

**IN THE MATTER of the Insurance Act, R.S.O. 1990,
c.I.8 s. 275, and Regulation 283/95;**

**AND IN THE MATTER of the Arbitration Act,
R.S.O. 1990, c.A.24;**

AND IN THE MATTER of an Arbitration between:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

-and-

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

DECISION

COUNSEL:

**William J. McCorrison
Counsel for the Applicant**

**Ian D. Kirby
Counsel for the Respondent**

ISSUES:

Is the applicant, Economical Mutual Insurance Company, or the respondent, Insurance Corporation of British Columbia responsible for payment of income replacement benefits and medical rehabilitation benefits payable to and on behalf of James Allen Brown arising out of a motor vehicle accident of July 11, 1998?

ORDER:

Economical Mutual Insurance Company is responsible for paying the income replacement and medical rehabilitation benefits.

HEARING:

This arbitration was held on May 25th, 2000, in the municipality of Owen Sound, Ontario and in the municipality of Vancouver, British Columbia on December 6, 7, and 8 2000. Submissions were made in the municipality of Toronto, Ontario, on March 16 2001. Further written and oral submissions were subsequently received from both parties.

THE FACTS:

This case arises out of a tragic motor vehicle accident that occurred in the province of Ontario on July 11, 1998. At that time, James Andrew Brown was a passenger in a Volkswagen Fox motor vehicle driven by his brother, John Evans Brown and owned by their step mother, Ruth Ann English. At the time of the accident the Volkswagen was insured by Ruth Ann English through the Economical Mutual Insurance Company. The vehicle was being driven back to British Columbia where James and John Brown lived.

As a result of the accident, James Brown suffered severe injuries and became entitled to various accident benefits. He applied to the Economical Mutual Insurance Company for the benefits and Economical commenced payment of those benefits. Economical takes the position, however,

that the Insurance Corporation of British Columbia (ICBC) is responsible for the payment of the accident benefits pursuant to section 268(2)(1) of the Insurance Act of Ontario, which states:

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 sub paragraph (i), the occupant has recourse against the insurer of the automobile in which he or she was an occupant . . .

Economical takes the position that James Brown was an "insured" pursuant to a policy of motor vehicle liability insurance issued by ICBC, by application of British Columbia law, and that there are three ways in which that occurs. While I will deal with them in greater detail below, they may be briefly summarized as follows. Firstly, James Brown was a licensed B.C. driver and as a result, he was granted a certificate of insurance from ICBC. Secondly, at all material times he ordinary resided with Ryan Chalke, a B.C. resident and licensed driver, and therefore an "insured" person. Thirdly, James Brown was in a vehicle not required to be licensed in B.C., which was operated by his brother, John Brown. In addition, it is Economical's position that James Andrew Brown was a person primarily dependent for financial support upon his mother Barbara June English and/or step father James Gregory English, and as such an "insured" person pursuant to the ICBC policy.

It is the position of ICBC that James Allen Brown was an "insured" under the Economical policy, or if not, then section 268 (2)(1)(ii) should apply and Economical would then be responsible as James Allen Brown, in their submission was an occupant of the vehicle insured by Economical at the time of the accident.

SECTION 268 (2)(1)(i):

Before dealing with Economical's position regarding whether James Brown was an insured of ICBC, let me first deal with the question of whether James Brown was in some way the named insured or specified insured under the terms of the Economical policy. This is one of the positions put forward by ICBC, and if it is correct, then the other arguments would become academic.

Counsel for ICBC takes a position that James Brown an "insured" of the Economical for the purposes of section 268(2)(1)(i) of the Schedule (Bill 59). In this regard counsel relies on the definition of "insured person" as set out in section 2(1) of the schedule, which states:

"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 dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent,
- (b) is involved in an accident in or outside of Ontario that involves the insured automobile . . .

It is the ICBC's position, as I understand it, that in the particular fact situation of this case, James Brown was the "insured" for the purpose of section 268(2)(1)(i). In order to determine if this was in fact the case, it is first necessary to review the facts leading up to the accident, and the actual placing of insurance on the automobile involved.

James Andrew Brown is the son of John Brown and Barbara June English, who were divorced a number of years before the accident. John Brown subsequently married Ruth Ann English and lived in Owen Sound, Ontario. Barbara June English moved to Vancouver, British Columbia with James A. Brown and John Evans Brown and subsequently married James Gregory English. In the spring of 1998 it was arranged that James Andrew Brown and his brother John Evans Brown would visit their father and stepmother in Owen Sound in late June and July 1998. His father and stepmother decided that they would give James Brown a 1989 Volkswagen Fox motor vehicle which his stepmother Ruth Ann English owned but no longer required. The idea was that when James and his brother John came to visit in the summer of 1998, James and John would then drive the motor vehicle back to British Columbia where it would be registered in James' name.

In order to ensure that James and John were properly insured while they drove the vehicle to British Columbia, Mr. John Brown contacted Mr. Richard John Carruthers, an insurance broker with whom he had dealings with over the years. At this time the Volkswagen had not been used for some time and had only comprehensive insurance on it. Mr Brown explained to Mr. Carruthers that they would be giving the car to James and that he and his brother as well as a friend, Ryan Chalke, would be driving the car back to British Columbia.

The evidence lead at the hearing suggested that Mr. Carruthers had provided insurance to Mr. Brown for many years and that Mr. Brown was not concerned about the price of any coverage. He simply wanted to be sure that his sons were properly insured. I accept that Mr. Carruthers arranged for there to be complete coverage on the Volkswagen including liability, accident benefits and property damage coverage. The insureds were named as Ruth Ann English and John Brown. The drivers were listed as John Brown and Ruth Ann English. There was no discussion of listing James or his brother as drivers under the policy although Mr. Carruthers was well aware that they would be the primary drivers of the automobile. There was discussion as to how to best effect the transfer of the motor vehicle and it was arranged, on Mr. Carruther's advice, that the Transfer of Ownership form be signed by Ruth Ann English prior to the car being driven to British Columbia, but not dated until they arrived in B.C. This would allow James some time to properly arrange for the necessary paper work to be done and arrange for any further insurance in B.C.

It is clear that Mr. Brown and Ruth Ann English relied entirely upon Mr. Carruthers for advice on the insurance and transfer matters. Mr. Carruthers attained the policy with Economical Insurance, and in the circumstances, was acting as the agent for Economical.

Counsel for ICBC suggested James should be deemed to have been an "insured person" within the meaning of section 2(1)(a) of Bill 59 which states:

the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse.

With the greatest respect to counsel's able submissions, I am unable to accept them in this case. I do accept that the broker, Mr. Carruthers, was made aware of the fact that the brothers were going to be driving to B.C. and that the ownership was being transferred. I also accept that Mr. Carruthers was unaware of what insurance was in place in British Columbia. It does not follow from this, however, that James should be considered a listed driver or named insured. The instructions given to Mr. Carruthers were, in effect, to make sure that the two youths were insured for their drive out to B.C., and he did this. James was fully insured for his drive to B.C. There was full liability insurance in place and accident benefits were available. The accident benefits may not have been available by way of the Economical through section 268 (2)(1)(i), but they were nonetheless available by means of one of the levels set out in section 268 (2). As such, I find that James Brown is not entitled to accident benefits by way of section 268 (2)(1) from Economical.

WAS JAMES BROWN AN "INSURED" AT THE TIME OF THE ACCIDENT?

The crux of this issue revolves around the question of whether or not James Brown was an insured at the time of the motor vehicle accident. An "insured" is defined, for the purposes of part VI of the *Insurance Act* as:

A person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described as an insured person.

Pursuant to section 2(1) of the applicable accident benefits schedule (Bill 59) an "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 dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent,
 - (i) is involved in an accident in or outside of Ontario that involves the insured automobile . . .

Let me now deal with the question of whether or not James Brown was insured by way of being financially dependent upon another person. Section 2(6) of the Regulation states that a person is a dependent of another person "if the person is primarily dependent for financial support or care on the person or other person's spouse".

The issue of who, if anyone, James Brown was principally dependent upon for financial support is critical in a number of ways. If he was principally financially dependent on his father, then the Economical would respond pursuant to section 268 (2)(1)(i). If he was principally financially dependent on his mother, then one would potentially look to the I.C.B.C. for payment of the accident benefits. One must therefore examine James Brown's financial situation in some detail.

JAMES BROWN'S FINANCIAL SITUATION:

At the time of the accident James Brown was 22 years old. While he had been working in British Columbia for a number of months prior to the accident he had also been a student at Capilano College on and off since 1994. When the accident happened on July 11, 1998 he had intended to enrol at the University of Victoria in the fall of 1998.

Questions of financial dependency involving students are often complex and difficult given their somewhat casual and often changing lifestyle and needs. This is particularly the case in James' situation as he was receiving money from his father and stepmother in Owen Sound as well as his mother and stepfather who lived in Vancouver. In addition he worked on an irregular basis

prior to the accident. In light of this, in order to determine his financial dependency situation we must examine his pre-accident history in some detail.

Prior to attending Capilano College in September of 1994 James lived with his mother Barbara June English and his stepfather James Gregory English in Vancouver. At various time between then and the time of the accident July of 1998 James Brown lived at home or with friends in a rented apartment. At various times he held part-time and summer jobs. While I will give a short chronology of his activities and financial arrangements prior to the accident, it is important to realise that the financial information is somewhat vague at best.

From September 1994 through April 1995 James was a student at Capilano College. At that time he also worked part-time in a ski rental shop at Mount Seymour and lived in a shared apartment with friends. In the summer of 1995 he had a full-time job at "Never Board", a snowboard manufacturing company. It would appear that he returned to Capilano College in the fall of 1995 but did not enrol in January 1996 term. At that time he worked full-time at McWines and continued to live in an apartment with friends.

He enrolled again at Capilano College in September 1996 and continued there until December 1996, again living with friends. By January 1997 James had left Capilano College and was working full-time at North Shore Ski and Sports Swap. This continued until he returned to Capilano College in the fall of 1997. By July 1997 James had moved back into his parents' home as his roommates had dispersed. While he moved back in, it is important to note that this was on a somewhat temporary and casual basis and it was not expected to continue for an extended

period of time. In his absence his room had been changed into a sewing room and while he slept there James' mother made it very clear to him that nothing was to be changed in the sewing room and it was to provide him with accommodation only while he and his friends looked for appropriate accommodation. During this period James spent very little time at home and seldom even ate there.

He apparently continued to work full-time at the Sport Swap until the fall of 1997 when he again returned to Capilano College. He may have worked part-time at the Sport Swap during that time frame.

In January 1998 James continued at Capilano College but moved into an apartment with his friend Ryan Chalke on Lytton Street. He may well have continued to work part-time at the Sport Swap store until he graduated in April of 1998, however I will deal with that in greater detail later. In any event he worked on a "as needed" basis at the Sport Swap following graduation until just before the accident when he flew to Ontario to visit his father and pick up the car. He continued to live in the apartment with Brian Chalke until he left for Ontario.

It would appear from the evidence, and I accept, that but for the accident James would have enrolled at the University of Victoria in the fall of 1998. In all probability, he would have had a part-time job, lived in Victoria and received some financial support from his parents.

The actual financial support provided to James Allen Brown prior to the accident is difficult in that the results of any such inquiry have to be considered approximate at best. While the amount

of support provided by his parents varied at different times prior to the accident, it would appear that they basically covered the cost of his tuition, books and the rent for his share of the apartment when he lived with Ryan Chalke, commencing in January of 1998. It would appear that the tuition was approximately \$1000 per year. Books cost roughly \$250 per term or \$500 per year.

In terms of the rent of the Lytton street apartment, it would appear that the cost was approximately \$1000 per month if one were to include the hydro, cable television etc. This was shared equally between Ryan Chalke and James Brown. Accordingly James Brown's share was \$500. The parent essentially split the cost from January 1998 through April 1998 with each parent paying \$250, while James remained at school. It would appear that James' mother and stepfather paid \$250 per month for his rent in May and June of 1998 as well, while James paid the remainder himself during those two months.

Beyond the odd Christmas and birthday presents, and the occasional few dollars from his parents to help out, it would appear that James was otherwise dependent upon himself to pay all his expenses which would include food, transportation, entertainment, telephone and other activities. Unfortunately the remaining records for both James' earnings and expenses are virtually non-existent. James himself, because of his injuries, has almost no recollections of these matters and what he does remember is unreliable. His primary employer and friend, Rick Cunningham of North Shore Sports Swap kept virtually no records during the time frame in question and accordingly can only give a general idea of James' earnings. What he did indicate is that James began working at North Shore Sports Swap in July of 1997. I am aware that this conflicts

somewhat with other testimony regarding the period prior to 1997 but I do not think that this is important for the purposes of this case. During that time he was working 8 hours a day, 1 or 2 days per week for "product". That is, he was not paid in cash, but with some of the stores stock-bicycles, snowboards, etc. He was paid the equivalent of approximately \$9.00 per hour.

Between September and November 1997 he worked about 1 day per month and in December 2 to 3 days per week. According to Mr. Cunningham's recollection, James didn't work from January until some time in April of 1998. He then worked roughly 1 to 3 days per week, 8 hours per day from April until he left for Ontario in late June 1998. It was Mr. Cunningham's best estimate that James Brown earned approximately \$1800.00 in the three months prior to the accident or approximately \$600.00 per month.

There was also a suggestion, made by James Brown's roommate, Ryan Chalke, that James also worked at Mount Seymour in the winter of 1997 and spring of 1998. While his evidence was somewhat vague on this point his recollection was that he did do some limited work there. Mr. Chalke's evidence was that he earned enough to get a free pass and was also paid some money. Unfortunately he could not be more definite than that. On the other hand, it was the evidence of both James' mother and father as well as his step parents that James had worked part-time at North Shore Sports Swap during the winter/spring of 1998 while he was at Capilano College. While Rick Cunningham, his employer at North Shore Sports Swap has no such recollection, I have already noted that Mr. Cunningham kept no records of James' employment at the Sports Swap and his recollection of James' employment there was at best vague. I accept that all of the witnesses testified honestly and openly and to the best of their recollection on this particular point. I prefer the testimony of the parents and step parents who would likely have some

recollection where James had been working during that time frame over that of Mr. Cunningham. I conclude, therefore, that James, in all likelihood, had some part-time employment between January and March 1998 whether it be at Mount Seymour, or more likely, at the North Shore Sports Swap.

Having said that, because of the extent of James' injuries, it is impossible to say with any precision how many hours per week James worked at the store between January and March 1998. As he was attending Capilano College during that time it is reasonable to conclude that he was working less than 1 to 3 days per week as he worked between April and June of 1998 when he was not at school. If he worked approximately 2 days per month this would amount to approximately \$144.00 per month.

There was some evidence that James Brown had a trust fund which had been set up by his grandparents. While the exact amount was unclear, it would appear that it was in the range of \$7000.00 or less. It would also appear that James did either not have access to or actually did not use the trust fund during the year leading up to the accident. Accordingly I am not taking these funds into account when considering his financial dependency during the time in question.

Counsel for both sides referred me to a number of items that both sets of parents gave to James during the year or so prior to the accident. James' mother and stepfather appear to have given him a computer, a bed and perhaps some basic furniture for his apartment as well as an occasional few dollars to help out. James' father and stepmother gave him the Volkswagen Fox in July of 1998 which would have a value of approximately \$3000.00.

I have some difficulty in determining what amount should be properly attributable to these particular items. The fact that they were received in the months prior to the accident does not mean that they should be attributed, in their entirety, to that time frame. They are items that have a considerable, although indeterminable, life span. In addition some of the items such as the computer and the car are arguably not essentials, but rather conveniences. When considering the issue of financial dependency one does not necessarily include items that the parents provide that may make the child's life easier, or more convenient, but not necessary. -See Periera vs. Pilot Insurance and Canadian General Insurance, O.I.C. A-953564. While something should probably be attributed to these items, I am of the view that the amount, on a monthly basis, is fairly minimal and as will be seen from my conclusions regarding the overall financial dependency issue, these amounts are not critical.

There is one final item regarding James' income that remains to be dealt with. The savings account statements for James for late 1997 and early 1998 filed during the hearing indicate a deposit of \$2000.00 on January 30, 1998. While counsel for ICBC suggests that this may have been a gift from James' father and stepmother, who may have been visiting James about that time, there is no evidence that this was the case. Indeed, it was the evidence that James' father and stepmother that they did not give such a gift. In the overall financial picture for James, this is a significant amount and yet there is no good explanation for where it came from and therefore how it should be attributed. While I'm reluctant to attribute it to any one party, it does highlight the very difficult issue of determining exactly what James' financial situation really was shortly before the accident.

The question of James' expenses were also vague, as often occurs with young persons in school. While the exact amount of his expenses may be difficult if not impossible to determine, it is fair to say that they were very modest. From January 1998 when he began living with Ryan Chalke, James' expenses for the apartment, including hydro and cable television were approximately \$500.00 per month, \$250.00 of which was paid by each parent. In addition there was tuition of approximately \$1000.00 a year and books amounted to approximately \$500 per year. Beyond that, James' needs were food, transportation, entertainment and a minimal amount for clothing.

Before making a final determination regarding the issue of financial dependency, it is necessary to consider what time frame should be used in analysing the question. Counsel have suggested periods of 12 months, 6 months and 3 months prior to the accident as possible appropriate periods. The appropriate time frame for students is often difficult. What is clear, from the case law, is that each case must be determined on its' own particular set of facts. What is also clear is that one should not simply take a "snap shot" of the day of the actual accident, but rather attempt to reflect a more accurate picture of the person's true financial situation.

In James' case, I am of the view that the appropriate time frame is approximately 6 months prior to the accident, being from January 1, 1998. This tends, to the extent possible, to most accurately represent his living and financial situation during that general time frame. As a student James had essentially moved away from home, with some periods when he would return home briefly. His home stays were an exception, however, as for example when he moved into the "sewing room" for a number of months in the summer and fall of 1997. At that time he was,

in essence, between apartments and using one room in the house to sleep. He ate outside the home and did not restore the sewing room to the style of his old room.

It is also clear that James would not have, in all likelihood, have returned to living at his parent's home. He had intended to start at the University of Victoria in the fall of 1998 which would have made living in his parent's Vancouver home impossible. While his future living plans are not determinative of the issue, they are some indication of his lifestyle, especially when taken together with his past history.

I am also of the view that it would be inappropriate to simply look at the period from April 1998 until the time of the accident in July 1998. To do so would be to over represent his income as a student. It is clear that he would earn more income some months than others. Normally he earned more when school was out and less while he was attending school.

If we then look at the period from January to June of 1998, we know that James' mother and stepfather contributed approximately \$250 per month for each month plus half of the cost of tuition and books, their share of which amounted to approximately \$750 for the six months of January to June 1998 or a total of \$375 per month including the contribution toward rent. James' father and stepmother contributed \$300 in January and \$250 for February, March and April of 1998 for a total of \$1050 or \$175 per month for the six months prior to the accident plus their share of tuition and books or \$125 per month. Their support was therefore approximately \$300 per month. In addition, there were small incidental gifts etc. mentioned above are difficult to quantify but I find were fairly minimal.

James' contribution is somewhat more difficult to determine. He did make approximately \$600 during each of April, May and June 1998. This would amount on average to approximately \$300 per month over the six months. In addition it would appear that he made some relatively small amount at either Mount Seymour, or more likely, North Shore Sports Swap. Even if he worked there only two or three days per month, this would amount to approximately \$144 to \$216 per month for the first three months of the year. He would then have earned, when averaged over the 6 months prior to the accident, approximately \$373 to \$408 per month.

While I must also consider the \$2000 deposit in James' bank account made in January of 1998, it is unclear where this money came from and if income over what time frame it was earned. In the final analysis, it makes little difference in the overall dependency issue.

What the above does indicate to me is that James' income and expenses were relatively modest and somewhat vague. We will never know, with certainty, exactly what his revenues were. I think it is useful, therefore, to look at what the persons closest to James believe was his true financial situation.

It was the testimony of all those closest to him, including his mother, father and step parents, as well as his close friend and roommate, Ryan Chalke, that James was not financially dependent upon his parents. While I accept that each of these witnesses had limited knowledge of James' financial situation, in the absence of accurate records I am of the opinion that their observations

and views are important. Each of these witnesses testified in an open and honest fashion and had no reason to slant their testimony.

In light of all the above I am of the view that while the combined monies provided by James' parents was more than James contributed, James was the largest financial contributor to himself.

There has been some discussion by the courts, as well as arbitrators with the Financial Services Commission of Ontario, as to what constitutes being "principally dependent for financial support" on another person. The Ontario Court of Appeal in Liberty Mutual Insurance Company vs. Federation Insurance Company [2000] O.J.No. 1234, recently provided some insights into this question. In that case the hearing arbitrator determined that the injured party earned sufficient monies over the time frame involved to provide at least 50% of his financial needs. The Divisional Court specifically approved the test used by the arbitrator when it quoted from the arbitrator's decision, stating:

"at page 5 of his reasons the Arbitrator said "Jonathan can only be considered primarily dependent for financial support of someone else if the cost of meeting Jonathan's needs is twice what Jonathan's resources were". I understand him to be saying that if Jonathan's resources were sufficient to pay 50% of his financial needs then he would not be dependent on others"

The court of Appeal upheld this view.

In our case it would appear that James' resources were perhaps less than 50% of the amount required to support himself but he himself was the largest single contributor to his financial needs. The question then becomes does this make him principally dependent for financial support on "the other person or other person's spouse".

In Hou vs. State Farm Insurance Company, (November 16, 1998), FSCO A97-001159, Arbitrator Baltman dealt with a situation where a child was receiving financial support from both his divorced parents. In addition, the child earned a significant amount himself. Arbitrator Baltman made it clear that one's parents' support cannot be added to the other parent's in order to establish financial dependency on one parent, when the parents have been divorced. I agree with Arbitrator Baltman in that regard, and as James' parents were divorced they must be looked at separately.

Arbitrator Baltman then goes on to state:

As Mr. and Mrs. Hou were no longer spouses at the time of the accident, Mr. Hou gets no credit for any reliance that Derek had on his mother. Quite the opposite: Derek's relies upon Mrs. Hou as one of many other sources of support which must be added together to determine how they compared to the support given to Mr. Hou.

In Najem vs. Economical Insurance Company (July 27 1993) O.I.C. A-00315 and A-3116 Arbitrator MacIntosh dealt with a situation where the injured party was partially financially dependent upon his mother at the time of the accident. In fact, his mother made the greatest single contribution to his support. She held, however, that the total of the applicant's other financial resources were greater than his mother's contribution and accordingly he was not principally dependent for financial support upon his mother, within the meaning of the schedule.

In our case, if you were to combine James' income with either parent, they would clearly be greater than the contribution of the remaining parent. If one were to apply the logic of Hou and Najem, James would clearly not be principally dependent on either party for financial support. It is not, however, necessary for me to accept this broad approach in our case as James' income alone would appear to have been greater than the contribution of either parent and I therefore find that James was not primarily dependent for financial support on either his mother or father. He was his own principal financial supporter at the time of the accident.

It is Economical's position that James was an insured person in a number of other ways pursuant to the laws of British Columbia. He was a licensed driver in the province of British Columbia and as such granted a certificate of insurance by ICBC. In addition he was at all material times ordinary resident with Mr. Ryan Chalke, a B.C. resident, a licensed B.C. driver. In addition at the time of the accident he was in a vehicle not required to be licensed in B.C. and operated by a licensed B.C. driver, namely his brother, John Evans Brown.

Two experts in motor vehicle insurance law in the province of British Columbia testified at the hearing: Mr. Brian Ross on behalf of Economical Insurance Company and Mr. Richard Barrow on behalf of the ICBC. For the most part their views as to the applicable law and its' impact corresponded.

They were both of the view, which I accept, that James Brown was an "insured" pursuant to section 78 part vii of the Regulations of the Insurance (Motor Vehicle) Act, RSBC 1996, c.231, in three possible ways:

Section 78 defines an "insured" as:

- (c.1) As described in section 42 who is not default of premium payable under section 45,
- (c.2) A member of a household of an insured described in paragraph (c.1),
- (d)(ii) An occupant of a vehicle that ... is not required to be licensed in the province but is operated by a person named in a driver's certificate.

I will deal with each section separately. Dealing first with section 78 (c.1) this in turn refers to section 42, which defines insured for the purposes of Part 4, "driver's certificates", in terms which embrace a resident named on a driver's certificate. A "driver's certificate" is deemed to be incorporated in every driver's license, under section 43 (1)(a). It was agreed that James Brown held a B.C. driver's license and was not in default and as was such, an "insured".

James Brown would also be an "insured" pursuant to sub section (c.2) by being a member of a household of an insured. By section 1 of the Regulation, "household" means "every person ordinarily resident in the same dwelling unit". Ryan Chalke held a valid B.C. driver's license. The question would then arise as to whether or not both Ryan and James were "ordinarily residing" together at the time of the accident. I do not propose to discuss this issue in great detail at this time, as it is sufficient that James Brown be an "insured" under any of the sub sections found in the section 78. However I find that Ryan and James were ordinarily resident in the same apartment. Both had lived in the apartment since January, 1998 and James was not the member of any other household.

Turning to section 78 (d)(ii) the vehicle in question at the time of the accident was driven by James' brother, John Evans Brown, who was named in a British Columbia driver's certificate. As such, he was an "insured".

I do find that James Brown was not an insured pursuant to section 78 (c) - a member of the household of a person named in an owner's certificate by way of his connection to his mother and stepfather. While James' mother and stepfather did own a car and had a owner's certificate, James was not a member of that household.

Having determined that James Brown was an "insured" for the purposes of the Regulation under the Insurance (Motor Vehicle) Act, the question becomes what flows from that. This would, subject to very important exceptions, entitle the "insured" to Part 7 "accident benefits". It is

necessary, however, to divide the analysis to income replacement benefits and medical/rehabilitation benefits as they are dealt with somewhat differently.

INCOME REPLACEMENT BENEFITS:

Pursuant to section 80 of the Regulation, James Brown would become entitled to "disability benefits for employed person". This is subject, however, to section 81 "Deduction for other benefits". If the benefits under the Economical policy constitute "other disability benefits", then ICBC's liability pay section 80 benefits will be limited as set out in section 81(2). What constitutes "other disability benefits" is defined in section 81(1) as benefits "payable under a contract or plan of automobile insurance providing accident benefits similar to those described in section 68 and 169 of the Insurance Act".

The first question which then must be addressed is whether the monies payable under the Economical policy would be "payable under a contract or plan of automobile insurance". While the phrase is not defined in the Regulation, I have no doubt but that the monies payable under the Economical policy would so qualify. The more difficult question is whether or not the provisions of the Economical policy provide "accident benefits similar to those described in sections 168 and 169 of the Insurance Act". This first requires a discussion of the term "similar".

The meaning of that term for the purposes of comparing Insurance Act accident benefits has been analysed in Gurniak et al. vs. Nordquist et al. (1997), 34 B.C.L.R. (3rd) 206(S.C.). The

British Columbia Supreme Court in that case rejected the two extremes of "exactly alike" and "any quality of likeness at all" and stated that it was sufficient to be of "the same general nature or character". In that case the Court found that while the extra provincial benefits in question were "substantially higher" than the B.C. benefits, they were nevertheless "of the same general nature or character".

We must then turn to section 169 of the Insurance Act which provides for the provision of accident benefits. We then move to section 80 of the Regulation which describes the "disability benefits for employed persons". This covers what in Ontario would be known as "income replacement benefits". These are more fully set out in Part II of section B.S.B - accident benefit which is a schedule to the Act. It requires that the person be employed at the time of the accident. The injured person's entitlement is then 80% of their gross weekly earnings up to what was originally \$50 per week and what I understand to be now \$300 per week. For the first 104 weeks the person must be disabled from their own occupation or employment. After 104 weeks they must be unable to do any job for which they are suited by way of education, training, or experience.

This compares very closely to the income replacement benefits available pursuant to Bill 59 in Ontario, where there are benefits of up to \$400 per week based on 80% of net weekly income. The test for entitlement is essentially the same for both the pre and post 104 week time frame. Based on the test as set out in the Gurniak decision, I am satisfied that the provisions regarding income replacement benefits available pursuant to s.80 of the Regulation are sufficiently similar

to the income replacement benefits available under Bill 59 in Ontario so that the limiting provisions of section 81(2) of the Regulation apply.

Section 81(2) of the Regulation states:

Where an employee is injured for which disability benefits are payable under section 80 and some or all of the insured's lost earnings arise from the accident are payable as other disability payments, the corporation shall not pay any disability benefits to the insured under that section unless the weekly gross total of other disability payments payable to the insured is less than 75% of the weekly gross earnings of the insured, in which case the corporation shall pay the insured the lesser of:

- (a) the amount of disability benefits payable under section 80, or
- (b) the weekly net lost earnings of the insured.

The effect of section 81(2) is to make the ICBC the secondary insurer with regard to income replacement benefits. It obligates the ICBC to pay benefits only to top up the insured's recovery where the insured's recovery through "other disability benefits is less than 75% of his weekly gross lost earnings". Thus, in this case, the Economical is the primary insurer and ICBC would only top up the benefits, if required.

MEDICAL REHABILITATION BENEFITS:

The situation with regard to medical rehabilitation benefits is somewhat more complex. In British Columbia those benefits are covered by section 88 of the Regulation. Section 88(6) of the Regulation provides that the ICBC is "not liable for any expenses payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or payable by another insurer". That provision must, however, be read in conjunction with section 104(2) of the Regulation, which provides that "the terms, conditions, and priorities" of an extra provincial jurisdiction will be taken to govern the payment of ICBC Part 7 benefits. While section 80 (income replacement benefits) are exempted from this provision by section 104(3) of the Regulation, section 88 (medical rehabilitation benefits) are not. Section 104 (2)(b) states:

- (a) Where an insured is also insured by a contract of automobile insurance providing the benefits or insurance described in sections 152 and 168 of the Insurance Act or providing under similar legislation of another jurisdiction similar benefits or insurance, the liability of the corporation [ICBC] for payment of benefits under this part shall be determined, . . .
- (b) Where a claim is made in respect of an accident that occurs in another jurisdiction, as if the provisions of the legislation of that jurisdiction respecting the terms, conditions, and priorities of automobile insurance applied in respect of benefits provided under this part.

Thus, James Brown's entitlement to ICBC medical rehabilitation benefits will be affected if the Economical policy provides "similar benefits or insurance" "under similar legislation" . . . to sections 152 and 168 of the British Columbia Insurance Act. Section 152 refers to accident benefits set out in the Schedule of the Insurance Act, where provision is made for "medical and rehabilitation benefits" as well as "death and total disability benefits". Section 168 refers to insurance "against expenses for medical, surgical, ambulance, hospital, professional nursing or funeral services".

This then leads to the same type of analysis undertaken with regard to income replacement benefits using the "similar" test as set out in the Gurniak case. In Ontario, medical and rehabilitation benefits are covered by sections 14 and 15 of Bill 59. The medical benefits cover such areas as medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services, chiropractic, psychological, physiotherapy services, medication, prescription eyewear, dental services, hearing aids, wheelchairs, transportation to and from treatment centres as well as other goods and services of the medical nature that the insured person requires. The maximum amount payable in Ontario for medical rehabilitation benefits is \$100,000, or in the case of a catastrophic impairment, \$1,000,000. While the Ontario benefits may appear to be somewhat broader and more generous, I am satisfied that they are of the same general nature or character.

That being the case the provisions of section 104(2)(b) apply and we must therefore apply the terms, conditions and priorities of Ontario automobile insurance in respect of the B.C. medical rehabilitation benefits.

Before doing so, however, I will first deal with a point raised by counsel for the ICBC. That counsel submitted that British Columbia accident benefits are obtainable when an injured party is an "insured" by way of holding a driver's certificate or being the member of a household where someone else holds a B.C. driver's certificate or being an occupant of a vehicle not required to be licensed in B.C. operated by a British Columbia driver is different than if one has a British Columbia policy by way of having a British Columbia Owner's Certificate. Counsel for the ICBC maintained that in the situation where one is an insured by in way of a driver's certificate or being associated with someone who does, rather than an Owner's Certificate, the accident benefit coverage is secondary to any other policy and that would include the Economical policy.

In light of my findings, the point is not critical to the disposition of this case, however since counsel has raised the point I will deal with it.

Mr Surinder Parmar, senior insurance analyst for ICBC testified on behalf of ICBC. He explained the basic frame work of motor vehicle insurance in B.C. He explained that a distinction must be drawn between having a Driver's Certificate and an Owner's Certificate of Insurance and Vehicle License.

In essence, it was his testimony that if you own a motor vehicle in B.C. you must have an Owner's Certificate. This means that you acquire full motor vehicle insurance, including accident benefit coverage when you get your license plates in British Columbia. The coverage you get when you acquire a driver's license is more basic, in Mr. Parmar's opinion. Essentially, if you have no other insurance by way of your Owner's Certificate, or being a dependent of someone with an Owner's Certificate, or be entitled to benefits from some other insurance, then the coverage provided by the driver's certificate will apply. This would then provide the Part 7 accident benefits. It would in effect, be a policy of "last resort. Since James Brown did not have a B.C. Owner's Certificate he would only be entitled to Part 7 accident benefits by way of being an insured through the driver's certificate, or living with Ryan Chalke, if no other insurance were available. Since the Economical policy was available, the ICBC need not respond.

In support of this position, Mr. Parmar points to the requirement for B.C. residence to acquire a "Binder for Owner's Interim Certificate of Insurance" when acquiring a vehicle out of province. This allows the person to bring the vehicle back to B.C. for the purposes of registration and licensing in B.C.

The coverage provided by the Binder for Owner's Interim Certificate of Insurance is created by section 150(1)(e) of the British Columbia Insurance (Motor Vehicle) Act. Section 150(2) provides that if you obtain such a Binder then you are entitled to, among other benefits, accident benefits through that policy.

In order to determine if the Binder applies in this case one must, pursuant to section 150(1)(e), go to Form APV-38 which sets out the Binder Certificate which states:

- (1) A certificate is invalid if issued for a vehicle that is not required to be licensed under the Motor Vehicle Act, (Ins.)(MV). Act, section 37.
- (2) A Certificate is deemed invalid as soon as:
 - (a) The vehicle is registered and licensed in another province or state.
 - (b) The vehicle in another province or state that by law then requires the vehicle to be registered and licensed there.

Section 37 of the Insurance (Motor Vehicle) Act states:

- (1) An Owner's Certificate must not be issued under this Act for a motor vehicle or trailer for its' use or operation for which a permanent license is not required under the Motor Vehicle act...
- (2) An Owner's Certificate is deemed to have lapsed and is void immediately when the vehicle for which the Owner's Certificate is issued is registered and licensed in another province or state.

Section 37(1) then takes us to the Motor Vehicle Act section 21(1) which states:

"Registration of Foreign Motor Vehicles and Trailers"

The owner of motor vehicle or trailer

- (a) that is duly registered outside of B.C.
- (b) for which the licensing requirements of the jurisdiction in which it is registered are fulfilled, and
- (c) that has displayed on it registration number plates of that jurisdiction for the current year,
is exempt from registration to register and license the motor vehicle or trailer under this Act, if
- (d) the owner or operator of the motor vehicle or trailer is in B.C. for, and uses the motor vehicle or trailer for touring purposes only for a period of 6 months,
- (e) the owner or operator of the motor vehicle or trailer is in B.C. for, and uses th motor vehicle or trailer for other than touring purposes for a period of 30 days from the date he or she began to operate the motor vehicle or trailer on a highway in B.C."

In light of the fact that the vehicle in question was already registered and licensed in Ontario, it would appear to me that there was no need for a Binder's Certificate in this instance.

Counsel for Economical argues, with support of his B.C. law expert witness, Mr. Ross, that the issue of the binder is irrelevant in light of the accident benefit coverage provided by way of the driver's certificate. In the absence of any further proof that the B.C. coverage is one of "last resort", I am in agreement with that proposition.

APPLICABLE ONTARIO LAW:

As section 104(2) of Regulation 447/83 of the Insurance (motor vehicle) Act of British Columbia directs us to the legislation of Ontario regarding the terms, conditions and priorities of automobile insurance regarding medical rehabilitation benefits, we must therefore look to the Insurance Act of Ontario in this regard. Counsel for the ICBC submits that we look to section 268(2)(1) and that pursuant to sub section (ii) Economical Insurance Company, the insurer of the Volkswagen Fox motor vehicle involved in the accident should pay the medical rehabilitation benefits.

That section states:

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 sub paragraph (i), the occupant has recourse against the insurer of the automobile in which he or she was an occupant.

In light of my findings of fact, above, I am of the view that section 268(2)(i) would not apply and that section 268(2)(ii) would normally apply. Counsel for Economical submits, however, that one must first consider the effect of section 268(7) of the Insurance Act of Ontario which is one of the "terms, conditions and priorities of automobile insurance" in the province of Ontario.

That section states:

The insurance mentioned in sub section (1) is excess insurance to any other insurance indemnifying the insured person or in respect of a deceased person for the expenses.

Economical argues that by section 268(7) the Ontario insurance as described in section 268(1) is excess to the B.C. insurance. In order to determine if this is in fact so, one must first examine the type of insurance described in section 268(1). That section states:

Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefit Schedule is made or amended, shall be deemed to provide for the Statutory Accident Benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

Economical argues that section 268(7), in conjunction with section 268 (1) creates a situation where the Ontario Accident Benefits are excess to the B.C. benefits. In other words, the insurance referred to in section 268(1) is Ontario insurance and therefore excess and since in its'

view, section 268(1) does not include B.C. motor vehicle liability insurance, the excess provisions of section 268(7) do not apply to the B.C. benefits.

ICBC argues, however, that the B.C. policy is a contract of motor vehicle liability insurance and therefore section 268(7) also applies to the B.C. benefits. In order to determine if this is in fact the case, we must first determine what constitutes a "motor vehicle liability policy" as referred to in section 268(1). This is defined in section 1 of the Insurance Act of Ontario as:

a policy or part of a policy evidencing a contract insuring,

- (a) the owner or driver of an automobile; or
- (b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person's employee or agent or any other person on that person's behalf,
- (c) against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof; . . .

If one then turns to Regulation 447/83 of the Insurance (motor vehicle) Act of British Columbia and more specifically to section 49 thereof, we find what is provided by way of insurance for drivers in B.C. That section states:

subject to section 49.1, the corporation shall indemnify an insured who is not in default of premium payable under section 45 for liability imposed on the insured by law for injury or death of another or loss or damage or property of another that

- (a) arises out of the use or operation by the insured of a vehicle not described in an Owner's Certificate issued to the insured or to a member of the insured's household, and
- (b) occurs in Canada or the United States of America or one . . .
.travelling between Canada and the United States of America . . .

In light of this wording I am satisfied that a B.C. Driver's Certificate does provide a motor vehicle liability policy as set out in section 268(1) of the Insurance Act of Ontario.

I do not accept Economical's submission that the motor vehicle liability insurance referred to in section 268(1) is limited to Ontario motor vehicle liability insurance. Neither section 268(1) or (7) makes such a limitation. Should the legislature have intended such a limitation it could have so stated. Indeed, if as is so often stated, the basic idea is to make motor vehicle liability insurance excess to other insurance, then that is consistent with my interpretation of section 268.

In light of the above, I find that section 268(7) does not apply to make the Ontario policy excess to the B.C. policy. Having decided that one must then turn to the priority Schedule set out in section 268(2) of the Insurance Act, as set out above. As noted above, I have found that section 268(2)(1)(i) does not apply, and one must therefore move to section 268(2)(1)(ii). James Andrew Brown was an occupant of the Volkswagen Fox insured by Economical and therefore Economical is responsible to pay the medical rehabilitation benefits to Mr. Brown.

COSTS:

I may be spoken to with regard to the issue of cost if the parties are unable to agree with regard to this matter.

Dated at Toronto this 25th day of February, 2002.

M. Guy Jones

Arbitrator