

Date: 1997/10/01
RE 6451/96

ONTARIO COURT OF JUSTICE (GENERAL DIVISION)

BETWEEN: KELLY KANE v. THE ATTORNEY-GENERAL FOR ONTARIO, AND
HER MAJESTY THE QUEEN, IN RIGHT OF ONTARIO, as represented
by THE MINISTER OF FINANCE, and AXA INSURANCE CO.

BEFORE: COO J.

COUNSEL: CYNTHIA PETERSEN and PETER LANDMANN
KATE ERICKSON FOR THE RESPONDENTS except
FOR THE APPLICANT AXA

HOLLY J. NICKEL
FOR THE RESPONDENT AXA

HEARD: SEPTEMBER 23, 1997

E N D O R S E M E N T

[1] This is an application for a declaration that the definition of “spouse” in section 224(1) of the Insurance Act, insofar as it touches the right of the applicant to claim a death benefit under Part III of Regulation 672 (the No-Fault Benefits Schedule) is unconstitutional as being in breach of section 15 of the *Charter of Rights*.

[2] Section 11 of Part III provides, in its material parts that:

“...If as a result of an accident, an insured person dies...the insurer will pay...\$25,000 to ...her spouse...”

[3] Spouse is defined, in part for the purpose of section 11, in section 224(1) as follows:

“Spouse” means either of **a man and a woman** [emphasis added] who,
(a) are married to each other,
(b) have together in good faith entered into a marriage, or
(c) are not married to each other, and have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child.

[4] The applicant was in a close and long-lasting relationship, to which were attached most of the characteristics listed by Kurisko J. in *Molodowich v. Penttinen*, (1980) 17 R.F.L. (2d) 376 at

381-382, with a woman who was killed in a motor vehicle accident. She made a claim on the relevant policy and the claim was denied, since there had been, in her case, a same-sex relationship. The denial by the insurer was entirely reasonable in the circumstances, since there was clearly no coverage provided by the statutorily-mandated form of policy.

[5] The Attorney-General conceded before me and in his factum that the provisions of section 15 were infringed. The insurer did not formally make the same concession, but there is no doubt on the material that the breach has been clearly established, examining the circumstances against the background of the three stage test commented on by Gonthier J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at page 435.

[6] There is danger in over-simplification, but reliance is placed by the respondents on section 1 of the *Charter*, with heavy emphasis on the decision of the Supreme Court of Canada in *Egan v. Canada*, [1995] 2 S.C.R. 513, to support the argument that the relevant statutory provision is constitutional. As for *M. v. H.* (1996), 31 O.R. (3d) 417, it is urged that I should simply treat it as wrongly decided and take into account that it has been appealed to the Supreme Court of Canada. The decision is, of course, binding on me. Alternatively it is put that *Egan* simply governs. In addition, the respondent insurer makes the point that while insurers generally would have no objection at all to providing coverage of the sort claimed here, it should only be on the basis of a received premium, however modest, reflecting that coverage.

[7] The applicant relies on the recent decision of the Ontario Court of Appeal in *M. v. H.* *Egan* is sought to be distinguished on the ground that there is nothing in the reasons given in that case, by Sopinka J. or by LaForest J., with whom other justices agreed, to foreclose a determination here that the section of the Act is unconstitutional.

[8] There was, of course, reference to a large number of authorities on both sides, all except two or three of which are listed or referred to in the factums.

[9] This matter is to be determined by an appellate court, whatever my decision on the merits.

[10] I have concluded that unless there is something in *Egan* that stands in the way, there should be a declaration that in the precise context in which the application has been argued, the definition section is unconstitutional and the language of section 1 of the *Charter* provides no relief.

[11] There is clearly a breach here of the applicant's rights under section 15 of the *Charter*. I will spend little time analyzing this obvious and in effect unchallenged conclusion, manifestly supported by the material made part of the record in this case. (I am sensitive, in this area, to the comments made about concessions by Findlayson J.A., in dissent in *M. v. H.*)

[12] There is a legislative distinction by way of denial of equal benefit.

[13] This denial is discriminatory. There has been an historical group disadvantage suffered by the homosexual community. The distinction created by the legislation does not depend on any contrast or comparison between married and unmarried couples. The denial of equal benefit contained in the legislative provisions is deliberately based only on sexual orientation and runs against the preservation of human dignity and self-worth for part of our society. The legislative scheme manifestly declares that opposite sex couples are entitled to rights and advantages to which same-sex couples are not and thus inferentially makes the point that certain clearly defined relationships should be entitled to, and certain clearly defined relationships should not be entitled to, recognition and respect. The declaration simply carries forward and nurtures now abandoned stereotypical concepts that have no place in the fabric of our community. This is the very sort of result with which section 15 was designed to deal and forbid.

[14] To engage briefly in the required analysis dealing with section 1 of the *Charter*, and recognizing that the burden rests with the respondents, I have concluded that the exclusion of same-sex couples from the definition referred to does not constitute a reasonable limit as can be demonstrably justified in a free and democratic society.

[15] It is very difficult for me to see how the law that excludes same-sex couples from the benefit that is the subject matter of this application can be categorized, to use the language of *R. v. Oakes*, [1986] 1 S.C.R. 103 as having an objective, which measures responsibility for a limit on a *Charter* right, that is of sufficient importance to warrant the overriding of a constitutionally protected right or freedom. The objective and the exclusion are not related in any rational way, so that the former can in effect justify the latter.

[16] It was concluded in *Miron v. Trudel* that at least one of the goals of the legislation in issue is to sustain families when one member is injured in a motor vehicle accident. It is argued by the Attorney-General that, to a very important degree, the objective of the definition section was to foster and to support the concept of the heterosexual family where the procreation and nurturing of children is generally, although of course not always, the cornerstone of the relationship. I do not see the object of the legislative provisions in this way. There is nothing in the Act or in the Regulation that helps to convince me that this was one of the essential or supplementary purposes of the way in which the definition in section 224(1) was written. Certainly there can be same-sex families that involve the raising of and caring for children, adopted or otherwise, for a variety of reasons. Equally there can be heterosexual families in which adopted children take their place. The benefits to be found in Regulation 672 do not depend on the existence of children; there are in our society a plethora of two person families. It is to be noted in this connection that there is, in the definition section, a specific shortening of the time two persons are required to have had continuous cohabitation where there are children. This suggests that the primary focus was not on children, since the basic provisions deal with the situation where there are none.

[17] To the extent that it might be argued that there is something internal to the definitional words that supports the Attorney-General's submission, there would be indulgence in the circular

reasoning referred to by Charron J.A. in *M. v. H.*, at page 447 and following, and by McLachlin J. in *Miron v. Trudel* at pages 488 and 489.

[18] The point is to be made that the definition of “dependant”, for the purpose of the Regulation in issue, is very broadly cast in section 3(2) of Part I of Regulation 672, and could include those who are indeed children of a person in a same-sex spousal relationship.

[19] Whether or not there are factions in any notional homosexual community that do or do not support the concept of a spousal or family atmosphere for couples is irrelevant. Undoubtedly some in the heterosexual community see things differently, and that too is irrelevant. Such social issues have nothing to do with legislative choice and judicial deference in regard thereto, or with any argument based on an incremental approach to the legislative process. The fact that some might not want or support the provision of a benefit is neither here nor there.

[20] The legislation as a whole, including the relevant regulation, was crafted as part of a legislative package designed to reduce in Ontario the volume of motor vehicle accident litigation. Part of this goal was to be met by providing for automatic no-fault benefits, including death benefits, without demonstration of actual loss or compensable damage. There was a bold attempt to structure motor vehicle accident claims and benefits to make the process more fair and rational, with less litigation based on fault. It was not part of any broad welfare or general benefits scheme having at its heart, or as a major aspect of its foundation, the preservation of the old family concept that supports the government’s argument on this point.

[21] There is no real issue of proportionality. Exclusion of same-sex relationships adds nothing meaningful to the scheme, except discrimination based on sexual orientation. There is no larger picture or broader consideration involved, and nothing that would be adversely affected by removing the violation of the applicant’s *Charter* rights.

[22] We are not dealing here with any balancing of competing interests and hard economic or other choices to be dealt with by the legislature. There is no suggestion that I have to consider the legislative provisions against the background of the “proper distribution of scarce resources” referred to by LaForest J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 288.

[23] I do not accept that *Egan* governs the circumstances with which I am faced. The sort of cost consequences referred to by Sopinka J, and dealt with by LaForest J. in *McKinney*, to which there is direct reference in *Egan*, are not the sort of commercial insurance coverage costs that are in issue here. Such evidence as there is on the cost point runs in the opposite direction. Almost as an aside, it is clear that the death benefits portion of the policy is one of the least expensive parts of the coverage, given the third party liability provisions and the \$500,000 limit on the amount payable for Part II supplementary and rehabilitation and care benefits.

[24] There was no crafting to limit impairment. There was simple exclusion of the relevant group.

[25] While there was almost oblique reference in argument to there being 90 places in the legislation of Ontario to “spouse” or “spouses”, there is nothing in the material, whatever may have been before the judges of the Supreme Court in *Egan*, as to the relevance of this to anything that is put into issue here in terms of analysis of prospective cost to government or to society.

[26] There is no sign that what has happened legislatively in recent years in the motor vehicle insurance field reflects even the thought of any incremental approach to the solution of multi-faceted social and family problems. There is no legitimacy to a position that relies on the balancing of needs of various segments of the population touched by the legislation and calling for deference and a conclusion that section 1 applies.

[27] As for relief, there should be the required declaration that the section is unconstitutional insofar as it provides a limiting definition of “spouse” for the purpose of the death benefits provision of Regulation 672. It should be altered in accordance with the request of the applicant set forth in paragraph 140 (c) of the applicant’s factum, so that the section will read, for that purpose, in its changed material parts:

“spouse” means **either of two persons who.....are not married to each other and have cohabited continuously for a period of not less than three years.....**

[28] The next question is whether the applicant is personally entitled to relief by way of a declaration about and judgment in her favour for the \$25,000.00 death benefit, together with interest in accordance with the Courts of Justice Act. The applicant’s position is that she is entitled to that which has been denied to her as a result of legislative unconstitutionality and that she should not be faced with having gone to all this expense and trouble, only to have a decision rendered that is academic for her. In this she is right and an order will go accordingly.

[29] The Attorney-General does not seek postponement of any entitlement that may flow from my ruling.

[30] Axa takes the position that it issued a policy in accordance with the legislative directions of the government and that the present applicant could have moved, when she received the policy in the first place, for the sort of relief that she now seeks; and that had matters unfolded in that way there might have been provided to the insurer the opportunity to collect additional premiums of the sort now lost to it forever. I do not see this as a realistic historical alternative.

[31] Axa does not dispute that the constitutional issue impacts the contractual obligations of an insurer but takes the position, in regard to any ruling of mine that might run against its position, that there is an important principle to the effect that legislation is not ordinarily retrospective. That principle can have no practical impact here, since to apply it globally would be to sanction by rote past unconstitutional action on the part of the legislature.

[32] It is not clear just what sort of premium would have had to be paid had the coverage been written in accordance with these reasons. What is clear is that such additional cost would have been minimal to an insured. I see no practical or policy reason to deprive the applicant of the fruits of her litigious labour, albeit there is inevitably discomfort with the impact on insurers, however modest, of the decision. Whether relief, in the form of premium rating, is possible is not something that is before me, and was not discussed in any meaningful way by counsel in response to my expressions of concern with regard to premium shortfall and reserves.

[33] The costs of the successful applicant should be paid by the Attorney-General on a party and party basis, after assessment. I invited counsel to specify a range within which costs might be fixed. That brought broader submissions in writing, but it is readily apparent that there is no narrow range upon which counsel are prepared to agree. I am not prepared to fix the costs in this situation.

[34] The insurer, very responsibly as I see the situation, seeks no costs and therefore none will be awarded. It certainly should, in the circumstances in which it has found itself, bear no responsibility for the costs of any other party.

[35] The costs awarded should not be on a solicitor and client basis, since there is no justification for exercising any special discretion that might be mine in this regard and there is no principled support for such an enlarged order. I have gone through the written submissions of counsel on the costs issue and have re-read the cases to which they have referred. There was nothing in the conduct of the government that would support a solicitor and client order, nor was the matter so free of difficulty that one might suggest that the matter should have been conceded. On the other side of the litigious scale, this is not a special situation in which an order for solicitor and client costs is required to do justice to the applicant. There is no general principle that citizens who engage in Charter litigation are to be treated in some special way because the issues involved may be of broad impact on society. I have approached the problem in the same general way as did Osler J. in *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 56 O.R. (2d) 240, recognizing that each case must be carefully examined on its own merits and on the basis of its particular facts.

October 1, 1997



N. DOUGLAS COE