

**IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990,
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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

PRELIMINARY DECISION – PRODUCTION ISSUE

COUNSEL:

Jason R. Frost and Megan Cui for the Applicant

Brenda Cuneo and Katherine E. Kolnhofer for the Respondent

BACKGROUND:

1. Marc Dulude was struck by a taxi insured by Economical Mutual Insurance Company (“Economical”) as he was standing on the street on August 19, 2012. He suffered serious injuries and has been determined to be catastrophically impaired under the SABS. He applied to Economical for payment of accident benefits under the *Schedule*, and his claims have now been resolved on a full and final basis.

2. Mr. Dulude was convicted of various driving infractions in the few years leading up to the above accident, and his driver’s license was under suspension at the time.

3. Mr. Dulude’s father, Jean Claude Dulude, drove a 2011 Hyundai Sonata at the time of the accident. It was insured by Wawanesa Mutual Insurance Company (“Wawanesa”) through a policy issued to Direct Upholstery Ltd., a company owned by Pasquale Raviele. Mr. Raviele also owned a company called SBS Furniture, at which the Claimant was working at the time of the accident. The evidence suggests that Jean-Claude was also working at SBS Furniture at that time.

4. Economical contends that the Claimant and his father participated in a “scheme” over the course of several years prior to the accident, by which Jean-Claude made vehicles that he owned or leased available for his son Marc’s “regular use”, given that Marc’s licence suspensions would have made it difficult for him to obtain insurance. Economical submits that the 2011 Hyundai leased through Direct Upholstery and insured by Wawanesa at the time of the accident was one such vehicle, and that the Claimant would therefore be a deemed “insured” under the Wawanesa policy by virtue of section 3(7)f of the *Schedule*. If true, Wawanesa would be in higher priority to pay the claim.

ISSUE – DISPUTED PRODUCTIONS:

5. Given the contention outlined above, Economical seeks an Order for the production of Wawanesa’s underwriting records relating to the two policies referred to above. Counsel for Economical contends that these records will assist in clarifying the gaps in the information obtained to date, and may help to reconcile the many

inconsistencies in the evidence provided by the Claimant and his father at the Examinations Under Oath conducted. Wawanesa resists these requests.

The issues to be determined are :

- 1. Is Wawanesa required to produce a complete copy of its underwriting records related to its policy issued to Jean-Claude Dulude, insuring a 2002 Jeep Liberty?***
- 2. Is Wawanesa required to produce a complete copy of its underwriting records related to its policy insuring a 2011 Hyundai Sonata, issued to Direct Upholstery Ltd.?***

6. Wawanesa has produced a copy of the “Declaration page” and other policy documents relating to the policy issued to Direct Upholstery. These confirm that the Claimant was not a named insured, listed driver or excluded driver on that policy. It resists production of the underwriting material for this policy, describing the request as a “fishing expedition”. Counsel for Wawanesa contends that the theory put forward by Economical is unsupported by the evidence, and that there is no support for the argument that its insured made a vehicle available for the Claimant’s “regular use” at the time of the accident.

7. Wawanesa also resists production of the underwriting records for the policy issued to Jean-Claude Dulude insuring the Jeep Liberty, claiming that they are not relevant to this dispute. Mr. Dulude advised that this vehicle was sold in October 2011, ten months before the accident. Wawanesa has also not provided the Certificate of Insurance relating to this policy.

8. Prior to being insured by Wawanesa, the Jeep Liberty was insured with State Farm. Economical also sought production of State Farm’s underwriting records relating to that policy, as well as records relating to other policies it issued to Jean-Claude Dulude. The motion material filed by Economical included submissions in support of an Order for production of these documents. State Farm subsequently agreed to provide the

material requested, and a “consent Order” has now been issued for the production of these records. I will accordingly not address those submissions.

DOCUMENTS FILED:

9. The parties filed extensive written material in support of their respective positions on this issue. I received a copy of a lengthy signed statement provided by the Claimant in November 2012, the transcript from a “SABS section 33” Examination Under Oath conducted in December 2012, and a transcript of evidence provided by the Claimant at a further EUO conducted in June 2018. Jean Claude Dulude was also examined under oath in June 2016, and the transcript of his evidence was filed by the parties.

10. Economical filed the MTO record listing the Claimant’s driving infractions, the details of which are set out below. It also filed a report summarising surveillance conducted on Mr. Dulude in August 2013, as well as a report outlining interviews held with Pasquale Raviele and his son, who was also involved in the operations of SBS Furniture. I was advised that Pasquale Raviele passed away some time after the events in question.

RELEVANT EVIDENCE:

11. A detailed review of the above documentation reveals that there were many inconsistencies between the information provided by the Claimant in his signed statement, and his evidence at the subsequent Examinations Under Oath. When he was questioned about these discrepancies, Mr. Dulude suggested that the brain injury that he suffered in the accident has affected his memory. Whether that is the sole reason for these differences, or whether the Claimant was less than forthcoming in an attempt to cover up or minimise his fraudulent behaviour is not clear. Either way, the evidence that has been gathered by the parties to date regarding his use of vehicles registered to his father, as well as his father’s awareness of such use, is complicated and contradictory.

12. Jean-Claude Dulude, the Claimant’s father, testified that he had been involved in various ventures in the furniture business with Pasquale Raviele over the course of thirty

years. He stated that his son Marc was employed by SBS Furniture at the time of the accident, and that that company was owned by Mr. Raviele. Jean-Claude stated that he had formerly been involved in the ownership of SBS but had transferred the operation of that company to Mr. Raviele a year or two before the accident. He stated that in August 2012, he was “partly employed” by SBS, as he was “semi-retired”.

13. Jean-Claude further testified that he had been the registered owner of a 2002 Jeep Liberty. That vehicle was initially insured with State Farm, but he recalled that coverage was shifted to Wawanesa in or around August 2010. He stated that the vehicle was sold in October 2011, and that he was a principal of SBS Furniture at the time. Mr. Dulude admitted that his son regularly drove this car from 2006 to 2010, and that he himself drove an Acura during this period. Wawanesa does not dispute that the Jeep Liberty was made available to the Claimant by his father for his “regular use” until October 2011, when it was sold.

14. Jean-Claude confirmed that he drove a 2011 Hyundai Sonata, insured under Direct Upholstery’s policy with Wawanesa, for approximately two years prior to the accident. He referred to it as the “company’s car”. When asked about his son’s use of that car, he testified that he had not permitted Marc to drive the vehicle prior to his accident in August 2012. He testified that his son did drive this car in 2015, a few years after the accident. He advised that he developed various health issues in 2014 and 2015, and that he had relied on his son to drive him to his medical appointments downtown around that time.

15. When asked whether his son drove the Hyundai Sonata before January 2015, Jean-Claude responded “I don’t think so”. At a later point in his testimony, when he was advised that the surveillance obtained by Economical showed Marc driving the vehicle prior to that time, Jean-Claude agreed that his son had done so, but stated only while he was also in the vehicle.

16. When asked at his EUO when he became aware of the fact that his son's drivers licence was under suspension, Jean-Claude provided various answers. He initially stated that his son did not have access to his vehicles from October 2010 until January 2015, due to his license having been suspended. He later testified that he only became aware of the suspension in 2013, after the accident in question, but that he had suspected it for some time before that. When he was asked on another occasion whether he had been aware of the license suspension before the car accident, he conceded that he had been.

17. The MTO records filed indicate that the Claimant's drivers' license was suspended in early February 2010 for the non-payment of fines. It remained under suspension at the time of the accident in August 2012, two and one-half years later. Despite this long period of suspension, it is clear that Marc Dulude continued to drive various vehicles, a fact that he admitted under oath at his EUO.

18. The records indicate that Mr. Dulude was charged with speeding while driving his father's Hyundai Sonata on October 18, 2010. This is inconsistent with Jean-Claude's statement that his son never drove the vehicle before the accident. Shortly after that, the Claimant was convicted of impaired driving for an incident that took place in February 2009, and his licence was suspended for a further year until October 2011. He was then stopped by the police while driving in March 2011, and the period of suspension was increased to October 2012.

19. Marc Dulude denied ever having driven his father's Sonata to work at SBS Furniture. When asked whether his father had ever picked him up and drove him to work in the year prior to the accident, he estimated that he had done so about once each month. Jean-Claude lived in Brampton at the time, Marc lived in Mississauga, and the SBS premises are located at 3655 Weston Road in North York. The Claimant testified that he often took public transit to work from his home in Mississauga, but could not provide any details of the route or the numbers of the buses involved. He acknowledged that he would have had to pay two different fares and that it would have taken "at least" two hours each way for him to travel between his home and SBS.

20. When asked if he had ever driven his father's Hyundai Sonata before the accident, Marc Dulude initially denied having done so, but later testified that he thought he was driving that vehicle in March 2011 when he was stopped by police. He stated that his father was not aware that he was driving the vehicle at that time, but later acknowledged that his father had been aware that he had done so "maybe one or two times". When asked how he would have accessed the keys to the vehicle, which was parked at his father's house, he was not able to answer. The MTO records indicate, however, that Mr. Dulude was driving his father's Jeep Liberty when he was stopped in March 2011, rather than the Sonata.

21. The Claimant's evidence regarding his use of his father's Hyundai Sonata after the accident was also inconsistent. When he was examined under oath and was asked whether he drove the vehicle after the accident in August 2012, Marc Dulude initially replied that he had not. He then said that he could not recall if he had done so. He agreed that his father had serious health issues in early 2013 that resulted in his foot being amputated, but initially denied that he had driven his father to and from his medical appointments in that car. When he was then advised that surveillance conducted in August 2013 indicated that he had done so, and that the car had been parked at his home, he replied "if you say so".

22. The Wawanesa policy documents filed indicate that the policy issued to Direct Upholstery covered four vehicles, two of which were driven by Pasquale Raviele and his wife. A third vehicle was driven by a woman who was described as a long-time secretary at the company. The fourth was the Hyundai Sonata discussed above that was provided to Jean-Claude Dulude.

PARTIES' ARGUMENTS:

23. Aside from submitting extensive written materials in support of their arguments, counsel also made oral arguments on this issue at a teleconference convened for that purpose.

Economical's submissions

24. Counsel for Economical contended that the evidence obtained to date regarding the Claimant's use of the Jeep Liberty and Hyundai Sonata that were registered to his father is inconsistent and contradictory. He contends that the underwriting files sought will assist in clarifying the facts, and will be helpful in light of the Claimant's alleged memory loss. Mr. Frost submits that the underwriting records may reveal the intentions of Jean-Claude Dulude or Pasquale Raviele with respect to the use of the Wawanesa insured vehicles, and that they may document communication between the parties and Wawanesa regarding the vehicles in question that is not reflected in the policy Declaration pages provided.

25. Counsel noted that sections 25(6)b and 29(2) of the *Arbitration Act* provide an Arbitrator with the jurisdiction to order production of records sought by a party, and that section 15 of the *Statutory Powers Procedures Act* provides that the tribunal may admit any document into evidence that is relevant to the subject matter of the proceeding, as long as it would not be inadmissible in court by reason of privilege. He argues that when these provisions are read together, it is clear that I have the jurisdiction to order Wawanesa to produce the underwriting records sought. Mr. Frost contends that it would be unfair if his client was forced to proceed without access to these records, as it would hamper both its ability to present its case and my determination of the relevant facts.

26. Counsel cited the court's decision on a summary judgment motion in the case of *Mailloux v. Mindorff* (2016) ONSC 6003 (CanLII), in which the judge admitted underwriting records into evidence. He noted that the court relied on references in those records regarding past excluded drivers on a policy and the insurer's knowledge of a suspended driver's license. Counsel also noted that in a motion for production of an insurer's underwriting records in the case of *Sidhu v Toor* (2018) ONSC 4874 (CanLII), in which the Declaration pages for the relevant policy had already been provided, the court determined that the underwriting records were relevant and should also be

disclosed, as they may contain information that was communicated to the insurer that was not reflected in the Declaration pages.

Wawanesa's submissions

27. Counsel for Wawanesa contended that Economical has failed to establish the relevance of the underwriting files sought, and likened its request to a “fishing expedition”. Counsel submitted that many of the allegations made or suggested by counsel for Economical are unsupported by the evidence, and that the orders sought are excessive and an invasion of both Jean-Claude Dulude’s and Pasquale Raviele’s privacy.

28. Counsel also contended that the cases cited by Economical are distinguishable, as the court in *Mailloux, supra*, did not order the production of underwriting records. She noted that the judge who heard the motion in the *Sidhu* case determined that the request made for underwriting information for all cars in the household was overly broad, and determined that the only relevant underwriting file was that relating to the specific vehicle that was involved in the accident.

29. Ms. Cuneo acknowledged that Wawanesa does not dispute that the Claimant regularly used the 2002 Jeep Liberty registered to his father before it was sold in October 2011. She contended that in light of this concession, there is no reason for an Order compelling production of the underwriting records related to the policy issued to Jean-Claude covering that vehicle.

30. Counsel denied that the fact that Marc regularly drove the Jeep Liberty from 2006 to 2010 leads to the conclusion that he also had “regular use” of the Hyundai Sonata insured with Wawanesa. She noted that his name did not appear anywhere on the policy issued to Direct Upholstery, and that if it did, Wawanesa would not be objecting to producing the documents sought. She also noted that Jean-Claude Dulude testified at his EUO that during the years that his son drove the Jeep Liberty he had a second vehicle to drive, whereas once he obtained the Hyundai Sonata, he no longer had one.

31. Counsel submitted that the EUO evidence of both the Claimant and his father suggested that Marc's use of the Hyundai Sonata was occasional at best, and that the only evidence that he drove the vehicle before the accident was the fact that he was charged with speeding while driving it in October 2010. She noted that the Claimant testified that his father had not been aware that he had taken the vehicle on that date, and contended that this did not support the argument that Jean-Claude had made the vehicle available for his son's "regular use" at that point.

32. Ms. Cuneo also contended that even if Mr. Dulude had made the vehicle available to his son, there was no evidence that he had the authority to do so on behalf of Direct Upholstery, the Wawanesa insured. She submitted that it was clear from the evidence that Mr. Raviele, the owner of that company, was not aware that the Claimant may have occasionally driven the Sonata that was registered to his father.

Reply submissions

33. Mr. Frost noted the fact that Jean-Claude Dulude was one of four listed drivers on the Direct Upholstery policy issued by Wawanesa, and that he was provided with a leased vehicle for several years. He suggested that this implies that he maintained some management or supervisory responsibilities at the company. He noted in any event that the focus of the question of whether someone is a deemed insured under section 3(7)f of the *Schedule* is on whether a vehicle is made available for their regular use, and that the identity of the person or entity who makes it available is not determinative.

34. Finally, counsel for Economical argued that given the Claimant's regular use of the Jeep that was registered to his father for several years before the accident, and his post-accident use of the Sonata revealed by the surveillance obtained (along with the fact that he drove the Sonata at least on one occasion in October 2010), it is either possible or likely that he used that vehicle on a regular basis prior to the accident. Given the above, and the fact that Mr. Raviele can no longer provide any relevant information, he argued that broad production of records is warranted as the documents sought will be a more reliable source of information than the oral evidence that has been gathered thus far.

ANALYSIS AND REASONS:

35. There is no dispute that I have the jurisdiction to make the Order requested by Economical, which in my view, is supported by section 18(1) and 25(6)b of the *Arbitration Act*. Wawanesa essentially claims that the underwriting files sought are not relevant to this dispute and that Economical's requests are "over-reaching". For reasons explained below, I find that while this type of request may perhaps be beyond the bounds of what should be produced in many cases, the documents sought by Economical are potentially relevant in the unique circumstances of this case, and should be produced by Wawanesa.

36. Counsel for Economical suggested that there is a trend toward broad production in these types of cases, and that Arbitrators have found that documents that are potentially relevant should be provided, unless there is a good reason not to do so. I agree. Arbitrator Samis addressed the questions surrounding production disputes in *Royal and SunAlliance v. Wawanesa Mutual* (April 17, 2012). After setting out the competing interests involved, he stated that Arbitrators must consider the nature of the request for production, the context of the dispute, and the possibility that the documents sought will be relevant to the issues or will lead to evidence relevant to the issues between the parties, and found that justice can "only be seen to be done once disclosure is made".

37. I referred to the above decision in my award in a Loss Transfer dispute in *Wawanesa Mutual v Zurich Insurance* (January 25, 2019). While I appreciate that this dispute arises in a different context and does not involve a second insurer requesting documents relied on by a first insurer in making adjusting decisions, Wawanesa in this case may be in possession of records and documents that contain certain facts or information regarding Marc Dulude's use of his father's vehicles that may support an argument that he was a deemed named insured under the policy issued by Wawanesa. For that reason, the documents in question are potentially relevant to this dispute and should be provided to Economical.

38. Despite counsels' best efforts – having conducted three Examinations Under Oath, and attended on many other occasions when the witnesses did not appear - the evidence gathered to date contains many inconsistencies and leaves many important questions unanswered. I find that the records in issue may help to clarify these questions.

39. The focus of the dispute is on whether Marc Dulude was a deemed insured under the Wawanesa policy issued to Direct Upholstery, that provided coverage to his father's car at the time of his accident. It is clear (and undisputed) that Jean-Claude Dulude made a Jeep Liberty available for his son's regular use between 2006 and 2010. That vehicle was registered in his father's name, but Jean-Claude testified that he referred to it as "Marc's car". It is likely that this arrangement was entered into because Marc had a poor driving record, and would have had a difficult time obtaining insurance on his own for a reasonable price, if at all. He was charged with impaired driving in early 2009, and his licence was suspended in early 2010 for non-payment of fines, before the "DUI charge" was heard. Further charges followed, and his licence was suspended at the time of the accident in August 2012, and remained so for a few years that followed.

40. The evidence suggests that the Jeep Liberty was sold either in October 2011 or at some earlier time. The question then becomes whether the Claimant regularly drove his father's Hyundai Sonata from that time until the time of the accident. While both the Claimant and his father testified that he did not, their evidence wavered under persistent questioning by counsel for Economical at the EUO's. It was also clear that the Claimant was charged with speeding in October 2010, while driving his father's Sonata. In light of the above, the extent of his use of the vehicle is unclear.

41. The parties also questioned the Claimant and his father about his use of the Sonata after the accident. That evidence was similarly obtuse. Surveillance obtained by Economical shows that the Sonata was parked at the Claimant's home on a few days in August 2013, and that he drove that car to his father's home to pick him up on two occasions. Both witnesses denied the suggestion that this had occurred until it was put to them that the activity had been recorded by the investigators.

42. Further, the evidence was also inconsistent with regard to whether Jean-Claude was aware that his son drove his car before the accident, while his license was under suspension. The varying answers on that point are set out above, and can safely be described as being “all over the map”.

43. It is not clear if the evidence provided by the witnesses at the examinations was purposely vague, or was the result of poor memories or recollections of events that took place several years earlier. Either way, I agree with counsel for Economical’s contention that a review of the underwriting records is the only way to determine what may have been communicated to Wawanesa, by whom, about the Claimant’s use of the Hyundai Sonata at the time of the accident.

44. For the reasons expressed above, Economical is entitled to production of the underwriting files it seeks, as well as the Certificate of Insurance relating to the policy issued to Jean-Claude Dulude insuring the Jeep Liberty. As I stated in *Wawanesa v. Zurich, supra*, the determination that documents should be produced in the course of the arbitration process is distinct from a ruling on the merits or strength of the arguments put forward by the party seeking the documents. My ruling is simply an attempt to create the a “level playing field” at this stage, so that Economical has access to the same material that is available to Wawanesa, in order to assess the strength of its argument and decide whether it should be pursued.

ORDERS:

Wawanesa is hereby ordered to produce to Economical a complete copy of the underwriting records regarding its policy issued to Jean-Claude Dulude, insuring a 2002 Jeep Liberty. It is also required to produce a copy of the Certificate of Insurance relating to that policy.

Wawanesa is similarly ordered to produce a complete copy of the underwriting records regarding the policy it issued to Direct Upholstery Ltd., insuring a 2011 Hyundai Sonata.

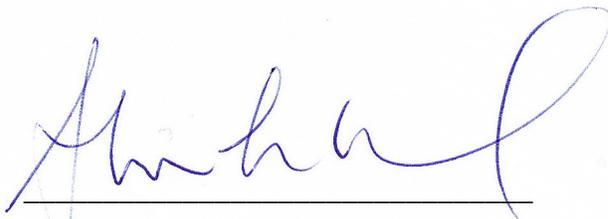
The above documents should be provided to counsel for Economical within sixty days of the date of this decision.

COSTS:

Given the outcome of this motion, Economical is entitled to recover its costs related to this aspect of the dispute on a partial indemnity basis. If counsel cannot agree on the quantum owing, I invite them to contact me so that a teleconference can be arranged at which submissions will be heard.

My office will be in contact with each of yours in the near future in order to arrange a further teleconference, so that the matter can proceed to the next stage.

DATED at TORONTO, ONTARIO this ___6th___ DAY OF JUNE, 2019



Shari L. Novick
Arbitrator