

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 :

BELAIRDIRECT INSURANCE

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY (TRAVELERS)

Respondent

A W A R D

COUNSEL:

Tracy L. Brooks
Counsel for the Applicant, Belairdirect Insurance ("Belair")

Neil Colville-Reeves
Counsel for the Respondent, Dominion of Canada General Insurance (Travelers) ("Dominion")

ISSUES:

This arbitration involves a priority dispute between insurers. It is agreed that there are no limitation issues. The issues, as set out in the arbitration agreement, are as follow:

- [a] is Matthew considered an insured person under Dominion's policy?
- [b] if the answer to [a] is in the affirmative, what is the appropriate indemnity amount to be paid by the respondent to the applicant?
- [c] if the answer to [a] is in the affirmative, what is the amount of interest payable on the indemnity amount owing?
- [d] the determination of the costs of arbitration.

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded on a written record only before me on Thursday, April 7, 2016.

Exhibit 1 – Arbitration Agreement dated April 7, 2016

Exhibit 2 – Applicant's document and authorities brief

Exhibit 3 – Respondent's document brief

Exhibit 4 – Respondent's book of authorities

The facts give rise to within arbitration are not in dispute. These facts can be gleaned from the recitals to be arbitration agreement together with the written and verbal submissions of counsel.

Belair issued a policy of personal automobile insurance to Michael G. Matthew was the operator of an uninsured 2007 Yamaha motorcycle involved in a motor vehicle accident on August 29, 2013 with the vehicle owned by Michael G. Matthew applied for and received statutory accident benefits from Belair.

Matthew was some 32 years of age when involved in the motor vehicle accident. At the time, he was living with his parents, Maria and Tarcisco "Chico". There is no suggestion that Matthew was dependent upon his parents, either financially or for care, at the time of the accident.

In November, 2012, Maria and Chico applied to Dominion to renew their automobile insurance policy respecting a 2009 Toyota Corolla. Dominion issued a renewal policy and provided a certificate of automobile insurance to Maria and Chico. The policy was in full force and effect from January 5, 2013 to January 5, 2014 which captures the date of the accident in question.

I have reproduced copies of portions of the policy documents prepared and sent by Dominion to Maria and Chico as follows. I have redacted surnames and other personal information by reason of privacy concerns.

Certificate of automobile insurance (Ontario)

This is your renewal policy.

Your policy information

Policy number: APP 4684394
 Effective date: Jan 5 '13 at 12:01 a.m.
 Expiry date: Jan 5 '14 at 12:01 a.m.

All times are local times at the Named Insured's postal address shown on this Certificate

Named insured

MARIA & TARCISIO [REDACTED]
 [REDACTED]
 [REDACTED]

Information about your broker

THE MAGNES GROUP INC.
 1540 CORNWALL ROAD, SUITE 100
 OAKVILLE ON L6J 7W5
 Broker No: 6750504
 Phone: 905-845-9793

This is your Certificate of Automobile Insurance. Contact your Broker with any questions or if you require clarification regarding your coverage choices.

Emergency claims service (24 hours)
 1-800-661-5522

Summary of your insurance

Automobiles insured

| Auto number | Model year | Make / Model | Serial number / V.I.N. | Premium |
|-------------|------------|----------------|------------------------|------------|
| 1 | 2009 | TOYOTA COROLLA | 2F18U40E59C128091 | [REDACTED] |

For information on method of payment, please see Your account statement.

Listed drivers

| Driver number | Driver name | Age | Years licensed | Driver training | Marital status |
|---------------|---------------------|-----|----------------|-----------------|----------------|
| 1 | [REDACTED] TARCISIO | 72 | 45 | | Married |
| 2 | [REDACTED] MARIA | 63 | 37 | | Married |
| 3 | [REDACTED], MATTHEW | 32 | 16 | Yes | Single |

Automobile 1

Described automobile

| | |
|------------------------|-------------------|
| Model year | 2009 |
| Make / Model | TOYOTA COROLLA |
| Body type | 4 Door |
| Serial number / V.I.N. | 2T1BU40E59C128091 |

Lienholders (to whom loss may be jointly payable)
 TOYOTA CREDIT CANADA INC.
 200-80 MICRO CRT.
 MARKHAM, ON L3R 9Z5

Rating information

| | | |
|---------------------------------------|---|--|
| Kilometres driven | 15,000 km driven each year; 0 km driven to work one way | |
| Vehicle code | 0458 | |
| Rate group | | |
| Accident Benefits | 5 | |
| Direct Compensation - Property Damage | 35 | |
| All Perils / Collision | 31 | |
| Comprehensive / Specified Perils | 25 | |
| Rating territory | 1R | Concord, Maple, Richmond Hill, Thornhill |
| Class | 01 | Principal driver age 25 or greater, pleasure use only, no commuting to and from work, school or transit station, not driven more than 15,000 km annually. |
| Driving record | Elite | Driver 55 years of age or greater, licensed 20 years or more (past 6 years in North America). All drivers, no cancellations for non-payment in the past 3 years and no chargeable accidents or licence suspensions in the past 6 years. Not more than 1 minor conviction (all drivers), and no major or serious convictions in the past 3 years. |
| Discounts | 10% | Dual Policy Discount - Applies to all related drivers in your household where we insure your principal residence on a Homeowners, Tenants or Condominium policy, provided there are no surcharges for accidents or convictions. |

| Driver number | Driver name | Assignment | Convictions | Chargeable claims | |
|---------------|----------------------|------------|-------------|-------------------|--------------|
| | | | | Date of loss | Type of loss |
| 1 | [REDACTED], TARCISIO | Occasional | None | None | |
| 2 | [REDACTED], MARIA | Principal | None | None | |
| 3 | [REDACTED], MATTHEW | Excluded | None | None | |

There is no dispute between the parties that in late 2008 or early 2009, Matthew and his parents, Maria and Chico, executed an OPCF 28A - Excluded Driver endorsement respecting, inter alia, the 1999 Toyota Corolla vehicle. This endorsement was in full force and effect at the time of the subject accident. The 2007 Yamaha motorcycle had no connection whatsoever to the Dominion policy. I have produced the signed endorsement, with personal details redacted, as follows.

OPCF 28A – Excluded Driver

| | | |
|--|-----------------------------|---|
| Name of Insured Tarcislo & Maria [redacted] | Policy number APP4684304 | Date of change (dd/mm/yyyy) 05/01/2009 |
|--|-----------------------------|---|

WARNING - BY SIGNING THIS FORM YOU AGREE THAT IF THE EXCLUDED DRIVER DRIVES ANY AUTOMOBILE DESCRIBED BELOW:

- this policy will not provide the insurance required by law;
- this policy will not provide coverage for damage or injuries caused by the excluded driver and
- both the automobile owner and the excluded driver may be personally responsible for damage or injuries caused by the excluded driver.

1. Purpose of this change - This change is part of the policy. Except for certain Accident Benefits, it excludes all coverage when the person (the Excluded Driver) named in paragraph 3 below drives the automobile(s) listed below in paragraph 2 below

2. Exclusions from coverage - Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage while the Excluded Driver is driving the automobile(s) listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in this policy

| Model year | Make | Trade name (make) | Serial number / VIN |
|------------|--------|-------------------|---------------------|
| 1996 | Toyota | Corolla | 4T1BG12K47102899 |
| 1997 | Toyota | Corolla | 3T1AF02C4170512 |
| 2001 | Toyota | Corolla | 3T1F01K0001125001 |

3. Acknowledgment of Excluded Driver - I promise that I will not drive the automobile(s) described in paragraph 2 above

- I understand that if I do,
- There is no coverage under the policy for:
 - property damage and bodily injury,
 - damage to the automobile(s), and
 - most Accident Benefits;
 - I may be charged with driving without insurance;
 - I may be held personally liable for injuries or damage caused by me;
 - The policy may be cancelled; and
 - in future, I may have more difficulty finding car insurance and it will likely cost more

| | |
|---|--|
| Name of Excluded Driver Matthew [redacted] | Driver license number B6876-52828-01213 |
| Signature of Excluded Driver [Signature] | Date (dd/mm/yyyy) Dec 19 2008 |

4. Acknowledgment of Named Insured(s) - I promise that I will not permit the Excluded Driver to drive the automobile(s) described in paragraph 2 above. I understand that if I do,

- There is no coverage under the policy for:
 - property damage and bodily injury,
 - damage to the automobile(s), and
 - most Accident Benefits;
- I may be charged with permitting the automobile to be driven without insurance;
- I may be held personally liable for injuries or damage caused by the Excluded Driver;
- The policy may be cancelled; and
- in future, I may have more difficulty finding car insurance and it will likely cost more

| | |
|---|-----------------------------------|
| Name of Named Insured(s) TARCISLO & MARIA [redacted] | Date (dd/mm/yyyy) Dec 19, 2008 |
|---|-----------------------------------|

All other terms and conditions of your policy remain the same.

Please sign and return this form. Keep a copy for your records.

LAW:

A priority dispute arises when there are or may be multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay accident benefits. Since the claimant was an occupant of a vehicle at the time of the accident, the following rules respect to priority of payment apply:

(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 (emphasis added).

For purposes of the arbitration before me, the sub clauses in dispute are i, to the extent that Matthew is an insured of an automobile in which case Dominion will have higher priority, or iii, in which case Belair will have higher priority.

Section 224 (1) of the *Insurance Act* defines "insured" as follows:

"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;

The parties agree and there is no dispute that the Court of Appeal for Ontario has, in *Warwick v. Gore Mutual Insurance Co.*, 32 O.R. (3d) 76; [1997] O.J. No. 174, directed that an automobile insurance policy insures those persons who conform to the definition of "insured persons" according to the Statutory Accident Benefits Schedule ["SABS"] and not according to the *Insurance Act*.

Section 3 [1] of the SABS defines "insured person" 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; [emphasis added]

SUBMISSIONS:

Counsel for Belair submits that when considering and interpreting the meaning of the words in the *Insurance Act* and SABS, consideration must be given to context, their grammatical and ordinary meaning, the scheme and object of the SABS and the intention of the Legislature with respect to the definition. Counsel further submits that clauses in an insurance policy providing coverage are to be interpreted liberally or broadly in favour of the insured while clauses excluding coverage are to be interpreted narrowly and strictly against the insurer.

Counsel for Belair reviewed those sections of the *Insurance Act* which give rise to the Excluded Driver endorsement, specifically sections 249 and section 224 (1). The point made by counsel is that this endorsement was designed to remedy increased liability exposure for insurers to third parties when the insured automobile was or could be operated by high or higher risk drivers to whom insured vehicles were or may be available. The Legislature did not intend to prevent a person specified in the policy as a driver of the insured vehicle from having the status of "insured person" for purposes of SABS coverage because he may be an excluded driver under the policy. Counsel relies upon the decision of Arbitrator Scott Densem dated March 10, 2016 in *State Farm Insurance v. Wawanesa Mutual Insurance* at pages 17 and 24.

Counsel for Belair submits that when an insurer names persons as drivers in the Certificate of Insurance, this makes them "specified drivers" and, therefore, "insured persons" for purposes of SABS coverage. Put another way, naming a driver in the list of drivers in the Certificate and describing that driver's status as "excluded" does not make the driver an excluded driver for purposes of SABS coverage. Counsel relies upon the decision of Arbitrator Scott Denson, described above, at pages 20 – 21, and the decision of Arbitrator Kenneth Bialkowski dated March 31, 2014 in *Pafco Insurance v. Cumis General Insurance*, at pages 8 – 10.

Counsel for Belair submits that "excluded driver" category is a subcategory of the broader "specified driver" category and relies upon Arbitrator Densem's comments at page 15 of the decision described above.

Counsel for Belair submits that once one is "specified in the policy as a driver", one has insurance coverage, particularly statutory accident benefits coverage, provided that one is not driving a vehicle that one is excluded from driving. This is exactly the finding made by Arbitrator Bialkowski at page 7 of *Dominion of Canada v. State Farm Mutual Automobile Insurance*.

Counsel for Belair acknowledges that I am bound to follow a decision of a judge of the Superior Court on similar facts and similar issues. There are exceptions if the decision is dated or stale or if there are other precedents from another judge which are open to me to follow in the alternative. Counsel suggests that I am not required to follow the decision of Justice K.P. Wright in *Dominion of Canada v. State Farm Mutual Automobile Insurance* as there is insufficient analysis to understand the reasons for decision and because the judge used an inappropriate term in the single and solitary paragraph of analysis [paragraph 10 - reference made to "insured driver" which is not a defined or applicable term in the *Insurance Act* or the SABS]. Counsel went one step further and quoted from a decision of Lord Denning to the effect that "the doctrine of precedent does not compel one to follow the wrong path until one falls over the edge of a cliff".

Counsel for Dominion submits that I am bound to follow the decision of Justice K.P. Wright in *Dominion of Canada v. State Farm Mutual Automobile Insurance*. While Justice Wright may have misspoken of one of the critical terms when she used the term "insured driver", she was obviously fully informed as to the issues, given the decision of Arbitrator Bialkowski which was under appeal and before the court, and given the benefit of counsel who are well-versed and

very familiar with these issues as they practice regularly in the area of private arbitrations involving priority disputes. The nub or essence of the decision of Justice Wright is that an excluded driver cannot be an insured person for purposes of SABS coverage.

Counsel for Dominion submits that section 3 (1) of the SABS should be read with care. This section, with emphasis added, is reproduced again.

"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,

Counsel for Dominion submits that section 3(1)(a) is a narrow class of individuals whereas section 3(1)(b) is a broad class of individuals. In the view of counsel, this explains how an excluded driver, whether an occupant or driver of the insured automobile, may have coverage under the policy which names the individual as an excluded driver.

Counsel submits that it would defy all principles of statutory or contractual interpretation to find an individual who, by agreement, is an excluded driver and somehow make them a specified driver involved in an accident in Ontario that involves another automobile. This individual must be specified in the policy as a driver of the insured automobile. By virtue of the Excluded Driver endorsement, this individual has agreed not to drive the insured automobile. Counsel submits that an individual cannot be specified in the policy as a driver and an excluded driver. This would be nonsensical and confound the ordinary and grammatical meaning of the words used in the Insurance Act, the SABS and government approved Excluded Driver endorsement. Counsel urges me to focus on the insurance policy documentation, reproduced above, which sets out "rating information" and which assigns driver numbers to Chico, Maria and Matthew and, the same time, designates their status as occasional, principal and excluded, respectively. Matthew cannot be an excluded driver and, at the same time, a specified driver for purposes of SABS and the within priority dispute.

Counsel for Dominion is in agreement with counsel for Belair regarding the purpose behind the Excluded Driver endorsement, namely to remedy increased liability exposure for insurers to third parties when the insured automobile was or could be operated by high or higher risk drivers to whom insured vehicles were or may be available.

Counsel for Dominion points out that in the application for accident benefits, Matthew indicated that he was not listed as a driver in an automobile insurance policy. This may well have been his belief but it is not determinative of the issue nor is it binding upon me.

Counsel for Dominion relies upon a decision of Arbitrator Jones released in July 2002 in *RBC General Insurance v. Lombard Insurance*. In this case, the claimant was a passenger in a motor vehicle owned by his girlfriend and insured by RBC. The claimant was named in the Lombard policy as an "excluded driver". RBC took the position that this would make the claimant an "insured person" under the Lombard policy. This position is identical to that taken by Belair in the matter before me. Arbitrator Jones found that while the claimant was indeed listed in the policy as a driver, he was specifically listed as an "excluded driver". Arbitrator Jones rejected this argument and observed as follows:

"To specifically list the person as an "excluded [driver – sic]" under the policy and to allow that then to give them status and benefits under the policy would result in a situation not likely intended by the Legislature or the parties."

Counsel for Belair points out that there is no indication in the reasons given by Arbitrator Jones that any evidence was offered regarding either the intentions of the Legislature or of the parties. Moreover, given the standard form nature of the insurance policy and the government approved endorsements, the Excluded Driver endorsement being one, the intentions of the parties are probably irrelevant.

ANALYSIS:

Before embarking on my analysis which need not be terribly complex, a few words about the legal context within which I am making my decision are in order. Arbitrator Densem heard *State Farm Insurance v. Wawanesa Mutual Insurance* on February 6, 2015. He considered but disagreed with the reasoning of Arbitrator Jones in *RBC General Insurance v. Lombard Insurance* which had been decided some 13 years earlier. Arbitrator Densem released his decision on March 10, 2016.

In the interim, Arbitrator Bialkowski heard *Dominion of Canada General Insurance v. State Farm Mutual Automobile Insurance* on May 20, 2015 and released his decision on June 26, 2015. An appeal was undertaken from Arbitrator Bialkowski's decision. This was heard before Justice K.P. Wright of the Superior Court of Justice on October 26, 2015. While Justice Wright's amended endorsement is dated October 26, 2015, I am advised by counsel before me that the decision was not released until late in March 2016.

There is apparently an appeal pending from Arbitrator Densem's decision, a leave to appeal application pending from Justice Wright's decision and, in response to my specific inquiry, the insurer which finds itself on the losing end of my decision will, in all likelihood, appeal my decision to the Superior Court and potentially catch up to the appeal from Justice Wright's decision if leave to appeal is granted. This is hardly surprising, given that the underlying claim which gives rise to the dispute before me involves catastrophic injuries as that term is used in the SABS.

As I alluded to, above, my analysis need not be particularly detailed as I am in agreement with the analysis offered by Arbitrator Densem and Arbitrator Bialkowski. On the evidence before me, Matthew is one of three listed drivers as per the policy documentation issued by Dominion. As such, he is specified in the policy as a driver. Moreover, he is listed as a driver with reference to the insured automobile, being a 2009 Toyota Corolla. While it is certainly true that he and his parents executed an Excluded Driver endorsement respecting the insured automobile, this endorsement would have a direct bearing on third party liability coverage and would have some bearing on Matthew's accident benefit coverage if he were to be driving the insured automobile. However, it does not negate all accident benefit coverages and the Excluded Driver endorsement does not purport to eliminate all accident benefit coverages. Indeed, if Matthew

was a passenger in the insured automobile while operated by his mother or father or some other person with consent, he would have the full extent of accident benefit coverages available to him.

I specifically find that for Matthew to be an "insured person", he need only meet the definition of "insured person" as set out in section 3 (1) of the SABS. He is a person specified in the policy as a driver of the insured automobile. It matters not that he has, by agreement as reflected in the Excluded Driver endorsement, agreed not to drive the vehicle. By being specified or listed in the policy as a driver of automobile, he has the status of "insured person".

I further find that there is no difference between being **specified** in the policy as a driver as compared to being **listed** in the policy as a driver. Neither word is defined in the *Insurance Act*, SABS or elsewhere. The Oxford Online Dictionary defines **list** as a number of connected items or names written or printed consecutively, typically one below the other. This same source defines **specified** as identified clearly and definitely. For purposes of my analysis, I believe specified and listed can and should be used interchangeably.

But for the amended endorsement of Justice K.P. Wright in *Dominion of Canada v. State Farm*, I would find in favour of Belair and rule that Matthew was an insured person under the Dominion policy such that Dominion has the higher priority to respond to Matthew's claim for statutory accident benefits. However, I am unable to do so as I am obliged to follow the decision of a Superior Court judge despite the fact that I may disagree with the analysis and the result. I am unable to circumvent what I believe is a binding precedent directly relevant and applicable to the matter before me. As a result, I find that Matthew was not an insured person under the Dominion policy such that Belair has the higher priority to respond to Matthew's claim for statutory accident benefits.

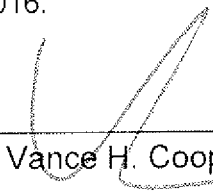
I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration to its current conclusion and wish to thank counsel for their thoughtful, comprehensive and intelligent submissions.

CONCLUSION:

I find that Matthew, at the time of the accident which gives rise to this arbitration, was not an "insured person" under the policy issued by Dominion of Canada. As such, Belair has the higher priority to pay statutory accident benefits. Thus, Belair is the insurer responsible to pay statutory accident benefits to Matthew arising from a motor vehicle accident occurred on August 29, 2013.

I remain seized of this matter to address the issue of costs if counsel are unable to work this out. I order that Belair pay the cost of the arbitrator in accordance with the terms of the executed arbitration agreement.

Dated at Toronto, this 19th day of April, 2016.



Vance H. Cooper, Arbitrator