CITATION: Economical Mutual Insurance Company v. State Farm Mutual Automobile Insurance Company, 2014 ONSC 6030
COURT FILE NO.: CV-13-485686
DATE: 201410

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, s. 268 and Ontario Regulation 283/95 thereunder;
AND IN THE MATTER of an Arbitration:

BETWEEN:	
ECONOMICAL MUTUAL INSURANCE COMPANY Applicant (Appellant in Appeal)	*Daniel Strigberger & Monika Bolejszo*, for the Applicant (Appellant in Appeal)
– and –	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Respondent (Respondent in Appeal)	*James S. Greve*, for the Respondent (Respondent in Appeal)
	HEARD: October 6, 2014

LEDERER J.:

[1] This is a priority dispute. Which of two insurers, the appellant, Economical Mutual Insurance Company ("Economical"), or the respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), bears the responsibility to pay statutory accident benefits of Shilan Hasan and her husband, Munir Nuri Saed? They were involved in a motor vehicle accident on July 29, 2009. Munir Nuri Saed was a passenger in a car being driven by his wife. It went out of control and struck two guard rails. He was ejected from the vehicle. The car was owned by Ali Abu Al Hour, who had loaned it to them. The car was insured by State Farm. It was on this basis that State Farm could be required to pay the statutory accident benefits that arose from the accident.

[2] Shilan Hasan owned a car of her own. It was insured by Economical. She and her husband were planning a trip to Iraq. They were to be away for two to three months. There is a suggestion in the record that they were intending to stay for six to eight weeks. Nothing turns on this difference. In preparation for leaving, (the anticipated day of departure was August 2, 2009) Shilan Hasan went to see her insurance broker, Tony Pannetta. She could not see why she should be paying for insurance for her car while she was away. The Arbitrator concluded that Shilan Hasan was not a sophisticated purchaser of insurance. She did not know the options that were available to her. The broker explained that, even though the car was not being driven, it should still be protected from fire and theft. The broker suggested that road coverage (liability coverage) be removed but comprehensive coverage be maintained. In the record, there is a "Confirmation of Discussion" form signed by Shilan Hasan, which indicates that the changes were to be effective as of July 26, 2009, three days before the accident. Nonetheless, for reasons that will become apparent, it was submitted that Economical remained liable and holds the coverage that is required to respond to the statutory accident benefit claims of Shilan Hasan and Munir Nuri Saed.

[3] The dispute was the subject of an arbitration conducted by Scott W. Densem. It was heard on July 4, 2012. The decision, 46 pages in length, was released on June 27, 2013. The Arbitrator concluded that, pursuant to s. 268 of the *Insurance Act*,[1] Economical was the priority insurer. An understanding of this determination centres on the Arbitator's view of the actions taken by the broker at the meeting he had with Shilan Hasan.

[4] OPCF 16 is a form published by the Superintendent of Insurance. It is an endorsement which, if added to a policy, extends the coverage to include statutory accident benefits. The Arbitrator noted that there are arbitration decisions which suggest that, when a policy is reduced to only comprehensive coverage, there is an obligation on the insurer to include OPCF 16 to

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[1] R.S.O. 1990, c. I. 8. S. 268(2), para. 1, states:

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
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> 1. In respect of an occupant of an automobile,
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> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

ensure that statutory accident benefit coverage remains in place.[2] He did not accept this interpretation. Rather, he concluded that "an insured can reduce coverage under a motor vehicle policy to only comprehensive coverage, without being obliged to accept an OPCF 16 endorsement and the enhanced coverage it provides."[3] In doing this, he accepted the view expressed in a third arbitration.[4] In short, he found it makes no sense that a consumer, at the time a policy is purchased, can choose to take only comprehensive coverage, but when he or she chooses to reduce an existing policy to only that coverage, the policy-holder is required to take on OPCF 16 and, through this endorsement, to maintain statutory accident benefit coverage. The Arbitrator found that s. 227 of the *Insurance Act* does not require the inclusion of OPCF 16 where coverage is reduced:[5] "All that this section does is to require an insurer to use the approved form, if there is one, in connection with certain automobile insurance transactions as itemized in the section."[6] The Arbitrator concluded:

> Although there may very well be good policy reasons to try to encourage operators of automobiles to have a minimum level of certain types of insurance coverage in all circumstances, I do not believe the law is that the insured must accept a certain kind or level of coverage absent a specific statutory requirement to that effect.[7]

[5] Based on this understanding, the Arbitrator did not find that the broker erred in failing to require Shilan Hasan to sign on to OPCF 16 at the meeting at which he was instructed to reduce

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[2] *Certas v. CGU/Aviva*, December 5, 2005 (Arbitrator Lee Samis) referred to in the arbitration under consideration here *Economical Mutual Insurance Company v. State Farm Mutual Automobile Insurance Company*, June 27, 2013, (Arbitrator Scott W. Densem), at pp. 22-24 [*Economical v. State Farm*]; and, *Enterprise Rent-A-Car v. ING Insurance Company of Canada* November, 2006, (Arbitrator M. Guy Jones), referred to in *Economical v. State Farm*, *supra*, at pp. 4-26.

[3] *Economical v. State Farm*, *ibid*, at p. 28.

[4] *State Farm Mutual Automobile Insurance Company v. TD General Insurance Company a.k.a. Security National Insurance Company*, 2012 (Arbitrator Jarvis Scott). It is noted that, in this case, Arbitrator Scott undertook "a thorough review of the case law in the area" (*Economical v. State Farm*, *supra*, (fn. 2), at p. 27).

[5] Section 227(1) of the *Insurance Act* states:

> 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.

The section is referred to in *Economical v. State Farm*, *supra*, (fn. 2), at pp. 23, 30 to 32.

[6] *Economical v. State Farm*, *supra*, (fn. 2), at p. 30.

[7] *Ibid*, at p. 30.

her policy by removing road (liability) policies, leaving only the comprehensive protection in place.

[6] Having said this, the Arbitrator observed that the broker retained an obligation to advise a policy holder of OPCF 16 and the coverage it provides. The Arbitrator relied on the following:

> ...It is my view that when an insured seeks to reduce coverage to comprehensive only an insurer and/or broker likely has an obligation to the insured to describe the availability of an OPCF 16 and the enhanced coverage it provides. As long as the endorsement and the provisions are adequately explained, an insured then can make an informed decision.
>
> ....
>
> An insured seeking to reduce comprehensive coverage is likely entitled, from a broker or an insurer, to be informed about the availability and benefits coverage of the OPCF 16. It is not my view that an insured must purchase the additional coverage on reducing the coverage grid policy...[8]

[7] The Arbitrator, on his own behalf, went on to say:

> Therefore, on this issue I conclude that Mr. Panetta did not have to use OPCF 16 to reduce Ms. Hasan's automobile coverage to comprehensive coverage from full coverage. As an insurance broker providing coverage advice to a client however, he did have an obligation to properly advise her about this option so that she could make an informed decision whether to take the coverage under the OPCF 16, or have the lesser comprehensive policy only.[9]

[8] The Arbitrator went on to find that when the broker (Tony Panetta) met with Shilan Hasan, he failed to act on this responsibility. He did not review OPCF 16 and the option it presented with her. The Arbitrator concluded:

> ...I am of the view that Mr. Panetta has an obligation in his capacity as Ms. Hasan's insurance broker to advise her of the availability and value of OPCF 16. Indeed, Mr. Panetta admitted as much himself. In my view he was negligent for not doing so.[10]

[9] At the hearing of this appeal, counsel for Economical acknowledged the duty and the failure of the broker to comply with the accompanying responsibility when he met with Shilan

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[8] *State Farm Mutual Automobile Insurance Company v. TD General Insurance Company a.k.a. Security National Insurance Company, supra*, (fn. 4), quoted in *Economical v. State Farm, supra*, (fn. 2), at pp. 29-30.
[9] *Economical v. State Farm, supra*, (fn. 2), at p. 33.
[10] *Ibid*, at p. 33.

Hasan. Counsel agreed that the broker had been negligent. That does not end the matter. The question that remains is whether the negligence was the cause of any harm or loss to the insured (Shilan Hasan).

[10] The Arbitrator referred to *Zefferino v. Meloche Monnex Insurance Company.*[11] In that case, the insured had not purchased optional income replacement available as part of his statutory accident benefits. The making of an offer of the optional coverage was mandatory. It had to include a meaningful explanation of the alternatives available in order that the insured could make an informed decision. As it was, the option had been mentioned followed by a solicitation of interest. This was not good enough. The failure to make a proper offer was a breach of the duty owed by the insurer to the insured. On a motion for summary judgment, the judge noted that the plaintiff indicated that, had he been informed, he would have purchased the enhanced income replacement coverage. The judge did not accept this evidence. It was self-serving. The choices made in the purchase of the insurance were based on price. There was no hint of interest on the part of the plaintiff in purchasing greater coverage than the statutory minimum in any area. The spouse of the plaintiff, who had been directly involved in the purchase of the policy, did not provide any evidence. The defendant asked that and the judge did draw an adverse inference from this failure. The judge rejected the evidence that, if the option had been explained, additional income replacement coverage would have been purchased. He concluded that "on a balance of probabilities the necessary causal connection between the defendant's breach of duty and the [plaintiff's] loss" had not been shown.[12]

[11] In the case I am asked to decide, the Arbitrator followed the same line of analysis, but went further and, ultimately, came to a different conclusion. Having concluded that Tony Pannetta had been negligent (had breached his duty to Shilan Hasan), the Arbitrator went on to consider the causal connection between that negligence and the alleged harm:

> Counsel for Economical argued that there was no evidence in this case to support a finding that [Shilan] Hasan would have agreed to take the OPCF 16 endorsement had [Tony] Panetta told her that it was available. In fact, counsel for Economical argues that the evidence is to the contrary and suggests that [Shilan] Hasan would likely not have taken the OPCF 16 endorsement had it been offered to her.
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> I agree with counsel for Economical's characterization of the law and with his submission that it is unlikely [Shilan] Hasan would have taken the OPCF 16 had it been offered to her.[13]

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[11] [2012] OJ No 57 (QL), 2012 ONSC 154, affirmed 2013 ONCA 127.
[12] *Ibid,* at para. 42.
[13] *Economical v. State Farm, supra,* (fn. 2), at p. 34.

[12] In fact, in her evidence, she conceded as much. Shilan Hasan was asked and she answered:

> Q. So, would you have paid the extra $20 or $30 for something that wouldn't even have applied to you in Iraq?
>
> A. I think not...
>
> Q. So, is it fair to say that you would have rejected that extra coverage?
>
> A. I think so...[14]

[13] Accordingly, in the absence of a determination that Shilan Hasan, having been properly informed of the option, would have purchased the protection offered under OPCF 16, the failure of the broker to properly inform her as to its availability cannot serve as the cause of her inability to collect her statutory accident benefits through reliance on her policy with Economical. As in *Zefferino v. Meloche Monnex Insurance Company*, this, left on its own, would demonstrate the absence of the required causal link between the negligence and the harm. In the normal course, this would be the end of the matter. The failure of the insured to demonstrate that, having been properly informed, the optional coverage would have been purchased would be determinative of the priority dispute. It would confirm that the responsibility for the statutory accident benefits claim belongs with State Farm. This is confirmed by the following observation:

> An insurer [in the case being decided, State Farm] seeking to establish a priority on the part of the insured's personal policy provider [in the case being decided, Economical], should at a minimum establish in the evidence at an arbitration that the insured would have purchased the coverage had it been explained and offered to him...[15]

[14] As it is, the Arbitrator did not stop at this point. He went further. To understand this part of his decision, it is necessary to go back to the meeting at which Shilan Hasan discussed the prospective changes to her insurance policy. Shilan Hasan acknowledged that she signed the "Confirmation of Discussion" form which indicates that the effective date of the change was to be July 26, 2009. She agreed that she had "probably" read it, but had no recollection of doing so. "She conceded that it was possible that [Tony] Pannetta had reviewed the details of the form with her but she had no recollection of him doing so."[16] In particular, she could not recall any conversation concerning the notation that the effective date of the change was to be July 26, 2009. She understood that the effective date was to be August 15, 2009. This was because this was the date that her next monthly premium would be paid and, accordingly, the date the

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[14] *Examination Under Oath*, quoted in *Economical Mutual v. State Farm, supra*, (fn. 2), at p. 12.
[15] *Economical v. State Farm, supra*, (fn. 2), at p. 30, quoting from *State Farm Mutual Automobile Insurance Company v. TD General Insurance Company a.k.a. Security National Insurance Company, supra*, (fn. 4).
[16] *Ibid*, at p. 10.

coverage provided by her last payment (July 15, 2009) would expire. Shilan Hasan said that the broker did not mention the prospect of a refund in the event of an earlier recognition of the change to the policy. Tony Pannetta said he advised Shilan Hasan that there would not be any "cash back", but there would be a subsequent reduction in future premiums.[17] Shilan Hasan says she told the broker that the intended date of her departure was August 2, 2009. She told the Arbitrator that it was her intention to continue to use her car until she left the country and she expected to have full coverage until that date. Tony Pannetta did not recall being told of the departure date. He testified that the July 26, 2009 date (the "effective date" on the Confirmation of Discussion form) was given to him by Shilan Hasan. He said "she must have told me she would not be driving the vehicle after July 26, 2009".[18] He knew that this was not the day Shilan Hasan was leaving Canada. He knew she was not leaving the country right away.

[15] What is apparent is that the parties do not agree at to what was said or what was intended. The Arbitrator preferred the evidence of Shilan Hasan to that of Tony Pannetta. He found that it was her intention to maintain full coverage until she departed the country and that she expected to make use of her own car until then.

[16] It is from this point that the Arbitrator proceeded further and completed his analysis of whether or not the negligence of the broker, in failing to properly advise Shilan Hasan as to her options, in particular as presented by OPCF 16, was the cause of her failing to maintain full coverage until the date of her departure. In short, the Arbitrator concluded that had OPCF 16 been fully reviewed with Shilan Hasan, her intention to retain full coverage while she remained in Canada would have been understood, her intended departure date would have become clear and the misunderstanding as to the appropriate effective date discovered and changed. On this basis, the Arbitrator found that the negligence of the broker was the cause of the Economical policy not being available to respond to the statutory accident benefit claims being made by Shilan Hasan and her husband:

> In my opinion, the negligent failure to advise [Shilan] Hasan about OPCF 16 on a balance of probabilities caused a change in the outcome in this case not because [Shilan] Hasan likely would have opted to add the OPCF 16 to her policy had it been discussed with her, but rather because a proper discussion of the OPCF 16 would probably have resulted in [Tony] Panetta implementing [Shilan] Hasan's intentions for the reduction in coverage on her policy by stipulating the correct date for the coverage reduction to take effect.[19]

[17] From this, the Arbitrator concluded that Economical was the priority insurer. At its root, this appeal questions the determination that the failure of the duty to advise Shilan Hasan of her options was the cause of the Economical policy not being available to answer the claims for

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[17] In his decision, the Arbitrator notes that she may later have received a rebate back to July 26, 2009 (see: *Ibid*, at p. 13).
[18] *Ibid*, at p. 16.
[19] *Ibid*, at p. 37.

statutory accident benefits. This is not because Shilan Hasan would have chosen to maintain the required protection. The Arbitrator found that she would not have done so. Rather, it was based on the understanding that if Shilan Hasan had been properly informed as to the option offered by OPCF 16, the ensuing conversation would have revealed the misunderstanding as to the time the coverage was to change. In his decision, the Arbitrator concluded:

> There is a reasonable likelihood that [Shilan] Hasan would have told [Tony] Panetta that while she would continue to use her own vehicle for shorter trips in the city, she did not like to use it for longer trips outside the city, and since she had a trip upcoming to Mississauga from Niagara Falls she may have even mentioned that she was planning on either renting a car or borrowing a friend's vehicle to make the journey.[20]

[18] The Arbitrator then went on to outline his expectation as to how Tony Pannetta should have responded:

> [Tony] Panetta should then have explained to [Shilan] Hasan that the OPCF 16 might be something she would want to consider for the time period between July 26, 2009, and when she departed for Iraq, but that it would not be worth her while to keep the OPCF 16 on her policy after she left for Iraq. The enhanced coverage would not be available to her and her family in Iraq because SABS coverage does not extend outside of Canada and the United States.[21]

and then suggested what would have happened next:

> Had he properly explained the OPCF 16 in this way to [Shilan] Hasan, in my view a detailed discussion of the OPCF 16, including the extremely time-limited value of having the OPCF 16 on the policy, would have drawn the attention of both [Shilan] Hasan and [Tony] Pannetta to the apparent misunderstanding about the date when [Shilan] Hasan wanted the reduced coverage to be effective. [Shilan] Hasan likely would have realized that [Tony] Pannetta was mistaken about when she wanted the coverage under her policy to be reduced. She would have pointed out to him that she did not want the coverage reduced until she actually left for Iraq, and they would have cleared up any further misunderstanding as to [Shilan] Hasan's intended use of her vehicle while she was still in the country. This would have caused her to reinforce the fact that she was going to use her vehicle right up until August 2, 2009, so she would not want the coverage reduced on the vehicle effective July 26, 2009.[22]

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[20] *Ibid*, at p. 36.
[21] *Ibid*, at p. 36.
[22] *Ibid*, at p. 36.

[19] In the next paragraph, the Arbitrator relies on the "facts as I have found them". It is not clear to me what this refers to. What is certain is it that the statements in the three paragraphs I have quoted are not facts. They are at best inferences and expectations about what could have happened if proper information had been provided to Shilan Hasan.

[20] The "facts", that is what is or can be known, end with the Shilan Hasan's acknowledgment that had she been informed of the ability to extend her statutory accident benefits coverage, she did not think she would have done so.[23] The answers to the questions she was asked provide the foundation for the finding (the inference) that even with the required information, she would not have taken on the additional coverage.

[21] I am obliged to observe that the Arbitrator found that there was a "reasonable likelihood" that, with the proper information, Shilan Hasan would have told the Tony Pannetta that she intended to continue to use her own car for shorter trips. "Likelihood" means the "state or fact of being likely or probable".[24] Thus, I take it that the Arbitrator found that this suggested conversation would have taken place on a balance of probabilities. To my mind, there is considerable measure of speculation in the train of thought reflected in the suggested conversation depicted in the reasons of the Arbitrator.

[22] Is this enough to allow for a finding that Economical is responsible for the statutory accident benefit claims that have been made by Shilan Hasan and her husband?

[23] I have not referred to the standard of review. This is a mixed question of fact and law. As such, as found in the seminal case of *Housen v. Nikolaisen*,[25] it falls along a spectrum. At one end, if the issue is particular to the facts (say, where a court decides that driving at a certain speed on a certain road under certain conditions was negligent), its decision would not have any great value as a precedent and the appellate court would be required to determine that the judgment made was the subject of a palpable and overriding error. At the other end, where the dispute is over a general proposition that might qualify as a principle of law, the standard of review could extend to correctness.[26] "Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future."[27] In this case, the suggested cause of the harm (the absence of coverage through the Economical policy) is founded on the specific facts of this case; this tends to the particular.

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[23] See para. [12], above.
[24] Concise Oxford English Dictionary, Eleventh Edition, Revised Oxford University Press, 2006.
[25] [2002] 2 S.C.R. 235, 2002 SCC 33.
[26] *Ibid*, at para. 28, (in particular the quotation from *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, at para. 37) and para. 36.
[27] *Ibid*, at para. 28, and the quotation, *Canada (Director of Investigation and Research) v. Southam Inc.*

[24] Causation, as it is dealt with in medical malpractice suits where there is a duty to inform, may assist in this analysis. In *Chester (Respondent) v. Afshar (Appellant)*,[28] the House of Lords examined a case where a surgeon had failed to provide a patient with an explanation of a small risk associated with an operation he proposed as a means of relieving problems she was having with her back. The operation was carried out. There was no negligence in the conduct of the procedure but the small risk materialized. The patient was partially paralyzed. At trial, she said that, if a warning had been given, she would not have proceeded with the operation three days later as proposed by the surgeon. She would have sought the advice of friends and other physicians. She acknowledged that she could not say that, in the end, she would have refused the surgery. Had she testified that, with the warning, she would not have proceeded with the surgery, the decision would have been easy. The doctor's failure to warn her would have been the cause of her injury. As it is, this was uncertain. If she had been warned and taken further advice, she might still have decided to go ahead. Thus, it could not be said with certainty that the failure to warn was a cause of the damage.

[25] There was no demonstrated causal connection between the failure to warn and the harm that resulted. In the House of Lords, this led to a question initially made in a note considering a similar case from Australia[29]:

> Do the courts have power in certain cases to override causal considerations in order to vindicate a plaintiff's rights? I believe they do though the right must be exercised with great caution.[30]

[26] The policy concern was that the duty to warn was not only directed to preventing the damage or harm, but also to protecting the autonomy and dignity of the individual by requiring that she or he be provided with the requisite information permitting an informed decision.

[27] The question prompted the following response:

> ...I have come to the conclusion that, as a result of the surgeon's failure to warn the patient, she cannot be said to have given informed consent to the surgery in the full legal sense. Her right of autonomy and dignity can and ought to be vindicated by *a narrow and modest departure from traditional causation principles.*[31]
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> [Emphasis added]

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[28] [2004] UKHL 41, [2004] 3 W.L.R. 927, [2004] 4 All E.R. 587, [2005] A.C. 134.

[29] *Chappel v. Hart* (1998), 195 CLR 232, a decision of the High Court of Australia.
[30] *Chester (Respondent) v. Afshar (Appellant), supra*, (fn. 24), at para. 22 (Lord Steyn).
[31] *Ibid*, at para. 24 (Lord Steyn).

[28] The House of Lords upheld the decision of the trial judge as confirmed by the Court of Appeal. The surgeon was liable for the damage suffered by the patient.

[29] How does this help here? On a first examination, the facts of this case lead to a situation that, for the House of Lords, was straight-forward. The Arbitrator found that had Shilan Hasan been properly informed as to the effect of maintaining her statutory accident benefits through her Economical policy (taking on the protection provided by OPCF 16), she would not have done so. This being so, the failure to inform her was not the cause of the supposed harm (the fact that she was no longer covered).

[30] As found by the Arbitrator, the cause of the harm was the failure of the two parties to understand the implications of the effective date as it appeared on the Confirmation of Discussion form that was signed by Shilan Hasan. The reasoning of the Arbitrator represents a departure from "traditional causation principles". As in *Chester (Respondent) v. Afshar (Appellant)*, the commonly referred to "but for" test does not provide a comprehensive answer to the question of causation.[32] ("But for" the failure of the broker to inform Shilan Hasan the statutory accident benefit coverage would have been in place.) We know that, in fact, if informed, Shilan Hasan would not have purchased the additional coverage. There is uncertainty as to whether the suggested conversation would have taken place as outlined by the Arbitrator. Other results were possible. Perhaps she would have changed her mind, decided not to drive her car and accepted the additional savings which she apparently did not realize were available.[33] Perhaps she would have used her friend's car, not only to go to Mississauga, but also for any shorter trips that remained before she was to leave Canada. To accept the finding of the Arbitrator, some departure from traditional principles of causation would be required. To my mind, the problem is that, unlike *Chester (Respondent) v. Afshar (Appellant)*, there is no policy foundation to justify such a change. The dignity or autonomy of Shilan Hasan is not in question. As the Arbitrator pointed out, either way, her and her husband's claims for statutory accident benefits will be recognized. This was one of the reasons why the Arbitrator accepted her evidence.[34] The issue here is to determine which of two insurance companies is required, by the provisions of the *Insurance Act*, to pay the statutory accident benefit claims. The responsibility is imposed by statute. The policy proposition is to keep this determination straight-forward. It is not to encourage esoteric disputes concerning causation or to take causation beyond our general understanding:

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[32] *Supra*, (fn. 24), at paras. 8 (Lord Bingham of Cornhill), 23 (Lord Steyn), 61, 72, 73 and 81 (Lord Hope of Craighead).
[33] See para. [14], above.
[34] *Economical v. State Farm, supra*, (fn. 2) at p. 4:

> She knows that she and her husband will continue to receive SABs whether Economical or State Farm is the responsible insurer. Hence there was no reason for her to colour her evidence in any particular manner.

> ...The scheme [for determining priority disputes] applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.[35]

[31] Left to myself, I would grant the appeal. To me, causation cannot be confirmed by reliance on inferences proclaiming the details of a conversation that did not take place, which is dependent on assuming a premise that did not occur (the broker providing proper information of the option presented by OPCF 16). As I understand the current state of the law, this is not an option that is available.

[32] In *Housen v. Nikolaisen*, the majority of the Supreme Court of Canada provides direction as to extent of the deference to be given to a trial judge:

> Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. ... It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge -- that of palpable and overriding error.[36]

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[35] *Kingsway General Insurance Co. v. West Wawanosh Insurance Co,* 58 OR (3d) 251; 35 CCLI (3d) 267; 155 OAC 238, at para. 10.

[36] *Housen v. Nikolaisen, supra,* (fn. 26), at para. 25.

[33] In circumstances such as this, the same level of deference is owed to an arbitrator, who, like a trial judge, is the initial fact-finder:

> The Ontario Court of Appeal has also commented that on a question of mixed fact and law, where the decision is highly dependent on a factual finding, the standard is more akin to 'overriding and palpable error.' ... The court commented that arbitrators have a special expertise 'in evaluating facts for determination of dependency for statutory accident benefits entitlement', and unless the arbitrator was unreasonable, he is entitled to deference. I infer arbitrators have similar special expertise in determining issues of loss transfer, and thus their conclusions should be equally afforded deference.[37]

[34] In the case I am asked to decide, the substance of the supposed conversation is not facts but inferences of what would have taken place if Shilan Hasan had been properly informed of her options. In *Housen v. Nikolaisen*, the standard of review for "inferences of fact" was considered.[38] The majority held that the standard of review for such findings was the same as for direct findings of fact:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.[39]

[35] In *Housen v. Nikolaisen*, the trial judge found that the car accident which was the subject of the litigation would not have occurred if warning signs had been posted. On this basis, the municipality in which the accident occurred was found to bear 15% of the fault. In that case, the history of accidents in the area which forewarned of further problems, the understanding of the speed at which it would be impossible for a vehicle to safely navigate the turn where the accident occurred and the fact that, despite being impaired, Nikolaisen was not driving recklessly such

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[37] *Aviva Insurance Company of Canada v. Royal & Sunalliance Insurance Company*, 2008 CanLII 41817 (Ont. Sup. Ct.) at para. 7, quoted in *Zurich Insurance Company v. Chubb Insurance Company of Canada*, 2014 ONCA 400, at para. 13. The Court of Appeal reference in the opening words of the quotation is at *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLII 37956, 83 OR (3d) 591 (Ont. C.A.), at p. 5.
[38] *Housen v. Nikolaisen, supra*, (fn. 26), at paras. 19-25.
[39] *Ibid*, at para. 23.

that he would have intentionally disregarded a warning or regulatory sign, all pointed to the absence of signage as being a cause of the injury suffered by the plaintiff, Housen. The finding that the municipality was negligent was overturned by the Court of Appeal but re-instated by the Supreme Court of Canada.

[36] The inference drawn there was similar to the one made here. It presumes what would have happened if the underlying facts were different. In the circumstances, I can find no palpable and overriding error either in the inferences drawn or the process by which they were drawn.

[37] There being no palpable and overriding error, the appeal is dismissed.

[38] Pursuant to the agreement of counsel, costs are to be paid by the appellant (Economical) to the respondent (State Farm) in the amount of $10,000 for the arbitration and $7,500 for the appeal.

LEDERER J.

Released: 20141024

CITATION: Economical Mutual Insurance Company v. State Farm Mutual Automobile Insurance Company, 2014 ONSC 6030
COURT FILE NO.: CV-13-485686
DATE: 20141024

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, s. 268 and Ontario Regulation 283/95 thereunder;
AND IN THE MATTER of an Arbitration:

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant
(Appellant in Appeal)

– and –

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent
(Respondent in Appeal)

JUDGMENT

LEDERER J.

Released: 20141024