

**IN THE MATTER of the Insurance act, R.S.O. 1990,
c.1.8 and Regulation 283/95,**

**AND IN THE MATTER of the Arbitration Act,
1991, s.o. 1991, c.17**

AND IN THE MATTER of an Arbitration between:

THE CO-OPERATORS INSURANCE COMPANY

Applicant

- and -

**M.J. OPPENHEIM IN HIS QUALITY
AS ATTORNEY IN FACT IN CANADA FOR UNDERWRITERS,
MEMBERS OF LLOYD'S OF LONDON, ENGLAND**

Respondent

AWARD

Appearances:

**Phillipa Samworth
Counsel for the Applicant**

**Anthony Bedard
Counsel for the Respondent**

ISSUES:

Is the Co-operators or Lloyd's of London responsible for payment of statutory accident benefits to or on behalf of Jonathan Wettlaufer arising out of a motor vehicle accident which occurred on October 19, 2000?

HEARING:

This matter was heard before me, M. Guy Jones, Arbitrator, on June 21, 2002, in the City of Toronto in the Province of Ontario.

THE FACTS:

This matter proceeded by way of an agreed statement of facts. No evidence was led at the hearing.

It was agreed that Mr. Jonathan Wettlaufer was involved in a motor vehicle accident on October 19, 2000. At that time he was driving a 1994 Crown Victoria motor vehicle which was being operated as a taxicab. At the time of the accident Mr. Wettlaufer also owned a Ford motor vehicle which was insured with Co-operators Insurance Company.

Mr. Wettlaufer applied for statutory accident benefits from Co-operators which he received and continues to receive benefits from that company.

The aforementioned taxi was insured through Lloyd's of London. The named insured on the Lloyd's policy was Ms. Janette Bolger, the owner of the taxi. Ms. Bolger had allowed Mr. Wettlaufer to operate the motor vehicle as a taxicab.

Co-operators has commenced this arbitration against Lloyd's pursuant to Ontario Regulation 283/95, taking the position that Lloyd's was the insurer of the motor vehicle of which Mr. Wettlaufer was an insured and therefore in accordance with section 268 (2)(1)(i) of the *Insurance Act*, responsible to pay the accident benefits.

Bill 59, the Statutory Accident Benefits Schedule (SABS), the applicable legislation defines an

"insured person" as:

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 involved in an accident in or outside of Ontario that involves the insured automobile or another automobile

Co-operators argues that Mr. Wettlaufer was a "named insured" by operation of section 66 (1)(a) or (b) of Bill 59 which states:

An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

- (a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or
- (b) the insured automobile is being rented by the individual for a period of more than 30 days.

It is agreed between the parties that for the purpose of this matter that Mr. Wettlaufer did have the regular use of the Bolger automobile.

I will deal with each subsection separately.

Is Mr. Wettlaufer deemed to be a named insured of Lloyd's by operation of section 66(1)(a) of Bill 59?

Co-operators takes the position that Mr. Wettlaufer had the motor vehicle in question made available to him by Ms. Bolger alone, the Cambridge City Cab Company alone, or the two acting together. Any of these three, in their view, constitute an "other entity". Lloyd's on the other

hand, takes the position that Ms. Bolger made the motor vehicle to Mr. Wettlaufer in her capacity as an individual and not as an "other entity" and such section 66 (1)(a) does not apply.

While I will discuss the precise nature of the capacity in which Ms. Bolger made the motor vehicle available to Mr. Wettlaufer at a later point in this decision, it is useful to set out a few basic facts at this point.

Ms. Bolger is a sixty-one year old woman who purchased a taxi cab and taxi license on March 31, 2000. She paid \$49,000.00 for the right to apply to the Municipality of Kitchener Waterloo to have a taxi license assigned to her as well as obtaining a 1988 Lincoln Continental which was being operated as a taxi and also acquired shares in the Cambridge City Cab Company. Mrs. Bolger then became one of thirty-four shareholders in the Cambridge City Cab Company.

It is worthy to note that while the primary purpose of the Cambridge Cab Company was to provide a dispatch service, it provided a number of other functions as well. Ms. Bolger would not have been able to operate the cab in Kitchener Waterloo without being a shareholder in the Cambridge Cab Company.

It was agreed that Ms. Bolger owned the cab in her personal capacity, even though she had no intention of driving it personally as a cab. Mr. Wettlaufer was a regular driver of the Bolger cab, but not the only driver. The financial arrangement between Ms. Bolger and Mr. Wettlaufer was

that Mr. Wettlaufer got forty percent of the meter fare and tips while Ms. Bolger got sixty percent of the meter fare.

The question of whether an individual can be considered an "other entity" for the purposes of section 66 (1)(a) was first considered by Arbitrator Nancy Makepeace in Sittler vs. Canadian General Insurance Company (1993) O.I.C.D 72. In that case, Ms. Sittler drove a cab that was owned and co-driven by a Mr. Johnson. The vehicle was insured in the name of Mr. Johnson and made available to Ms. Sittler by Mr. Johnson.

Arbitrator Makepeace found that the cab was made available for Ms. Sittler's regular use by a "sole proprietor or other entity". Counsel for Lloyd's pointed out that there was very little analysis of the term "other entity" by Arbitrator Makepeace and that the Sittler decision was not determinative of the issue. I am in agreement with counsel in that regard.

The issue was dealt with more recently by Arbitrator Samis in State Farm Mutual Automobile Insurance Company vs. Kingsway General Insurance Company (unreported decision dated October 20, 1999). In that case the insured party, Robert Scheffler, was injured while a passenger in a motor vehicle which was used as part of a rotating car pool. The vehicle in question was owned by his mother, and when it was Robert's turn to provide a car for the pool he used one of his mother's two cars. While Arbitrator Samis found that the vehicle was made available for Robert's regular use, he held that it was not made available to him by an "other entity" as required by section 66 (1)(a).

Arbitrator Samis stated:

while the parties have put definitions before me which support the possibility that the term "entity" could encompass almost anything or being, I can not conclude that the drafters of clause 66 (1) use this language with the intention of describing individuals. I note that throughout the Regulation that people are referred to as "individual" and in other places "person". I find it difficult to conclude that section 66 (1) was intended to embrace individuals or persons without using either term and used, instead, the term "other entity". As the drafters have used different words - "individual" versus "other entity" -, different meanings should be given to the terms: Driedger on the Construction of Statutes, 3rd edition, p.164. As a matter of ordinary parlance, it would be very unusual to refer to an individual as "entity", not withstanding broad dictionary definitions which sanction this use.

As submissions made supplementary to our original hearing, the parties have addressed a further interpretation issue. Clause 66(1)(a) necessitates that the vehicle be "made available by a corporation, unincorporated association, partnership, or sole proprietorship or other entity". This appears to be a case where it is appropriate to use the ejusdem generis rule or limited class rule, and as an interpretative aid. As quoted by Driedger on the Construction of Statutes 1994, Justice La Forest defined the rule as follows:

whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that proceeds it.

In my view, the list contained in clause 60 (1)(a) described businesses and organisations that might own automobiles. The list embraces entities which might have business purposes or other objects. But it clearly describes entities that have some goals or structure other than private individuals. When this list is followed by the words "or other entity" one is driven to the conclusion that the section refers to other varieties of organisations similar to those specified. Applying this interpretation to the scope of "other entity", I do not conclude that Hannelore Scheffler is an "other entity" as contemplated by the Regulation.

I am in general agreement with Arbitrator Samis in his statement of the law and how it was applied in that particular fact situation. It now remains to examine the facts of this particular case.

As stated above, the owner of the taxicab in question was Ms. Bolger. She bought the motor vehicle in her personal capacity but not for her personal use. It was a business acquisition. She also acquired the taxi cab owner's license in her personal capacity. She, in her personal capacity acquired the shares of the Cambridge Cab Company.

Counsel for Co-operators submits that the cab in question was made available by either Ms. Bolger and Cambridge Cab Company as a joint venture, constituting as "other entity", or alternatively it was the Cambridge Cab Company that made the vehicle available to Mr. Wettlaufer.

In order to determine who made the vehicle available and what the consequences of that are, we must examine the relationship between the parties in greater detail.

The Application for Insurance indicates that both Jonathan Wettlaufer and Ms. Bolger were listed as drivers, and there is a reference to a driver pool in the Application. The Certificate of Insurance also refers to the "driver pool" as listed drivers. From this it would appear that the motor vehicle was intended to be used as a taxicab. The evidence as set out in the Agreed Statement of Facts makes it clear that Ms. Bolger did not intend the motor vehicle to be used for her private use but rather as a business proposition.

In order for Ms. Bolger to operate the taxi service it was necessary for her to have a taxi cab license. While she took this in her personal name it was also necessary by City of Kitchener

Waterloo by-law 94-046 for her to be a shareholder with a cab company - in this case Cambridge City Cab Company. Without the shares in the cab company Ms. Bolger would not have been running the taxi service and Mr. Wettlaufer would not have been operating the motor vehicle in question.

The respective roles and obligations of Ms. Bolger and the cab company are set out in an agreement dated January 4, 1991. A brief review of the agreement makes it apparent that the Cambridge Cab Company exercised a considerable degree of control over the parties. For example, in addition to the usual dispatching services the agreement stipulates that the taxi license shall be transferred as well when selling the shares of the company. In addition the company can terminate the agreement and thus put the taxi out of business if the cab is not operated at least thirty hours per week.

The agreement also stipulates that the owners and drivers of the cabs must comply with a number of rules and regulations of the Company. This covers the use and operation of the cabs including what zones they can operate in, rights to turn down fares, under what conditions they can leave before the end of their shift, log-in requirements, and so on.

It is also worthy of note that pursuant to paragraph 15 of the agreement, upon the death of the shareholder the Company has considerable rights as to who can take over control of the taxi.

It is also worth commenting that the drivers must be listed with the company in order to drive.

When one looks at the totality of the evidence one is drawn to the conclusion that there was a very close relationship between Ms. Bolger and the Cambridge Cab Company. While Ms. Bolger did own the car, it could not be operated as a cab without the involvement of the Cambridge Cab Company. In addition, the company played a vital role in the day to day operation of the motor vehicle.

Counsel for Lloyd's has pointed out that while the cab company played a large role, it was Ms. Bolger who had the final say as to whether or not the motor vehicle was operated as a cab. This is true in the sense that she could choose not to be part of the taxi cab business and could withdraw from the business completely. However, as long as she wished to operate a cab business in Kitchener Waterloo it had to be in conjunction with the Cambridge Cab Company or its' equivalent. Counsel for Lloyd's emphasised the fact that Ms. Bolger was a listed owner of the motor vehicle. While this is an important consideration for the purposes of section 66, it is not determinative of the issue. As Mr. Justice O'Leary stated in Co-operators General Insurance Company vs. Cigna General Insurance Company (unreported decision dated January 7, 2000),:

it is irrelevant whether the owner of the tractor or the holder of the plate made the vehicle available for . . . regular use

In light of all the facts, I find that Ms. Bolger and the Cambridge Cab Company were working in essence, as a joint venture.

The question then becomes whether this "joint venture" constitutes an "other entity" for the purposes of section 66. In my view the "joint venture" that I have found to exist is similar to the

organizations specified in section 66 of Bill 59. As such I find that it is an "other entity" as set out in section 66.

This finding is consistent, in my view, with the purpose of section 66. The section was designed to capture the risk when a business organization is a named insured. Ms Bolger had never planned to be a driver of the motor vehicle in question and the above analysis allows one to deal with a situation where there is a business involved. It is to be distinguished from the State Farm & Kingsway situation which was clearly a non-business relationship.

Some time was spent by counsel for Co-operators suggesting that an individual alone could be an "other entity" if operating as a business or, alternatively, that Cambridge City Cab Company was the organisation making available the car in question. In light of my findings that this was in essence a joint venture situation the point is somewhat academic. It is quite possible in my view, however that, an individual, in the proper and yet very limited circumstances, be an "other entity". With regard to Cambridge Cab Company being the provider of the motor vehicle, in light of my findings above, that situation did not apply here.

Is Jonathan Wettlaufer Deemed to be a Named Insured under the Lloyds' Policy by

Operation of section 66 (1)(b) of Bill 59?

In light of my findings as to the applicability of section 66 (1)(a) above, it is unnecessary for me to decide whether section 66(1)(b) applies, however, since counsel made submissions in this regard I will consider the question.

Section 66(1)(b) states:

an individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident, . . .

(b) the insured automobile is being rented by the individual for a period of more than thirty days.

The essence of the question with regard to this issue is whether or not Mr. Wettlaufer could be said to have rented the vehicle in question for a period of more than thirty days. There is no doubt but that Mr. Wettlaufer had the use of the vehicle and that he in fact used it for more than thirty days. Counsel for Lloyd's argues that while Mr. Wettlaufer may have had the "license to use" the vehicle, he did not have the contractual right to use the vehicle exclusively for a specific period of time - being thirty days as required by section 66.

The Supreme Court of Canada in *Johnson vs. The British Canadian Insurance Company* [1932]

S.C.R. 680 distinguished between the term "rent" and "license to use". In order for the arrangement to be considered rent there must be:

(a) an agreement between parties,

- (b) an agreement of payment,
- (c) an agreement for exclusive use of the vehicle; and
- (d) an agreement for a specific period of time.

Arbitrator Makepeace in Sittler vs. Canadian General Insurance Company (1993) O.I.C.D. 72 dealing with a taxicab situation found that there was a fixed fee for a specified period of time. In our situation however Mr. Wettlaufer did not have the exclusive use of the vehicle for a set period of time. He truly was at the pleasure of Ms. Bolger.

I note that Arbitrator Robinson in the Co-operators General Insurance Company & State Farm Mutual Automobile Insurance Company (unreported decision dated February 22, 2002), has adopted the approach set out by the Supreme Court of Canada and I am in agreement with that approach.

In light of the fact that pursuant to the agreement between himself and Ms. Bolger, Mr. Wettlaufer did not have the exclusive use of the motor vehicle for a specified period of time of at least thirty days, I find that section 66(1)(b) does not apply.

Order:

1. Lloyd's of London is responsible for paying the statutory accident benefits to or on behalf of Jonathan Wettlaufer.

Costs:

At the conclusion of the hearing counsel made submissions with regard to the costs of an adjournment requested by Co-operators. The adjournment was granted due to the late production of documents by Lloyd's. These documents were important to the final disposition of the case. As such I order that the costs of the adjournment are to be borne by Lloyd's.

If the parties are unable to agree between themselves as to the issue of costs of the entire arbitration I may be spoken to.

Dated this _____ day of August, 2002.

M. Guy Jones
Arbitrator

