IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.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

B E T W E E N:

UNIFUND ASSURANCE COMPANY

Applicant

- and –

BELAIR DIRECT INSURANCE COMPANY/INTACT INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Derek Greenside – Kostyniuk & Greenside
Counsel for the Applicant, Unifund Assurance Company
(hereinafter referred to as "Unifund")

Caroline Theriault – Intact Insurance Company
Counsel for the Respondent, Belair/Intact Insurance Company
(hereinafter referred to as "Belair")

ISSUE – APPLICATION OF THE TIE-BREAKING MECHANISM IN A PRIORITY DISPUTE

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to the claimant, Maureen Linton, with respect to psychological injuries sustained in an incident involving a motor vehicle accident, which occurred on August 1, 2020. Such determination involves the issue of the interpretation of the tie-breaking mechanism for priority as set out in s. 268(5.2) of the *Insurance Act*.

PROCEEDINGS

[2] The matter proceeded on the basis of Document briefs, Books of Authority and written submissions.

FACTS

[3] Peter Linton was riding his motorcycle, insured with the Applicant Unifund under policy 81AAR20O, when he was involved in a motor vehicle accident with a vehicle insured with Aviva insurance on August 1, 2020. Mr. Linton's wife, Maureen Linton (hereinafter the "Claimant"), was following her husband in her own vehicle, insured under Belair Direct Insurance policy 6081197, when she witnessed the accident ahead of her. Her husband sustained multiple injuries and was airlifted to Sunnybrook Hospital. Maureen witnessed the accident happen and suffered psychological injury as a result.

[4] The Claimant submitted her completed OCF-1 to the Applicant on September 22, 2020 and would be considered an "insured person" (under both policies) under the definition contained in section 3(1) of the *Statutory Accident Benefits Schedule* because the Claimant and Peter Linton were spouses at the time of the accident. The Applicant sent a Notice to Applicant of Dispute Between Insurers to the Claimant and Belair Direct Insurance on October 6, 2020. Arbitration proceedings were initiated by the Applicant on December 3, 2020.

[5] The operation of the 2018 Dodge Ram driven by Maureen did not cause or contribute to the actions of the two drivers that ultimately came into contact with one another. The 2018 Dodge Ram did not make contact with either of the two vehicles involved in the collision.

ANALYSIS AND FINDINGS

[6] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[7] The priority rules set out in s. 268(2) differ as to whether the claimant was an "occupant" or "non-occupant".

[8] In respect of "occupants":

> *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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

[9] 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.

[emphasis mine]

[10] It should be noted that whether an "occupant" or "non-occupant", the claimant's first recourse is against the policy in which he or she is "an insured".

[11] Section 3(1) of the *Statutory Accident Benefits Schedule* defines "insured person" and reads:

"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; ("personne assurée")

[12] "Accident" is defined in section 3(1) of the *Statutory Accident Benefits Schedule* and reads:

> "accident" means an incident in which the use or operation of **an automobile** directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device

[13] The definition does not stipulate that the incident must involve the insured automobile.

[14] The Claimant was a named insured under the policy issued by Belair with respect to the vehicle she was operating at the time of the accident. As the spouse of Peter Linton, she was also an "insured" under his policy with Unifund by reason of s. 3(1) of the *Statutory Accident Benefits Schedule*. Unifund claims that the tie-breaking mechanism of s. 268(5.2) of the *Insurance Act* ought to apply which reads:

> *(5.2) Same – 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.*
>
> [emphasis mine]

[15] The Applicant Unifund therefore has claimed that the Claimant, Maureen Linton, was required to claim against the insurer of the vehicle in which she was an occupant which was insured by Belair, which would make Belair the priority insurer. Unifund has maintained that s. 268(5.2) does not indicate that the insured vehicle must be "involved" in the incident.

[16] Unifund relies on the decision of *Wawanesa Mutual Insurance Company v. Co-operators General Insurance Company* (Arbitrator Malach - September 4, 2003). The Claimant was driving his wife's vehicle, which was owned and insured by the company his wife was employed with, when he was involved in an accident on July 18, 2000. That vehicle was insured with The Wawanesa Mutual Insurance Company. The husband was also the named insured under a Co-Operators General insurance Company policy. Arbitrator Malach applied Section 268 (5.2) of the *Insurance Act* and concluded that The Wawanesa Mutual Insurance Company was the insurer responsible for the payment of the Claimant's statutory accident benefits.

[17] In response, Belair has claimed that the priority hierarchy set out in s. 268(2) in respect of "non-occupants" would apply. Belair concedes that the Claimant was an "insured person", both under their policy and the Unifund policy. However, Belair has submitted that it is not s. 268(5.2) that would apply, as she was a "non-occupant" for the purpose of priority determination and was the equivalent of simply a witness to the incident. Accordingly, she was entitled to choose the insurer to seek accident benefits as set out in s. 268(5.1):

> *(5.1) Same – 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 own discretion, may decide the insurer from which he or she will claim the benefits.*

[18] According to Belair, acceptance of Unifund's position requires a literal interpretation of s. 268(5.2), without any consideration towards the context or purpose in which it was written.

[19] Belair submitted that modern statutory interpretation cannot be founded on the wording of the legislation alone. The *Supreme Court of Canada* addressed the issue in the context of an employment dispute in the decision of *Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27, where it was stated:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[20] In looking at the purpose and context of a specific provision, a simple review of the wording is not sufficient. The language must be analyzed with a view towards intention and/or the goal to be achieved.

[21] Belair states that the purpose of section 268(5.2) is to assign priority to the insurer of the vehicle involved in the accident. While the provision is silent, it cannot have been the intent of legislators to create a tie-breaking provision that assigns priority to insurers of vehicles that were not involved in the actual collision, as this would lead to an absurd result. According to Belair, the entire purpose in drafting section 268(5.2) was to ensure priority was placed on the vehicle that was involved in the accident itself.

[22] To place the position of Belair in the context of the present case, they have put forward the following questions:

> a. would it matter if Maureen had decided to stop for gas and did not witness the collision? or;
>
> b. what if she was simply in her vehicle while talking to her husband on the phone when she heard the accident take place?

[23] The Respondent Belair has claimed that the tie-breaking provision is not intended to include "being an occupant in any vehicle." When the tie-breaking provision is read in the full purpose, context and scheme of the legislation, in accordance with the basic principles of statutory interpretation set by the Supreme Court of Canada in *Rizzo,* it is clear that Unifund's interpretation leads to an absurdity that must be avoided. Section 268(5.2) should be interpreted as requiring the occupancy to be an occupancy of a vehicle "involved" in the accident. On that basis, Belair's interpretation of the tie-breaking provision that Maureen is a "non-occupant" and merely a witness to the accident, is claimed by Belair to be more reasonable and should govern this priority dispute.

[24] There is merit in the position advanced by Belair with respect to statutory interpretation. I am satisfied that modern statutory interpretation cannot be founded on the wording of the legislation alone, but that the language must be analyzed with a view towards the intention and/or goal to be achieved. The priority hierarchy set out in s. 268(2) of the *Insurance Act* clearly places priority with the insurer with the closest connection to the claimant. Sitting at the top rung of the priority ladder is the insurer where the claimant is "an insured". It matters not that the insured vehicle is involved in the incident or not. For example, a claimant might reside in Northern Ontario where he owns a vehicle insured by Company A. The claimant flies to Toronto for a weekend holiday and is struck as a pedestrian (non-occupant) by a vehicle insured by Company B. Company A would be the priority insurer even though the insured vehicle cannot be said to have been involved in the incident giving rise to injuries. Similarly, if he is in a taxi insured by same Company B during his trip to Toronto (occupant), Company A would still be the priority insurer even though the insured vehicle was not involved in the incident. Accident benefits follow the person and not the insured vehicle. There is nothing unfair about the insurer who has received a premium for accident benefits coverage under its policy to be the insurer with the highest priority, regardless of whether the insured vehicle was involved in the incident or not. The difficulty in the case before me is the fact that both Unifund and Belair received a premium for accident benefits coverage for Mr. and Mrs. Linton and the claimant was "an insured" under both policies. Should the tie-breaking mechanism of s. 268(5.2) apply?

> *(5.2) Same – 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.*
>
> [emphasis mine]

[25] Does the reasonable interpretation of the section require that the "automobile" referred to in the section be an automobile "involved in the incident"? In the case of physical injury, there is no issue as someone physically injured must have been "involved in the incident" so as to suffer those injuries. It is a different story where psychological injuries are sustained. Section 3(1) of the *Statutory Accident Benefits Schedule* includes in the definition of "insured person":

> (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,

[26] The section clearly contemplates a claim for accident benefits for an individual who suffers psychological injury by reason of injury to a spouse as a result of the spouse's involvement in a motor vehicle accident, regardless of whether the individual is at the scene of the accident or not.

[27] In my view, the objective of the tie-breaking mechanism of s. 268(5.2) where the claimant is "an insured" under both policies, is to place the insurer with close physical connection to the incident as the priority insurer, rather than the insurer of a vehicle with no connection to the incident. I am satisfied that this objective must be considered in interpreting the wording of the section. I therefore find that the reasonable interpretation of the word "automobile" as contained in the section requires it to be an automobile "involved in the incident". However, on the basis of the facts before me, I am satisfied that the vehicle operated by Maureen Linton was an automobile "involved in the incident".

[28] There exists an abundance of jurisprudence with respect to the issue of whether a vehicle is "involved in the incident". It is clear from this jurisprudence that there need not be contact for a vehicle to be "involved in the incident". Contact is only one of several criteria to be considered in making the determination of whether a vehicle can be considered "involved in the incident".

[29] The criteria to be considered in determining whether a vehicle is "involved in the incident" was canvassed in the *Dominion of Canada General Insurance Company v. Kingsway Insurance Company* (Arbitrator Lee Samis - August 23, 1999). The criteria established by Arbitrator Samis was confirmed on appeal in an unreported decision of H. Sachs, J. of the Ontario Superior Court of Justice, released January 11, 2000 and in *ING Insurance Co. of Canada v. Farmers Mutual Insurance Co. (Lindsay)* (2007) 157 AWS (3d) 1003 (Ont. SCJ), namely:

(a) Whether there is contact between the vehicles;

(b) The physical proximity of the vehicles;

(c) The time interval between the relevant actions of the two vehicles;

(d) The possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and

(e) Whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

[30] The difficulty with the established criteria is that the *Dominion (supra)* decision and all of the jurisprudence that followed, which is summarized in detail in the recent decision of *MVACF v. Intact (Arbitrator Bialkowski – October 2021)*, involved situations where the claimant sustained physical injuries. In a case of a psychological injury, contact is a criteria of lesser importance. In the case at hand, there was clearly physical proximity of all three vehicles. The observations of the collision involving her husband's motorcycle was simultaneous with the motorcycle's impact with the Aviva vehicle. There was no time interval lapse. There was a causal connection between the claimant's psychological injuries and the actions of the other two vehicles involved. It was foreseeable that the occupants of following vehicles, particularly family members, might suffer psychological injury having observed the collision and its aftermath. Considering that the case at hand involves psychological injury, I

find that sufficient criteria have been met to qualify the vehicle operated by Maureen Linton as an automobile "involved in the incident".

[31] I therefore find that s. 268(5.2) provides the appropriate tie-breaking mechanism for the present fact situation where the claimant was "an insured" under both the Belair and Unifund policies and an "occupant" of an automobile "involved in the incident". Applying s. 268(5.2) makes Belair the priority insurer.

ORDER

[32] On the basis of the findings aforesaid, I hereby order that:

1. Belair is the priority insurer and is to assume carriage of the Claimant's accident benefits file, if ongoing;

2. Belair indemnify Unifund for all accident benefits payments reasonably paid to or on behalf of the Claimant, together with interest calculated in accordance with the *Courts of Justice Act;*

3. Belair pay Unifund its legal costs with respect to the within arbitration on a partial indemnity basis;

4. Belair pay the Arbitrator's account.

[33] In the event issues arise with respect to indemnity, interest or costs, I will simply reactivate my file.

DATED at TORONTO this 6th)
day of October, 2021.)

K J Bialkowski

KENNETH J. BIALKOWSKI
Arbitrator