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# **Axa Insurance v. Markel Insurance Co. of Canada**

Between

Axa Insurance Company, appellant, and  
Markel Insurance Company of Canada, respondent

[2001] O.J. No. 294

Docket No. C32841

**Ontario Court of Appeal  
Toronto, Ontario  
Laskin, Goudge and Feldman JJ.A.**

February 2, 2001.

(23 paras.)

*Insurance — Automobile insurance — The contract, particular terms — Occupant defined — Accident benefits.*

Appeal by Axa Insurance from a judgment which held that Markel Insurance was not required to pay statutory accident benefits to the dependants of the deceased, Ferguson. Axa and Markel each issued a policy of insurance on different vehicles under which Ferguson was named as an insured. Ferguson had driven the vehicle which was insured by Markel to a delivery yard. He exited his vehicle and waited to unload the truck. He was struck by a piece of wood which was propelled off the back of another vehicle. The parties agreed to arbitrate the issue. The arbitrator found that Markel was obliged to pay statutory accident benefits to Ferguson's dependants because Ferguson was the driver, and therefore an occupant of the vehicle within the meaning of the Insurance Act. On appeal, the court held that Ferguson could not have been the driver of the vehicle at the time of the accident, and he was therefore not an occupant under the Insurance Act.

**HELD:** Appeal allowed. It was not necessary for Ferguson to have been engaged in the activity of driving at the time of the accident to be considered the driver of the vehicle and therefore an occupant under the Insurance Act.

## **Statutes, Regulations and Rules Cited:**

Insurance Act, R.S.O. 1990, c. I.8, ss. 224(1), 224(1)(a), 224(1)(b), 268, 268(5), 268(5.1), 268(5.2).

Appeal from:

On appeal from the judgment of Justice Theodore P. Matlow dated April 20, 1999.

**Counsel:**

Geoffrey D. E. Adair, Q.C., for the appellant.  
T.H. Rachlin, Q.C., for the respondent.

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The judgment of the Court was delivered by

¶ 1 **GOUDGE J.A.**:— This is a dispute between two insurance companies. The appellant, AXA Insurance Company ("AXA"), and the respondent, Markel Insurance Company of Canada ("Markel"), each issued a policy of insurance under which Edward Ferguson was a named insured. The question raised by this appeal is whether s. 268(5.2) of the Insurance Act, R.S.O. 1990, c. I.8 (the "Act") as amended obliges Markel to pay statutory accident benefits to Mr. Ferguson and his dependants because he was "the driver" of the vehicle insured by Markel at the time of the incident in which he was injured.

¶ 2 AXA and Markel agreed to arbitrate this question. Arbitrator J.T. Fidler found in favour of AXA. He determined that Mr. Ferguson was the driver and therefore an "occupant" of the vehicle insured by Markel and that it was therefore responsible for the benefits payable under the Statutory Accident Benefit Schedule of the Act. On appeal Matlow J. came to the opposite conclusion, finding that, at the time of the incident, Mr. Ferguson could not have been the driver of the vehicle. AXA appeals from this decision.

¶ 3 For the reasons that follow I agree with the conclusion reached by the arbitrator. I would therefore allow the appeal.

**THE FACTS**

¶ 4 Pursuant to a standard policy of automobile insurance, AXA insured a 1987 Cadillac motor vehicle. Edward Ferguson was the named insured under that policy.

¶ 5 For its part, pursuant to a standard policy of automobile insurance, Markel insured a 1987 Freightliner tractor together with its trailer.

¶ 6 The tractor trailer was owned by Southlake Transportation Systems Inc. a company owned by Mr. Ferguson and his wife. The company was the named insured under the Markel policy. However, as Mr. Ferguson was employed by the company and was the only person to drive the tractor trailer, on appeal, Markel conceded that Edward Ferguson would be considered a named insured under this policy.

¶ 7 On January 30, 1996, Mr. Ferguson drove the tractor trailer to the Stelco South Billet Yard, Rod Mill #2 in order to make a delivery of steel. Once there, he stopped his vehicle outside the loading bay, exited his vehicle and entered the loading bay to wait his

turn to unload his truck. He was outside his truck standing about 30 feet away when he was struck by a piece of wood which had been propelled off the back of another tractor trailer exiting the loading bay. As a result, he suffered serious injuries which ultimately led to his death.

¶ 8 Mr. Ferguson's dependants applied for and received statutory accident benefits from AXA. AXA subsequently gave notice to Markel that Markel ought to be paying these benefits. Mr. Ferguson's family objected to the claims for statutory accident benefits being transferred to Markel.

¶ 9 AXA and Markel agreed to arbitrate this dispute as to priority. The arbitration award was appealed to Matlow J. and it is his decision which is before this court.

## ANALYSIS

¶ 10 The provision of statutory accident benefits is regulated by s. 268 of the Act. That section sets out rules for determining who is liable to pay these benefits. Section 268(5) provides that if a person is a named insured under a motor vehicle liability policy the person shall claim the statutory accident benefits from the insurer under that policy. Sections 268(5.1) and (5.2) are designed to resolve which insurer is responsible to pay these benefits when as in this case, the person is a named insured under more than one policy. These three subsections read as follows:

268 (5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependent of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

¶ 11 Under s. 268(5.2) it is the insurer of the automobile in which the person was an occupant at the time of the incident who must pay the statutory accident benefits. "Occupant" is a defined term, the definition being set out in s. 224(1) of the Act as follows:

224.(1) In this Part,

...

"occupant", in respect of an automobile, means,

- (a) the driver,
- (b) a passenger, whether being carried in or on the automobile,
- (c) a person getting into or on or getting out of or off the automobile;

¶ 12 In this case Mr. Ferguson could not be said to be a passenger in the tractor trailer or a person getting into or out of it. If he was to be considered an "occupant" of the tractor trailer, it must be as the driver. The issue is therefore whether for the purposes of s. 268(5.2) of the Act Mr. Ferguson was at the time of the incident the driver of the tractor trailer.

¶ 13 To answer this question it is helpful to begin with the ordinary meaning of the word "driver". The concise Oxford Dictionary defines it as "one who drives". Using this definition the issue is whether at the time of the incident Mr. Ferguson was the one who was driving the tractor trailer.

¶ 14 By using this criterion the Act focuses on the description of the person claiming the benefits. It does not turn on the activity being engaged in nor the person's precise location. There is nothing in the statutory definition that requires the person at the time of the incident to be engaged in the act of driving or to be in the vehicle. The requirement is merely that he or she be the driver of the vehicle.

¶ 15 This statutory approach is to be contrasted with that addressed in *Kyriazis v. Royal Insurance Company of Canada et al.* (1991), 82 D.L.R. (4th) 691, affirmed (1993), 107 D.L.R. (4th) 288 (Ont. C.A.). In that case the court was considering the standard automobile insurance policy which defined "occupant" to be "a person driving, being carried in or upon or entering or getting on to or alighting from an automobile." The court pointed out that the word "occupant" was defined by reference to various physical activities or processes and since the person in that case had stopped his vehicle and exited it to clean snow from the windows of the vehicle, he was not engaged in driving and therefore was not an occupant.

¶ 16 Because the relevant definition in *Kyriazis* was by reference to various physical activities including driving, that case is clearly distinguishable from this one. In the instant case the relevant definition contains no requirement that the person be engaged in driving at the time of the incident.

¶ 17 However, the legislative context here suggests several other considerations relevant to determining whether Mr. Ferguson can be said to have been the driver of the tractor trailer on January 30, 1996.

¶ 18 First, while s. 224(1) does not require that a person be in the vehicle to be "the driver", by placing s. 224(1)(a) together with the definitions in ss. 224(1)(b) and (c), it suggests that there must be some degree of physical connection with the vehicle for the person to be the driver.

¶ 19 Second, the requirement in s. 268(5.2) that the person be the driver at the time of the incident suggests that this is not a status that attaches permanently to a person but, rather, something that depends on the circumstances at the time.

¶ 20 Third, s. 268(5.2) uses this criterion to determine which of two insurers may be required to pay the benefits. This suggests that although a person may be a named insured in respect of two vehicles in two separate policies, at the time of the incident the person can be the driver of only one but not both of those vehicles, at least for the purposes of s. 268(5.2). Otherwise this criterion of being "the driver" would be ineffective in determining which insurer pays.

¶ 21 Keeping in mind these considerations, the question is whether in all the circumstances at the time of the incident Mr. Ferguson was the driver of the tractor trailer. Would an objective observer of this incident on January 30, 1996 who had in mind these considerations answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor trailer?

¶ 22 In my view, the answer is clear. When he was injured Mr. Ferguson was in close physical proximity to the vehicle. He had driven it there and was waiting to unload it after which he undoubtedly would have driven it away. It is also safe to infer that at the time he was hit he maintained some element of control over the vehicle. Certainly there is no evidence that anyone else had taken over control of it nor had assumed the role of driver. In my view therefore, at the time he was injured he was the driver of the tractor trailer for the purposes of s. 268(5.2) of the Act. As a consequence, Markel was the insurer obliged to pay statutory accident benefits to him and his dependants.

¶ 23 I would therefore allow the appeal with costs, set aside the order of Matlow J. and substitute an order dismissing with costs the appeal from the award of arbitrator J.T. Fidler.

**GOUDGE J.A.**

**LASKIN J.A.** — I agree.

**FELDMAN J.A.** -- I agree.

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