

JAN 17 2005

IN THE MATTER OF SECTION 268
ON THE *INSURANCE ACT*, R.S.O. 1990, c.I.8 and O. REG. 283/95

AND IN THE MATTER OF THE *ARBITRATION ACT*, 1991, S.O. 1991, C.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL AND SUNALLIANCE INSURANCE COMPANY

Respondent

AWARD:

APPEARANCES:

Douglas A. Wallace
For the Applicant

Mark K. Donaldson
For the Respondent

ISSUES:

1. As between ING Insurance Company of Canada and Royal and Sunalliance Insurance Company which of the insurers has the primary legal obligation to pay statutory accidents benefits to and on behalf of Dorota Malinowski arising out of a motor vehicle accident which occurred on August 23rd, 2001.

2. Was Dorota Malinowski an insured person under the ING Insurance Company of Canada policy.
3. Was Dorota Malinowski a named insured or a deemed named insured under the ING Insurance Company of Canada policy by operation of s.66(1)(a) of Bill 59 Statutory Accident Benefit Schedule.
4. Was the vehicle which Dorota Malinowski was operating at the time of the accident an "excluded automobile" under the ING Insurance Company of Canada policy, and if so, does such exclusion have any application to the availability of statutory accident benefits or the priority hierarchy described in s.268(2) of the *Insurance Act*.

RESULT:

1. Royal and Sunalliance Insurance Company is responsible for payment of statutory accident benefits to and on behalf of Dorota Malinowski arising out of a motor vehicle accident which occurred on August 23rd 2001.
2. Dorota Malinowski was not an insured person under the ING Insurance Company of Canada policy.
3. Dorota Malinowski was not a named insured or a deemed named insured under the ING Insurance Company of Canada policy.
4. The vehicle which Dorota Malinowski was operating at the time of the accident was an "excluded automobile" under the ING

Insurance Company of Canada policy and statutory accident benefits are not payable under that policy.

HEARING:

The Arbitration was held in the City of Kitchener in the Province of Ontario on November 22nd, 2004, before me, Bruce R. Robinson, Arbitrator.

EVIDENCE:

The parties filed an Agreed Statement of Facts at the commencement of the hearing and no witnesses were called.

EXHIBITS:

Two exhibits were filed by ING:

- (1) An Agreed Statement of Facts, and
- (2) Joint Document Brief

BACKGROUND AND FACTS:

ING Insurance Company of Canada ("ING") issued an Ontario Garage Automobile Policy (O.A.P.4) bearing policy number 704004628 to Polmaster Collision 0\B Walter Malinowski and Ted Poplawski. This policy was in force at all material times.

Royal and Sunalliance Insurance Company ("Royal") issued an Ontario Automobile Policy (O.A.P.1) to Perciballi Pools in respect of a 1995 Dodge motor vehicle bearing policy number 50057280. The 1995 Dodge was

driven by Philip Mailloux at the time of the accident. The policy was in force at all material times.

Royal also issued an Ontario Automobile Policy (O.A.P.1) to Windsor Volvo in respect of a 1998 Volvo motor vehicle bearing policy number 32-13246166. The 1998 Volvo was driven by Lawrence Pazner at the time of the accident. The policy was in force at all material times.

Polmaster Collision was established in January of 1999. Waldemar Malinowski and Ted Poplawski were the sole partners and employees. This business is a body shop. Mr. Malinowski's spouse, Dorota Malinowski, was not an employee and was not a partner of the business.

ING issued a Garage Policy (O.A.P.4) to Polmaster Collision on February 1st, 2000 and renewed the policy on February 1st, 2001. ING requested updated information from Polmaster Collision by a form dated January 8th, 2001. The form was completed and signed by Mr. Malinowski and received by ING on February 5, 2001. Mr. Malinowski indicated that there were two dealer plates (yellow plated). They were license numbers 187 DHC and 188 DHC. He further indicated that there were no owned vehicles (white plated), no tow trucks and two courtesy vehicles. ING issued the Garage Automobile Policy with the full name of the insured and full business address being Polmaster Collision O\B Walter Malinowski and Ted Poplawski 1035 Crawford Avenue, Windsor, ON N9A 5E1.

An O.E.F. 76 – Additional Insured Endorsement was not purchased by Polmaster Collision.

Mr. Malinowski purchased a 1993 Dodge Shadow motor vehicle before he started his business. The vehicle was registered to Mr. Malinowski personally. At some time after February 2000, Mr. Malinowski attached the yellow dealer plate bearing number 188 DHC to the Dodge Shadow. This vehicle was used primarily for personal transportation and it was parked at Mr. Malinowski's home. The Malinowski family had no other personal vehicle. The Dodge Shadow was provided to Mrs. Dorota Malinowski for her regular or frequent use.

On August 23rd, 2001, Dorota Malinowski was driving the 1993 Dodge Shadow to work when it was rear-ended by the Mailloux vehicle and pushed into the Pazner vehicle. These latter two vehicles were both insured by Royal. As a result of the accident, Dorota Malinowski sustained personal injuries and presented a claim for statutory accident benefits to ING. ING paid accident benefits to or on behalf of Dorota Malinowski in accordance with section 2 of O. Reg. 283/95 pending the determination of a priority dispute with Royal. ING served a Notice of Application of Dispute Between Insurers upon Royal on January 2nd, 2002.

ING takes the position that the 1993 Dodge Shadow was an “excluded automobile” under the Garage Policy and therefore Royal is the priority insurer pursuant to section 268(2) 1.iii of the *Ontario Insurance Act*. Royal takes the position that Dorota Malinowski is an insured under the ING Garage Policy and therefore ING is required to make payments to her for statutory accident benefits pursuant to section 268(2) 1.i of the *Ontario Insurance Act*.

THE LAW:

Insurance Act R.S.O. 1990 c.1.8 s.268(2)

- (2) Liability to pay – 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 subparagraph i., the occupant has recourse against the insurer of the automobile in which he or she was an occupant.
 - iii. If recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose.

Section 268(3) Liability – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

Insurance Act s.240.

If a contract evidenced by a motor vehicle liability policy names an excluded driver, the insurer is not liable to any person under the contract or under this Act or the regulations for any loss or damage that occurs while the excluded driver is driving the automobile insured under the contract, except as provided in the Statutory Accident Benefit Schedule.

**STATUTORY ACCIDENT BENEFIT SCHEDULE – ACCIDENTS OCCURRING
ON OR AFTER NOVEMBER 1, 1996, ONTARIO REGULATION 403/96**

s. 2(1) "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 or same-sex partner of the named insured, and any dependant of the named insured, spouse or same-sex partner, if the named insured, specified driver, spouse, same-sex partner or dependant,
- (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile,

THE RELEVANT SECTIONS OF THE ONTARIO GARAGE AUTOMOBILE
POLICY (O. A. P. 4) READ AS FOLLOWS:

Section 2

ACCIDENT BENEFITS

Please note that the General Provisions, Definitions, Exclusions and Statutory Conditions of this Policy found in Section 7 and Section 8, except as otherwise stated in those Sections, apply to every Section of the Policy.

Each Section of the Policy should be read subject to the provisions in Sections 7 and 8.

2.1 Who is Covered

For the purposes of Section 2, insured persons are defined in the Statutory Accident Benefits Schedule and an insured automobile for this purpose includes an owned, a non-owned, and customer's automobile as defined in this Policy.

In addition, insured persons also include any person who is injured or killed in an automobile accident involving an owned, non-owned or customer's automobile as defined in this Policy, and is not the named insured, or the spouse, same-sex partner or dependent of a named insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them.

SECTION 7

GENERAL PROVISIONS, DEFINITIONS AND EXCLUSIONS

Please note that the General Provisions, Definitions, Exclusions and Statutory Conditions of this Policy found in Section 7 and Section 8, except as otherwise stated in those Sections, apply to every Section of the Policy.

Each Section of the Policy should be read subject to the provisions in Sections 7 and 8.

Excluded Automobiles

7.15 THE INSURER SHALL NOT BE LIABLE under this Policy for loss, damage, injury or death arising from the ownership, use or operation of any automobile,

- (b) provided by the insured to any person for regular or frequent use, except an active partner or a full-time employee of the business stated in item 3 of the Certificate of Insurance PROVIDED that this exclusion does not apply while the person is using the automobile in the business stated in item 3 of the Certificate of Insurance;

War Risks Excluded

7.17 THE INSURER SHALL NOT BE LIABLE under Section 2 (Accident Benefits), Section 3(Uninsured Automobile Coverage), Section 4 (Direct Compensation – Property Damage), Section 5 (Loss or Damage to Owned Automobiles), and Section 6 (Loss or Damage to a Customer's Automobile), of this Policy for any loss,

damage, injury or death caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, coup, or actions of armed forces while engaged in a war, whether declared or not.

SECTION 8

STATUTORY CONDITIONS

The *Insurance Act* requires that these conditions be printed as part of every automobile insurance policy in Ontario. If there is a discrepancy between these conditions and the wording in the policy, these conditions prevail.

None of the Statutory Conditions apply to Section 2 (Accident Benefits) EXCEPT conditions 1, 11, 12 and 13.

ONTARIO REGULATION 403/96-STATUTORY ACCIDENT BENEFITS **SCHEDULE – ACCIDENTS ON OR AFTER NOVEMBER 1, 1996**

Company Automobiles and Rental Automobiles

66. (1) 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.
- (2) An individual who is not 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 the 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; and
 - (b) the individual, his or her spouse or same-sex partner or any dependant of the individual, spouse or same-sex partner is an occupant of the insured automobile.

CERTIFICATE OF INSURANCE ISSUED BY ING (O.A.P 4)

Section 3 – The automobiles in respect of which insurance is to be provided are those used in connection with the Insured's business of: AUTO BODY REPAIR SHOP INCLUDING AUTO REPAIR AND INCIDENTAL USED CAR SALES.

FINDINGS:

I wish to examine first the issue as to whether or not the 1993 Dodge Shadow was an “excluded automobile” under the ING Garage Policy Section 17.15 (c). The parties to this Arbitration have agreed that the exclusion applies and the issue becomes what effect does that have as it relates to accident benefits payable to Mrs. Malinowski.

Justice Sutherland in *1126389 Ontario Limited v. Dalton*, [2000] O.J. No. 668 considered the wording “excluded automobile”. In that case, the plaintiff carried on a business as an automobile body shop. He leased a 1996 Ford Explorer for personal use and attached the yellow dealer plates to it. When the Explorer was involved in an accident, the plaintiff sought a declaration of coverage under the Garage Policy. Justice Sutherland held that the vehicle was an “excluded automobile” under the terms of the Garage Policy and dismissed the action. He found as a fact that the vehicle was carrying a “dealer” license plate and that at paragraph 30 he stated:

“I agree with the alternate submissions of counsel for the defendant to the effect that the Ford Explorer was not at the material times within the coverage in force by the Policy.”

A similar result was reached by Justice McNeely in *O'Donnell v. Lumbermans Mutual Casualty Company* [1978] O.J. No. 2703. In this case the plaintiff operated a garage business. He owned a vehicle which he loaned to his son for regular and personal use. The son was not an employee of the business. The son was involved in an “at fault” accident while driving the vehicle and the

plaintiff sought liability coverage under the Garage Policy. Justice McNeely found that the vehicle was “an excluded vehicle” and that there was no coverage under the Garage Policy.

Both of these prior decisions involved tort proceedings. The exclusion has been considered within the context of an accident benefit priority dispute by the Director’s Delegate, S. Naylor, in *Goos v. Non-Marine Underwriters, Lloyds of London*, [1998] O.F.S.C.I.D. No. 36. Appeal P.96-00038. In that case, the issue was whether or not an O.E.F. 76 – additional insured endorsement under a Garage Policy elevated the person named on the endorsement to “named insured” status. The Director's Delegate commented upon the purpose of the Garage Policy and the exclusion at issue. She stated at paragraph 40,

“The Garage Policy is designed to cover the risks involved in operating an automobile business, including use of business’ owned vehicles and the use of customers’ and other vehicles. The policy excludes coverage of a vehicle supplied for the regular or frequent use of an individual, unless he or she is an active partner or full-time employee of the business.”

In the facts before me there was no O.E.F. 76 Endorsement on the Polmaster Collision Policy issued by ING. I find that such an endorsement would in fact countermand the exclusion in section 7.15 (c) of the Garage Policy. Had this endorsement been purchased, Dorota Malinowski would have been covered by the ING policy. Such was not the case.

I find upon the facts presented to me that the 1993 Dodge Shadow was owned personally by Mr. Malinowski. It was provided by him to his wife for her regular and frequent use. Mrs. Malinowski was not a partner nor an employee of the business. She was not using the vehicle in her husband's business when the accident occurred. I find that the exclusion is very clear on its wording and as such there would be no coverage available to her under the ING Garage Policy.

I find that the exclusion in section 7.15(c) of the ING policy therefore applies to Mrs. Malinowski.

I find that the preamble to both section 2 and section 7 of the Garage Policy are identical and their stated purpose requires these sections to "apply to every section of the policy". I find this explicitly refers to the accident benefit coverage under section 2. As such, the ING policy does not supply accident benefit coverage to Mrs. Malinowski in these circumstances.

Furthermore, section 7.15 uses mandatory words, "the insurer shall not be liable". I find these words most important. A clear and unambiguous use of these words directs a specific result. When read in conjunction with the priority rules found in section 286(3) dealing with an insurer's liability to pay benefits, it is clear that the specific intent, with regard to an "excluded automobile" was to exclude coverage for accident benefit claims in this type of circumstance. I find the plain meaning of section 7.15 is reinforced by the context of the wording of section 268(3).

The word "loss" had been interpreted to include the payment of statutory accident benefits. Justice Spiegel in *Jevco Insurance Company v Wawanesa Insurance Company*, 42 O.R. (3d) 276 at p.10 states as follows:

"While the word damage may not be appropriate to describe the indemnity for SABs, the word "loss" is broad enough to include the payment of the SABs for which the first party insurer seeks indemnity, especially since section 275 is referred to as the loss transfer provision. "

The analogy of the "Excluded Automobiles" provision in the Garage Policy and that of the "excluded driver" provision in section 240 of the *Insurance Act* have been referred to by the Applicant. The operative wording of section 240 is virtually the same as the wording in paragraph 7.15 of the Garage Policy. Section 240 has been interpreted to completely exclude liability coverage notwithstanding the statutory minimum limits provided for by section 258 of the *Insurance Act*. (see *Toulouse v Makadebin*) [1998] O.J. 2621.

Section 240 explicitly preserves statutory accident benefits. Paragraph 7.15 of the Garage Policy specifically does not. I find that the general principles of statutory interpretation dictate that such omissions are not made without purpose. Professor Ruth Sullivan in "Statutory Interpretation" describes the "implied exclusion" principle at page 74 as follows:

“...the reasoning on which implied exclusion is based is found every where in statutory interpretation. An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are everywhere in legislation, reliance on implied exclusion reasoning is common.”

It therefore follows from the “implied exclusion principle” that had the drafters of the Garage Policy intended to preserve statutory accident benefits, they would have specifically done so. Instead, I find that the Garage Policy wording explicitly provides that the exclusions contained in section 7 apply to section 2 (Accident Benefits).

I now turn to the issue of section 66(1) of Ontario Regulation 403/96 which deals with company automobiles and rental automobiles. On the evidence before me I find that the 1993 Dodge Shadow was not an “insured vehicle” as described in section 66(1) by virtue of the “excluded automobile” provision in paragraph 7.15(c) of the Garage Policy. As a result, I find that the deeming provisions of section 66(1) do not apply in these particular circumstances. Furthermore, I find that the Dodge Shadow was provided to Mrs. Malinowski by an “individual”, namely her husband. Her husband was the sole personal registered owner of the automobile in his own personal capacity. As such, the vehicle was not made available by “a corporation, unincorporated

association, partnership, sole proprietorship or any other entity” as required by section 66(1). I find that where the registered owner of the automobile in question is an “individual” as in the facts in this case, the automobile is not made available by “a corporation, unincorporated association, partnership, sole proprietorship or other entity” for the purpose of section 66(1). I have been referred to and have considered the following cases.

Co-operators General Insurance Company v State Farm Mutual Automobile Insurance Company (unreported February 22nd, 2002, Arbitrator Robinson)

All State Insurance Company v State Farm Mutual Insurance Company (unreported decision October 30th, 1996, Arbitrator Rudolph)

State Farm Mutual Automobile Insurance Company v Kingsway General Insurance Company (unreported October 20th, 1999, Arbitrator Samis)

I therefore find on the evidence presented to me in this case that the exclusion under paragraph 7.15(c) explicitly applies to excluded coverage for accident benefits. As such, I find that Mrs. Malinowski is not entitled to recover accident benefits from ING pursuant to the ING Garage Policy. I therefore find that Royal and Sunalliance Insurance Company, who have two policies, covering the other two striking vehicles, are require to pay statutory accident benefits to Mrs. Malinowski.

COSTS:

The parties have agreed that the costs in this matter will follow the event. I may be spoken to with regard to the quantum of costs at a later stage if necessary.

ORDER:

1. It is ordered that Royal and Sunalliance Insurance Company is the priority insurer pursuant to section 268(2) 1.iii of the *Insurance Act* and is required to pay statutory accident benefits to or on behalf of Dorota Malinowski arising out of the motor vehicle accident of August 23rd, 2001.
2. It is further ordered that Royal and Sunalliance Insurance Company will reimburse ING Insurance Company of Canada for statutory accident benefits paid to or on behalf of Mrs. Malinowski plus appropriate interest thereon. I may be spoken to with regard to both the quantum and interest at a later date.
3. It is further ordered that Royal Sunalliance Insurance Company will pay to ING Insurance Company their costs of the arbitration herein.

DATED at Toronto, this 13 day of December, 2004



B. R. Robinson, Arbitrator