

IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and *ONTARIO REGULATION 283/95* THERETO;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

**TRADERS GENERAL INSURANCE COMPANY/
AVIVA HEALTHCARE SERVICE**

Applicant

- and -

THE GUARANTEE COMPANY OF NORTH AMERICA

Respondent

ARBITRATION AWARD

COUNSEL:

Derek Greenside for the Applicant

Alexander W. Neaves for the Respondent

ISSUE:

1. Was the Claimant an "occupant" of his police cruiser at the time of the accident as that term is defined in section 224 of the *Act* ?

RESULT:

1. Yes, he was an "occupant" of his police car at the time, and Guarantee is therefore in highest priority to pay his claims.

BACKGROUND:

1. Police Constable Kurt Hartill was injured when he was struck by a car that slid off the road as he was investigating a motor vehicle accident on November 27, 2014. He was employed by the Waterloo Regional Police as a patrol officer at the time, and had driven to the accident scene in his police cruiser. He was standing a few metres from his vehicle at the time that he was struck.
2. Mr. Hartill submitted an application for payment of benefits under the *SABS* to Traders General Insurance Company ("Traders"), the insurer of his personal vehicle, and they have paid benefits to him and on his behalf.
3. The Guarantee Company of North America ("Guarantee") insured the police car that was assigned to P.C. Hartill on the evening in question. It concedes that the police force made a vehicle available to him for his "regular use" at the time of the accident, and that he would therefore be a "deemed named insured" under the Guarantee policy pursuant to section 3(7)f of the *SABS*.
4. Traders contends that P.C. Hartill was an "occupant" of the police cruiser at the time of the incident, and that subsection 268(5.2) of the *Insurance Act* requires that he claim benefits from Guarantee, the insurer of the cruiser. Guarantee disputes that he was an "occupant" of that vehicle at the relevant time. The parties agree that the determination of priority rests upon whether or not Mr. Hartill was a "driver" of the police vehicle when he was struck.

EVIDENCE:

5. The parties agreed to have this issue determined by way of an exchange of written submissions. No witnesses were called nor oral submissions made. Counsel filed an Agreed Statement of Facts and some photographs of the accident scene with me. These reveal the following facts:

6. Police Constable Hartill was called to an accident scene at the intersection of Trussler Road and Bleams Road outside of Kitchener, Ontario, in order to investigate a single- vehicle accident involving a 2013 Hyundai vehicle. It was approximately 7 p.m. on November 27, 2014. The driver of the Hyundai had been proceeding westbound along Bleams Road, approaching its intersection with Trussler Road, which is described as a "T intersection". Due to slippery road conditions, the driver failed to stop at the intersection, crossed over Trussler Road and struck a hydro pole located down an embankment seven meters west of that road.

7. Mr. Hartill drove to the scene and parked his police car on the west side of Trussler Road, near the hydro pole. The pole was located near or at the bottom of an embankment, which was approximately 6 feet lower than the road itself. He got out of the cruiser to speak with the driver of the Hyundai, to determine whether she required medical assistance and to assess the damage to her vehicle. He obtained her driver's license and returned to his cruiser to complete an accident report on his computer. The computer is part of the police force's communications system, and is attached to the cruiser. It cannot be removed.

8. After completing part of the report, the Claimant realised that he had not obtained the driver's phone number. He exited his vehicle in order to obtain this information, and approached the passenger door side of the Hyundai. When he noticed that the driver was having difficulty opening that door, he indicated that he would walk around to the driver's side of the vehicle. As he was in the process of walking around the rear of the vehicle, he was struck by a BMW that had approached the intersection, and failed to stop due to the slippery road conditions. Mr. Hartill was found face down in the ditch by an independent witness and the first responding police officer.

9. The parties agree that before he was struck, Constable Hartill intended to obtain the driver's telephone number and return to his cruiser to complete the accident report. He would have then provided a copy of the report to the driver of the Hyundai, returned her driver's licence, and ensured that she and the car were towed from the scene. The parties also agree that the police cruiser remained "turned on" throughout his investigation of the accident, in order to power the lights and the police communications system.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act:

224 (1) In this Part,

"occupant", in respect of an automobile, means,

(a) the driver,

(b) a passenger, whether being carried in or on the automobile,

(c) a person getting into or on or getting out of or off the automobile

268(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,

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,

(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.

(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.

(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.

10. As stated above, the parties agree that if the Claimant is determined to be a “driver” at the time of the accident, he would qualify as an “occupant” under the *Act*, and Guarantee would be in higher priority to pay his claims. If he is not, priority would remain with Traders.

APPLICABLE CASE LAW :

11. The parties’ arguments drew heavily from the case law that has evolved on this issue. Both counsel referred at length to two Ontario Court of Appeal decisions in which the definition of “occupant” in section 224 of the *Act* was closely analysed. I will summarise the facts and findings in these cases before referring to the arguments presented in this case.

Axa Insurance v. Markel Insurance Co. of Canada

12. The Court of Appeal’s decision in *Axa Insurance v. Markel Insurance Co. of Canada* [2001] O.J. No. 294 overturned the appeal decision of the Superior Court, and restored the arbitration award issued by Arbitrator Fidler. The claimant in that case, a Mr. Ferguson, was an owner operator of a Freightliner tractor trailer, insured by Markel. He drove his loaded truck to a steelyard to make a delivery. He stopped the truck outside the loading bay, and left the vehicle. While he was standing approximately thirty feet from his truck, a piece of wood flew off another tractor trailer that was leaving the loading bay, struck him in the head and killed him.

13. Mr. Ferguson’s dependents applied to AXA, the insurer of his personal vehicle, for payment of accident benefits under the *Schedule*. AXA pursued Markel for priority, claiming

that Mr. Ferguson was still an “occupant” of the truck at the time of the incident. As he was a named insured under the Markel policy covering the truck, Markel would be in higher priority to pay his claim by virtue of section 268(5.2) of the *Act*.

14. Arbitrator Fidler agreed and determined that the claimant remained an “occupant” of the vehicle at the time of the incident, despite the fact that he was not inside the truck when he was struck by the flying piece of wood. On appeal, Justice Matlow reversed that decision.

15. Writing for the Court of Appeal, appeal Justice Goudge agreed with the arbitrator that Mr. Ferguson remained a driver of his vehicle while he stood outside of his truck. He stated that while the definition of “occupant” in section 224(1) of the *Act* suggests that there must be some degree of physical connection with the vehicle for a person to be considered its driver, it does not require them to actually be driving the vehicle at the time of the incident. He emphasized that parties should consider the status of the person claiming benefits, rather than their precise location or the activity that they were engaged in at the time.

16. Justice Goudge noted that section 268(5.2) of the *Act* refers to a person being an occupant of a vehicle “at the time of the incident”. He concluded that this suggests that the status of driver or passenger does not attach permanently to a person, but rather may vary depending on the circumstances. He stated that the question becomes whether, keeping the above considerations in mind, an objective observer of the incident would “answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor trailer”.

17. Justice Goudge concluded that Mr. Ferguson met the definition of “driver” at the time of the incident, as he was in close proximity to the vehicle when it occurred, had driven the truck to the yard and would have driven it away after unloading, if the incident had not taken place. He retained an element of control over the vehicle at the point that he was struck, as no one else had assumed the role of its driver. Justice Goudge accordingly allowed the appeal, set aside the judge’s order and restored the arbitrator’s award.

McIntyre Estate et al. v. Scott et al.

18. This decision arose out of a motion brought under Rule 21 of the Rules of Civil Procedure to determine a question of law, in a dispute between Jevco Insurance and Pilot Insurance. Ms. McIntyre was a passenger on a motorcycle driven by her husband. The couple pulled off the road and onto a shoulder of the Don Valley Parkway under an overpass, when it started to rain. They both got off the motorcycle, and intended to wait out the rainstorm under the shelter of the overpass. After a few minutes, Ms. McIntyre walked back to the motorcycle in order to retrieve some dry clothing from the saddlebag. She was struck by an uninsured motorist and seriously injured. Her husband Joseph was also struck and killed in the incident.

19. Joseph was a named insured under the Jevco policy insuring the motorcycle. He was also a named insured under an auto policy issued by Pilot, insuring two other vehicles. The parties agreed that if Ms. McIntyre was an “occupant” of the motorcycle at the time of the accident, Jevco would be liable to pay her claims. If she was not, liability would be shared between Jevco and Pilot. The motion judge ruled that she was not an “occupant” at the time, as she was not “in or on” the motorcycle at the point at which she was struck, and would therefore not meet the definition of “passenger” in subsection (b) of the “occupant” definition in section 224(1). Pilot appealed the decision.

20. Justice Sharpe wrote the Court of Appeal’s ruling, reported at (2003) 68 O.R. (3d) 45. He disagreed with the motion judge’s finding that the word “passenger” as defined in section 224(1) of the *Act* is restricted to a person who is physically in or on the vehicle at the time of the accident. He referred to Justice Goudge’s findings in *Axa v. Markel, supra*, and stated that a consistent approach should be taken when interpreting the terms “passenger” and “driver”, as they both appear in the definition of “occupant”. He agreed that both terms identify a person’s status, rather than the physical activity that they are engaged in at the time.

21. Justice Sharpe concluded that Ms. McIntyre met the definition of a “passenger” at the time of the accident, and endorsed the “objective observer” approach set out in *Axa v. Markel, supra*.

I am clearly bound by the above decisions and the analyses undertaken.

22. Counsel also referred to the decision of Arbitrator Bialkowski in *Intact Insurance v. AIG (2016) Carswell Ont 16187*, in which he followed the decisions cited above. In that case, a claimant drove his tractor trailer to a truck stop off the highway, and slept in his truck overnight. The next morning, while still at the rest stop, he exited his truck and was struck by another truck. One witness testified that the driver had been standing on one of his truck's front tires inspecting the engine when he was hit, whereas the claimant testified that he had left his truck to do his morning exercise routine when the accident occurred. Yet another witness provided a statement that he had observed the claimant doing a "circle check" of his truck when he was run over by the second tractor trailer.

23. Arbitrator Bialkowski stated that he need not determine which of the above scenarios actually occurred, as any of the circumstances described were "not sufficiently distinguishable from those in *Axa* so as to come to a different conclusion". He accordingly found that the claimant met the definition of "driver" under the *Act*, as the "physical connection" test had been met, and the claimant had clearly driven the truck to the location of the accident, and intended to drive it away had the accident not intervened. He found that the claimant had not relinquished his status as a driver of the truck while outside of his vehicle, and that an objective observer would consider that claimant to have maintained his status as the "driver" of that vehicle at the time of the accident.

24. Finally, counsel referred to my decision in *Intact Insurance v. Unica Insurance (2016) Carswell Ont 14915*, in which I addressed the same question. In that case, I found that the claimant drove his vehicle to the side of the highway in order to help a friend whose vehicle had become disabled. He was working as a mechanic at the time, and the evidence suggested that his assistance was sought in that capacity. After arriving at the scene, he called a tow truck driver that he knew for assistance. Several minutes later, while he and the tow truck driver were discussing how best to position the disabled vehicle to be towed, a van insured by Unica struck the tow truck. That impact pushed the tow truck forward toward the claimant, and caused his injuries.

25. The claimant's vehicle was not insured at the time of the accident. He applied for payment of accident benefits to Intact, the insurer of his friend's vehicle that had become disabled. The parties agreed that if he was found to be an "occupant" of his vehicle at the time of the incident, Intact would be in priority to pay the claim. I determined that the claimant ceased to be the driver of his vehicle once he approached his friend's disabled car, and began to take steps to plan how to extricate that vehicle from its awkward place on the shoulder of the highway. Finding that he was engaged in a series of activities that were completely unrelated to his vehicle over the course of several minutes, I determined that his status shifted from that of a "driver" of his vehicle, to that of a mechanic and supportive friend. I also determined that in that sense, the underlying facts differed from those that the Court of Appeal faced both in *Axa v. Markel, supra*, and *McIntyre v. Scott, supra*, and merited a different conclusion.

PARTIES' ARGUMENTS:

Traders' submissions

26. Counsel for Traders contended that Guarantee, as the insurer of the fleet of police cruisers, was in higher priority to pay Mr. Hartill's claim. He noted that Guarantee accepts that its insured made a police cruiser available for Mr. Hartill's "regular use" at the time of the accident, and that he was therefore a deemed named insured under its policy, raising Guarantee to the "first tier" of priority insurers. He argued that section 268(5.2) requires that if a claimant is a named insured under more than one policy, he must claim benefits from the insurer of the automobile in which he was an occupant.

27. Mr. Greenside submitted that the evidence supports a finding that Police Constable Hartill was an "occupant" of his police cruiser at the time of the accident. He noted that part of his regular duties as a police officer include responding to motor vehicle accidents and completing reports of those incidents, and that patrol officers routinely travel around in their police cruisers in order to do so. He emphasized that Mr. Hartill was in the middle of completing his accident report when he left his vehicle in order to obtain more information from the driver of the Hyundai, and that he was struck by the other vehicle moments later.

28. Counsel contended that given that Mr. Hartill was struck by the BMW a short distance from where his police cruiser was parked, the "physical connection" part of the test was satisfied. He also submitted that there was no doubt that if the accident had not occurred, the Claimant would have left the accident scene in his police cruiser. Counsel noted that all of the activities that Mr. Hartill engaged in were consistent with his role as the driver of a police car, and that he did nothing to sever his status as the driver of that vehicle. Accordingly, he argued that an objective observer would conclude that the Claimant remained the driver of the police cruiser at the time of the accident, and was therefore "an occupant" of that vehicle as defined in section 224(1) of the *Act*.

Guarantee's submissions

29. Guarantee contends that Mr. Hartill was not an occupant of the police vehicle at the time that he was struck, and that section 268(5.2) of the *Act* does not apply. It submits that as the Claimant chose to submit his application for benefits to Traders, Traders is required to continue paying benefits to him, in accordance with section 268(5.1) of the *Act*.

30. Counsel reviewed the facts surrounding the accident that led to the Claimant's injuries, and the court decisions referenced above, and conceded that the requirement for "some degree of physical connection" between the person and the vehicle in question is met in this case. He contended however, that an objective observer who is mindful of the Court of Appeal's directive that a person's status depends on the circumstances at the time of the accident, would not consider Mr. Hartill to be the "driver" of the police cruiser when he was struck.

31. Mr. Neaves submitted that once he arrived at the accident scene, the Claimant assumed the duties of an investigating officer. He noted that at the point at which he was struck, Officer Hartill was walking in a ditch in the process of gathering information, and that his need to do so did not stem from the use of his vehicle, but rather from his duty as a patrol officer called to investigate an accident. He submitted that the police cruiser was merely the method by which he arrived at the scene. He cited my finding in *Intact v. Unica, supra*, that

the Claimant's actions at the time that he was struck did not stem from the use of his vehicle, and urged me to reach the same conclusion here.

ANALYSIS & FINDINGS:

32. Having considered the submissions filed and the cases cited, I have concluded that Mr. Hartill remained a driver of his vehicle at the time that he was struck by the BMW in the ditch. He therefore fits within the definition of "occupant" in the *Act*, and by virtue of section 268(5.2) of the Act, Guarantee is in higher priority to pay his claim.

33. The parties agree on all of the relevant facts underlying this dispute. Both counsel agreed that Constable Hartill drove to the scene of a single-vehicle accident in his police cruiser, and that he was subsequently struck while he was in the course of his duties as a patrol officer, investigating that incident. The key fact to note is that while working on his accident report inside the police car, he decided that he needed more information. He then exited his vehicle in order to speak further with the driver of the Hyundai. Shortly after approaching her vehicle, he was struck by another car that slid off the road a few meters from where his police cruiser was parked.

34. In the decisions referenced above, the Court of Appeal has directed that while the person involved need not be actually driving the vehicle at the time of the incident, there must be some degree of physical connection between them and the vehicle in order for them to be considered a driver. It is agreed by both parties in this case that this part of the test is satisfied, given the proximity of the police cruiser to the point where the Claimant was struck. The more difficult part of the analysis is whether an objective observer would conclude that Constable Hartill's status remained that of a driver when he was struck, or whether it had shifted to that of an "accident investigator".

35. The Court of Appeal determined in *Axa v. Markel, supra*, that Mr. Ferguson retained his status as a "driver" while he was standing outside of the truck awaiting his turn to unload. I found that the facts in *Intact v. Unica, supra*, differed significantly from those in that case, as unlike Mr. Ferguson, the claimant in that case was struck as he was engaged in a series of

activities that were not related to his vehicle. I determined that the vehicle that he drove to the shoulder of the highway was merely his means of travel, and that his status had shifted from that of a driver to that of a mechanic and supportive friend, and that his subsequent actions in arranging for the vehicle to be towed did not stem from the use of his own vehicle.

36. In contrast, I find that Constable Hartill's activities in investigating the incident involving the Hyundai and the hydro pole were part of his patrol duties, and that these duties were linked to his use of the police cruiser. While his role differs from that of a truck driver charged with transporting and delivering a load, police officers on patrol use their vehicles in various ways while performing their duties in a manner that most other people do not. Officers typically drive to the accidents or calls that they are dispatched to investigate in their cruisers, and complete their reporting of the incident in their vehicles, using the communications system that is hardwired into the cars. They may make phone calls to police headquarters, or run searches from drivers' licences or identification provided.

37. Police officers may also question suspects or witnesses in their vehicles, and use their cars to chase suspects driving other vehicles. They bring people that they have placed under arrest into these vehicles. In all of these ways, the use of a police cruiser is inextricably linked to the role and duties of a patrol officer.

38. Constable Hartill was in the midst of collecting information for his report when he was struck by the BMW that slid off the road. He had begun to complete the report while he was sitting in his vehicle, and only exited the cruiser in order to obtain some missing information. While I agree with counsel for Guarantee's contention that he was acting as an investigator at the time that he was struck, I find that he required access to his police cruiser in order to complete the report. Given the above, I am persuaded that an objective observer properly instructed in the Court of Appeal's directives in the *Axa v. Markel* case would consider his status when he was struck to have remained that of a "driver".

39. For the reasons set out above, I find that Mr. Hartill was an "occupant" of the police cruiser insured by Guarantee at the time of the accident, and that Guarantee is therefore in higher priority to pay his claim in accordance with section 268(5.2) of the Act.

ORDER:

40. I hereby order Guarantee to reimburse Traders for all benefits paid out under the *SABS* to date, together with the applicable interest owing. If the claim remains open, Guarantee shall take over the adjusting of the claim from Traders.

COSTS:

41. Given the result, Guarantee is responsible to pay Traders for the legal costs it has incurred, on a partial indemnity basis. If counsel are unable to agree on the quantum of costs payable, I invite them to contact me so that a process for resolving the issue may be arranged.

DATED at TORONTO, ONTARIO this ^{15th} DAY OF NOVEMBER, 2017.



Shari L. Novick

Arbitrator