

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.8, s. 268 and Regulation 283/95 thereunder;

AND IN THE MATTER of the *Arbitration Act*, 1991,
S.O. 1991, c.17;

AND IN THE MATTER of an Arbitration between:

CERTAS

Applicant

and

CGU/AVIVA

Respondent

AWARD

INTRODUCTION

The parties have submitted this dispute to me to be resolved as an arbitrator pursuant to the *Arbitrations Act*, 1991. This is a dispute between two insurance companies, governed by Ontario Regulation 283/95. Pursuant to the provisions of that regulation and the provisions found in section 268 of the *Insurance Act*, automobile insurers are required to pay statutory accident benefits to persons who have suffered injury in connection with an automobile accident. The Ontario plan provides broad benefits on a generous basis for accident victims. The plan contemplates that all accident victims should have access to an automobile insurer for the purpose of making a claim for these benefits. The insurance scheme is broadly crafted to embrace a range of individuals within the scope of coverage, by treating them as “insured person” for the purpose of accident benefits. When a person is injured in a car accident, it is likely that there will be more than one insurance company that is obliged to treat this person as an “insured person”.

Priority rules are set out in section 268 of the *Insurance Act* to identify which insurer must respond when more than one insurance company might be called upon to pay benefits. Section 268 creates a ranking that scheme is highly relevant here. In accordance with section 268, both Certas and Aviva, in the context of this arbitration, might be called upon to treat this accident benefits claimant as an “insured person”. However, the injured victim in this case is a dependent of the named insured under the Certas policy. Accordingly, if the Certas policy is obliged to respond with respect to statutory accident benefits, then section 268 of the *Insurance Act* dictates that the Certas policy is primary and the other policy, of Aviva, does not apply. The Aviva policy is issued with respect to the automobile involved in the accident.

The parties entered into an arbitration agreement in August of 2004 (Exhibit 1 to this proceeding) and proceeded based on an agreed statement of facts dated September 7,

2004 (Exhibit 2 to this proceeding) and have supplemented that record with underwriting documents that formed part of the factum of the respondent (Exhibit 3 to this proceeding).

FACTUAL BACKGROUND

Oleg Michnevich Jr. suffered injury as a result of a motor vehicle accident which occurred on September 23, 2002. He was eleven years old at the time of the accident. He was riding a bicycle on Lakeshore Road in the City of Toronto when he was struck by an automobile insured by the respondent CGU/Aviva.

Oleg Junior was a dependent on Oleg Michnevich. Oleg Michnevich was a named insured under a policy of insurance issued by the applicant Certas, which was said to be a standard Ontario automobile policy bearing policy number 51128691. The policy was issued for the policy term August 1, 2002 to August 1, 2003. It appears that the policy was issued with the broad range of coverages commonly found under Ontario automobile insurance including liability coverage, accident benefits coverage, coverage for damage to the insured vehicle by collision, and “comprehensive coverage” that would respond to fire and other non-collision losses.

About a month before the accident, on August 22, 2002 Certas’ named insured communicated with his insurance company and requested that all “road coverages” on the insured vehicle be deleted and that only “comprehensive coverage” should be continued in force with respect to the automobile.

The critical issue in this arbitration is the paperwork used by Certas to attempt to accommodate the change requested by their policyholder. Certas issued a “Certificate of Automobile Insurance” apparently for the purpose of describing alterations to the contractual arrangements that previously existed. That document is at Tab 1 of Exhibit 2 to these proceedings. Certas did not utilize Ontario Policy Change Form 16, an endorsement entitled “Suspension of Coverage” which is an endorsement approved by the regulatory authorities pursuant to Ontario’s *Insurance Act*.

Subsequent to the accident Certas was approached for the payment of accident benefits, has paid benefits, and has instituted these proceedings to recover reimbursement from Aviva and to effectively determine whether the respondent, CGU/Aviva, is the insurer obliged to pay accident benefits in respect of Oleg Michnevich Jr.

THE ISSUE BETWEEN THE PARTIES

The parties, in their Arbitration Agreement, have mandated that I shall determine all matters in dispute between the parties in respect of accident benefits for Oleg Michnevich Jr. They have described the issue more precisely in the form of a question for determination as follows:

“What is the effect, if any, of the contractual arrangements made as between the claimant’s father and his insurer, Certas, on the availability of statutory accident benefits to the claimant?”

ANALYSIS

The clear issue in this case is the status of Certas and its policy. Certas insured the father of the injured claimant, and it is agreed that the claimant is a dependant upon that person. In respect of the Certas policy the father was the named insured.

In argument Certas has raised two issues. Firstly they raised the issue of whether or not it is possible in Ontario to issue a policy of insurance that only has comprehensive coverage (covering for non-collision damage to the insured vehicle) without also providing the statutory accident benefits coverage. The second issue concerns the effect, if any, by Certas' failure to employ OPCF 16 for the purpose of altering the policy.

Automobile insurance in the Province of Ontario is a highly regulated product. The price of the product is controlled by regulatory authorities, the characteristics of coverage are defined, limited, and mandated by the provisions in Part VI of the *Insurance Act*, and the documentation issued by insurers to their policy holders is highly regulated in accordance with the statute. There is a strong public policy, evidenced by the extensive legislative activity, that the insurance product should be delivered in a way that makes it understandable to the consumer. There are many instances of limitations on the ability of an insurer, or a consumer, to enter into agreements that vary from the mandatory characteristics.

The product is a complicated one. In the context of one contract an insurer and an insured person may make several different insurance arrangements. Most commonly the contract is for liability insurance coverage. This is the coverage that the law requires operators of motor vehicles to purchase, and no doubt this is what they usually have in mind when they engage in discussions with an insurer for the purpose of obtaining insurance. Also important in the insurance transaction is coverage for damage to the insured vehicle. In Ontario's scheme this is seen as having two components, "collision coverage" for damage sustained to the vehicle by collision or upset and "comprehensive coverage", for all forms of damage to the vehicle other than that caused by collision or upset. The latter coverage embraces such things as fire or theft loss.

Part VI of the *Insurance Act*, however, addresses automobile insurance and also addresses "motor vehicle liability insurance". Various provisions of the act apply to motor vehicle liability policies and others apply to "automobile insurance". Section 268 of the *Insurance Act* provides as follows:

"(1) every contract evidenced by a motor vehicle liability policy, including every such contract in force when the statutory accident benefits schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the schedule and any amendments to the schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that schedule."

Therefore, as a matter of legislative policy, any contract of insurance which sets out to be a "motor vehicle liability policy" must necessarily include the statutory accident benefits. In section 1 of the Act motor vehicle liability policy is defined as follows:

"Motor Vehicle Liability Policy" means a policy or part of a policy evidencing a contract insuring,

- (a) the owner or driver of an automobile or;**

- (b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person's employee or agent or any other person on that person's behalf,

against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof."

In my view, if an individual wishes to enter into a contract of insurance with an insurer solely for the purpose of providing protection against damage to the insured vehicle, and not covering for bodily injury or property damage caused by the automobile, then this is not a "motor vehicle liability policy" and, accordingly, is not deemed to include statutory accident benefits.

In my opinion it is entirely lawful and possible for an insured to enter into such a contract with an insurer and there is no requirement that statutory accident benefits become part of the contract.

Certas has referred to the decision of Arbitrator Paul Torrie in *Coseco vs. Pilot*. In this case arbitrator Torrie was dealing with a situation where a contract of insurance provided only coverage with respect to comprehensive losses. There is no indication in the documentation how the policy came to be in that state. We do not know whether or not the policy was issued that way or whether it was a more fulsome coverage which was reduced in some fashion. In any event arbitrator Torrie concluded that Section 268 of the *Insurance Act* required Statutory Accident Benefits to only be part of a policy which is a motor vehicle liability insurance policy. A policy which provides only comprehensive coverage is not a motor vehicle liability insurance policy within the terms defined in insurance legislation. I agree with Mr. Torrie's conclusion and I therefore agree that it is possible for an automobile insurance policy to be issued that is not required to have Statutory Accident Benefits.

In my opinion, a policy issued as an automobile policy, that does not include any liability coverage, does not need to have coverage for Statutory Accident Benefits.

However, the factual background of this case is somewhat different. This is a policy which was indeed issued with liability insurance. Therefore, within the meaning of Part VI of the *Insurance Act* of Ontario, this was a motor vehicle liability policy. This was a policy which was required to include Statutory Accident Benefits. The insurer issued it on this basis and charged a premium on this basis.

On August 22, 2002, the insured requested a change to the coverage. The insured apparently gave some indication culminating in the notation that the insured wished to remove the "road coverage". The insurer, Certas, accomplished this on the documentation by re-issuing a Certificate of Automobile Insurance, which it described as "endorsement". The Certificate of Automobile Insurance is a special document contemplated by the statute that provides, in sub-section 232(5) that an insurer can issue a certificate approved by the Commissioner instead of issuing a policy.

Certas, however, used this form as a general purpose document to alter the policy which it had issued. Instead of sending the insured person an endorsement in plain readable language, Certas sent this amended Certificate of Automobile Insurance, four pages

long, which has a number of confusing features. On the face of the certificate is found the following statement:

**“SUMMARY OF MODIFICATIONS
Modify Risk 0001, Terminate Endorsement OF 44 0001”**

Page 2 of the endorsement/certificate describes various coverages. More or less opposite to a description of coverage there is a premium indication. Opposite liability coverage there is an indication of “\$ 482 CR”. This is not decoded anywhere on the form but might be intended to represent a \$ 482 credit with respect to liability insurance premium.

With respect to accident benefits, the certificate provides the following comment:

“As stated in Section 4 of the Policy”.

Opposite that reference is an indication “\$ 802 CR”.

Following that entry there are numerous references to optional increased accident benefits. In the right margin of the certificate is the phrase “not included” evidently as an indication that the optional benefits have not been included in the policy.

Further down on the same page there is reference to the direct compensation property damage coverage. This is the coverage that compensates an individual when their vehicle is damaged as a result of the fault of another motorist. Again the policy certificate shows in the right column “\$ 377 CR”.

With respect to other references to loss or damage, All Perils, and with respect to Collision or Upset, the right column shows “N/A”.

Opposite Comprehensive Coverage the policy shows a premium in the right column of “\$117.00”.

Finally, with respect to the Family Protection Endorsement, 44R the policy shows a “\$ 15 CR” in the right column.

This is the sole documentation issued by Certas to change the insurance contract to remove all coverage except the Comprehensive Coverage.

On the other hand, the Superintendent of Insurance has approved a form of endorsement for this purpose. Entitled “OPCF16 Suspension of Coverage”. This document is an approved form issued by the Superintendent pursuant to Section 227 of the *Insurance Act*. It succinctly describes its’ purpose as follows:

“This change is part of your policy. It cancels coverage for the use or operation of the described automobile until coverage is reinstated”.

Section 2 of the endorsement describes the various changes. It is notable, that the coverage deleted does not include Comprehensive Coverage. In other words, the coverage that would be found under a policy that includes only fire and theft coverage continues to be in force. The endorsement does delete liability coverage and accident

benefits coverage “for the use or operation of the described automobile”. In other words, this approved endorsement which continues Comprehensive Coverage in force, does not contemplate total elimination of liability coverage or accident benefits coverage. The approved endorsement would require an insurer to carry on with some residual risk to the extent that there is limited coverage under the policy for Statutory Accident Benefits or for liability coverage that may arise out the use or operation of some other automobile.

If Certas had issued the approved form OPCF16 instead of the documentation proffered, Certas would remain as an insurer on risk for accident benefits coverage with respect to the claims of the dependant son of the named insured, Oleg Michnevich.

It is important to recognize that OPCF16 differs greatly from the documentation used by Certas. OPCF16 is written in relatively plain language which, in my view, better communicates the effect of changes contemplated by the document. Secondly, OPCF16 apparently requires the signature of the insured person. The approved form has a place for the signature and the heading at the beginning of the endorsement states “Please sign and return this form. Keep a copy for your records”. In my opinion, the approved OPCF16 is a vastly different document than the document issued by Certas in this case.

Section 227 of the *Insurance Act* provides as follows:

“(1) An insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent;

1. **An application for insurance**
2. **A policy, endorsement or renewal**
3. **A claims form**
4. **A Continuation Certificate”.**

Certas has described their amended certificate as an “endorsement” and I think this is a correct description. It is a document which evidences a change in the contractual relationship between the insured and the insurer. As such, the form of the endorsement must be approved by the Superintendent.

While it may be that Certas’ “certificate of automobile insurance” is also a form which is approved by the superintendent, the regulator has specified a particular form to be used when a person intends to suspend the coverage except for Comprehensive Coverage. By the terms and conditions of that form, the Superintendent requires the person to continue to have residual liability coverage and accident benefits coverage and other features. If it is permissible for Certas to delete coverage in the manner in which they have purported to do so, then the approved form, the OPCF16, serves no purpose whatsoever. It is obviously a useful and purposeful document. It explains in reasonably clear language the effect of the changes to the contract. It requires the signature of the insured person, thereby communicating the import of the decision taken.

Certas, in argument, points out that there might changes in coverage sought by an insured person for which there is no approved form of endorsement. For example, it is suggested that an insured person might want to delete collision coverage with respect to a vehicle. Certas suggests that it would be appropriate to use the amended certificate of automobile insurance to achieve this purpose.

However, whether that is so or not, the facts in this case are quite different. We are indeed dealing with a case where the insured sought to delete “road coverage” and leave in force comprehensive coverage. There is an approved endorsement which deletes coverage except for comprehensive coverage, but which leaves in force certain residual protection for the insured person. In effect, the approved form deals with the common event where an insured person decides not to use a vehicle for a period of time. Because the vehicle will be stored and is still a property in which they have an insurable interest, the people like to continue to have protection against fire and theft by continuing the “comprehensive” feature of coverage. Regulators have seen that it is important for people that have coverage under suspension to continue to have residual protection for liability coverage and accident benefits coverage. Hence regulators have issued the OPCF16 to provide this residual protection.

Certas, by taking the approach that it did, purported to delete the residual liability coverage. The residual liability coverage would arise if Oleg Michnevich incurred a liability while being the driver of someone else’s vehicle. In that circumstance the insurer of the vehicle would be primary insurer, and Oleg Michnevich’s own insurer would provide excess protection for Mr. Michnevich while he was driving the vehicle. Similarly, pursuant to the approved endorsement, there would be some coverage for accident benefits but only when the accident benefits do not arise out of the use or operation of the described automobile. In this limited way coverage is extended beyond comprehensive coverage in order to protect interests of the insured person that the regulator considers in need of protection.

In my view, the transaction entered into by Certas and Michnevich on August 22, 2002, is, substantially, the same transaction which is intended to be governed by the OPCF16. It is, for the most part, a suspension of liability coverage, and other coverage other than comprehensive. As such, in my view, Section 227 of the *Act* requires that the insurer use the available approved form for this purpose, the OPCF16.

The Effect of Failing to Use the Approved Form

In this priority dispute Certas is paying benefits and applies to recover payment of those amounts from Aviva. Certas does so on the premise that it does not have any obligation to provide Statutory Accident Benefits to Oleg Michnevich. However, as I have found, Certas ought to have used the OPCF16 when making the policy coverage change on August 22, 2002. If it had used the OPCF16 it would continue to have coverage for the Statutory Accident Benefits and would not have any claim against Aviva for reimbursement. By Certas’ own non-compliance with the Statutory scheme, it cannot acquire a right against Aviva. It cannot better its own position by non-compliance with the statute.

In the Supreme Court of Canada’s decision in *Smith vs. Co-operators* the court discussed the effect of insurer non-compliance with prescribed procedures. In the *Smith* case, the insurer had declined a claim but had provided documentation to the insured person, which was found to be deficient in meeting the prescribed obligations to disclose Dispute Resolution Procedures. The obligation to describe the Dispute Resolution Procedures was separate and distinct from a limitation period found in the insurance arrangement. Nonetheless, the court concluded that the inadequacy of the disclosure prevented the insurer from saying that the limitation period had started to run. In this

way, the court has shown that the consumer interest represented by having insurers comply with prescribed procedures, means that insurers will not be able to rely upon their own inadequate procedures, to their advantage or to the detriment of policy holder. Here, if Certas had followed the prescribed procedure and issued the OPCF16, Certas would be the insurer responsible to pay the accident benefits and would have no claim against Aviva.

In my view Certas has avoided the regulated scheme prescribed by the *Insurance Act* in this instance. There was an approved form to be used for the transaction and they did not use it. In my view, the contract changes which they purported to effect by their conduct, are not effective to the extent they differ from the obligations which would flow if the approved endorsement had been used. In this instance, where the regulator has specifically approved an endorsement for the transaction requested by the insured, it is not open to the insurer to use another form.

To the extent that the insurer's documentation purports to change the contract to something not permitted by the statute and the approved forms, to the detriment of the consumer, it is of no effect.

CONCLUSION

The effect of these transactions is that Certas must respond and provide statutory accident benefits in accordance with the requirements of the statutory scheme.

In answer to the question posed in the arbitration agreement I award as follows:

“The arrangements made as between the claimant's father and his insurer Certas, on and after August 22, 2002 has no effect on the availability of statutory accident benefits to the claimant from Certas. The benefits are available to the claimant, payable by Certas.

In the circumstances of this case this finding means that the application by Certas against the respondent cannot succeed. In accordance with paragraph 10 of the Arbitration Agreement Certas shall pay the costs of the Arbitration and I award the party and party costs of the arbitration in favour of Aviva. The parties may endeavour to agree upon the amount of the party and party costs and any other cost issues and if they are unable to agree they may contact me within thirty days to make arrangements for an award with respect to cost issues.

Dated at Toronto, this 5th day of December, 2005.

Lee Samis