

IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER
THE *INSURANCE ACT*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

-and-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

-and-

AVIVA INSURANCE COMPANY OF CANADA, AVIVA GENERAL INSURANCE COMPANY,
TD HOME AND AUTO INSURANCE COMPANY, TD GENERAL INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

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(hereinafter referred to as “Wawanesa”)

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Counsel for the Respondents, Aviva Insurance Company of Canada and Aviva General Insurance Company
(hereinafter referred to as “Aviva”)

ISSUE - IMPACT OF BEING AN “EXCLUDED DRIVER” UNDER WAWANESA POLICY

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 ACE INA brings this motion for an order that the claimant was an “insured person” under the Wawanesa policy, despite being an “excluded driver” and that Wawanesa is therefore higher in priority so that the arbitration herein as against ACE INA be dismissed with costs.

PROCEEDINGS

[2] The matter proceeded on the basis of Document Briefs including Examination Under Oath transcripts, Books of Authority and written submissions.

BACKGROUND

[3] The claimant, Julius Servito (“the claimant”), was involved in a motor vehicle accident while a passenger in a rental vehicle insured with the Respondent ACE INA. He applied to Wawanesa for accident benefits under a policy issued to his father on which he was an excluded driver.

[4] The Respondents, the TD group of insurers and the Respondent, State Farm Mutual Automobile Insurance Company, have been released from this dispute. The Respondent Aviva has been brought into this dispute as it is alleged that Aviva issued a policy of automobile insurance to the claimant that was not properly cancelled. The issue of the Aviva policy cancellation will be decided at a later date, if necessary.

[5] The sole issue before the arbitrator in this preliminary hearing is whether the claimant’s excluded driver status affects the claimant’s status as a person specified as a driver of the insured automobile.

[6] The controlling case law, according to ACE INA regarding this issue, indicates that an excluded driver is an insured under the corresponding policy and that such policy is higher in priority than the insurer of the vehicle the excluded driver occupied.

[7] ACE INA requests an order that the claimant was an insured person under the Wawanesa policy at the time of the accident and that Wawanesa is higher in priority than ACE INA.

FACTS

[8] The claimant rented a Jeep Patriot from Enterprise Rent-A-Car on June 20, 2014. The Jeep was insured under a policy issued by ACE INA.

[9] On June 30, 2014, the claimant was involved in a motor vehicle accident. He was the front seat passenger of the rented Jeep Patriot, which was being driven by a friend, Carl Ozcon.

[10] The claimant submitted his OCF-1 to Wawanesa on August 20, 2014, under the automobile insurance policy held by his father, Rogelio Servito.

[11] At the time of the accident, the claimant resided with his parents, Rogelio and Virginia Servito.

[12] Rogelio Servito held an automobile insurance policy with Wawanesa, on which he was the named insured. The claimant was an excluded driver on the Wawanesa policy at the time of the accident.

[13] An OPCF-28A Excluded Driver Endorsement was executed by the claimant on January 29, 2014.

[14] As of the date of loss, the Wawanesa policy specified the claimant as a driver as follows:

Rating Information

Driver Name	Principal Driver of Vehicles	Occasional Driver
Servito, Rogglio	01,02,03	
Servito, Julius	Excluded	Excluded

[15] This is the only location in the Wawanesa Certificate where drivers are specified. Had there been other non-excluded drivers on the policy, presumably their names would also have appeared in this list.

[16] The Wawanesa policy specifically provides that the OPCF-28A forms part of the policy.

ANALYSIS AND FINDINGS

[17] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or

hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[18] Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant.*

[emphasis mine]

[19] Section 3(1) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10 defines an “insured person” as follows:

- (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 dependent of the named insured or of his or her spouse

[emphasis mine]

[20] ACE INA has submitted that the claimant was “an insured” under the Wawanesa policy as he was a “person specified in the policy as a driver”, thereby placing Wawanesa at the top rung of the priority hierarchy set out above, whereas ACE INA would rest at the second rung as the claimant was only an occupant of their insured vehicle.

[21] In support of its position, ACE INA relies on the decision of *State Farm v. Wawanesa* (Arbitrator Densem - March 10, 2016). The applicant was a passenger in a car insured by State Farm that was involved in an accident. The applicant’s sister and brother-in-law were named insureds under a policy issued by Wawanesa and the policy included an Excluded Driver Endorsement stipulating that the applicant was an excluded driver. He applied to State Farm for benefits. State Farm argued that, as a person specified in the Wawanesa policy, the applicant was an “insured person” under that policy, and that Wawanesa was in higher priority to pay the claim.

[22] The Certificate of Insurance specified the claimant in an identical manner compared with the manner in which the claimant in this case is specified. In *State Farm*, the claimant was specified as follows:

Rating Information:

Driver Name	Principal Driver of Vehicle(s)	Occasional Driver of Vehicle(s)
Dang, Hoang Nga	01	

Nguyen, Xuen Hung
Dang, Phucuong

02
Excluded

Excluded

[23] In reviewing the Certificate of Insurance, Arbitrator Densem commented:

"An examination of the first column of the chart entitled "Driver Name" indicates that Wawanesa has specified 3 drivers [emphasis added]. The 3 drivers specified are the two named insureds, and the claimant. The claimant's name clearly appears in this column entitled "Driver Name". In my opinion, by including the claimant in the column headed "Driver Name", Wawanesa has specified – listed or identified if you will, the claimant as a driver of the insured automobile(s) [emphasis added].

Therefore, in my view, giving the words, "...any person specified in the policy as a driver of the insured automobile..." their grammatical or ordinary meaning leads to the conclusion that the claimant is a specified driver in the Wawanesa policy. This conclusion is supported by a careful study of the chart on page 2 of the Certificate. Column 1 of the chart specifies in the policy the 3 drivers under the heading, "Driver Name". Columns 2 and 3 of the chart describe the status of the specified drivers. Their status is described as "Principal Driver", "Occasional Driver", or "Excluded".

In the case of the claimant, who is a specified driver in column 1, he is indicated in columns 2 and 3 as holding the status "Excluded" in connection with the insured automobiles (page 12-13)".

[24] Arbitrator Densem also noted in *State Farm* that the General Exclusions sections in the SABS provide that an excluded driver who drives the vehicle(s) that he has promised not to drive, remains entitled to receive some accident benefits under the SABS such as medical/rehabilitation benefits and attendant care benefits. He concluded that if that individual is injured while a passenger in the vehicle and has not breached the promise made not to drive it, he or she should be entitled to receive full benefits under the SABS, without any limitations. He wrote:

"If a person is listed in the Certificate under the heading "Driver Name", then he is a "specified driver" of the insured automobiles, and therefore an "insured person" for SABS purposes. He is not precluded from being an "insured person" because he has been designated in an OPCF 28A Excluded Driver Endorsement as an excluded driver.

It must be remembered that the only situation where the SABS recoverable by a specified driver who is also an excluded driver are less than full is the situation where the excluded driver drives the insured vehicle. Otherwise he is entitled to full SABS benefits just like any insured person."

[25] Arbitrator Densem's analysis was considered in the appeal decision of *Belair Direct Insurance v. Dominion of Canada General Insurance Company*, 2017 ONSC 367. At paragraph 47 of the *Belair* decision, the appeal judge found as reasonable Arbitrator Densem's conclusion that a person listed in the Certificate of Insurance under "driver name" is a specified driver of the insured automobile and that excluded driver status is a sub category of specified driver.

[26] In *Economical Insurance Group v. Security National Insurance Company and Royal & SunAlliance Insurance Company* (July 16, 2018, Arbitrator Jones), the claimant, as in this case, was specified as a driver under the heading "Rating Information". As in this case, his status was indicated as "excluded". Arbitrator Jones accepted that the claimant's name under the rating information section, together with the execution of the excluded driver endorsement, qualified the claimant as an "insured person" under the policy.

[27] In *Aviva General Insurance Company v. Security National Insurance Co.*, (December 6, 2018, Arbitrator Novick), the only place in the Certificate in which any driver's name appeared was in a chart entitled "Rating Information", where the claimant was also listed as "excluded". An excluded driver endorsement was executed. Arbitrator Novick held that the claimant was specified in the policy and met the definition of "insured person under the policy".

[28] In *Aviva General Insurance Company of Canada v. Economical Mutual Insurance Company*, (April 11, 2019, Arbitrator Samworth), again, the only place in the Certificate of Insurance in which any drivers are listed is in the "rating information" section, where the claimant is also listed as excluded. Arbitrator Samworth agreed with the comments in the decision of Arbitrator Novick that if individuals (secondary or occasional drivers) are only listed under the rating information, then it would not make sense that these individuals fail to meet the definition of listed driver as that is the only place where these individuals are listed.

[29] In accordance with the authorities referred to above, ACE INA has submitted that the claimant was specified on the Wawanesa policy and accordingly was an "insured person" under the policy.

[30] There have been a number of arbitral decisions in recent years leading up to a decision by the Ontario Court of Appeal in 2018, that a specified driver includes an excluded driver.

[31] In *Pafco v. Cumis* (Arbitrator Bialkowski - March 31, 2014), the applicant was involved in an accident while he was a passenger in a car insured by Cumis. He was identified as an excluded driver on the Cumis policy. He was also a specified driver on a policy issued by Pafco and submitted an application for accident benefits to Pafco.

[32] Several questions were posed to the Arbitrator in that case, one of which was whether the applicant was an insured under the Cumis policy, given his status as an excluded driver. The Arbitrator determined that while the policy was subject to an Excluded

Driver Endorsement and the applicant was excluded from driving the described vehicle, he was nevertheless “specified in the policy as a driver” and therefore met the definition of “insured person” in the SABS. The Arbitrator held:

“The clear language of the Endorsement states that Gaetano Miceli would only be excluded from claiming accident benefits if he was driving the 1992 Toyota. There is no bar to his right to claim SABS if he is a passenger in the Toyota. Equally, there would be no bar if he were a passenger in someone else’s vehicle or simply a pedestrian on the street. He is only barred if he is driving the automobile identified in the Endorsement, and then, he is only barred from receiving most accident benefits.”

[33] The same issue was again considered by the same Arbitrator in *Dominion v. State Farm* (Arbitrator Bialkowski - June 26, 2015). The applicant in that case was injured while he was a passenger in his girlfriend’s car, which was insured with State Farm. His parents were named insureds under a Dominion policy in force at that time and he applied to Dominion for payment of accident benefits. The applicant’s name appeared under the heading “Listed Drivers” on page one of the Dominion Certificate of Insurance. He was also noted in the “Rating Information” section of the policy as being an excluded driver. The issue before the arbitrator was whether the applicant was an insured person under the Dominion policy.

[34] The Arbitrator found that although the applicant was excluded from driving both vehicles listed on the Dominion policy, the applicant was nevertheless specified as a driver in the policy and was therefore entitled to accident benefit coverage.

[35] Arbitrator Cooper considered the excluded driver / listed driver issue in *Belair v. Dominion* (Arbitrator Cooper - April 19, 2016). The question in that case was whether the applicant was an insured person under the Dominion policy issued to his parents. His name appeared on a list of listed drivers in the policy and also appeared on the rating information list of drivers, in which he was identified as an excluded driver. He had also executed an OPCF-28A endorsement.

[36] Arbitrator Cooper agreed with the analyses and findings of Arbitrators Bialkowski and Densem in the cases outlined above. He stated that because the applicant was specified in the policy as a driver of the vehicle, he was an insured person under the Dominion policy and would be entitled to full coverage for accident benefits, as long as he did not drive the described vehicle. He concluded however, that he was bound by Justice Wright’s ruling in *Dominion v. State Farm* (which was subsequently overturned by the Court of Appeal) and was therefore compelled to find that the claimant was not an “insured person” under the Dominion policy.

[37] Arbitrator Cooper’s decision was appealed to the Superior Court. As reported in *Belair direct v. Dominion of Canada Insurance Co.*, 2017 ONSC 367, Justice Akbarali determined that the applicant was an “insured person” under the Dominion policy. Her Honour noted Arbitrator Cooper’s agreement with the approach taken by Arbitrator Bialkowski and Arbitrator Densem in the above cases. She stated that the reasoning advanced by Arbitrator Cooper and that of Arbitrators Bialkowski and Densem, as adopted

by Arbitrator Cooper, and the conclusion that an excluded driver is an insured person, was reasonable.

[38] In coming to her conclusion, Justice Akbarali wrote:

"I find that the reasoning advanced by Arbitrator Cooper, and Arbitrators Bialkowski and Densem as adopted by Arbitrator Cooper, and the conclusion that an excluded driver is an "insured person" when the driver is also a "listed driver", are reasonable. I rely in particular on the following:

a. Although [the applicant] is an excluded driver under the Dominion policy, he is not excluded from all coverage under the policy. The excluded driver endorsement makes clear that, when driving the Corolla, [the applicant] is excluded from coverage under the policy for property damage and bodily injury, damage to the automobile and most – but not all – accident benefits. The policy, by its terms, makes available, under the policy, some limited coverage to [the applicant] even if he is driving the vehicle that he is specifically excluded from driving. Neither the policy, nor the relevant statutory provisions, limits the accident benefits available to [the applicant] if he is involved in an accident when he is not driving the Corolla.

*b. The excluded driver endorsement is, at most, ambiguous with respect to the accident benefits coverage available to an excluded driver when she is not driving the excluded automobile. The ambiguity must be construed against the insurer. Moreover, the ambiguity relates to a coverage exclusion. Exclusions to coverage must be construed strictly against the insurer: see *Schneider v. Maahs Estate* at paras. 15 and 22.*

c. By virtue of being a "listed driver", [the applicant] was "specified" as a driver in the Dominion policy in relation to the insured automobile. That is apparent from the summary of insurance coverage which first identifies the insured automobile (the Corolla) and immediately below, identifies the "listed drivers", who include [the applicant]. Put another way, [the applicant] is specified in the policy as a driver by virtue of being listed as a driver. The list is the mechanism of specifying the drivers. In this context, "specified" is not meaningfully different than "listed".

[39] In February 2018, the Court of Appeal released its reasons in the appeals of *Dominion v. State Farm* and *Belair v. Dominion*, reported at 2018 ONCA 101. The Court upheld Justice Akbarali's decision in *Belair v. Dominion* and agreed with her conclusion that the arbitrator's analysis was reasonable. It set aside Justice Wright's decision in *Dominion v. State Farm* and restored Arbitrator Bialkowski's decision.

[40] Following the Court of Appeal's decision, Arbitrator Jones released his decision in *Economical v. Security National* (Arbitrator Jones - July 16, 2018). He held that an excluded driver comes within the meaning of "a person specified in the policy as a driver of the insured automobile." Further, Arbitrator Jones wrote that the OPCF-28A endorsement must be considered as part of the policy.

[41] The above jurisprudence was considered and applied by Arbitrator Novick in *Aviva v. Security National* (Arbitrator Novick - December 6, 2018), which is the most recent case to

consider the excluded driver / listed driver issue. Following Justice Akbarali's reasons in *Belair v. Dominion*, Arbitrator Novick held that broader considerations must be applied in considering coverage and priority, rather than questioning the "specific format of [a] Certificate in question" or "whether a person's name appears on [a] Certificate in one place or two".

[42] In holding that the excluded driver applicant was an insured person under the Security National policy, Arbitrator Novick wrote:

"The priority ladder set out in section 268(2) of the Act is structured in such a way that insurers who have a relationship with any of the people defined in section 3(1)(a) of the SABS stand at the front of the line, followed by insurers of vehicles in which a claimant was an occupant, then followed by insurers who insure any vehicle involved in the incident and lastly, the Fund.

*... it is settled law that the definition of "insured person" in section 3(1) of the SABS is what dictates whether an occupant of an automobile is an "insured" for the purpose of section 268(2)1(i) of the Insurance Act (see *Warwick v Gore Mutual Insurance Co.* (1997) 32 O.R. (3d) 76 (C.A.)). It is also clear that the SABS is consumer protection legislation, and its provisions must be interpreted broadly.*

The language used in the definition of "insured person" in section 3(1) of the SABS is certainly broad. An individual can meet the definition under subsection (a), by being the named insured, their spouse or dependant, or "any person specified in the policy as a driver of the insured automobile" as discussed above. Subsection (b) then includes any person who is involved in an accident involving the insured automobile if the accident occurs in Ontario. Subsection (c) casts the net even wider, to include an occupant of an involved vehicle even if the accident occurs outside Ontario, as long as that person is or was an Ontario resident within sixty days of the accident. Given the all-encompassing nature of this definition, it is clear that the legislators have determined that the category of "insured person" under a policy should be defined and interpreted broadly."

[43] ACE INA has submitted that all of the case law, including the controlling decision of Justice Akbarali (as upheld by the Court of Appeal), holds that an excluded driver is a specified driver for the purposes of the SABS and for priority.

[44] Wawanesa opposes the motion brought by ACE INA for an Order confirming that the claimant was an "insured person" under the Wawanesa policy, despite being an excluded driver. Wawanesa claims that the claimant did not appear on the policy until executing the Excluded Driver Endorsement some five months pre-accident. I am satisfied that the issue in this case is not whether the claimant's name appeared on the policy on a prior occasion. Rather, the issue is whether the claimant was specified as a driver on the Wawanesa policy as of the date of loss. It is clear to me that the claimant was specified in the policy as of the date of loss. The Excluded Driver Endorsement was executed January 29, 2014 (five months pre-accident) and three Amended Certificates of Insurance had been dispatched to the policyholder between the date of execution of the Excluded Driver Endorsement and the date of the accident, as outlined below:

Tab 1: Amended Certificate effective January 15, 2014	Purpose: "ADD OPERATOR/DRIVER(S)"
Tab 2: Amended Certificate effective June 27, 2014:	Purpose: "DELETE VEHICLE(S)"
Tab 3: Amended Certificate effective June 27, 2014:	Purpose: "ADD VEHICLE(S)"

[45] Each of these Certificates specifically indicated that the policy was subject to an Excluded Driver Endorsement and each Certificate listed the claimant in the same manner. The first Certificate, effective January 15, 2014 (Tab 1), specifically indicates (p.1, top) "Reason: ADD OPERATOR/DRIVERS". I am satisfied that this phraseology is evidence of Wawanesa's intent to add the claimant as a driver.

[46] Support for this finding is found in *Economical Insurance Group v. Security National Insurance, et al.* (July 16, 2018, Arbitrator Guy Jones), the original RSA policy was issued without reference to the excluded driver. The policy however, was amended and was in effect at the time of the accident. In that amendment, the excluded driver was assigned to the policy and he had signed an Excluded Driver Endorsement. Arbitrator Jones concluded that the Excluded Driver Endorsement and the listing of the claimant should be determined with reference to the policy in place at the time of the accident.

[47] No authority for the proposition that a prior Certificate of Automobile Insurance not in place on the date of loss should have any influence on whether an individual is a specified driver has been provided to me.

[48] The main thrust of the position advanced by Wawanesa is that the Ontario Court of Appeal decisions relied upon by ACE INA, namely *Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company* (supra) and its companion appeal, *Belair Direct Insurance v. State Farm* (supra), are distinguishable from the within case. The applicant seeks to draw a distinction by submitting that, in both cases, the name of the excluded driver appeared under a "listed driver" and a "rating information" section.

[49] On careful review, nowhere in the decision of the Court of Appeal is it indicated that an excluded driver must be listed under a specific category in the Certificate of Insurance. In fact, the Court of Appeal specifically dismissed the appeal from *Belair Direct Insurance v. Dominion of Canada General Insurance Company*. The Court of Appeal commented that the appeal judge in the *Belair Direct Insurance* case appropriately applied the reasonableness standard of review. The Court of Appeal found no error in that judge's thorough review of the arbitrator's decision. In *Belair Direct*, the appeal judge specifically considered the issue of whether an excluded driver's name, appearing only under the heading "Driver Name", is sufficient to "list" or "specify" that driver. The appeal judge in *Belair Direct* noted the analysis of Arbitrator Densem in *State Farm Insurance v. Wawanesa Mutual Insurance, March 10, 2016*. The appeal judge held:

"Arbitrator Densem found that "listed" is a synonym of "specified" and held that a person listed in the Certificate of Insurance under "driver name" is a specified driver of the insured automobile and therefore an insured person for purposes of the SABS. He concluded that an excluded driver is a sub-category of specified drivers and when viewed in this light, it is not absurd that an excluded driver is also a specified driver of an automobile under the policy.

These conclusions are consistent with the conclusions of Arbitrator Bialkowski which Arbitrator Cooper also accepted. I note in particular Arbitrator Bialkowski's conclusion in Dominion v. State Farm at page 7, that accident benefits legislation is remedial in nature and should be accorded a broad and liberal interpretation. Arbitrator Bialkowski found that there was sufficient ambiguity to an individual reading the excluded driver endorsement to think there would be full accident benefits if not driving the excluded vehicle and even limited accident benefits if driving the excluded vehicle. He found the ambiguity must be interpreted in favour of the insured.

I find that the reasoning advanced by Arbitrator Cooper, and Arbitrators Bialkowski and Densem as adopted by Arbitrator Cooper, and the conclusion that an excluded driver is an "insured person" when the driver is also a "listed driver" are reasonable." [emphasis added].

[50] In Arbitrator Densem's decision in *State Farm* (supra), the Certificate of Insurance specified the claimant in an identical manner compared with the manner in which the claimant in this case is specified – i.e., the claimant appeared only under the "Rating Information" section of the Certificate.

[51] It now appears that since the release of the Court of Appeal's decision in *Dominion of Canada v. State Farm, et al.*, three arbitrators in three separate cases have held that listing an excluded driver under only a "Rating Information" section as excluded, meets the definition of listed driver. I do not find these Court of Appeal decisions, nor the subsequent Arbitrator's decisions with respect to this issue, distinguishable from the facts before me. Accordingly, I find that the claimant was a listed driver under the Wawanesa policy and therefore an "insured person".

[52] The reality of the situation is that insurance premiums may well be reduced by use of the Excluded Driver Endorsement for those deemed "high risk" if driving an insured vehicle, while continuing to provide accident benefits coverage to those so listed, so long as they are not operating the vehicles they were excluded from driving. I am satisfied that it was contemplated by the OPCF-28A endorsement that the claimant would have access to all accident benefits when he was not operating one of the vehicles insured on the Wawanesa policy.

ORDER

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

1. The claimant was an "insured person" under the Wawanesa policy and therefore Wawanesa stands higher in priority than ACE INA;
2. Wawanesa is to pay to ACE INA and Aviva their costs of this motion on a partial indemnity basis;
3. Wawanesa is to pay the Arbitrator's account of the motion.

[54] This leaves the issue as to whether the Aviva policy had been properly cancelled prior to the subject motor vehicle accident and the consequences of such determination.

DATED at TORONTO this 8th)
day of January, 2020.)



KENNETH J. BIALKOWSKI
Arbitrator