

**IN THE MATTER of a dispute between The Dominion of Canada General Insurance Company and Zurich Canada, pursuant to Regulation 283/95 under the Ontario Insurance Act, R.S.O. 1990, chapter I.8 as amended;**

**AND IN THE MATTER of an Arbitration pursuant to the Arbitration Act, S.O. 1991**

**BETWEEN :**

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

ZURICH CANADA

Respondent

Counsel for the Applicant

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Joan Takahashi

Counsel for the Respondent

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Aldo E. Picchetti

### **AWARD**

This Arbitration arose out of a dispute between The Dominion of Canada General Insurance Company and Zurich Canada as to which insurer was required to pay Statutory Accident Benefits to Elaine Segært, Aaron Segært, David Segært, Trevor Ogletree and Tina Ogletree following the death of Steven Ogletree in a motor vehicle accident which occurred on July 26th, 1995. The accident took place in Ontario.

I was advised that there was an ongoing dispute as to whether some of the applicants for benefits were dependent on Steven Ogletree for support such as to qualify them for Death Benefits.

The parties hereto agreed that I would determine the issue as to which insurer is responsible to pay the Death and Funeral Benefits claimed, at this time. The parties reserved the right to re-attend to make further submissions if it is determined that Zurich Canada is responsible to pay the benefits claimed. I was advised that the parties may then request a further attendance in order that I might determine whether the applicant, The Dominion of Canada General Insurance Company, is entitled to recover the sum of

\$3,745.00 paid to Messrs. Lerner & Associates as costs and to determine whether the Applicant is responsible for the payment of interest which might be due on overdue Death Benefits, even if Zurich Canada is found ultimately to be responsible to pay the Death and Funeral Benefits claimed.

The parties, may approach me if there is a need to determine these further issues.

As the parties are unable to agree as to which Insurer is required to pay the benefits, the dispute must be resolved through an arbitration under the Arbitration Act, 1991, as required by Ontario Regulation 283/95.

#### **AGREED STATEMENT OF FACTS**

Attached hereto as Schedule "A" is a copy of an Agreed Statement of Facts agreed to by both insurers.

The important facts may be summarized as follows:

- (a) The accident which was the subject of the claim for Statutory Accident Benefits occurred on July 26, 1995 in Ontario.
- (b) At the time of the accident, the deceased Steven Ogletree was operating a vehicle owned by his employer, Union Gas Ltd. That vehicle was insured by Zurich Canada. There is no issue that that vehicle was made available for the regular use of the deceased by his employer and that the deceased was living and ordinarily present in Ontario at the time.
- (c) At the same time, the deceased was the named insured under a policy issued by The Dominion of Canada General Insurance Company on a vehicle personally owned by the deceased, Steven Ogletree.

#### **DETERMINING LIABILITY TO PAY STATUTORY ACCIDENT BENEFITS**

Section 268 (2) of the Insurance Act, R. S. O. 1990, chapter I.8, as amended, sets out rules which are to be applied in order to determine which insurer is liable to pay Statutory Accident Benefits under the SABS.

It is agreed that the deceased Ogletree was a named insured under the motor vehicle liability policy in effect on his personal vehicle insured through The Dominion of Canada General Insurance Company.

There is no issue that the deceased Ogletree is at least an insured person under the policy of insurance on the Union Gas Ltd. vehicle, which he was operating at the time of the subject accident. That vehicle was insured by Zurich Canada.

The issue is whether Ogletree is a "named insured" under the Zurich Canada policy in effect on the vehicle of his employer at the time of the subject accident.

Section 268(5) of the Insurance Act provides that if a person is a named insured under a motor vehicle liability policy, he shall claim statutory accident benefits against the insurer under that policy.

Section 268(5.1) gives the person discretion to decide the insurer from which to claim benefits, if there is more than one insurer against which he may claim benefits under Section 268(5).

Section 268(5.2) provides that if there is more than one insurer against which such a person may claim benefits under Section 268 (5) , and the person was, at the time of the incident, an occupant of an automobile in respect of which he is the named insured, he shall claim benefits against the insurer of the automobile in which he was an occupant.

Accordingly, if the deceased Ogletree was a "named insured" under the Zurich Canada policy in effect on the vehicle of his employer, the result will be that Zurich Canada will be responsible to pay the Death and Funeral Benefits claimed by the next of kin and dependents of the deceased Ogletree.

I must then go on to consider whether the deceased Ogletree was a "named insured" under the Zurich Canada policy.

#### **CONSIDERATION OF THE SAME ISSUE UNDER THE SABS (PRE-1994)**

In the Award, which I granted on November 26, 1996, in the case of State Farm Mutual Automobile Insurance Company and Canadian Surety Insurance Company I reviewed the decision of Mr. Justice F. Roberts in the case of AXA Home Insurance Company v. Western Assurance Company, (1994) 21 C.C.L.I. (2d) 120 (Ont. Gen'l Div.) and various decisions of Arbitrators at the OIC in cases which followed the line of reasoning in the AXA Home case. I was of the view that AXA Home v. Western Assurance Company correctly interpreted Section 3(l) of the SABS (PRE-1994), as the wording in Section 3 (1) clearly confined the treatment of the insured person, *as if he was a named insured*, to the Regulation itself, by the clear wording in Section 3 (1) I was of the view that by referring to the application of the Schedule to the individual, it was clear that the legislators intended to confine the treatment of the individual referred to in Section 3 *as if he was a named insured* to the Schedule itself and not for the purpose of determining which insurer is liable to pay under Section 268 (2) of the Insurance Act.

**REVIEW OF CONSIDERATION OF THE SAME ISSUE UNDER SECTION 91(1) AND (2) OF THE SABS  
(POST-1994) IN RESPECT OF ACCIDENTS OCCURRING BEFORE JANUARY 1, 1995**

In the State Farm v. Canadian Surety case, I considered the same issue under Section 91 (1) and (2) of the SABS post-1994 since the old Section 3 was recast in Section 91 of the new SABS. I again concluded

that the wording of Section 91(1) clearly set out that the deceased would have been deemed to be a named insured **for the purpose of the Regulation**. Again, Section 91(1) did not set out that the deceased was "deemed to be the named insured under the policy". The Section simply made reference to how the deceased was to be treated under the Regulation, ie., the new SABS.

I went on to consider the Decision in Crosbie v. Co-operators General Insurance Company (OIC Files A-009908 and A-012239). I noted that Arbitrator Blackman, in that case, followed the reasoning in the AXA Home case. I also noted that Arbitrator Blackman followed his own reasoning in the Crosbie Decision in determining the matter of Aujla v. Progressive Casualty Insurance Company of Canada and Old Republic Insurance Company (OIC Files A95-1628 and A95-1629).

**CONSIDERATION OF SECTION 91(4)**

In the case of State Farm v. Canadian Surety, I went onto consider the effect of Section 91(4).

The accident in the State Farm v. Canadian Surety case occurred on March 8, 1995. The accident in the subject case took place on July 26, 1995.

The situation in respect of the deceased Ogletree is identical to the situation of the deceased Eschelbacher in the State Farm v. Canadian Surety case.

Section 91(4) of the SABS applies in respect of accidents occurring on or after January 1, 1995.

As set out in the State Farm v. Canadian Surety case, Section 91(4) differs from Section 91(1) in two ways. Firstly, Section 91(1) applied when an insured automobile was rented to an individual who was living and ordinarily present in Ontario. Section 91(4) altered the situation by providing for a rental period of more than 30 days. There was no time requirement for the rental in Section 91(1).

More importantly and applicable to the subject case, is the change in Section 91(4) dealing with the effect on the status of an insured who qualifies under the Section.

Section 91(4) provides:

"... if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation".

According to Section 91(4), the person who qualifies under the Section *shall be deemed to be the named insured under the policy* insuring the automobile for the purpose of payment of the *Statutory Accident Benefits set out in this Regulation*.

Under Section 91 (1) , the individual was deemed to be the named insured *for the purpose of this Regulation*. Under the line of cases referred to above, it was determined that applying Section 91(1) meant that the individual who qualified under Section 91 (1) would be treated as a named insured for the purpose of the SABS only and not for the purpose of determining which insurer ought to pay under Section 268(2) of the Insurance Act.

As I determined in the State Farm v. Canadian Surety case, the new wording in Section 91(4) makes it clear that the individual who qualifies under Section 91(4) is not simply to be a named insured for the purpose of the SABS. The section in clear words sets out that such an individual is to be the named insured under the **policy**. If that was not clear enough, the section goes on to state that the individual who qualifies under the section is to be the named insured for the purpose of payment of Statutory Accident Benefits.

In the State Farm v. Canadian Surety case, I made reference to what I felt was the intention of the legislators in making the change in Section 91, effective January 1, 1995. The legislators made it clear that the individual who qualifies under Section 91(4) is to be the named insured under the policy.

I accordingly reached a conclusion in the State Farm v. Canadian Surety case that the deceased Eschelbacher met the definition in Section 91(4) of the SABS and was deemed to be a named insured under the Canadian Surety policy.

I reach the same conclusion in this case. It is my conclusion that the deceased Ogletree qualifies under Section 91 (4) to be the named insured under the Zurich Canada policy.

Since the deceased Ogletree is a named insured under the Zurich Canada policy, and since he was an occupant of the vehicle insured by Zurich Canada at the time of the subject accident, Zurich Canada must pay whatever Death Benefits and Funeral Benefits flow from the death of Steven Ogletree in the subject accident.

**CONSIDERATION OF THE CASE OF COMMERCIAL UNION ASSURANCE COMPANY OF CANADA v. WELLINGTON INSURANCE COMPANY (HALIFAX INSURANCE COMPANY)**

In considering whether to apply my decision in the State Farm v. Canadian Surety case to the subject case, I considered the decision of The Honourable J. Drew Hudson, Arbitrator, in the case of Commercial Union Assurance Company of Canada v. Wellington Insurance Company (Halifax Insurance Company), decided Friday, May 2, 1997.

In the Commercial Union v. Wellington case, Mr. Kaushal was the occupant of a taxi cab insured by Halifax at the time of the accident. Mr. Kaushal was a named insured under a policy of insurance on his personal vehicle insured by Commercial Union.

Arbitrator Hudson reviewed the decision in AXA Home and also considered the old sections, ie., Section 3 (1) of the OMPP SABS and Section 91(1) of the Bill 164 SABS.

Arbitrator Hudson, like myself, felt that the AXA Home case was good law and that the Crosbie case was also good law.

Arbitrator Hudson was of the view that the wording "shall be deemed to be the named insured under the policy" excluded broadening the meaning of "named insured" for the purpose of the Priority Rules in Section 268 of the Insurance Act.

The parties in this case do not take issue with the fact that the legislature intended to make some change in Section 91 when Section 91(4) was legislated. If the interpretation of Arbitrator Hudson is correct, then there is no explanation for the legislators inserting the words "under the policy" in Section 91 (4) of the SABS.

Section 268(5) specifically refers to "a named insured under a contract evidenced by a motor vehicle liability policy". Section 91(4) specifically sets out that the "individuals shall be deemed to be the named insured under the policy insuring the automobile". I am of the view that the legislators inserted the word "policy" in Section 91(4) so that there would be a link between that section and Section 268(5) which already had the word "policy" in it.

It is clear to me that the legislators wished to change the situation in respect of company automobiles and rental automobiles from what the situation was prior to January 1, 1995.

The legislators were responding to comments made and decisions made in respect of Section 91(1) of the Insurance Act. Such comments addressed the unfairness of a situation in which an insurer of a company vehicle, assessed the risk, and charged and collected premiums based on that risk but then, in most cases, did not have to assume the responsibility for payments under the SABS to regular users of the company vehicle. Yet, the insurer of a personal vehicle of a company employee, did not assess the risk of that individual driving as part of his job, did not charge or collect high premiums covering such an individual and, yet, had to respond, in most cases, and pay such company employee the benefits under the SABS. Accordingly, in my view, it was no accident, that in Section 91(4), the legislators made reference to the "policy", the same word that appears in Section 268(5) of the Insurance Act, in reference to "a named insured".

There is clearly and obviously a link between the wording in Section 91 (4) and the wording in Section 268 (5) since both sections refer to a "named insured" and to a "policy".

In addition, the fact that the concluding words of Section 91(4) make reference to "for the purpose of payment of the Statutory Accident Benefits set out in this Regulation" does not restrict the classification of the individual as a named insured under the policy so that that classification cannot be considered under Section 268(5) of the Insurance Act. Again, there is a link between those concluding words and the words "the following rules apply for determining who is liable to pay Statutory Accident Benefits" at the beginning of Section 268(2) of the Insurance Act.

Accordingly, I disagree with Arbitrator Hudson, although I have considered his Reasons before reaching my decision.

I conclude that Zurich Canada is the insurer responsible for the payments of the benefits due under the SABS by reason of the death of Steven Ogletree.

I am of the view that the costs should follow the event and accordingly I order Zurich Canada to pay to The Dominion of Canada General Insurance Company costs fixed at the sum of \$2,500.00, disbursements which would ordinarily be assessable in a court action and appropriate GST. In addition, Zurich Canada shall pay the fees and expenses of the Arbitrator. Counsel may speak to me if any difficulty arises in respect of the calculation of costs.

DATED THIS 16<sup>th</sup> DAY of JULY, 1997.

**Stephen M. Malach, Q.C.**