

IN THE MATTER OF the *Insurance Act* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended
AND IN THE MATTER OF an arbitration

BETWEEN

ECONOMICAL INSURANCE a.k.a. DEFINITY INSURANCE COMPANY Applicant

and

ECHELON INSURANCE

Respondent

AWARD

COUNSEL APPEARING

Danielle Gauvreau, counsel for the Applicant, Economical Insurance (hereinafter referred to as “Economical”).

Alysha D. Bayes, counsel for the Respondent, Echelon Insurance (hereinafter called “Echelon”).

BACKGROUND

This is a priority dispute pursuant to s. 268 of the *Insurance Act* which arose as a result of a motor vehicle accident that occurred on March 20, 2022.

On that date the claimant was a pedestrian who was struck by a car insured by Echelon. The claimant sustained serious injuries.

Economical insures the claimant's ex-boyfriend. The claimant applied to Economical for statutory accident benefits.

Economical takes the position that the claimant is not a spouse, a dependant of Economical's named insured nor on the date of loss was she a listed driver. Economical claims that more than two months prior to the motor vehicle accident the claimant had been removed as a listed driver from her boyfriend's policy.

Echelon takes the position that based on the Certificate of Insurance that was in place at the time of the claimant's accident that the claimant remained a specified driver under the Economical policy and accordingly that policy ranks ahead of Echelon in terms of priority. The dispute is therefore whether the claimant was a “specified driver” on the Economical policy on March 20, 2022.

PROCEEDINGS

The parties chose me as their arbitrator on consent and this matter proceeded to a written hearing. The parties provided an Arbitration Agreement dated April 30, 2024, an Agreed Statement of Facts, a Joint Book of Documents and each party made written submissions.

The Joint Book of Documents included:

1. A blank OPCF-28(A): Excluded driver endorsement
2. A transcript of a phone call between the claimant's boyfriend's broker and the boyfriend on April 8, 2021, May 17, 2021 and January 11, 2022
3. Copies of log notes from the broker
4. Certificate of Automobile Insurance: (a) Policy May 17, 2021 to May 16, 2022; and (b) Policy January 11, 2022 to May 16, 2022
5. Echelon Certificate of Insurance
6. Copy of OCF-1 and covering letter to Economical
7. Transcript of an examination under oath of the claimant on July 18, 2022

ISSUE IN DISPUTE

According to the Arbitration Agreement the parties asked me to determine the following issues:

1. Which insurer is highest in priority for the claimant's accident benefit claim arising from a motor vehicle accident that occurred on March 20, 2022?
2. The quantum of reimbursement of accident benefits paid to the claimant if any.
3. Interest and costs.

In this decision I am addressing only the first issue. I conclude that Echelon is the priority insurer under s. 268 of the *Insurance Act* responsible for paying the claimant's accident benefits as the claimant was not a specified driver on the Economical policy on March 20, 2022.

FACTS

The facts are not in dispute.

It is acknowledged that Economical at all material times insured the claimant's boyfriend as the sole named insured under a standard automobile policy bearing policy no. 20561779. The

described vehicle was a 2012 Nissan Juke and the policy term ran from May 16, 2021 to May 16, 2022.

There is also no dispute that Echelon insured the vehicle that struck the claimant when she was a pedestrian on March 20, 2022.

It is agreed that the claimant was not a named insured under the Economical policy. It is also agreed that on the date of loss she was not the spouse nor the dependant of Economical's named insured: her boyfriend. There was no excluded driver endorsement (OPCF-28(A)) attached to the Economical policy. In or around April or May of 2021 the claimant was living with her boyfriend, the named insured under the Economical policy.

On or about April 8, 2021 the boyfriend called his broker to advise that the claimant was another licensed driver living in his residence and that she did not have her own vehicle. The broker advised that everyone who lives in the home who holds a valid licence must be either listed or excluded on the auto policy. He was told that therefore she should be added as a driver to his policy.

According to the broker's log note of April 8, 2021 the broker intended to run the necessary reports, "adding the claimant as a driver" and was going to e-mail the results to the named insured. It did not appear that that was done.

In another phone call between the broker and the named insured/boyfriend on May 17, 2021 he indicated that he had received a renewal on the policy and that his girlfriend had not been added. He advised that she does not have her own insurance but was a licensed driver and they had been living together for a few months. There was some discussion about the cost and he was told that she would be added. According to a log note dated May 17, 2021 from the broker's file the change was completed and the driver was added and an updated address put in.

The Certificate of Insurance of Economical dated May 17, 2021 with an expiry of May 16, 2022 shows under "rating information" the following:

<u>Driver No.</u>	<u>Name</u>	
Driver No. 1	Claimant	Secondary Driver 1
Driver No. 2	Named insured	Principal Driver 1

The parties agree that as of May 17, 2021 that the claimant was a listed driver under the Economical policy shown as the secondary driver for the described automobile: A 2012 Nissan Juke.

A further Certificate of Insurance was also issued a short time later correcting the spelling of the claimant's name.

In or around January of 2022 the relationship between the claimant and her boyfriend ended. He spoke to his broker and requested that the claimant be removed from his policy with Economical.

On or about January 11, 2022 the now ex-boyfriend spoke with his broker and it was confirmed that effective January 11, 2022 a driver was removed from the policy. A further Certificate of Automobile Insurance was then issued by Economical with an effective date of January 11, 2022 at 1:02 p.m.

Under the heading Rating Information the only driver shown is the named insured and he is shown as the principal driver for the described vehicle: the 2012 Nissan Juke.

Under Remarks we see that there is a credit given to the premium for the policy amendment in the amount of \$57.54. Under this same heading is the following:

<u>Automobile/Driver</u>	<u>Description</u>
Claimant	Driver Removed

This policy change was noted by Economical's underwriting department on January 11, 2022.

The accident then occurred on March 20, 2022 and as noted the claimant through her counsel submitted an OCF-1 to Economical. The OCF-1 indicated under part 4: Details of automobile insurance that the claimant applied to Economical on the basis that "a policy that lists you as a driver". The OCF-1 is dated April 11, 2022.

The claimant was examined under oath on July 18, 2022. During the course of her evidence she confirmed that she moved out of her boyfriend's house and was no longer living with him effective October 2021. She also confirmed that she had been told that once she moved out that her ex-boyfriend removed her as a driver from his auto insurance policy.

The claimant confirmed that this took place before the accident occurred.

On June 27th 2022 Economical served a Notice to Applicant of Dispute Between Insurers on both the claimant and Echelon.

A Notice to Participate and Demand for Arbitration was served on or around March 30, 2023.

RELEVANT LEGISLATION

s. 268(2) of the *Insurance Act* is the priority legislation relevant to this dispute. It provides for a hierarchy of policies that will respond to a motor vehicle accident for the purposes of statutory accident benefits.

It provides it in respect of a non-occupant (pedestrian in this case) that the first tier in the priority hierarchy is recourse against the insurer of an automobile in respect of which the non-occupant is an insured.

If recovery is not available under that heading then the non-occupant can make a claim against the insurer of the automobile that struck the occupant.

This then brings in the definition of an insured in "under the Statutory Accident Benefit

Schedule.” S. 3(1) of the Schedule defines “an insured person” in respect of a particular motor vehicle liability policy as:

- “(a) the named insured, any 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 dependant of the named insured or of his or her spouse.”

As it is agreed that the claimant was not a named insured or spouse or dependant of Economical’s named insured the relevant portion of s. 3(1) is “any person specified in the policy as a driver of the insured automobile”.

POSITION OF THE PARTIES

Economical

It is Economical's position that the documents clearly indicate that the claimant was removed from its policy effective January 11, 2022. Economical submits that a named insured may change or terminate coverage at any time on request including midway through a policy term. Economical makes reference to the Ontario Automobile Policy owner's policy at pages 6 and 58. Economical submits that it is important that a policyholder have that right to change their coverage at any time. Flexibility is needed to ensure that policyholders promptly have any coverages they require. They are also required under the Ontario automobile policy to promptly notify the insurer of any change in risk material to the contract which would include any change as to who may be driving the insured vehicle or who may reside in the named insured's home.

From a policy perspective Economical points to the fact that it is important that only members of the household remain insured under an automobile policy such as this and not people who are strangers to the policy. In this case the claimant became a member of the household and as such should have been on the policy as indeed occurred. However, once she left the household then, Economical submits, there must be a way in which that individual can be removed from the policy and no longer be covered as a listed driver.

Economical submits that there are no technical requirements as to how that should be done. Economical submits that the Certificate of Insurance that it issued clearly indicated that the claimant was removed as a driver, that there was no ambiguity in that and in fact a refund of premium was noted.

Economical submits that to find in these circumstances that a listed driver who has been removed from the policy remains listed solely because their name appears on the policy as having been removed would create commercial chaos. It would place an insurer on risk for an individual beyond the date that the individual was removed from the policy and it would be in the absence of any premium being received by the insurer for that coverage.

Economical relies on the decision of *AXA Insurance Company v. Gore Mutual and State Farm Insurance Company*, a decision of Arbitrator Stephen M. Malach dated May 4, 2000.

In that case Michael Perry was involved in a motor vehicle accident on August 23, 1998.

Mr. Perry had lived with a Deborah Van Beek from approximately August 1996 to May of 1997. After they separated Ms. Van Beek received a renewal from State Farm (her insurer) in approximately July or August of 1997 and saw that Mr. Perry was still a listed driver. She contacted State Farm and asked that he be removed as a listed driver.

A document was produced at the hearing called "Household Clients and Violations". It showed the removal of Mr. Perry as a listed driver on August 14, 1997. Under a section called "Rate IND" the listing showed an X beside his name.

Evidence was given from the underwriting department of State Farm to advise that when a listed driver is deleted, that an X is noted in the rating column beside the listed driver's name to show that that individual has been deleted.

The issue before Arbitrator Malach was whether or not Mr. Perry remained a listed driver on the State Farm policy. He concluded that Mr. Perry was not a listed driver on the State Farm policy on the date of loss.

To summarize Economical's position, it is that the claimant was removed from their policy prior to the date of loss and that there is no evidence to the contrary. The Certificate of Insurance dated January 11, 2022 confirms her removal from the policy at the material time. She was not included in the list of drivers nor in the driver rating information. Her name only appears on the certificate to indicate she has been removed as a driver and to note the corresponding credit premium. Economical submits that this cannot make her a "person specified in the policy as a driver."

Position of Echelon

It is Echelon's position that while they acknowledge that the claimant is no longer listed under the rating information of the certificate, the fact that her name appears at the top of page 5 of the certificate under the heading Automobile Driver creates ambiguity and therefore the claimant remained as a listed driver.

Echelon submits that an average insured would not understand that the movement of the claimant's name from rating to automobile driver would leave the insured unclear as to whether the individual was or was not a listed driver and in the absence of clarity that the claimant would therefore remain as a listed driver (specified driver) under the Economical policy.

To a large extent Echelon relies on the line of cases that deal with the excluded driver endorsement (OPCF-28(A)). Echelon referenced the following decisions: *Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA 101, *Belair Direct Insurance v. Dominion of Canada General Insurance Company (Travelers)*, decision Arbitrator Vance Cooper, April 19, 2016, *Aviva Insurance Company of Canada v. Economical Mutual Insurance Company*, decision Arbitrator Samworth, April 11, 2019, *Aviva General Insurance Company v. Security National Insurance Company*, Arbitrator Shari Novick, December 6, 2018 and *Co-operators General Insurance Company v. Intact Insurance Company*, Arbitrator Samworth, December 22, 2020.

The majority of these cases deal with whether an excluded driver with a properly executed OPCF-28(A) is considered a listed driver under the definition of an insured person under the Statutory Accident Benefit Schedule so that that individual would qualify as an insured under the policy for the purposes of statutory accident benefits. Echelon submits that as in the excluded driver cases, that the placement of the driver's name on the policy establishes that individual as a listed driver. There is no disagreement between the parties that a listed driver would be a "specified driver" under s. 3(1) of the Statutory Accident Benefit Schedule.

Echelon submits that the arbitrators and courts reviewing the excluded driver issue looked carefully at the Certificate of Insurance and the fact that the excluded driver's name would appear on the policy as a listed driver of the described vehicle albeit with a notation beside it that he or she was an excluded driver. Echelon points to the case law that confirmed that in those circumstances even though the individual is excluded from some coverage while driving the insured automobile based on the excluded driver endorsement, that by virtue of his name appearing on the certificate as a driver that the cases confirm that that individual remains a specified driver for the purposes of statutory accident benefits.

Echelon asks me to apply the same argument to this case. It submits that the claimant's name on the amended policy appears under the heading Automobile/Driver and that as with the excluded driver cases that means her name remains listed under the policy and therefore an ambiguity is created as she may still be a listed driver under the policy even though a request has been made to remove her.

Echelon submits that even though it is clear that Economical did not intend the claimant to qualify as a "insured person" on their policy that by virtue of the manner in which it chose to list the claimant on their declaration page/Certificate of Insurance ultimately results in the claimant qualifying as a specified driver.

With respect to the submissions of Economical on the policy issues, Echelon points out that unlisted drivers are entitled to insurance coverage whether or not they are actually named on the policy and that no commercial chaos has come from that. Echelon submits that often insurers end up covering accident benefits of unknown dependants of whom they are not aware.

Echelon submits it is not relevant whether or not someone has received a premium for that individual's coverage as there are multiple situations where insurers are obliged to extend coverage to people who have not paid a premium. Echelon points to this particular case and that if they are found to be the priority insurer they would have never received a premium for the claimant.

Economical's Reply

Economical submits that the declaration page of their policy does not create any ambiguity. It submits that in plain language beside the name of the claimant are the words "driver removed". There is also the confirmed premium credit associated with the removal. There is simply no doubt that it was the intent to remove the claimant from the policy and that that was effected by the declaration page.

With respect to the cases relied upon by Echelon and their analogy to the excluded driver, Economical submits that the Court of Appeal's decision in *Dominion v. State Farm (supra)* is simply not relevant. It dealt with the excluded driver endorsement and the specific terms of that endorsement preserve a right for an excluded driver to claim statutory accident benefits. Economical points to the following term of the OPCF28(A):

"Exclusions from coverage - Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage while the Excluded Driver is driving the automobile(s) listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy."

Economical submits that it is that specific language in the OPCF-28A that was relied upon by arbitrators and the Court of Appeal as interpreting an intention of the legislature to preserve accident benefit coverage in some circumstances for an excluded driver.

Economical submits that when looking at all the cases referred to by Echelon, that those excluded driver cases speak to circumstances in which an injured party was otherwise an insured person under the policy by virtue of dependency or a spousal relationship and the only issue was whether the OPCF-28(A) disentitled them to insured person status.

Economical submits that the case here is completely different. It involves a previously listed/specified driver on the policy being clearly removed from the policy with the intention that there would be no coverage in any circumstances as the individual was no longer intended to be an insured.

Finally, Economical submits that Echelon did not provide any case law to support their position that an insurer who confirms coverage is deleted specifically at the insured's request maintains coverage despite the insured's wishes.

DECISION AND ANALYSIS

I agree with the submissions and analysis of Economical in this matter.

There is no doubt from the facts of this case that the named insured under the Economical policy intended to remove his girlfriend from the policy when she moved out of his home. There is also no doubt that Economical intended to effect that change and issued their amended policy and declaration on January 11, 2022 for that purpose.

The claimant was clearly a specified driver/listed driver under the Economical policy from May 17, 2021 until her removal on January 11, 2022. The Certificate of Automobile Insurance produced by Economical reflects under rating information that both the claimant and her boyfriend were noted as drivers. Specifically under rating it indicated whether they were a secondary or principal driver. It had their age and how long they had been licensed. Under this section as well there was a heading "excluded" and for both claimant and the named insured both were noted as not an excluded driver. All this is supported by the various log notes and transcripts of telephone calls between the named insured and his broker.

Equally, the intent to remove the claimant is supported by the log notes and the recorded

telephone calls and I also find it was clearly set out by the second Certificate of Automobile Insurance issued by Economical effective January 11, 2022. That certificate under the same heading where on the previous certificate we had seen the claimant's name as a driver now only shows the named insured as a driver. He is shown as the principal driver for the Nissan Juke. This in my view clearly shows that the claimant was no longer considered a driver for the purpose of rating.

I also find that it was clear and unambiguous under the remarks section of this certificate that the claimant had been removed as a driver. In my view there is no other interpretation for what we see under the remarks. It clearly indicates that the change that has been made is to remove the claimant as a driver. Beside her name are the words "driver removed". The fact that her name appears under a heading Automobile/Driver does not in my view raise any ambiguity. It is simply to direct the reader's attention to what change is being effected.

Further, the certificate is clear that there is a credit to the premium being made of \$57.54. Again I find that this makes it even clearer that this policy change intended to remove the secondary driver: the claimant.

s. 3(1) of the Statutory Accident Benefit Schedule provides that a specified driver is an insured under the policy. I find that the claimant as of January 11, 2022 was no longer a specified driver and the mere fact that her name appeared on the declaration page to indicate she had been removed as a driver does not result in her being a listed or specified driver under the policy. To do so would go against the clear intent of the parties and the clear wording of the Certificate of Automobile Insurance.

I carefully reviewed the case law referred to by Echelon with respect to an excluded driver and I find that that case law is clearly distinguishable from the facts before me. Those cases deal with an excluded driver which is a specified term under the Ontario automobile policy: OAP-1: Owner's policy. Under the OAP-1 excluded driver is described as follows:

"An excluded driver is someone specifically not covered by this policy when driving the described, temporary substitute or newly acquired automobile. The only exception is coverage for those accident benefits the law requires to be paid to anyone injured in an automobile accident in Ontario."

This wording is carried forward in the OPCF-28(A) excluded driver endorsement. Under part 2 of the endorsement it clearly indicates that a person otherwise insured under the policy of insurance is excluded from coverage except for certain accident benefits when they are driving the listed automobile. They are not excluded from coverage if they are driving an automobile that is not listed, is not a temporary substitute or a newly acquired automobile. If they are an occupant of another automobile (not the one listed under the policy) and are involved in an accident then they are covered under the policy in which they are a listed driver. It is only when they are driving the listed vehicles under the policy that they are excluded from certain accident benefits and other coverage under the OPCF-28(A). This is a significant difference from the situation before me. The claimant was not an excluded driver. She was specifically a listed driver for a certain time period while living in the named insured's household. When she moved out of his household she was taken off the policy.

I note in the decision of *Dominion v. State Farm (supra)* of Arbitrator Bialkowski which was upheld by the Court of Appeal that the arbitrator pointed out that the clear language of the excluded driver endorsement was that an individual would only be excluded from claiming certain accident benefits if he was driving the vehicles identified in the policy. The excluded driver endorsement did not bar the right to claim accident benefits if the individual was a passenger in, for example, his girlfriend's car, or someone else's car, or simply a pedestrian on the street. The claimant is only barred from receiving some accident benefits if he is driving the automobile identified in the endorsement. When he is not driving the described automobile, he remains a listed driver for all purposes.

I therefore find that on the date of loss of March 20, 2022 the claimant was not a specified driver under the Economical policy and that she had been effectively removed as a specified driver on January 11, 2022.

As a result, Echelon is the priority insurer pursuant to s. 268 of the *Insurance Act* and responsible for paying accident benefits to the claimant.

COSTS

The Arbitration Agreement provides that the cost of the arbitration shall be ordered paid by the unsuccessful party to the arbitration which in this case is Echelon. However, the Arbitration Agreement goes on to provide that costs shall not be quantified in the original award and only in a subsequent award in the event there is a dispute between the parties.

I therefore find in accordance with the Arbitration Agreement that both the legal costs and costs of the arbitration are payable by Echelon in an amount to be agreed upon by the parties or to be determined by me at a later date if the parties cannot agree.

DATED THIS 30TH day of July, 2024 at Toronto.



Arbitrator Philippa G. Samworth
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