

IN THE MATTER OF THE *INSURANCE ACT*
R.S.O. 1990 c. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER THE
THE INSURANCE ACT

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

-and-

INSURANCE COMPANY OF BRITISH COLUMBIA

Respondent

ARBITRATION DECISION

Counsel:

Jason Frost for Economical Insurance
Schultz Frost LLP

Paul D. Mooney
Bertschi Orth Solicitors & Barristers LLP

Before:

Arbitrator Fred Sampliner

This matter concerns whether Economical Mutual Insurance Company (Economical) or the Insurance Company of British Columbia (ICBC) has a higher priority to pay Ms. Kelly Heo *Statutory Accident Benefits*

(SABS) under section 268(2) of the *Insurance Act*. On September 14, 2013, Kelly was a passenger in a taxi and injured near her school residence at the University of Toronto. The taxi insurer, Economical, claims Kelly was dependent on her parents at that time of this accident, insured by their ICBC automobile policy, and that insurer has priority insurer to pay her accident benefits.

The hearing was held on February 16, 2017 at Professional Court Reporters in Toronto. The parties presented an Agreed Statement of Facts, one (1) Joint Document Brief, their written submissions (with separate authorities) and both counsel made oral arguments. No witnesses testified.

The Issues:

1. Was Ms. Kelly Heo a dependent on her parents at the time of the accident?

Result:

1. Ms. Kelly Heo was a dependent on her parents at the time of the accident, and ICBC is the priority insurer responsible.

Background:

Ms. Kelly Heo lived with her parents and two younger sisters in their family home in Surrey, British Columbia until 2005 when she left to attend undergraduate school at Queens University in Kingston, Ontario. Kelly graduated from Queens in 2010 and was accepted to Queens graduate law program for the following fall term. She completed her first year of law school in the spring.

Kelly injured her back while participating in a sporting event during the 2011 spring term. Her symptoms continued after she returned to the family home for the summer, and Kelly did not return to law school that fall. Kelly remained with her family in B.C. from the end of her 2011 spring term until the fall of 2012. While living there, she helped with household chores and tutored her younger sisters. Kelly's back problem continued, and in April 2012 she flew to South Korea for back surgery.

Kelly tried to resume law school at the University of Toronto (U of T) in the fall of 2012, but withdrew shortly after the term began due to her recurring back problem. Kelly returned home, and stayed for another year. During that year she volunteered at a local legal clinic.

Kelly returned to Toronto on August 31, 2013 to resume her legal education at U of T, but the term was interrupted by the accident of September 14, 2013. She returned home on October 26, 2013, and since then has continuously lived at her parents' home in B.C..

Kelly's father, Min Heo, is the family breadwinner. He is a partner in a South Korean business and periodically travels to work there. Mrs. Sun Hee Cho, Kelly's mother, does not work outside the family home and maintains the household. Both parents own and operate automobiles that are insured on a joint ICBC policy. Kelly has not owned a vehicle or had a driving licence during the relevant time period.

Law:

The determination of the priority between ICBC (the parents' policy) and Economical (the taxi policy) respecting the responsibility to pay Kelly's *Statutory Accident Benefits Schedule* (SABS) is governed by section 268(2) of the *Insurance Act*, which states in pertinent part:

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 automobile in which he or she was an occupant,

There is no dispute that Kelly occupied the Economical insured taxi at the time of the accident and was not named as an insured person on her parents' ICBC policy. The specific issue is whether Kelly was a dependent on her parents before the accident, which would qualify her as an insured person on their ICBC policy pursuant to section 3(1) of the SABS:

the named insured, any other person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependent of the named insured or his or her spouse,

Economical has the burden to establish that Kelly was principally dependent on her parents under subsection 3(7)(b) in order to succeed in establishing ICBC as the priority insurer:

a person is a dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

ICBC contends Kelly was independent of her parents in that she intended and had the means to finance her graduate education and living expenses.

The Dependency Time Period:

Since the seminal 1985 *Miller v. Safeco*¹ decision, dependency in priority disputes has been examined using the following criteria:

1. duration of dependency;
2. amount of dependency;
3. financial or other needs of the dependent, and;
4. ability to be self-supporting.

The Court of Appeal determined in *Federation Insurance Company v. Liberty Mutual Insurance* (May 7, 1999, aff'd Ont. C. A. [2000] O. J. 1234) that the appropriate time frame to examine dependency is crucial to a priority decision.

ICBC advocates using Kelly's second return to U of T law school as the commencement of the time period. They argue Kelly had sufficiently recovered from her back surgery to resume her career path during the six week period she resumed graduate school in 2013. They refer to the *Intact Insurance Co. of Canada and Economical Mutual Insurance Co.*² discussion of short time frames to determine

¹ (1985) 9 C.C.L.I. 1 (S.C.J.), aff'd (1986) 13 C.C.L.I. 31 (C.A.)

² 2014 CarswellONT 15265

dependency. In that case the arbitrator ultimately chose a one year “look back” period, which does not accord with ICBC’s position. Arbitrator Bialkowski wrestled with the permanence of a relationship in *Co-Operators General Insurance Co. and Axa Insurance Co.*, (August 13, 2016, K. Bialkowski), also using a one year period, and there are many similar decisions.

ICBC conceded at the hearing its proposed snapshot view of Kelly’s 2013 resumption of law studies may not be appropriate. An example of an insured’s situation similar to this case was decided in *RBC General Insurance and Her Majesty The Queen*³, where a young man had left high school and struggled with modestly paying jobs living at his parents’ home, then resuming adult education classes shortly before the accident. In rejecting the snapshot approach, the arbitrator referred to the following passage from the seminal Ontario Court of Appeal decision in *Oxford Mutual Insurance Co. v Co-Operators’ General Insurance Co*⁴;

True characterisation of a dependent relationship will usually require consideration of that relationship over a period of time, particularly in cases of young adults whose lives are in transition.

Other court cases dealing with priority matters, such as *State Farm v. Bunyan*⁵, have likewise adopted longer time frames where the person faced unstable circumstances. My view is that periods of less than two months are not likely to present a realistic picture of an unstable person’s life. One year provides a better historical perspective, but I adapt that period to the facts here due to the dearth of relevant information.

Economical’s position is that the twenty eight month period from Kelly’s first departure from Queens until the September 2013 accident is more realistic. The flaw in this view is it eliminates her first academic year at graduate school, and I prefer Kelly’s entire graduate law school career from September 2010 through September 2013 as a better representation of her dependency situation.

³ (July 22, 2013, S. Novick)

⁴ (2006) 83 O.O. (3rd) 591 (ON C.A.), 2006 CanLII 37956

⁵ 2013 ONSC 6670 (CanLII)

Kelly's Resources and Expenses:

There are no primary source records to document Kelly's law school tuition, fees, lodging and meals at either Queen's or U of T. The evidence consists of Kelly's statement, a letter from a law firm representing Kelly, she and her mother's credit card statements, Kelly's tax returns and the transcribed testimony of her parents.

Kelly's statement of November 14, 2013 was taken by an adjuster shortly after the accident, but contains few relevant details. The law firm representing Kelly for her injuries submitted a June 25, 2014 letter with information about Kelly's tuition, fees and living expenses at U of T. Kelly did not appear to give testimony at her scheduled December 3, 2015 examination under oath. I ascribe modest weight to the information from Kelly's lawyers.

The law firm letter states Kelly does not comment about her first year law and living expenses at Queens, but does say she did not incur any tuition or living expenses for the 2012/2013 academic year at U of T. The letter states Kelly incurred 2013/2014 tuition of \$28,516, plus housing costs \$8,770, and books \$1,000. The letter asserts Kelly paid half the housing cost of \$4,385 on her credit card and the balance from a \$7,413 student loan, but there are no documents attached to the firm letter and it does not speak to Kelly's payment of any other university expenses.

The firm also indicated Kelly had a \$50,000 line of credit for 2013/2014, from which she did not charge anything. Kelly's September 2013 Visa statement confirms she paid half the residence fee and no other university charges appear on her credit card statements from mid-September 2012 through mid-December 2013. There are no confirming student loan or payment documents to support the firm's statement that Kelly paid the other half of the residence fee from a student loan.

Mr. Min Heo testified he earned approximately \$40,000 per year in Canadian funds from his partnership business in South Korea, which he used to support his family. Mr. Heo did not work or earn money in Canada and said the wire transfers or checks to pay him were timed to obtain the best currency exchange rate. He did not recall times or amounts. Mr. Heo said he also received two or three loan repayments per year from his brother in South Korea of approximately \$30,000 to \$40,000 each,

similarly transmitted by wire or check. Mr. Heo's evidence establishes he had sufficient income to comfortably support his family.

Mr. Heo explained that Kelly's grandmother in South Korea wanted to assist with Kelly's law school expenses, and that she provided the equivalent of approximately \$50,000 Canadian funds. He said he initially sent about \$35,000 of the grandmother's money to Kelly for her 2010/2011 expenses, and the total \$50,000 was more than sufficient to pay Kelly's entire first year law school expenses at Queens. He contributed nothing that academic year and afterwards said he had between \$10,000 and \$15,000 surplus money in his account.

Mr. Heo recalled he may have used the grandmother's surplus money from her first year law to pay his daughter's student loan, but was unsure if or how much money he had left over afterwards. Mr. Heo speculated he would have given the remainder to Kelly and perhaps she used the money while residing at the parental home.

Mr. Heo admitted that the money he received from South Korea was sometimes wired directly into his daughter's checking account to pay for her education expenses. He did not recall the amounts or when money was sent. The lack of any documentation to substantiate the gift together with Mr. Heo's admission that the grandmother's money was co-mingled into his account with other funds or sometimes directly forwarded to his daughter creates great difficulty in determining the contribution the Korean family members generated for Kelly's education and support.

Mrs. Sun Hee Cho, Kelly's mother, estimated her husband's business income from South Korea as \$30,000 per year, supplemented with family savings they accumulated before they emigrated and money from Korean relatives. Mrs. Cho's evidence about family money is relatively consistent with Mr. Heo and supports the co-mingling from different sources. Based on the confusing testimony about the use of family money and lack of documents, I cannot determine the amount of money or if Kelly received any funds from Korean-based family members.

Mrs. Cho explained that Korean tradition obliges a parent to pay for their children's undergraduate education. Accordingly, they paid Kelly's entire undergraduate degree expenses at Queens. However, she said they and Kelly expected her to gain independence by funding her law school career, and that

neither she nor her husband co-signed Kelly's graduate student loan. Mrs. Cho testified that during the time Kelly resided with the family they paid her airfare expense and surgery in Korea, estimated to total \$5,000.

The \$5,000 and \$50,000 amounts are sizable sums, completely undocumented. I am unwilling to find, infer or presume that large amounts of family money from South Korea were made available to Kelly in the complete absence of records, the parents' inability to recall details of the payments and the admitted co-mingling of the family funds in Mr. Heo's account and Kelly's with overseas earnings.

The evidence is that Kelly always came home to live with the family during her undergraduate school breaks. The parents kept her room for her and she continued this return pattern after her first year at Queens law and her attempts at U of T. There is no evidence Kelly paid any household expenses during these time frames, and it is uncontroverted that she lived at the family home without expense beginning May 2011 until her August 2013 return to U of T, apart from brief periods. Thus, I find that Kelly was provided with financial support from her father's income and both parents care for approximately twenty seven (27) months.

Kelly's tax returns indicate she earned \$1 in 2011, \$1 in 2012 and \$1,460 of "other income" in 2013. This constitutes the sole documentary evidence of Kelly's or her parent's income and resources. Her returns are consistent with her November 11, 2013 written statement to an adjuster that she last worked as a waitress during the 2010 summer, and did not work afterwards. Mrs. Cho said her daughter told her she might have saved \$2,000 from work during the summer before she entered law school. Kelly's minimal earned income before law school and consistent return to the family home clearly demonstrate she had relatively minimal potential to be self-supporting, and contradict ICBC's position she was financially independent from other resources during the relevant period.

ICBC contends that consideration should be given to Kelly's ability to obtain student loans and use her credit as future financial resources. The contrary argument advanced by Economical is that student loans or lines of credit are repayable and should not be characterized similarly to scholarship or grant

money where there is no reimbursement obligation.⁶ I agree with the latter position that repayable education funds are neutral in most situations.

ICBC principally relies on Arbitrator Densem's discussion in *Jevco Insurance Company and TD General Insurance Co.* (October 16, 2015, S. Densem), that considered excess funds from OSAP loans above incurred education expenses as a financial resource. While I agree with the reasoning, there is no evidence Kelly used a line of credit and the *Jevco* case is distinguishable from the facts here.

Kelly's Visa statements show she charged half her residence fee for 2013/2014 on credit. Kelly's father testified he paid half the residence fee from the grandmother's money and her parents said she retained enough surplus money from her grandmother's gift to pay this amount. No additional details or documents have been produced, and I am unwilling to attribute the payment source as the grandmother without corroboration by document.

If I were to accept that Kelly had a student loan, there is no evidence she retained excess funds, contradicting ICBC's position the loan should be added to her income. Secondly, there is no independent reliable source to document that Kelly's grandmother paid any portion of the alleged \$50,000 for her benefit. As a result, I find that Kelly had earned income of \$1,462 for her financial resources between September 2010 and September 2013.

ICBC argues that Kelly's potential ability to independently fund her law education should be considered along with her and her parents' cultural expectation of self-sufficiency. In my view, this potential should be viewed through the lens of the family situation. Her parents admit her father's income and savings paid Kelly's entire undergraduate school education from 2005 to 2010. Likewise admitted, Kelly did not contribute to her undergraduate expenses and there is no evidence of her having student loans for that period. Considering Mr. Heo's income and the family history to fund their daughter's education, I am not persuaded Kelly could have funded her education as ICBC contends.

⁶ *Personal Insurance Co. v. Allstate Insurance Co.*, 2009 CanLII 64827 (ON SC)

Kelly's Needs:

The appeal decision in *Federation Insurance Company and Liberty Mutual Insurance Company* deems that a person is independent if it is established they meet more than 50% of their financial needs. The paucity of documented expenses or payments prevents an accurate accounting, quite usual in these family matters. Arbitrator Samis commented from his extensive experience about the limits of applying an accounting approach to accurately assess dependency needs in *St. Paul Travellers Insurance v. York Fire and Casualty Insurance*, (August 11, 2011, Samis):

Finally, I entertain considerable doubt about the accuracy and completeness of the evidentiary picture painted in the traditional approach. The families do not keep careful records that document household expenses or contributions. And the monetary value of contributions (in kind) is highly debateable in family situations. Such efforts are best viewed as giving a "ballpark" insight only.

His reasoning is a noteworthy departure from what I view as artificial attempts to construct a accounting of monetary needs within family units when there often are few evidence-based yardsticks.

In this case, Mr. Heo and Mrs. Cho did not provide costs for running their household and Kelly has not provided evidence either. Economical advocates using the Low Income Cut-Off (LICO) approach to assess Kelly's needs, which the Court approved in *Allstate Insurance Company and ING Insurance Company*, 2015 ONSC 4020 (CanLII):

Using government statistics also has the benefit of simplicity, low-cost proportionality, and it was accepted in *Miller*. While Allstate may be unhappy bearing the substantial accident benefits paid in this catastrophic personal injury case, I dare say that over time, it (and all insurers) will see substantial savings in the cost of lawyers and accountants for these types of hearings by using an objective statistical approach to the analysis of needs instead of hiring experts to create hypothetical models of a claimant's needs based on estimated and guesstimated historical spending and meaningless averages.

ICBC offers no evidence as to Kelly's needs and I adopt the Court's rationale and use of LICO for this priority dispute.

ICBC criticizes Economical's proposed \$20,778 single person LICO figure it referenced from the arbitration decision in *Allstate Insurance Company and ING* (May 2014, V. Cooper). Without citing authority, ICBC argues that the Ontario living costs of that case are dissimilar from Kelly's in Surrey, B.C.

As the Court stated in approving Arbitrator Cooper's decision in the above *Allstate* case, LICO is a generalized approach. I have nothing before me to indicate the relative comparison is invalid and ICBC has not introduced information to indicate there is a more current or geographically relevant figure. Consequently, I am satisfied that \$20,778 per year represents a fair amount as determinative of Kelly's needs.

Conclusion:

Kelly Heo lived with her family and was supported by her father's income, her mother's care for twenty seven out the overall thirty six month period between September 2010 and September 2013. Kelly never lived anywhere else but her parents' home except while at Queens or U of T, and she always returned to her bedroom that her parents kept for her in Surrey during breaks from school. Her father was periodically in South Korea on attending to business, but her mother was always there to keep house and attend her daughter's needs.

Kelly could not have afforded otherwise with a meagre \$1,462 income during the three years, and this income was inconsequential in comparison with either the \$30,000 or \$40,000 Mr. Heo earned from his Korean business, plus other payments he claimed to receive. Thus, I find that Economical has met its burden to establish the Kelly was principally dependent for financial support on her father, Mr. Heo. I further find that Kelly was principally dependent for care upon her mother, Mrs. Cho, during the relevant time.

The conclusion I reach is that Ms. Kelly Heo qualified as an insured person on her parents' ICBC policy on September 14, 2013, pursuant to SABS section 3(1), ICBC is the priority insurer for Kelly's benefits.

Expenses:

Economical is successful in this matter and ICBC is responsible to pay the Applicant's expenses of this arbitration along with the costs of the arbitration process. I am grateful to Mr. Frost and Mr. Mooney for their well-prepared materials and helpful submissions. I suggest they promptly work to resolve any disputes they may have about the payments and expenses. If the parties cannot agree, I invite them to contact me to schedule a conference or hearing on those remaining issues.

Order:

1. ICBC shall assume responsibility for adjusting and payment of Ms. Kelly Heo's SABS benefits, and reimburse Economical the benefits paid previous to this Order.
2. ICBC shall pay the costs of this arbitration and reimburse Economical for its expenses of this process.

April 19, 2017



Fred Sampliner, Arbitrator