

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990  
c. I.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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

YORK FIRE & CASUALTY INSURANCE COMPANY

Respondent

## AWARD

### Counsel:

Economical Mutual Insurance Company: Daniel Strigberger

York Fire & Casualty Insurance Company: Philip Tyborski

### Introduction:

This matter came before me as an Arbitrator pursuant to the Arbitrations Act, 1991, to arbitrate a dispute as to which of two insurers is obliged to pay Statutory Accident Benefits pursuant to the *Insurance Act* and its Regulations to Ms. Alice Lu (Ai Yi Lu) hereinafter called "Alice".

The parties selected me as their Arbitrator on consent and the matter proceeded to a single day hearing in Mississauga on November 1, 2012.

The Applicant and the Respondent are automobile insurers and the dispute before me was with respect to priority arising out of a motor vehicle accident on June 22, 2011 when Alice was struck as a pedestrian by a motor vehicle operated by Ho H. Mak. The main issue for my determination was

whether Alice at the time of the accident was principally dependant for care on her legal custodian in Canada, Mr. Yang Jian Tan.

Economical Mutual Insurance Company is the insurer of the striking vehicle of Mr. Mak and is presently paying Statutory Accident Benefits to Alice. York Fire & Casualty (the Respondent) are the insurers of Mr. Tan.

**Record:**

The record in this matter consisted of four exhibits as follows:

Exhibit 1: Arbitration Agreement

Exhibit 2: Book of Documents of the Respondent, York Fire & Casualty Insurance Company

Exhibit 3: Custodianship Declaration dated March 30, 2010

Exhibit 4: Agreed Statement of Facts

**The Issue:**

Exhibit 1: the Arbitration Agreement states the issue for determination by me to be the following:

- a) Which insurer is liable to pay Alice Lu's Statutory Accident Benefits under Section 268 of the *Insurance Act*;
- b) If it is determined that the Respondent is liable to pay the claimant accident benefits under Section 268 of the *Insurance Act*, what is the amount that is due from the Respondent to the Applicant as reimbursement for benefits and expenses the Applicant has paid?; and
- c) If there is amount due from the Respondent to the Applicant, is there interest due to the Applicant and, if so, what is the quantum of the interest?

The parties agreed at the commencement of the arbitration that only issue a) would be dealt with. In light of my conclusion in this Award it will not be necessary to reconvene to hear evidence with respect to issues b) and c).

**Facts:**

I have set out in its entirety the seven paragraphs that make up the Agreed Statement of Facts as follows:

1. On June 22, 2011 Alice Lu (Ai Yu Lu) was struck as a pedestrian by a vehicle driven by Ho H. Mak.

2. At the time of the accident, Mak's vehicle was insured by Economical under Policy Number 6304294. There was no other vehicles involved in the accident.
3. Alice was born on July 11, 1995, making her almost 16 years old at the time of the accident. She was an international student from China, where her parents were still living. In Canada, she was attending Markville Secondary School in Markham. At the time of the accident she was just about to finish Grade 10.
4. On March 30, 2010, Mr. Yang Jian Tan, who was a friend of Alice's mother, executed a Custodian Declaration – Custodian form. In August 2010, Alice moved into Tan's home, located at 57 Upton Crescent in Markham. While she was in school, Tan would sign school permission forms for Alice although he was unaware of the contents of same.
5. At the time of the accident, Tan was insured under a policy of insurance issued by York Fire & Casualty Insurance under Policy Number Ho40254572.
6. While Alice was living with him. Tan would receive approximately \$500.00 per month for rent and food from Alice, who receive that money from her mother in China. Otherwise Alice was responsible for her own expenses.
7. As a result of the accident, Alice submitted an OCF-1 to Economical, who has been paying her benefits.

### **Background Information:**

On June 22, 2011 Alice, who was born on July 11, 1995 was stuck as a pedestrian by a vehicle driven by Mr. Ho H. Mak and insured by Economical Mutual Insurance Company. Alice sustained a number of injuries which are not relevant with respect to the issues in this arbitration.

Alice was an international student from China. At the time of the accident her parents resided in Guangdong in China.

Alice had come to Canada in August of 2010 in order to attend school in Canada.

An arrangement had been made with Mr. Tan, who is a friend of Alice's mother, that he would agree to act as her custodian. As required under the *Immigration and Refugee Protection Act* (SC 2001, c. 27 Sections 30 and 39) a foreign national cannot study in Canada unless they are able to support themselves or satisfy someone that adequate arrangements for their "care and support" have been made.

Counsel for Economical provided information from Citizenship and Immigration Canada in which it was outlined that minor children who are less than 17 years of age and come to Canada to study without a parent or legal guardian must be cared for by a responsible adult in Canada. This individual is known as a custodian.

Exhibit 3 was the Custodianship Declaration that Mr. Tan executed on March 30, 2010. This document confirms that Mr. Tan undertook to:

“The full custodianship of Alice Lu during her stay in Canada, while under the age of majority in the Province in which she resides. As custodian I have made the necessary arrangements for the care and support of the said student in place of the parents as appropriate. By signing the Custodian Agreement, I certify I reside within a reasonable distance of the student’s intended residence and school and will be able to fulfill any obligations as a custodian in the event of an emergency.”

Based on Mr. Tan’s signature on the Custodian Declaration and his arrangements with Alice’s parents Alice was permitted to come to Canada. As noted she came in August of 2010 and moved into Mr. Tan’s home located at 57 Upton Crescent in Markham. While in Canada she attended Markville Secondary School and at the time of the accident she was about to complete Grade 10.

According to the examinations under oath that were conducted (Exhibit 2) Alice remained in Canada during the school year but was scheduled to return home to China in the summer. Her return to China was prevented due to her accident on June 22, 2011.

Mr. Tan’s household included his parents, his sister, niece, nephew and his son. Alice was provided with her own room. She provided some modest assistance within the family.

While Alice was living with Mr. Tan he would receive \$500.00 per month via Alice who received that money from her mother in China. This was to cover her accommodation and food. Alice was otherwise responsible for her own expenses. In her examination under oath she suggests that she would receive money from her family in China as needed.

While here in Canada Alice attended school. Mr. Tan would sign school permission forms for Alice but both the agreed Statement of Facts and the information from the examination under oath suggest that he was unaware of the contents of these. Mr. Tan and his family provided food and accommodations for Alice. Mr. Tan did not help Alice with her school work. It would appear from the examination under oath that Alice handled her own school work and would talk to her parents about her grades.

Alice also paid for all her own clothing, makeup and other personal items. She was provided money by her mother and this was deposited into a bank account in Alice’s name. Alice did not ask for Mr. Tan’s permission with respect to making these purchases and Mr. Tan agreed that that was not something that he was concerned with.

While Alice lived with Mr. Tan she maintained close contact with her parents. She advised on her examination under oath that she would speak to them up to 3 times a week on the phone or through the internet. Generally the evidence appears to support the notion that her emotional needs were satisfied and responded to by her parents and not by Mr. Tan. The evidence of both Mr. Tan and Alice suggest that she maintained a parent child relationship with her parents and Mr. Tan did not step into that role.

In the examinations under oath there was a canvassing of what rules or discipline was enforced on Alice by Mr. Tan. It appears that there was relatively little rules. Mr. Tan accepted that he was responsible for her. However the only rule that appeared to have been in place was that she had to come home in time to join the family for dinner. Mr. Tan also appears to have some rules with respect to dating. According to Alice Mr. Tan suggested that she does not get involved in any relationships. Mr. Tan in his examination under oath appeared to have relatively little knowledge of Alice's activities outside of his home. He was not sure what time she spent with friends and did not seem to know what social activities she participated in. He described her as very independent.

### Dependency Issue:

It would appear that all parties agree that the onus of proof in this matter would be on Economical Mutual Insurance Company as the Applicant to establish that Alice is principally dependent for care on Mr. Tan, the insured of York Fire & Casualty.

The parties agree that pursuant to Section 268 (2) and 268 (5) of the *Insurance Act* R.S.O. 1990 c. 1.8 that unless it is established that Alice was a dependent of Mr. Tan as defined under the Statutory Accident Benefits Schedule that priority for payment of her claim for accident benefits rests with Economical.

The term "dependent" is defined under Section 3 (7) (b) of the Statutory Accident Benefits Schedule Ontario Regulation 34/10 (hereinafter referred to as the "SABS") as follows:

"A person is a dependant of an individual if the person is principally dependant for financial support or care on the individual or the individual's spouse."

As noted earlier it was agreed that the only issue here is principal dependency for care.

On behalf of Economical it is argued that Alice could not have come to Canada as a student had Mr. Tan not signed the Custodianship Declaration which was marked as Exhibit 3. Economical argues that the execution of this document and the obligations that flow from it results in Mr. Tan becoming a de facto parent of Alice and as such becomes principally responsible for her care. Economical argues in support of their position that one must not only look at the de facto physical care arrangements but also the relationship in order to determine dependency. Economical suggests that based on Federal and Provincial law Alice would be considered to be Mr. Tan's dependant for care while she was in Canada. Economical makes reference to the *Immigration and Refugee Protection Act*, Citizenship and Immigration Canada information, the *Children's Law Reform Act*, the *Family Law Act*, the *Education Act* and the *Child and Family Services Act*. Economical submits that under the laws of Ontario a 15 year old child would be considered to be dependant on a parent or a guardian for care and that as Mr. Tan was Alice's legal guardian/custodian while she was in Canada that Alice therefore is considered to be a person in need of care and she was principally dependant on Mr. Tan for that care.

York Fire argues that while it acknowledges there was a legal obligation for Mr. Tan to act as a custodian in accordance with Exhibit 3 that the analysis should not start and stop by looking at the legal obligations of the caregiver. York Fire argues that the focus should be on whether the individual was actually principally dependant for "care" on the other individual at the time of the

accident regardless of the caregiver's legal obligations and the consequences of whether those obligations are or are not being fulfilled.

York Fire points out that with respect to the factual circumstances that Alice was more dependant for care in the traditional sense on her parents than she was on Mr. Tan. York Fire suggests that the assessment of dependency for care requires more than a consideration of the legal obligation but must look at the individual's physical, social and emotional needs and who she receives support from.

I have carefully reviewed all the various statutes outlined in Economical's Factum and Book of Authorities and while it creates an interesting argument I believe that I am bound by the Court of Appeal's analysis of this issue in the case of *Oxford Mutual Insurance Company and Co-operators General Insurance Company*, 2006 CanLII 37956 (ON CA). The *Oxford Mutual* case has remarkable similarities to the case of Alice and Mr. Tan. In *Oxford* Joshua Williams was 22 years of age at the time the accident occurred. He had resided away from his mother's home and had been able to live self-sufficiently. However at the time of the accident he had been involved in an assault charge and in April of 2002 had been released on bail to his mother. His mother had agreed to act as his surety on agreed upon terms which were set out in an executed document. The rules set out in the surety agreement required Mr. Williams to reside with his mother and obey her house rules. A curfew was established. He was obliged to keep his mother informed of his whereabouts and work with his mother to seek counseling among other terms. Co-operators argued in that case that the surety arrangement established a legal obligation on Mr. Williams' mother to provide "care". Co-operators argued that the legal obligation resulted in Mr. Williams being as if he were under the age of 16 and therefore a "person in need of care" as defined under the Statutory Accident Benefits Schedule. I note this similar argument is put forward by Economical in this case.

The Court of Appeal determined that Mr. Williams was not principally dependant for care on his mother as a result of this legal arrangement. The court found that in determining issues of dependency/care the following rules should be followed:

1. In determining dependency the relationship to be examined should not simply be a "snap shot" at the time of the accident. The true characterization of a dependant relationship at the time of the accident will require consideration of that relationship over a period of time, particularly in the case of young adults whose lives are in transition. The analysis should also consider the degree of care provided to the individual at certain times as well as the individual's need for care.
2. While the legal relationship between the two individuals is relevant and important it is not determinative. It is only one factor to be considered in determining whether an individual is dependant for care. Other factors include the claimant's physical, social and emotional needs.
3. The definition of a person in need of care under the Statutory Accident Benefits Schedule (a person who is less than 16 years of age or who requires care because of physical or mental incapacity) deals exclusively with eligibility for caregiver benefits. This section only appears in part 4 of the Regulation. As the legislature chose not to incorporate a similar defined term into that part of the Regulation dealing with entitlement to Statutory Accident Benefits the court concluded that that provision

does not necessarily have any relevance to a determination as to whether someone is principally dependant for care on another individual.

Taking into consideration those criteria from the Court of Appeal, I conclude that while there was certainly a legal relationship created that made Mr. Tan a custodian of Alice that that legal relationship in and of itself was not sufficient to establish that Alice was principally dependant for care on Mr. Tan. In looking at all the other facts relating to the question of “care” it is clear that Alice remained principally dependant for emotional support, social support, guidance, discipline and making sure that her needs were met on her parents despite their residency in China.

Further I have looked closely at the timeframe within which one must assess dependency. The Court of Appeal in the *Oxford* decision (supra) noted that one cannot simply look at the “snap shot” in time in looking at dependency. I am very cognizant of the fact that this custodial relationship was temporary in nature. It was in place only during the school year and that Alice was to return to her parents for the summer.

I also found instructive the following decisions:

1. *Liberty Mutual Insurance v Kaur* (1999) CarswellOnt 5191 (FSCO). In that decision Arbitrator Novick concluded that in assessing dependency for care one must establish that an individual to be considered dependant on another person must “chiefly or for the most part” derive support for care from that person and must be more dependant on that person than under any other source including herself. The evidence establishes that Alice was largely independent in Mr. Tan’s home and even if I were to be wrong with respect to the impact of the legal relationship I find that Alice did not “chiefly or for the most part” derive support for care from Mr. Tan more than any other source. In particular I find she derived most of her support for care from herself and her parents. In other words Alice was more than 51% dependant for care on herself and her parents and not Mr. Tan.
2. *Echelon General Insurance Company v State Farm Mutual Automobile Insurance Company* (2011) CarswellOnt 13197 a decision of Arbitrator Novick in July of 2011. In that case Arbitrator Novick confirmed that in assessing dependency for care one must conduct a qualitative analysis that should not take financial considerations into account. She noted that it requires a consideration of the claimant’s physical, social and emotional needs, and the social and emotional support she receives from the person in question. I agree with Arbitrator Novick in her analysis and I note that Mr. Tan provided limited if any social and emotional support to Alice. Alice was able to dress and bathe herself, prepare her own meals (in particular her lunch and breakfast), handle her own laundry, make her own decisions and had control to a large extent over her own finances and her day to day life.
3. *Co-operators v Her Majesty the Queen in the Right of the Province of Ontario (The Motor Vehicle Accident Claims Fund)* [2001] a decision of Arbitrator Guy Jones in August of 2001, unreported. In that case Arbitrator Jones noted that in his view the inclusion of the words “for care” that were added into the original financial definition of dependency were added to reflect those cases where a dependant is emotionally dependant upon

another. I agree with Arbitrator Jones' analysis and believe that in the cases involving the issue of dependency in relationship to "care" not only should physical care be analyzed but emotional care is an important component. In Alice's case it is my finding that all of her emotional care continued to come through her parents despite the distance that separated them.

I also wanted to comment on Ecomomical's submissions that I should rely upon the various statutes that outlined the duty and legal obligation of Mr. Tan to provide "care" to Alice. York Fire urged that those other statutes had no relevance to the interpretation of the Statutory Accident Benefits Schedule. York Fire referred me to the decision of Justice Ferguson in *Catherwood v Young Estate* (1995) CarswellOnt 1076 (Ontario General Division). In that case Justice Ferguson noted and I quote:

"A comparison of the scheme and public policy in the family law statutes with those in the No Fault Benefit Schedule reveals significant differences. The fact that the Schedule may have incorporated some definitions from the family law statutes does not mean the policy from those statutes should be applied to the Schedule...these are various different schemes. However no observer of the process by which the No Fault provisions were created and involved could reasonably say that the scheme was an attempt to integrate all the policies of the Provincial and Federal family law statutes into the law of automobile insurance."

I believe that Justice Ferguson's analysis is apt here. It is my view that while other statutes may be of some limited assistance in interpreting the Statutory Accident Benefits Schedule that overall one must reach conclusions with respect to the interpretation of that Schedule by relying upon the wording in the *Insurance Act*, its regulations, the Schedule and any predecessor or subsequent Schedules. I therefore did not find the reference to the other statutory authorities to be helpful in determining whether Alice was principally dependant for care on Mr. Tan.

I carefully reviewed the decision in *State farm Mutual Automobile Insurance Company v Non-Marine Underwriters, Lloyd's London* [1997] O.J. No. 3402 (General Division). That case was an appeal from the award of an Arbitrator and the appeal was heard by Justice Feldman. A 15 year old boy had been injured in an accident. He was the son of adopted parents but had temporarily been placed in the care of foster parents. He was injured while in the care of his foster parents and the question was whether the child was dependant on the Children's Aid Society or on its agent, the foster parents. The court held that the child was dependant on the Children's Aid Society and not on the foster parents. This again is a situation somewhat analogous to the circumstances of Alice and Mr. Tan. Justice Feldman in that case looked carefully at not only who was providing care but the relationship between those individuals in order to ensure that absurd results would not follow. For example she noted that even though the child may de facto be principally dependant on the foster parents for care that is really only a temporary circumstance that is set up for and paid for by Children's Aid. It is noted that it would be most unfair for the actual biological children of the foster parents to share in statutory death benefits with whatever foster children happened to be in the home at the time of the death of a father or mother. This raised similar questions for me with respect to Alice. If I accepted that Alice were principally dependant for care on Mr. Tan then what would flow from such a finding in similar cases that should Mr. Tan die then Alice would be entitled to claim death benefits. I agree with Justice Feldman that that would be most unfair to the actual children of the parent. I also agree with Justice Feldman's comments found in paragraph 20:



“In my view, therefore, one must look not only at the de facto physical care arrangements but also the basis for the care situation and for the relationship in order to make a determination as to whether a person is principally dependant on another for care. Such considerations would include whether the person is a dependant or independent person that is able to provide their own care even though someone else may be catering to their needs. That may be a function of their age as well as their financial, residential, physical and emotional circumstances. They would also include the legal relationships between the parties...one must look at whether the care situation is a temporary, long term or permanent one and if it can be terminated, then by which party and on what basis.”

Justice Feldman goes on to find that because in this young boy’s case he was in a temporary care situation and that the Children’s Aid Society continued to have the legal obligation and responsibility for care that the child’s dependence was on the Society and not its agent. I find in this case that Mr. Tan is the agent of Alice’s parents and that the technical legal responsibility and responsibility for care continue to reside with Alice’s parents. Such a finding prevents the anomaly in relationship to death benefits that I referred to earlier and maintains a consistent interpretation of the policy and intent of the Statutory Accident Benefits Schedule.

### Conclusion:

I find that Ai Yi Lu was not principally dependant for care on Yiang Jian Tan. Therefore Economical Mutual Insurance Company is the priority insurer for paying accident benefits to Ms. Lu with respect to the accident of June 22, 2011.

With respect to the questions posed in the Arbitration Agreement I note the following:

1. Which insurer is liable to pay Alice Lu’s Statutory Accident Benefits under Section 268 of the *Insurance Act*?

Economical Mutual Insurance Company is liable to pay Alice Lu’s Statutory Accident Benefits under Section 268 of the *Insurance Act*. There is no need to answer questions b) or c).

### Costs:

According to the Arbitration Agreement (paragraph 4) the expenses of the Arbitrator and the expenses of the arbitration are to be apportioned as determined by the Arbitrator taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in litigation before the Courts of Ontario. I have not been made aware of any offer to settle. Despite the eloquent submissions of Mr. Strigberger on behalf of Economical I find that York Fire and Casualty Insurance Company were wholly successful in this case and the costs of the arbitration should be borne by Economical.

If the parties are unable to reach an agreement on costs within 30 days of the receipt of the Award I would ask counsel to contact me so the issue of costs can be dealt with.

**Order:**

It is ordered that Economical Mutual Insurance Company is responsible for the payment of Statutory Accident Benefits to Ai Yi Lu with respect to the accident of June 22, 2011.

DATED THIS 8th day of January, 2013 at Toronto.



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Arbitrator Philippa G. Samworth  
**DUTTON BROCK LLP**