

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,  
c. I. 8, and REGULATION 283/95, as amended,

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

AND IN THE MATTER OF AN ARBITRATION

**BETWEEN:**

**ALLSTATE INSURANCE COMPANY**

Applicant

- and -

**KINGSWAY GENERAL INSURANCE COMPANY**

Respondent

- and -

**CAA INSURANCE COMPANY**

Respondent

**DECISION ON PRELIMINARY ISSUE**

**COUNSEL:**

Eric Grossman for the Applicant

Mark Fonseca for the Respondent Kingsway General Insurance Company

Lee Samis for the Respondent CAA Insurance Company

**ISSUES:**

1. Was Linda Terris a “deemed named insured” under the Allstate policy of motor vehicle liability insurance at the time of the motor vehicle accident?

**DECISION:**

Linda Terris was not a “deemed named insured” under the Allstate policy.

**HEARING:**

This arbitration was held on October 3, 2007 in the city of Toronto, in the province of Ontario.

**FACTS AND ANALYSIS**

This arbitration arises out of a motor vehicle accident which occurred on January 3, 2004. On that date, Victor Terris was involved in an accident involving a motor vehicle that was insured by Kingsway General Insurance Company (“Kingsway”). Victor Terris applied for and received accident benefits from Allstate Insurance Company (“Allstate”), who insured the 1992 Plymouth Sundance and listed Darlene Montreuil as the named insured on that policy.

While Allstate has been paying the accident benefits, it takes the position that either Kingsway, as the insurer of the striking vehicle, or CAA Insurance Company (“CAA”) as the insurer of Victor’s father, is higher in priority and therefore should be responsible for the accident benefit payments.

As noted above, Darlene Montreuil, Victor Terris' grandmother, is the named insured on the Allstate motor vehicle liability policy. Her daughter, Linda Terris, is a listed driver under that policy. Allstate takes the position that this puts them potentially lower in priority than the other two insurers. Kingsway and CAA take the position, however, that Linda Terris was the real owner of the Allstate insured Plymouth Sundance and that she should have been entered as the named insured on the policy. The issue to be determined in this preliminary hearing then, is whether Linda Terris should be considered the "deemed named insured" on the Allstate policy at the time of the accident.

It is the position of CAA and Kingsway, based on all the facts of this case, that Allstate should have put Linda Terris on the policy as the named insured rather than her mother. In order to understand their position, it is necessary to review some of the facts of the case.

In the summer of 2003, a 1992 Plymouth Sundance was acquired by either Linda Terris or Darlene Montreuil, or both. Linda Terris gave a signed statement in April of 2003 wherein she stated that she, Linda, bought the Sundance but because she had gone bankrupt, didn't think she could register it in her name, and accordingly registered it in her mother's name, Darlene Montreuil. The registration for both the plate and vehicle portion showed Darlene Montreuil as the owner.

There was some question as to who actually paid for the vehicle. Linda indicated in her signed statement that she bought it. She later gave sworn testimony that she paid \$800 for it but that her

mother or stepfather may have paid approximately \$500 to “get it on the road”. By that I assume that according to Linda Terris, her mother and/or stepfather paid for repairs to make it road worthy.

Darlene Montreuil also gave a signed statement in April of 2004. In that statement she indicated that Linda Terris paid \$800 for it, of which, Linda Terris:

“put in about \$50 and I paid the balance, I basically bought the car for her, and because she went bankrupt maybe two years ago, she wasn’t able to have a car in her name. As such, I agreed to put the vehicle under my policy, and I am registered on the ownership, both the plate and vehicle portions... as far as I’m concerned, it is my vehicle and I could go and get it any time I wanted. Since it’s purchase, Linda has had essentially sole use and control of the vehicle.”

Darlene was questioned under oath prior to the hearing and her transcript was filed at the hearing. With regard to the purchase of the car and related matters, Linda Terris indicated, among other things, that Darlene Montreuil paid for the insurance, Linda paid for the gas and her stepfather took care of the maintenance.

Based on the evidence, CAA and Kingsway take the position that Linda Terris was the real owner of the vehicle. She had the primary and almost exclusive use of the automobile and should have been listed as the “named insured” of the vehicle. As such, they urge me to find that Linda Terris be considered the “deemed named insured”.

CAA's and Kingsway's first submission in this regard relates to what they say is a failure by Allstate to comply with the provisions of section 232 and 239 of the Insurance Act. They argue that Linda Terris was the real owner of the car and as such, there should have been a signed application for car insurance as well as the other provisions of section 232 and 239 of the Insurance Act. They suggest that it may have simply been easier for the Allstate agent to add the 1992 Sundance to Darlene Montreuil's existing policy rather than have to go through the more cumbersome administrative process of creating a new policy for Linda Terris. Counsel for CAA also suggested that the requirement of section 232 may apply when adding a car to an already existing policy. I see no such requirement in that section. I also saw no compelling evidence to suggest that the Allstate simply put the car in Darlene Montreuil's existing policy for administrative convenience.

Counsel for CAA and Kingsway argue that the principal of "spoliation" should apply to this fact situation. Briefly stated, spoliation is an evidentiary rule raising a presumption that the evidence destroyed would be unfavourable to the party who destroyed it, but the presumption may be rebutted. (see Spasic Estate vs. Imperial Tobacco, 188 DLR (4<sup>th</sup>) 577(Ont. CA), and Drouillard vs. Cogeco Cable Inc., 42, C.C.E.L. (3<sup>rd</sup>) 22 (Ont. SC.).

In our case, it is unclear what application forms or communications Allstate's agent forwarded to Allstate to give effect to the transaction that insured the Plymouth Sundance. Allstate has only a computer print out respecting this coverage as the Allstate agent subsequently retired and his paper file were not transferred to the agent, and has either been destroyed or has gone missing.

Having said that, the computer printouts amount to approximately 100 pages of transactions and notes related thereto. It is clear from those records, as well as “pink slip” filed at the arbitration, that the car in question was insured with Darlene Montreuil listed as the named insured, and Linda was a “listed driver” on the policy.

It is worthwhile to note that it is not Allstate’s records that are missing but its’ agent. While this is regrettable, I see no evidence of this having been done deliberately or to hide incriminating evidence. An explanation has been provided which, in my view, has rebutted the presumption. Having said that, the lack of documentation does create some difficulties which I will refer to below.

In Liberty Mutual Insurance Company vs. Markel Insurance Company of Canada (unreported decision of Arbitrator Jones, July, 2006), I indicated that I would be prepared to accept that in the right circumstances someone other than the applicant and owner could be a “deemed named insured”. In reviewing the evidence before me, it would appear that Linda Terris contributed some amount to the purchase of the car. It would also appear that the fact that Linda Terris had declared bankruptcy before the car was purchased played some role in the car being registered and insured in Darlene Montreuil’s name. Clearly Linda Terris had the primary and almost exclusive use of the motor vehicle. Linda Terris paid for the gas and Darlene Montreuil’s husband paid for the maintenance. I am satisfied on the evidence before me that there may have been a sufficient connection between Linda Terris and the vehicle in question such that Linda Terris could have been a “deemed named insured”. That is not, however, the end of the inquiry.

In order for Linda Terris to be a “deemed named insured” and Allstate therefore be held responsible in priority for payment of accident benefits, as the insurer of a “named insured”, I am of the opinion that it is necessary for Allstate, in these circumstances, to either have been aware or ought to have been aware of the facts such that they should have listed Linda Terris as a named insured. The evidence, in this regard, is far from clear.

Counsel for CAA and Kingsway rely on the signed statement of Linda Terris given to an Allstate representative on April 6, 2004 wherein she stated:

I know my mother told the agent that I bought the car, as I heard my mom on the phone.

Linda Terris was questioned under oath prior to this arbitration and her transcript was filed at the arbitration. She was questioned at some length regarding the ownership and Allstate’s knowledge of the situation:

418. Q. It’s my understanding that the vehicle was registered as your mom’s vehicle?  
A. Yes
419. Q. And that when the insurance was sought on the vehicle, it was sought for your mother because she was listed as the owner of the vehicle; is that right?  
A. Yes, with me being the principal driver.
420. Q. Correct. To your knowledge had Allstate via the broker or some other way, ever been notified that that wasn’t the case? In other words, that it wasn’t your mom’s car, that it was your car?

Ms. Von Buchwald: okay, you can ask her: Did she ever talk. - - why don't first say: did she ever talk to the broker?

By Mr. Grossman:

421. Q. Did you ever talk to the broker?  
A. No.
422. Q. Okay. Were you ever present when the conversations were had with the broker?  
A. Yes.
423. Q. Okay. And during the time that you were present with the broker, what was your understanding of what was discussed with respect to the ownership of the vehicle?  
A. My mother was insuring it with me being the principal driver.
- 434.Q. Okay and that doesn't speak to ownership. Who owned the car, according to what was told as you heard it, to the broker who's car was it?  
A. I paid for the car, my father - - my stepfather paid \$500 to get it on the road for me.
- 424.Q. Right.  
A. But it didn't matter who owned it, my mother was doing me a favour because I had gone bankrupt. I didn't think I could put a paid vehicle in my name.
- 426.Q. Now, as far as the broker was being told, to your knowledge, it was your mom's car; right?  
A. Yes.
- 427.Q. Okay. And that information never changed from the time it was put on the road to the time of Victor's accident; is that right? . . .  
A. Yes that's right.

Darlene Montreuil, in her signed statement, stated:

“Regarding the Sundance, it was purchased by my daughter Linda Terris, around the summer of 2003. I think she paid \$800 for it, and I believe she put in about \$50 and I paid the balance. I basically bought the car for her and because she went bankrupt maybe 2 years ago, she wasn't able to have a car in her name. As such, I agreed to put the vehicle under my policy, and I am registered on the ownership, both the plate and vehicle portions. Linda is identified as a listed driver under my policy and is the principal

driver of the Sundance. My insurance agent is Martine Gagne of Newmarket and I think she has an office in Wasaga Beach. As far as I am concerned, it is my vehicle and I could go and get it anytime I wanted but Linda needed it.”

I am not persuaded that Allstate or its agent knew or ought to have known enough of the situation such that they should have put Linda Terris down as a named insured. The only evidence that suggests Allstate had knowledge is Linda’s statement that

“I know my mother told the agent that I bought the car, as I heard my mom on the phone”.

At most we have Linda Terris testifying to hearing half a conversation. Linda’s sworn answers when questioned prior to the hearing leave a very different picture of Allstate’s knowledge. I also find it odd that Darlene Montreuil would tell the Allstate agent that Linda Terris bought the car when Darlene Montreuil signed a statement that she, Darlene, paid for all but \$50 for the car.

In light of the above, there is insufficient evidence to conclude that Allstate knew or ought to have known of the situation such that they should have put Linda Terris on the policy as a named insured.

I am reinforced in this view by two arbitration decisions which have dealt with somewhat similar situations. In Wendy and Michael Kamstra vs. Allstate Insurance Company of Canada and State Farm Mutual Automobile Insurance Company (unreported decision of Arbitrator Jay Rudolph, released October 30, 1996), the Arbitrator dealt with a situation where Wendy Kamstra purchased a vehicle. However, the ownership of the vehicle was placed in her mother’s name

(Mrs. Taylor). Mrs. Taylor testified that this was done as Ms. Kamstra was separated and was going through bankruptcy proceedings. Mrs. Taylor testified that she had told her insurance agent that Ms. Kamstra was in fact the owner of the vehicle. Arbitrator Rudolph found that while Mrs. Taylor told the agent that Ms. Kamstra would be the principal driver of the vehicle, she did not tell him that Ms. Kamstra was the owner. Accordingly, Arbitrator Rudolph did not find that Ms. Kamstra was a deemed named insured under the policy.

In Axa Assurance vs. ING Insurance Company of Canada (unreported decision of Arbitrator Samis, released May 25, 2000) a Mr. Michael Yelin was insured by Axa. Mr. Yelin had a business relationship with CNG Freight Systems and Axa insured CNG Freight Systems. Mr. Yelin acquired a 1994 Volvo Tracker vehicle. In May 2003, Yelin and CNG Freight Systems entered into a subcontractor agreement which is described as “the standard contract that CNG Freight Systems would have their owner – operators execute”. CNG Freight Systems arranged for the 1994 Volvo Tracker to be added to the insurance policy with Axa. Despite being named the “registered owner” in the insurance endorsement, the arbitrator found that this did not raise Mr. Yelin to the status of a named insured as that was not the intent of the parties.

In light of all of the facts of our case, I am satisfied that Linda Terris was not a “deemed named insured” under the contract with Allstate but rather a listed driver.

In the event that the parties are unable to agree with regard to the issue of costs, I may be spoken to.

**Dated in Toronto, this \_\_\_\_\_ day of October, 2007.**

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**M. Guy Jones**