. He reported that Mr. Krishnar advised him that he and the Claimant were never legally married, but that they had lived together from 2006 to some time in 2009, at two different locations. These locations were consistent with the addresses provided by Ms. Manoharan in the statement that she provided to the ACE adjuster. Mr. Krishnar advised that he was now married to someone else.

17. Mr. Giorno was cross-examined by counsel for ACE. When asked whether he had been given a copy of the signed statement provided by the Claimant in which she advises that she married Mr. Krishnar in November 2007, the witness responded that he could not recall. He similarly did not recall whether he had asked Mr. Krishnar about the marriage

date set out in the statement, but stated that if he had not mentioned it in his report, it was unlikely that he had asked that question.

18. Mr. Giorno testified that he believed that Mr. Krishnar was telling the truth when he stated that he was never legally married to the Claimant, given his mannerisms and the way in which he presented that information.

PARTIES' ARGUMENTS:

Economical's position

19. Counsel for Economical contended that when all of the documentation is considered, as well as Mr. Giorno's evidence that he believed that Mr. Krishnar was telling the truth when he told him that he was never legally married to the Claimant, I should conclude that these two were not "spouses" within the meaning of the definition in the *Insurance Act*.

20. Counsel noted that neither Ms. Manoharan nor Mr. Krishnar indicated on the OCF 1 forms that they each filed that they were married. She suggested that if they had gone through a legal marriage ceremony in November 2007, as Ms. Manoharan's statement suggests, there would be no reason for both of them to not have ticked off the "married" box on that part of the form. She contended that the letter that they co-signed in August 2008 advising that they had lived "in common law for over one year" was consistent with the information provided on the OCF 1 forms, and tips the balance toward them not having been married.

21. Counsel for Economical acknowledged that the statement provided by the Claimant to ACE is inconsistent with the above, but contended that the results of the marriage search performed place that allegation into question. She submitted that when all of the documents are considered, I should conclude that Ms. Manoharan and Mr. Krishnar were never legally married and find that ACE is in higher priority to pay the claim.

22. In response to ACE's argument that Economical bears the onus to disprove that the Claimant was a "spouse" of its named insured, Ms. O'Hara cited Arbitrator Samis' comments in *Dominion of Canada v. MVACF* (November 10, 1997), in which he states that the fact that the Applicant insurer in a priority dispute is adjusting the claim should not be significant in determining the onus of proof. She noted his statement that the Applicant in that case was not in any better position than the Respondent to lead evidence on the disputed issues, and that Arbitrator Densem also endorsed this view in *Aviva Canada v. State Farm Mutual Automobile Insurance* (May 14, 2013) and *Intact Insurance v. HMQ/MVACF* (July 10, 2013).

23. Counsel argued alternatively that if I do find that Economical bears the onus to disprove that the Claimant fits within the definition of "spouse", that they have done so.

ACE's position:

24. Counsel for ACE acknowledged the comments of the arbitrators cited above, but noted that they were made in *obiter* as they both explicitly stated that the result in their cases did not turn on the question of whether the Applicant bore the onus of proof. He submitted that the approach suggested in those cases that the evidence provided by a claimant in a priority dispute arbitration be treated as if he or she was a Plaintiff in a court action against both insurers is not helpful to the question of whether an applicant insurer bears the onus of proof in a priority dispute, noting that a claimant is not required to prove anything in a priority dispute.

25. Counsel argued that it is incorrect to say that an insurer who initiates an arbitration faces no burden of proof at all, suggesting that at the very least, an Applicant insurer should bear the onus of leading some evidence to show why the obligation to continue to pay the claim in question should not remain with them. He submitted that as Ms. Manoharan alleged that she was the "spouse" of Mr. Krishnar, the Economical insured, Economical must lead some evidence to show that she is not, in order to support their claim that they are not the priority insurer.

26. Mr. McGoey noted the statement provided by the Claimant, in which she sets out that she married her husband on November 15, 2007. He suggested that this makes it clear that the parties went through a marriage ceremony, and were not simply living in “common law”. He acknowledged that the search conducted revealed that their marriage was not registered in Ontario in 2007, but contended that they could have been married in another jurisdiction.

27. Counsel argued that in light of Mr. Krishnar not attending the Examination Under Oath that he was summoned to, and Economical’s decision not to enforce the Summons issued, the evidence in Ms. Manoharan’s statement should be taken as the best evidence on the issue. He submitted that no weight should be placed on Mr. Giorno’s evidence regarding what Mr. Krishnar told him, as it was hearsay.

ANALYSIS & FINDINGS:

28. I will first address the issue of who bears the onus of proof. I agree with the concerns expressed by Arbitrators Samis and Densem in the cases cited above, that in light of the sometimes arbitrary manner in which an application for benefits may be submitted, and the requirement in section 2 of the regulation that the first insurer receiving an application must “pay now, dispute later”, it is not fair to ascribe a burden of proof to the applicant insurer in a priority dispute. In this case, that general principle translates into the question of whether Economical, as the Applicant insurer, bears the onus of disproving the Claimant’s allegation that she was the spouse of its insured.

29. In my view, it does not bear that onus. Claimants and their representatives may in theory allege any fact as the basis for submitting an application for payment of benefits to an insurer, and unless there is no nexus between the parties, an insurer is obliged to accept the claim. While this system is designed to ensure that claimants, who may not be aware of the often complicated system dictating which insurer is in priority to pay, receive benefits on a timely basis, it would be manifestly unfair if the first insurer to receive an application who is not the priority insurer must not only adjust the claim but also bear the onus of proving or disproving some fact casually alleged by a claimant.

30. However, I agree with counsel for ACE's contention that it is incumbent upon the Applicant, as the initiator of the process, to lead some evidence to show why the obligation to continue to pay the claim in question should not remain with them. That is the case in most legal proceedings. An arbitrator must then apply the "balance of probabilities" test to the evidence presented, in order to determine what evidence to accept. I have followed this analysis in considering the evidence presented by the parties in this case.

31. As set out above, the only *viva voce* evidence presented in this case was that of Mr. Giorno, an investigator retained by Economical. It was clear that his evidence was hearsay, and was tendered not for the truth of its contents, but merely to confirm the statements made in his reports. Ultimately, counsel did not focus much on Mr. Giorno's evidence and the weight to ascribe to it in their closing submissions.

32. In my view, given the limited manner in which it can be applied, Mr. Giorno's testimony is not helpful to the question of whether the parties were legally married. Had Mr. Krishnar testified under oath that he was never married to the Claimant, and that evidence withstood cross-examination, it would be determinative of the issue. However, Mr. Giorno's statement that he heard him say that, and believed that statement to be true is of much less value. While the *Arbitration Act* gives me the discretion to accept hearsay evidence, I am not inclined to rely on it to determine the key issue in the case, in the absence of any direct evidence on that point.

33. I turn instead to the documents submitted and relied on by the parties. In my view, the documents authored by the parties themselves – Ms. Manoharan and Mr. Krishnar – close to the time of the accident, should carry the most weight. People in the initial stages of filing a claim are generally focused on the task at hand, in this case providing biographical information. In my experience, they are less inclined to think about the effect or consequences of the information that they provide at the initial stage, as they may come to be with the passage of time when other issues may arise.

34. Both insurers agree that the parties were not cohabiting for three years before the date of the accident. That leaves the question of whether they participated in a legal marriage ceremony as the only issue to be determined in answering the question of whether they were spouses.

35. The first documents that contain any information about the parties' spousal status are the OCF 1 forms submitted by each of them. The Claimant's OCF 1 is dated July 7, 2007, one month after the accident. In the section asking about her marital status, the box next to "common-law" is ticked off. The box above it, providing the option for "married", is blank. Mr. Krishnar submitted his OCF 1 on June 13, 2008, one week after the accident. He ticked off the box indicating "single" in that section. These answers are not necessarily inconsistent. It is clear that these two were living together at the time of the accident, and the definition of a "common-law" relationship, in terms of the duration of co-habitation, differs among various statutes.

36. The next document in the chronology is the handwritten letter dated August 13, 2008, just over two months after the accident, sent by the Claimant and Mr. Krishnar to the Crawford adjuster. As noted above, it states – "As per your letter dated July 29, 2008, we are living common law for more than one year". While the July 29th letter referred to was not filed with me, it is safe to presume that the adjuster had requested the parties to confirm their marital status or the duration of their cohabitation, and this note was sent in response.

37. This document is significant. It was authored and submitted within a few months of the accident, and is the only one signed by both parties. It is also consistent with the information provided in the Claimant's OCF 1 form.

38. The hospital record filed, and the results of the marriage search are interesting, but ultimately not persuasive evidence on the issue. While the marriage search confirms that there is no record of these two having participated in a marriage ceremony in Ontario

between 2005 and 2009, it leaves open the question of whether they may have done so in another jurisdiction, as pointed out by counsel for ACE.

39. That leaves the signed statement provided by Ms. Manoharan on September 28, 2009. It is the only document filed that provides that the couple was married, stating “I got married on November 15, 2007”. Given that this document was prepared more than two years after the date of the accident, and is entirely inconsistent with both the OCF 1 forms submitted and the August 2008 letter signed by both parties, and provides no explanation for the inconsistency, I do not attach much weight to it.

40. Applying the balance of probabilities test to the evidence outlined above, I find that Ms. Manoharan was not legally married to Mr. Krishnar at the time of the accident. She was therefore not his “spouse” as defined in section 224(1) of the *Act*, and was not an “insured” under the Economical policy. ACE is therefore in higher priority to pay her claim, pursuant to section 268(2)1(ii) of the *Act*.

ORDER:

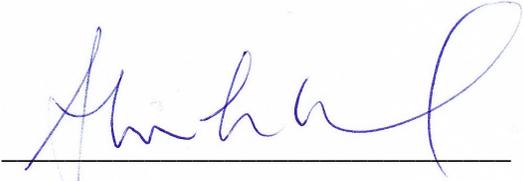
41. The Application for Arbitration is allowed. ACE INA is the insurer in priority to pay Ms. Manoharan’s claim, and should reimburse Economical for the accident benefits paid out to her.

COSTS:

42. In accordance with the parties’ Arbitration Agreement, Economical is entitled to its costs of this proceeding. If counsel are unable to agree on the quantum owing, I invite them to contact me and I will hear submissions on the matter.

43. Given the result, I will forward my account for arbitration fees and disbursements incurred to counsel for ACE, under separate cover.

DATED at TORONTO, ONTARIO this __24th_ DAY OF MARCH, 2015.



Shari L. Novick

Arbitrator