

Case Name:

Kingsway General Insurance Co. v. Intact Insurance

Between

**Kingsway General Insurance Company now known as Jevco
Insurance Company, Kingsway General Insurance Company and
Jevco Insurance Company, Applicant/Appellant, and
Intact Insurance, Intact Insurance Company, and
Intact Insurance Company of Canada,
Respondent/Respondent in Appeal**

[2011] O.J. No. 4040

2011 ONSC 5024

[2011] I.L.R. I-5195

Court File No. CV-11-420504

Ontario Superior Court of Justice

K.B. Corrick J.

Heard: June 7, 2011.

Judgment: August 24, 2011.

(27 paras.)

Insurance law -- Actions -- Practice and procedure -- Appeals and judicial review -- Appeal by Kingsway from an arbitrator's decision that Kingsway was the responsible insurer dismissed -- Pappas, a taxi driver, was struck by another car while standing outside his broken down taxi -- Pappas was a listed driver under his mother's Intact insurance policy and his employer's Kingsway insurance policy -- The arbitrator did not err in finding that Pappas was a deemed named insured on the Kingsway policy -- Pappas' employer had made one of its insured cabs available to him for his regular use as a cab driver -- The fact that the taxi broke down was not relevant -- Insurance Act, s. 268 -- Statutory Accident Benefits Schedule, s. 66.

Insurance law -- Automobile insurance -- Accident benefits -- Appeal by Kingsway from an arbitrator's decision that Kingsway was the responsible insurer dismissed -- Pappas, a taxi driver, was struck by another car while standing outside his broken down taxi -- Pappas was a listed driver

under his mother's Intact insurance policy and his employer's Kingsway insurance policy -- The arbitrator did not err in finding that Pappas was a deemed named insured on the Kingsway policy -- Pappas' employer had made one of its insured cabs available to him for his regular use as a cab driver -- The fact that the taxi broke down was not relevant -- Insurance Act, s. 268 -- Statutory Accident Benefits Schedule, s. 66.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I.8, s. 268(2), s. 268(4), s. 268(5), s. 268(5.2)

Statutory Accident Benefits Schedule, O. Reg. 403/96, s. 66

Counsel:

Frank Benedetto and Catherine Zingg, for Applicant/Appellant.

Eric Grossman and Tanya Zigomanis, for Respondent/Respondent in Appeal.

REASONS FOR DECISION

K.B. CORRICK J.:--

Overview

1 On May 31, 2008, George Pappas was driving a cab on Highway 403 for his employer, Burlington Taxi, when it broke down. He pulled over on the shoulder of the road, and got out of the cab. While on the side of the road, Mr. Pappas was struck by a car, and suffered catastrophic injuries.

2 At the time of the accident, Mr. Pappas was a listed driver on two different insurance policies. He was a listed driver under his mother's car insurance policy issued by Intact. He was also a listed driver under his employer's insurance policy issued by Kingsway. As a result of the injuries he sustained, Mr. Pappas applied to Intact for accident benefits.

3 Intact commenced an arbitration proceeding against Kingsway for a determination of which insurer was responsible for paying statutory accident benefits to Mr. Pappas. On January 18, 2011, Arbitrator Kenneth Bialkowski issued a decision finding that Kingsway was the responsible insurer. Kingsway appeals the decision to this court on a question of law or mixed fact and law, as provided for by the terms of an Arbitration Agreement entered into by the two insurance companies on September 24, 2009.

4 In my view, the decision of the Arbitrator is correct, and the appeal is dismissed.

Facts

5 Mr. Pappas had been employed as a cab driver for Burlington Taxi since 2004. On May 31, 2008, Mr. Pappas was working, driving a cab. He started work that day at 8:00 a.m. His last recorded trip was at 4:30 p.m. Although Mr. Pappas has no memory of the accident, it is assumed by his employer that Mr. Pappas was driving south on Highway 403 to return the taxi cab to Burlington's yard, retrieve his own car, and go home. While on his way to Burlington's yard, Mr. Pappas

pulled the cab over on the right shoulder of the road, and got out of the cab. According to witnesses, Mr. Pappas was standing behind his cab on the shoulder of the road between two and five feet away from the cab when he was struck by a car at about 5:20 p.m. The doors and the trunk of the cab were closed. The Arbitrator found as a fact that Mr. Pappas was standing nearby his cab at the time of the accident.

6 The cab was towed to Burlington Taxi that evening. The president of Burlington Taxi attempted to start the cab that evening, but it would not start. The next day, the cab's alternator was replaced. The Arbitrator found as a fact that, at the time of the accident, the cab was disabled due to a failed alternator.

7 The parties agree that Mr. Pappas was a listed driver on insurance policies issued by each of them. They also agree that Mr. Pappas was not a "named insured" under either policy.

8 The parties raised two issues before the Arbitrator.

- a. Was Mr. Pappas an "occupant" of the vehicle insured by Kingsway at the time of the accident?
- b. Did Mr. Pappas have "regular use" of the Kingsway vehicle "at the time of the accident" so as to become a "deemed named insured" by reason of s. 66 of the *Statutory Accident Benefits Schedule*, O. Reg. 403/96?

9 Kingsway appeals the Arbitrator's decision on the basis that he erred in determining that Mr. Pappas was an "occupant" of the cab at the time of the accident and that the disabled cab was "made available for Mr. Pappas' regular use" at the time of the accident.

Relevant Statutory Provisions

10 Section 268(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 is the starting point for determining which insurance company is responsible for paying accident benefits to a claimant. First in priority for paying is the insurer of a car in respect of which the claimant is an insured person, whether that person is an occupant or non-occupant of the car. It is agreed that Mr. Pappas is a listed driver under both insurance policies, and is therefore an insured person under both insurance policies. In that case, s. 268(4) of the *Insurance Act* provides that Mr. Pappas may decide, in his absolute discretion, the insurer from which he will claim accident benefits. Mr. Pappas chose to claim benefits from In-tact.

11 However, in the circumstances set out in s. 268(5) and (5.2) of the *Insurance Act*, the insured person has no discretion to choose the insurer from which to claim. Section 268(5) provides that if a person is a named insured under a policy, the person shall claim accident benefits against the insurer under that policy. If the person is a named insured under more than one policy and the person was, at the time of the accident, an occupant of an automobile in respect of which the person is a named insured, the person shall claim accident benefits against the insurer of the automobile in which the person was an occupant: s. 268(5.2).

12 Section 268(5) is relevant in this case because s. 66 of the *Statutory Accident Benefits Schedule* contains a deeming provision whereby a person who is living and ordinarily present in Ontario shall be deemed to be the named insured under a policy insuring an automobile at the time of an accident if, at the time of the accident, the insured automobile is being made available for the individual's regular use by a corporation. If section 66 applies to this case, Mr. Pappas is a named

insured under the Kingsway policy and Kingsway is responsible for paying statutory accident benefits to Mr. Pappas.

Occupancy

13 The Arbitrator held that the issue of occupancy was irrelevant to the determination of which insurance company was responsible for paying accident benefits to Mr. Pappas. Notwithstanding that, he went on to explain why he would have found that Mr. Pappas was an "occupant" of the Kingsway vehicle if he was mistaken about the relevancy of occupancy.

14 I agree that occupancy is irrelevant for this reason. The parties agree that Mr. Pappas was "an insured" under both insurance policies because he was a listed driver on both insurance policies. For that reason, whether he was an occupant of a vehicle or not, Mr. Pappas is entitled to choose the insurer from which he claims benefits pursuant to s. 268(4) of the *Insurance Act*. Occupancy only becomes relevant if, pursuant to s. 268(5.2), Mr Pappas is a named insured under more than one policy **and** was the occupant of an automobile in respect of which he was the named insured. In that case, Mr. Pappas must claim benefits from the insurer of the automobile of which he was an occupant. Mr. Pappas was not a named insured under more than one insurance policy, and therefore, whether he was an occupant of an automobile or not is irrelevant.

Regular Use

15 In my view, the key issue on this appeal is whether Mr. Pappas was a deemed named insured on the Kingsway policy pursuant to s. 66 of the *Statutory Accident Benefits Schedule*. If he was, Kingsway is responsible for paying him accident benefits pursuant to s. 268(5) of the *Insurance Act*. If he was not, he is entitled to choose the insurer from which he claims benefits, and he chose Intact.

16 Arbitrator Bialkowski found that Mr. Pappas was a deemed named insured on the Kingsway policy. I agree with that finding.

17 The relevant part of section 66 of the *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996*, O. Reg. 403/96 reads as follows:

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 ...

18 Arbitrator Bialkowski found that at the time of the accident, Burlington Taxi had made its cab available for Mr. Pappas' regular use.

19 Kingsway argues that the Arbitrator erred because, at the time of the accident, the cab was not available for Mr. Pappas' regular use because it was disabled and not capable of being driven. The Arbitrator applied a "control and accessibility" test, and determined that the cab was available

to Mr. Pappas for purposes other than driving, such as using it for shelter from inclement weather. Kingsway argues that the Arbitrator's application of this test was also an error.

20 It was unnecessary for the Arbitrator to engage in an analysis of the other purposes Mr. Pappas could have made of the disabled cab to determine whether, at the time of the accident, it had been made available for his regular use within the meaning of s. 66. In my view, on a plain and common sense reading of s. 66, at the time of this accident on May 31, 2008, Burlington Taxi had made one of its insured cabs available to Mr. Pappas for his regular use as a cab driver. The fact that the cab broke down while Mr. Pappas was driving it for the purposes of his employment by Burlington Taxi is not relevant to the analysis. If Kingsway's interpretation is correct, Kingsway's responsibility for the cab ceased at the moment the cab stopped working. That is not a reasonable interpretation of the statute.

21 As Belobaba J. said in *ACE INA Insurance v. Co-operators General Insurance Co.* [2009] O.J. No. 1276 at paragraph 19, "the point of section 66 is that the accident benefits are to be paid by one's employer's auto insurer if at the time of the accident, a company car is being made available to the injured employee, i.e. is accessible to him - even if he is a pedestrian or a passenger in someone else's car."

22 Mr. Pappas had been a full-time employee of Burlington Taxi since 2004. He was employed as a cab driver. As such, Burlington Taxi made their insured vehicles available to him for his regular use. On the date in question, Mr. Pappas was driving one of Burlington Taxi's insured vehicles during the course of his employment, when it broke down. The cab was on the shoulder of the road, and Mr. Pappas was standing near it at the time of the accident. In my view, the Arbitrator was correct in concluding that at the time of the accident the cab had been made available for Mr. Pappas' regular use.

23 It is not necessary for me to determine whether the Arbitrator's conclusion is a question of law or mixed fact and law or whether the standard of review is correctness or reasonableness because I find that his conclusion was correct.

24 Given the Arbitrator's conclusion that s. 66 of the *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996* applies, Mr. Pappas is therefore a named insured, and pursuant to s. 268(5) of the *Insurance Act*, Kingsway is responsible for paying statutory accident benefits to Mr. Pappas.

25 For the foregoing reasons, Kingsway's appeal is dismissed.

Costs

26 Intact is entitled to its costs of this appeal, fixed at \$7,500.00, inclusive of disbursements and applicable taxes, as agreed by the parties.

27 I thank both counsel for their able and thorough written and oral submissions.

K.B. CORRICK J.

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