

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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and -

ALLSTATE INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Jeffery T. Booth

Counsel for the Applicant, Intact Insurance Company ("Intact")

Nawaz Tahir

Counsel for the Respondent, Allstate Insurance Company ("Allstate")

ISSUE:

This arbitration involves a priority dispute between insurers. The issue, as set out in the Arbitration Agreement, is as follows:

- (a) Which insurer is liable to pay statutory accident benefits to Joseph M. (known as Joey generally and in these reasons) arising from his injuries sustained in a motor vehicle accident occurring on or about April 25, 2017, including the quantum of any related indemnity claim?
- (b) If the answer to (a) is the Respondent, what is the appropriate indemnity amount to be paid by the Respondent to the Applicant?
- (c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing?
- (d) The determination of the costs of the arbitration and the burden of payment of same.

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded before me on Monday, February 24, 2020:

Exhibit 1 – Arbitration Agreement (long form)

Exhibit 2 -Arbitration Agreement (short form)

Exhibit 3 – Agreed Statement of Facts

Exhibit 4 – Joint Document Brief (2 volumes consisting of some 97 tabs)

I did not receive any evidence apart from the documents filed. I have attached a redacted or edited version of the Agreed Statement of Facts (eliminating personal details by reason of privacy concerns) which is appended to this award as Schedule A.

The facts which give rise to the within arbitration are not in dispute at all. Rather, it is the interpretation of certain portions of the *Insurance Act* and the regulations made pursuant to the *Insurance Act* (largely the Statutory Accident Benefits Schedule (“SABS”)) which gives rise to the issue to be determined by me in this matter.

The basic facts which serve as a backdrop to the dispute are as follows. Joey was involved in a motor vehicle accident on April 25, 2017. At the time of the accident, he was operating a motor vehicle owned by his mother, Charlotte, with her consent. This vehicle was insured with Intact. Joey was not, at the time of this accident, and had never been listed anywhere on the declaration pages or certificates for the policy of insurance issued by Intact. While not reflected in the agreed statement of facts, there is no dispute that Joey owned his own vehicle which was insured with Allstate. Joey was a “named insured” on the Allstate policy.

Intact received the initial application for statutory accident benefits from or on behalf of Joey and has been evaluating, adjudicating and paying statutory accident benefits. Intact has brought this priority dispute against Allstate.

Procedurally, there is no dispute that, at first blush, Joey is not a named insured under the Intact policy but is a named insured under the Allstate policy. As a result and, once again, at first blush, Intact would succeed in this priority dispute. However, counsel for Allstate has advanced creative arguments and analysis which, it is submitted, makes Joey a named insured or

something akin to a named insured under the Intact policy. If this argument is successful, Allstate submits that Intact would have priority by virtue of operation of section 268 (5.2) of the *Insurance Act*. If I find that Joey is a named insured under the Intact policy, section 268 (5.2) would indeed lead to a priority finding against Intact as Joey was the driver and occupant of the Intact vehicle.

Thus, the pivotal or critical question for me to determine is whether Joey can be found to be a named insured in relation to the Intact policy. This argument is being advanced by Allstate. As a result, Allstate took on the role of applicant at the hearing before me, despite its appearance as respondent in the title of proceedings, as Intact had already made out a prima facie case for priority as against Allstate (Joey being a named insured on the Allstate policy and not being an obviously apparent named insured on the Intact policy). Put another way and as stated in the factum of Allstate, the sole issue for determination by me is whether or not Joey is a deemed named insured under the Intact policy.

Section 268 of the *Insurance Act* provides as follows:

Statutory Accident Benefits

268 (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.

Liability to Pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

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.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

Choice of Insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

Same

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

Same

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

Same

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

accident benefits against the insurer of the automobile in which the person was an occupant.

SUBMISSIONS AND ANALYSIS:

Allstate makes the following arguments. The term “named insured” is one that is not explicitly defined in the Insurance Act or the SABS. There are certain provisions within the *Insurance Act* which broadly outline who is an insured. Section 224 (1) provides that:

“Insured” means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person

Joey was entitled to statutory accident benefits under both the Intact and Allstate policies pursuant to section 268(1) of the *Insurance Act*. This section provides:

*268 (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.***

Allstate emphasizes the last line or phrase, such that it is necessary to examine the SABS to determine if Joey is entitled to benefits under the SABS. Subsection 3 (1) of the SABS defines “insured person” to be:

A person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario.

Allstate argues that Joey fits within the foregoing definition and has a legally recognized right to claim benefits against Intact as an “insured person”. Allstate further submits that Joey is an insured in relation to the Intact policy. Thus, he is an insured person under the Intact policy though not explicitly named in the policy as an insured. As I understand Intact’s position, it does not necessarily disagree or quibble with the foregoing. Rather, Intact takes the position that there is a world of difference between being an insured or an insured person, in relation to the Intact policy, as compared to being the named insured under the Intact policy issued to Charlotte, Joey’s mother, or being deemed to be the named insured (as per subsection 3 (7) of the SABS).

Allstate submits that Joey is deemed to be a named insured under Charlotte's policy of insurance issued by Intact by operation of section 244 of the *Insurance Act*. This section provides:

Any person insured by but not named in a contract to which section 239 or 241 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

Allstate submits that a consideration of section 244 requires an examination of section 239 of the *Insurance Act* to determine if section. 239 is applicable. Section 239 provides:

239 (1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and

(b) resulting from bodily injury to or the death of any person and damage to property.

Allstate's argument continues that Joey was driving a vehicle with Charlotte's consent and that the vehicle was insured by Charlotte with Intact. This policy was an owner's policy. I do not think this point is contentious between the parties. Allstate argues that Intact issued a policy of insurance for a vehicle owned by Charlotte, Joey was driving the vehicle with Charlotte's consent and, thus, the policy responds an owner's policy. Section 240 of the *Insurance Act* has no application as Joey was not an excluded driver in relation to his mother's policy.

Allstate's argument is that section 239 of the *Insurance Act* confirms that Joey is insured under Charlotte's policy issued by Intact as he was driving with her consent.. An owner's policy is the primary or first loss insurance. If a driver, operating with consent of the owner, has his or her own policy of insurance, the driver's policy respecting another vehicle would stack upon the owner's policy as excess insurance. All of this analysis is applicable to a third party liability claim. Indeed, the heading immediately preceding section 239 of the *Insurance Act* reads "Motor Vehicle Liability Policies".

Allstate submits that since section 239 of the *Insurance Act* applies to Joey, section 244 of the *Insurance Act* is triggered and Joey is deemed to be a named insured.

Intact responds to this argument by submitting that section 244 of the *Insurance Act* serves to cure a potential lack of privity of contract. The argument continues that a simple reading of section 244 does not and cannot make someone a “deemed named insured” as suggested by Allstate. Intact submits that to interpret this section, as suggested by Allstate, would be to ignore the priority scheme set out in section 268 (2) of the *Insurance Act*.

In the course of hearing submissions, I put the following hypothetical to counsel for Allstate. If I was to be operating a vehicle owned and insured by a friend with his or her consent, if I was involved in an accident giving rise to injuries and claims under the SABS and if I have my own policy of automobile insurance respecting my own vehicle which happens to be sitting on my driveway, the argument advanced by Allstate would mean that I should apply to the friend's insurer. Counsel for Allstate agreed that this was the upshot of his argument. This would upset approximately 30 years of priority dispute jurisprudence. It must require clear language in the *Insurance Act* or in the SABS. An example of the latter is subsection 3 (7)(f) and (g) which provides:

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or

(ii) the insured automobile is being rented by the individual for a period of more than 30 days; and

(g) an individual who is not living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, and

(ii) the individual, his or her spouse or any dependant of the individual or spouse is an occupant of the insured automobile.

In addition, consideration should be given to section 3 (1) of the SABS which provides as follows:

“Insured person” means in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario;

There is a clear differentiation and distinction between the named insured as compared to persons specified in the policy or persons involved in an accident involving the insured automobile.

Allstate points out that section 268 of the *Insurance Act* applies to this case as statutory accident benefits are created by subsection 1 and priority disputes are governed by subsection 2. Allstate argues that this triggers section 270 of the *Insurance Act* which provides:

Rights of Unnamed Insured

270. Any person insured by but not named in a contract to which section 265 or 268 applies may recover under the contract in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

Allstate submits that the foregoing confirms that Joey is a deemed named insured by virtue of the facts of the case. The argument continues that as Joey is a deemed named insured and as the term "named insured" is not explicitly defined anywhere else in the legislation or regulations, Joey is a named insured and is deemed to be a party to the contract.

While I can certainly appreciate and accept that Joey is deemed to be a party to the contract, I cannot accept the interpretation urged upon me by Allstate to the effect that Joey is a deemed named insured. A plain and simple reading of section 270 of the *Insurance Act* does not lead to this conclusion. Joey is an unnamed or not named insured under the Intact contract of insurance. Because Joey was driving the vehicle, he is entitled to accident benefit coverage

under the Intact policy. If there was no Allstate policy, Intact would be higher in priority as compared to another policy insuring another vehicle involved in the accident. Section 270, to my understanding, addresses issues that might arise between Joey and Intact in relation to privity of contract or otherwise. The upshot of this section deems Joey to be a party to the contract. This can be compared and contrasted with the named insured, being the owner the vehicle and contracting party with the insurer, and those specifically listed or enumerated under the policy as drivers or excluded drivers.

Intact submits that while there may not be a definition of the term "named insured" in the *Insurance Act*, there is a definition for this phrase in the Ontario Automobile Policy (OAP 1) Owner's Policy. In section 1.3 of the policy, the term "named insured" is defined as "the person or organization to whom the Certificate of Automobile Insurance is issued. "You" is defined to refer to the person or organization shown on the Certificate of Automobile Insurance as the named insured. This is contrasted with other people who may be covered under the policy under certain conditions. These people are referenced as "insured persons".

Allstate relies upon a decision of the Ontario Court of Appeal in *Avis Rent A Car Inc. v. Certas Direct Insurance Company*.¹ This decision interpreted sections 239 and 244 of the *Insurance Act* as there was a dispute as to whether the owner's policy of liability insurance respecting the Avis rental vehicle would provide coverage to the renter who had personal coverage for his own vehicle which was not involved in the accident. The court held that when the renter drove the vehicle with Avis' consent, he was insured to the same extent as the owner, being Avis, and was deemed to be a party to the contract between Avis and its insurer.

This is not in dispute but does not, in my view, assist Allstate in its efforts to construe Joey to be a named insured in relation to the Intact policy. If there was to be a third party liability claim made against Joey, as driver in possession of the vehicle with Charlotte's consent, Intact's policy, as an owner's policy, would provide primary coverage in favour of both Joey and Charlotte. Joey's policy with Allstate would provide excess coverage in favour of Joey.

Allstate argues that a consideration of the Ontario Court of Appeal's decision in *Axa Boreal Assurances v. Co-operators Insurance Co.*² advances and supports its position. I cannot agree. This case deals with the contest between a personal policy of automobile insurance and a truck provided by the claimant's employer for the claimant's regular use. The claimant was an

¹ 2005 CanLII 16075 (Ont. C.A.)

² 2000 Carswell Ont 3426 (Ont. C.A.)

occupant of the truck when involved in the accident. In a prior version of section 3(7) of the SABS, the court found the claimant to be deemed to be a named insured under the employer's policy of automobile insurance. The court noted, at paragraph 10 of its decision, that "the designation "named insured" is significant in determining which insurer is responsible for paying accident benefits." The court reviewed the priority scheme under section 268 (2) and following which I have addressed earlier in this award.

The employer's insurer attempted to argue that the predecessor section to section 3(7) under consideration in the matter before me cannot make the driver of the company truck a named insured under the company truck's policy for purpose of determining which insurer is liable to pay accident benefits. The court noted the insurer's argument that "named insured" has a well understood meaning in the industry and that the SABS cannot alter this meaning when applying the legislative priority rules. The court rejected these arguments and found that the claimant was a deemed named insured under the company truck's policy and, as a result, this policy had the higher priority to respond to the claimant for statutory accident benefits.

The final argument advanced by Allstate is that Joey was using Charlotte's car regularly. It is submitted that if Charlotte was making her vehicle available to Joey for his regular use, section 3(7)(f) of the *Insurance Act* would apply. This would require me to construe Charlotte to be an "other entity" as the phrase requires the automobile to be made available for the individual's use by a "corporation, unincorporated association, partnership, sole proprietorship or other entity". This argument was made and rejected in a predecessor version of section to 3(7)(f) in *State Farm Mutual Automobile Insurance Co. v. Kingsway General Insurance Co.*³ before Arbitrator Samis. As Arbitrator Samis observed, the list embraces entities which might have business purposes or other objects. It describes entities that have goals or structures separate and apart from private individuals. When the list is followed by the words "or other entity", one is driven to the conclusion that the section refers to other varieties of organizations similar to those specified. I agree with and accept the reasoning of Arbitrator Samis. One such example is the family automobile supplied to a nanny to facilitate or advance the completion of his or her duties as a nanny. This section affords no relief to Allstate and has no application to the facts of the matter before me.

If my analysis is incorrect and if Joey is found to be a named insured or deemed named insured under the Intact policy in addition to being the named insured under the Allstate policy, there is

³ 1999 Carswell Ont 7018 (Arbitrator Lee Samis)

no dispute that section 268 (5.2) would break the tie. Joey, being an occupant of the Intact policy, would be required to seek accident benefits from Intact has the higher priority insurer.

As a result, I find that Joey was the named insured under the Allstate policy. He was not the named insured or deemed to be a named insured under the Intact policy. A plain reading of sections 244 and 270 of the *Insurance Act* does not lead me to a different conclusion. As a result, Allstate is the higher priority insurer and is liable to pay statutory accident benefits to Joseph M. rising from his injuries sustained in a motor vehicle accident occurring on or about April 25, 2017.

I remain seized of this matter to determine the quantum of any related indemnity claim, the appropriate indemnity amount to be paid by Allstate to Intact, the amount of interest, if any, on such indemnity amounts as may be found to be owing and to determine the costs of the arbitration and the burden of payment of same.

I note that pursuant to the arbitration agreement, the parties have an automatic right of appeal on a point of law or a point of mixed fact and law to a judge of the Ontario Superior Court of Justice within 30 days of the release of my award. Until the time for appeal has expired, I am not to determine the burden of costs, their scale or quantum. That said, the agreement provides that my fees, expenses and disbursements will generally be borne by the unsuccessful insurer. In the event of an appeal, my award is deemed to be stayed, pending the outcome of any such appeal with the exception of payment of my account for fees, expenses and disbursements which will be borne equally by the parties, pending final determination of all appeals. Consequently, I will proceed to render an account divided equally between the parties, to be adjusted depending upon the result of any appeal, if undertaken, an agreement between the parties or further order or disposition I may make as an incident of adjudicating costs as between the parties.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion and wish to thank counsel for their thoughtful, comprehensive and creative submissions.

Dated at Toronto, this 3rd day of March, 2020.



Vance H. Cooper, Arbitrator

SCHEDULE "A"

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I.8
and O. REG. 283/95**

AND IN THE MATTER OF THE *ARBITRATION ACT*, 1991, S.O. 1991, c. 17

AND IN THE MATTER OF AN ARBITRATION BETWEEN

INTACT INSURANCE

Applicant

- and -

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

AGREED STATEMENT OF FACTS

1. Josephus M. (also known as "Joey") was involved in a motor vehicle accident on April 25, 2017.
2. He was born February 13, 1987.
3. At the time of the accident, Joey was the named insured of a policy of insurance with Allstate.
4. On the day of the accident, he was driving a Pontiac Wave.
5. The Pontiac Wave was owned by Charlotte, Joey's mother, who gave consent to Joey to drive the vehicle.
6. Intact is the insurer of the Pontiac Wave.
7. Joey's name was never listed anywhere on the declarations page(s) or certificate for the policy of insurance with Intact.
8. Joey is not dependant on Charlotte.
9. Joey applied to Intact for the payment of Accident Benefits in relation to the April 25, 2017 accident.
10. Intact has been paying accident benefits to Joey in relation to the April 25, 2017 accident.
11. Charlotte placed the insurance on the Pontiac Wave through K and W, a brokerage in Welland, Ontario and specifically, with Diana M., a broker.

12. Diana M. prepared the application for insurance.
13. When Charlotte initially applied for insurance, Joey was included on the application.
14. On this application, Joey was noted to be an Applicant that "lives with parents".
15. The address for Charlotte and Joey was noted to be 19 Leaside Dr. in Welland, Ontario.
16. At her examination under oath, Diana M. advised that in preparing the application, she did not know if Joey resided with Charlotte.
17. At her examination under oath, Diana M. advised that she believed that Charlotte told her that Joey did not reside in Charlotte's household and was living in Hamilton.
18. The address provided by Joey on his OCF-1 as well as what is listed on his driver's licence is 280 Melvin Avenue in Hamilton, Ontario which is the address of his father.
19. Joey was involved in a previous accident on July 2, 2015 at the intersection of Barton and Centennial Parkway in Hamilton, Ontario.
20. At that time, he was driving a 2005 Chevrolet Optra that was owned by Charlotte and insured by Intact.
21. Intact paid out a property damage claim relating to the July 2, 2015 accident. Payment was made to Charlotte.
22. Intact became aware that Joey was driving the Optra at the time of the July 2, 2015 accident.
23. Intact was told by Charlotte to deal with Joey in relation to the property damage claim for the July 2, 2015 accident.
24. After this accident, Intact renewed the policy in August of 2015.
25. Diana M. became aware that Joey was the driver at the time of the July 2, 2015 accident.
26. Joey was involved in another accident on April 30, 2016.
27. At that time, he was driving a vehicle owned by Charlotte and insured by Intact.
28. Intact became aware that Joey was driving the vehicle at the time of the April 30, 2016 accident.

29. On June 2, 2016, Kate G. of Intact was told by Charlotte that the vehicle in question was with her son "Joey" and that he owns the vehicle, but is listed under Charlotte's policy.
30. Diana M. confirmed that Charlotte owned the vehicle involved in the accident on April 30, 2016 and not Joey.
31. After this accident, Intact renewed the policy in August of 2016.
32. Diana M. became aware that Joey was the driver at the time of the April 30, 2016 accident.
33. Diana only has a hard copy of the brokers file. Any notes she would have made would be on the face of a document that is in the broker's file, either directly, or on a sticky note.
34. By letter dated June 25, 2018, Intact advised Charlotte that it was not going to renew the policy due to a policy violation regarding misrepresentation or failing to disclose information required in an application.