IN THE MATTER OF THE *INSURANCE ACT,* R.S.O. 1990, C. 1.8 (as amended)
AND ONTARIO 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

BETWEEN:

MELOCHE MONNEX INSURANCE/ TD INSURANCE/ SECURITY NATIONAL INSURANCE COMPANY

Applicant

-and-

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION

Derek Greenside for the Applicant

Daniel Strigberger for the Respondent

Issues:

1. Was there an accident as defined in the Insurance Act and Statutory Accident Benefit Schedule and if so, what are the consequences?
2. Is Wawanesa permitted to resile from its acceptance of priority on April 30th , 2020 and if so, what are the consequences if it can or cannot?

Facts:

This arbitration arises out of an alleged car accident that occurred on July 26, 2019 wherein Ms. Naleny Raveendran claims she was an occupant of the motor vehicle and injured in it.

The relevant facts and timelines are as follows:

July 26, 2019 the alleged accident occurs.

On August 16, 2019 Ms. Raveendran submitted a completed OCF – 1 to TD Insurance (TD) claiming accident benefits in relation to the injuries she claimed that she suffered in the alleged accident.

In the collision reporting centre report, Ms. Raveendran confirmed that she was the driver of her daughter's motor vehicle which was insured by TD and accordingly TD accepted priority and administered Ms. Raveendran's accident benefit claim.

TD subsequently determined that Ms. Raveendran was the spouse of Mr. Thavamany Raveendran who was the named insurer under a Wawanesa Mutual Insurance ('Wawanesa') policy.

TD paid medical rehabilitation benefits to or on behalf of Ms. Raveendran in the amount of $8,092.98, as well as the cost of an engineering report in the amount of $2906.29 prior to Wawanesa accepting priority on April 30th, 2020.

On October 24th, Wawanesa received a priority dispute notice from TD.

As noted above, Wawanesa accepted priority on April 30th, 2020. On October 8th, 2019 TD advised Ms. Raveendran that her SABS claim was being investigated on or without prejudice basis and she could be liable to indemnify TD for benefits paid and the costs of the investigation if this investigation revealed she was not involved in the accident.

In December 2019, Ms. Raveendran attended an examination under oath where she confirmed she was the driver of the car at the time of the accident.

TD retained the services of 30 Forensic Services to prepare a report as to whether Ms. Raveendran was involved in the accident. The report is dated March 3rd, 2020.

TD sent a registered letter to Ms. Raveendran on April 28th , indicating they were denying Ms. Raveendran's claim and demanded repayment of the SABS already paid in the amount of $8,092.98.

On May 21st, 2020 Wawanesa advised TD that they were resiling from their position that they were in priority for the accident and responsible for paying past and future benefits. This was done on the grounds that TD had made material misrepresentations regarding the providing of information as to whether there had in fact been an accident in which Ms. Raveendran was involved.

Can Wawanesa resile from its agreement to take over the handling of the claim and pay what TD for benefits already paid.

Wawanesa takes the position that TD made what amounts to a material misrepresentation in its communication with TD. More specifically, Wawanesa maintained that TD failed to provide information it had regarding the issues of whether there was an accident. Had TD provided this information they say they would have accepted priority.

There is no doubt that the case law permits resiling from an agreement to take over priority. See: TD v Markel 2011 CARSWELL ONT 1960 a decision of Arbitrator Samis; AVIVA INSURANCE COMPANY OF CANADA V. STATEFARM INSURANCE COMPANY, 2012, CARSWELL ONT, 17689.

The Supreme Court of Canada in C. M. Callow Inc v. Zollinger, 2020 S.C.C. 45 (CanLIT) stated:

"At the end of the day whether or not the party has knowingly misled its counterparty is a highly specific determination, and can include lies, half-truths, omissions and even silence depending on circumstances."

The first issue to be confronted in our case is what day was there disclosure and certain information regarding the interpretation by TD to Wawanesa that there may not have been an accident within the meaning of the Insurance Act and the SABS. Counsel for the respondent points out that while there is a duty to act in good faith as between the first party insurer and the insured, there is not such duty as to between the two insurers. This does not mean, in my view, that the first party insurer can actively mislead a second party insurer on a relevant issue. In our case, TD was suspicious as to whether there was an accident from quite early on and there were numerous opportunities where TD could have advised Wawanesa that they had serious concerns whether Ms. Raveendran was involved in the accident and had hired an engineering firm to determine if she was involved in an accident. Indeed, TD has received the report and advised Ms. Raveendran that the issue denying coverage just days before Wawanesa accepted priority. None of this information was provided to Wawanesa prior to their accepting priority.

It is undoubtedly desirable for first party adjustors to provide as much information to a second party insurer as reasonably possible so that they can make decisions on the various issues they deal with in handling accident benefit claims.

In our case the adjustor testified that while she agreed with the decisions made vis a vis Ms. Raveendran claim, she had known at the time of the agreeing to accept priority, she would

not have done so because of the accident issue, of which she was totally unaware of the time of accepting priority.

While I accept the adjustor's testimony in this regard the difficulty that I have is that the accident in question of whether there was an accident goes to entitlement, whereas the issue that the Wawanesa and TD adjustors were dealing with deals with priority. There are two distinct issues, and if there was material misrepresentation regarding entitlement, which I do not accept, this does not mean I would allow Wawanesa resile from the agreement on a totally different issue. I would hold, to be clear, that I find as a fact that TD's actions with regard to entitlement did not amount to material misrepresentation.

While it not necessary for me to make a determination as to whether TD made material misrepresentation regarding entitlement, given my finding above, to be clear I find as a fact that TD did not make what would amount to a material misrepresentation regarding the issue of entitlement.

Counsel for Wawanesa has submitted that given the fact that TD had taken the position vis a vis Ms. Raveendran prior to Wawanesa accepting priority, there was no longer a claim as TD had by then advised Ms. Raveendran there was no accident in their view. I do not agree. Just because TD had taken the position there was no accident just days before Wawanesa accepted liability does not end the issue. Not only do we not know what Ms. Raveendran's position on this, but there was no judicial determination on the point.

In light of the above, I find that Wawanesa is not entitled to resile from the agreement.

I now turn to the question of whether TD can recover the monies spent for medical benefits and the costs of the engineering report. The medical/rehabilitation amounts to $8,092.98

and the cost of report being $4,812.58 of which Cooperators paid half and therefore the amount claimed for the report is $2,906.29.

Any repayment of these amounts must be through the doctrine of unjust enrichment, as the SABS and Insurance Act do not cover such recovery. The issue therefore becomes whether this equitable relief applies to this case.

Unjust enrichment permits recovery when the plaintiff can establish three elements: an enrichment of or on behalf of the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment. See KERR V. BARANOW, 2011 S.C.C. 10.

Arbitrators and the courts have long accepted that arbitrators have equitable powers. Arbitrator Samis accepted that the equitable relief of unjust enrichment could be applied in SABS cases.

In my view the criteria set out by the Supreme Court of Canada in KERR (above) and the policy consideration set out by Justice Perrell in ONTARIO (MINISTER OF FINANCE) apply.

Wawanesa could obtain an enrichment in that they would not have to pay what they would have been requested to pay if they paid as if they were the first party insurer, and TD suffered an equal deprivation and there was no lack of judicial reason for the enrichment.

In terms of policy reasons there are good reasons to have second party insurer assume priority quickly and if unjust enrichment does not apply, there is little incentive on the second party insurer to assume priority, rather they will be inclined to delay the process and let the first party insurer incur all the expenses associated with the file.

For the reasons stated above, I am satisfied that Wawanesa is not entitled to resile from the agreement to assume priority, and TD is entitled to reimbursement from the accident in the amount of $10,499.27.

For the reasons stated above, this is the full amount of the claim. In the event that I am incorrect in this regard and the parties have arrived at different numbers, I may be spoken to.

Was there an accident and is it required for an injured party to claim accident benefits?

Counsel for the respondent has submitted that TD has no claim against it as Ms. Raveendran was not involved in an accident as defined in the Statutory Accident Schedule. He argues that entitlement starts with reference to section 282 (of the Insurance Act of Ontario). One must then look to the definition of 'insured person' which is found in section 3 of the SABS which states:

> "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 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 of Ontario; ("personne assuree")

As can be seen subsection 3(a), (b) and (c) all require that the injured party be involved in a 'accident' in order to be entitled to benefits. There is substantial case law in support of this proposition. (See: TD GENERAL INSURANCE COMPANY V. WAWANESA MUTUAL INSURANCE COMPANY (unreported decision of Arbitrator Samworth, September 29th, 2021):

PRIMMUM INSURANCE COMPMANY V. ING INSURANCE COMPANY OF CANADA (2005) CANLIT 11975; TTC INSURANCE V. LOMBARD CANADA (unreported decision of Arbitrator Densem released May 29th, 2012).

While I accept the principle that there must be an accident, the question arises as to whether there was an accident in our case. It seems clear that Ms. Raveendran maintained that she was involved in an accident when she provided details for the police accident report as well as OCF-1 in a telephone conversation with the TD adjustor and at examination under oath. While TD disputed whether there was an accident, in my view the fact that TD and Ms. Raveendran disputed there was an accident does not mean there was no accident while that matter was in dispute. Indeed, there are good policy reasons for this approach. The courts and arbitrators have long held that it is vital to the proper operation of the system to have benefits as soon as possible and to dispute entitlement later. To assume there was no other accident and therefore no payment to be made would defeat that purpose.

Counsel for the respondent has pointed out that on April 28th, 2020, TD formally advised Ms. Raveendran that they were rejecting the claim and on April 30th, 2020 Wawanesa accepted priority. It is Wawanesa's position that by formally rejecting Ms. Raveendran's claim as they said there was no accident, TD could no longer maintain this arbitration, having taken the position there was no accident. Counsel also submits that both parties to the arbitration have agreed there was no accident and that should end the matter. I respectfully disagree.

As of the date of the hearing there was no evidence before me that Ms. Raveendran agreed that there was no accident. Perhaps more importantly, there has been no judicial or arbitrarial that there was no accident. While it may be difficult to determine this issue, I am satisfied based on the facts of this case, that there was still an accident during the relevant

timeframe in this case. I should add that the respondent's submissions under section 268(2) of the requirement to be an occupant also fails for the same reasons as above.

For the reasons set above, I find that TD is entitled to reimbursement in the amount of $8, 092.98.

If the parties are unable to agree on the issue of costs, I am to be spoken to.

Dated at Toronto this ~~27th~~ 23rd day of December 2021.

M. Guy Jones, Arbitrator