

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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ALLSTATE INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Jessica L Rogers for the Applicant

Jennifer L. Griffiths and Jessica N. Telfer for the Respondent

PRELIMINARY ISSUE:

1. Was Cheryl MacDonald an “occupant” of the vehicle insured by Aviva at the time of the accident that caused her injuries on May 6, 2017?

RESULT:

1. Yes, Ms. MacDonald was an “occupant” of the Aviva insured vehicle at the time that she was struck, as that term is defined in section 224(1) of the *Insurance Act*. Aviva is therefore in higher priority to pay her claim, in accordance with section 268(2)1(ii) of the *Act*.

BACKGROUND:

1. Cheryl MacDonald sustained serious injuries when she was struck by a vehicle insured by Allstate Insurance (“Allstate”) as she was walking across a roadway on May 6, 2017. Ms. MacDonald had been driving a vehicle that belonged to her parents, when she stopped at the side of the road to assist a driver whose vehicle had slid into a ditch. The vehicle she was driving was insured by Aviva Insurance Company of Canada (“Aviva”).
2. Ms. MacDonald applied to Aviva for payment of accident benefits under the *Schedule*. Aviva accepted her application and has paid benefits to her, but asserts that Allstate is in higher priority to pay her claims by virtue of section 268(2) 2(ii) of the *Act*. The parties agree that the determination of which insurer is in higher priority depends on whether or not Ms. MacDonald was an “occupant” of the Aviva insured vehicle at the point that she was struck.
3. The Claimant was not a listed driver under the Aviva policy. The question of whether or not Ms. MacDonald was principally dependent for financial support upon her parents at the time of the accident is in dispute. Counsel has agreed that the occupancy issue would be determined as a preliminary matter, and that if necessary, the question of financial dependency would be addressed at a later point.

THE EVIDENCE:

4. The parties filed an Agreed Statement of Facts setting out the facts relevant to this matter. They also filed a Joint Book of Documents that included various police reports and notes, as well as a transcript of the Claimant's evidence provided at an Examination Under Oath in July 2019. Counsel also exchanged written submissions setting out their respective positions on the "occupancy issue".

5. The Agreed Statement of Facts provides that Cheryl MacDonald was driving on Red Hill Valley Parkway near Hamilton in a vehicle owned by her parents on the evening in question. While she has no recollection of the events preceding the accident, she has been advised that she was on her way to meet a friend for dinner at a restaurant in Hamilton. As she was driving northbound on the Upper Red Hill Valley Parkway off ramp, she saw that a car had slid into the east ditch near that roadway.

6. Ms. MacDonald pulled her vehicle over onto the west shoulder of the road, across from where the disabled car was stopped, to see if she could assist the passengers of that vehicle. Another car also pulled over onto the west shoulder to offer assistance. The Claimant and the passenger of that car exited their vehicles and had a brief conversation about helping the disabled car. The passenger then walked across the road to the ditch on the east side. While he was talking to the driver of that car, he heard tires spinning. Ms. MacDonald was crossing the road toward the vehicle in the ditch when she was struck by a Chevrolet Cobalt insured by Allstate.

7. The parties agree that Ms. MacDonald's decision to pull over on the shoulder of the off ramp was not a planned event, and that she had intended to drive directly to dinner with her friend.

RELEVANT PROVISIONS :

The following provisions are relevant to the determination of this issue –

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,*
- (b) 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,*
- 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.*

*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,*
- 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.

PARTIES' ARGUMENTS & RELEVANT CASE LAW:

8. Aviva claims that as the insurer of the vehicle that struck Ms. MacDonald, Allstate is in higher priority to pay her claims in accordance with section 268(2)2(ii) of the *Act*. Allstate contends that Aviva is in higher priority to pay, as Ms. MacDonald remained an “occupant” of the vehicle that she was driving at the time of the incident, and that subsection 268(2)1(ii) applies. The parties agree that the only way that the Claimant would fit within the definition of an “occupant” of the Aviva vehicle is if she was found to be the “driver” of that vehicle when she was struck.

9. While it may seem that someone who is struck by a car as they cross a road after leaving the vehicle that they were in would no longer be an “occupant” of their vehicle, that term has been interpreted broadly by the Ontario Court of Appeal in two cases that are binding upon me. Both parties cited extensively from these decisions and referred to various arbitration awards that have followed.

10. Counsel agree that the leading case on this issue is *AXA Insurance Company v Markel Insurance Company of Canada* (2001) CanLii 24143. In that case, a truck driver drove a tractor trailer with a load of steel to a large yard in order to make a delivery. He stopped his truck outside a loading bay, left the vehicle and walked into the loading bay area to await his turn to unload. While standing approximately thirty feet away from his truck, he was struck by a piece of lumber that fell off the back of another truck as it was leaving the area. The driver unfortunately died as a result of the injuries sustained. His dependents applied to AXA, the insurer of his personal vehicle, for payment of death benefits under the *SABS*.

11. AXA commenced a priority dispute against Markel Insurance, the insurer of the tractor trailer he had been driving, contending that the driver remained an occupant of that vehicle when he was struck by the piece of lumber. Arbitrator Fidler accepted that argument, and determined that Mr. Ferguson remained the driver of the tractor trailer at the time that he was struck. Since he was an occupant of that vehicle, the arbitrator determined that Markel was in higher priority to pay the claim. Markel appealed that ruling, and the Superior Court allowed the appeal.

12. The case was appealed further, to the Court of Appeal. That court overturned the lower court's decision and restored the arbitrator's award. Giving the Court's unanimous judgment, Goudge, J.A. noted that the definition of the term "driver" in the *Act* does not require a person to actually be driving their vehicle at the time in order to be found to be a driver, and that the focus should be on their status, rather than on their precise location or the activity they are engaged in. He also found that some degree of physical connection to the vehicle must be maintained in order for a person to meet the definition.

13. Applying those criteria to the facts before the Court, Goudge J.A stated (para 22):

When he was injured Mr. Ferguson was in close physical proximity to the vehicle. He had driven it there and was waiting to unload it after which he undoubtedly would have driven it away. It is also safe to infer that at the time he was hit he maintained some element of control over the vehicle. Certainly there is no evidence that anyone else had taken over control of it nor had assumed the role of driver. In my view therefore, at the time he was injured he was the driver of the tractor trailer for the purposes of s.268(5.2) of the Act.

Goudge J.A. also noted that it was appropriate to consider the point of view of an "objective observer" of the incident, and ask whether such an observer who had in mind these considerations would answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor-trailer. The Court of Appeal determined that the answer to the question in the case before it would clearly be "yes".

14. The Court of Appeal revisited this issue in its decision in *McIntyre Estate v. Scott* (2003) CanLii 31493. In that case, a passenger of a motorcycle that had stopped at the side

of a highway under an overpass to wait out a rainstorm, was found to have retained her status as a passenger when she was struck by a car a few minutes after she got off the motorcycle. In finding that she remained an “occupant” of the motorcycle as defined in section 224 of the *Act*, the Court repeated the idea that a person’s “status” should be considered, rather than solely focusing on whether they were in physical contact with the vehicle.

15. Sharpe, J.A. noted that Ms. McIntyre’s presence at the scene was entirely explained by the fact that she had been a passenger on the motorcycle prior to the driver stopping under the overpass to seek shelter from the rain. He noted that the couple intended to resume their journey once the rain stopped, and that she had remained in close proximity to the motorcycle. He also stated that she had not engaged in any other activities while waiting for the rain to stop.

Allstate’s submissions

16. Allstate contends that Ms. MacDonald remained an “occupant” of the Aviva insured vehicle at the time that she was struck by the Chevrolet Cobalt insured by Allstate. Counsel cited the Court of Appeal’s decisions above in support of its position, and referred to four of my arbitration awards in which the issue of “occupancy” was raised (*The Personal Insurance Company of Canada v Dominion of Canada (Ahou)* - June 2013, *Intact Insurance Company v. Unica Insurance Company (Woolner)* - February 2016, *Traders General Insurance v Aviva Canada & The Guarantee Company of North America (Hartill)* - November 15, 2017 and *Co-operators General Insurance Company v. Intact Insurance and Northbridge General Insurance (Petrunka)* - January 17, 2018, upheld on appeal by Diamond, J. on November 30, 2018, leave to appeal to Ct of Appeal denied).

17. Counsel for Allstate noted that in the latter case, I dismissed Northbridge’s argument that a truck driver who was struck by a car as he walked across a street near the spot at which his truck was parked was more accurately described as a “pedestrian” than as the driver of the truck. The evidence in that case revealed that the claimant had left his truck approximately one hour before he was struck as he waited to be called to complete

the delivery. It was not clear what he did during the ensuing hour. I found that it was reasonable to assume that he had remained in the general vicinity of the truck, and that there was no evidence to suggest that he had given up control of the vehicle. Counsel contended that I should follow the same approach here, as the evidence suggests that Ms. MacDonald would have resumed her journey in her car after pulling over to offer assistance, had the accident not intervened.

18. Ms. Griffiths also noted my finding in *Intact v Unica Insurance, supra* that a claimant who drove to the shoulder of a highway where his friend's vehicle had become disabled lost his status as a driver when he walked down the shoulder of the road and engaged in activities relating to moving the vehicle so that it could be towed away. Counsel contended that these facts are distinguishable from those in the instant case, as the driver of that disabled vehicle had called the claimant to assist because he was a mechanic who owned a body shop nearby, and would have had experience in dealing with disabled vehicles. She noted that in contrast, Ms. MacDonald did not know the people whose vehicle had slid into the ditch across from where she had stopped, and had no experience with towing cars. Counsel contended that unlike Mr. Woolner in the *Intact v. Unica* case, the Claimant in this case was simply a Good Samaritan who had stopped to see if she could provide assistance, and would have resumed her journey afterwards.

19. Ms. Griffiths submitted that when the *AXA v Markel Insurance* analysis is applied to the facts here, it is clear that Ms. MacDonald remained in close physical proximity to her vehicle at the time that she was struck, and that she retained control over the vehicle at the relevant time. Her presence at the scene was explained by having stopped to assist a fellow motorist. She noted that the evidence suggests that she was struck by the Chevrolet Cobalt just a few minutes, if not seconds, after she exited from her vehicle. Counsel claimed that an objective observer aware of these circumstances would undoubtedly think of Ms. MacDonald as the "driver" of the Aviva insured vehicle, and she urged me to reach that conclusion.

Aviva's submissions

20. Aviva contends that the Claimant was not an occupant of its insureds' vehicle at the time of the accident. Counsel concedes that Ms. MacDonald was in close proximity to the vehicle when she was struck, and that the requirement for maintaining a physical connection was met. She noted, however, that the Court of Appeal stated in *AXA v Markel* that the focus should be on the status of a person, rather than their precise location at the moment that they are struck, and that such status does not attach permanently. Counsel submitted that when the events leading up to the moment that Ms. MacDonald was struck are considered, her status should be found to have shifted from that of a driver to a pedestrian crossing the road.

21. Ms. Rogers contends that there are two key factors that distinguish Ms. MacDonald's actions from the claimants in the other decisions cited above – she was not in the course of her employment at the time of the accident, and her decision to pull over onto the shoulder of the off ramp stemmed from her desire to help out a fellow motorist, and had nothing to do with her own vehicle. Counsel submitted that the conclusions in each of the cases cited above can be explained either by the fact that the individual involved was in the course of their employment at the time they were struck, or had stopped driving because of a problem they experienced with their vehicle. As neither of these circumstances are present in this case, she argued that a different result should be reached.

22. Counsel highlighted the fact that Ms. MacDonald was on her way to meet a friend for dinner, and had decided to pull over and help another driver in distress. She noted Sharpe, J.A.'s comments in *Re McIntyre Estate, supra*, that an objective observer would describe Ms. McIntyre as an "occupant" of the motorcycle when she was struck, as her presence at the scene was explained by the fact that she was a passenger on the motorcycle, and "she did not engage in any other activity except to wait for the rain to abate". Counsel submitted that this last comment clearly suggests that if the individual does engage in activities that are unrelated to their vehicle, as Ms. MacDonald had done, their status as an "occupant" of that vehicle will be lost.

23. Ms. Rogers also referred to my decision in *The Personal v Dominion*, *supra*, in which I stated that a driver or passenger may lose their status by “leaving the vehicle and engaging in activities that are outside of a sequence of events related to the initiating incident”. I determined in that case that the passenger of a vehicle with a flat tire who had exited the vehicle, crossed the road to seek assistance from someone who lived nearby, and crossed back to where the car had pulled over retained his status as a passenger, as he had not engaged in any activities other than those related to fixing the flat tire. Counsel for Aviva submitted that in contrast, Ms. MacDonald did engage in activities that were unrelated to her vehicle, and that once she left her vehicle to help someone else, her status shifted to that of a pedestrian who had decided to assist another motorist in distress.

24. Counsel suggested that the facts of this case closely resemble those in *Intact Insurance v Unica*, *supra*, and that a similar finding should result. The claimant in that case was found to no longer be an occupant of the vehicle that he had driven to the scene, in order to assist a friend whose vehicle had become disabled. As noted above, he had parked his car some distance down the highway, walked over to the disabled vehicle and engaged in a discussion with a tow truck driver regarding the best options for moving the vehicle safely, before being knocked down when another vehicle veered onto the shoulder and hit the tow truck. I determined that the claimant’s status had shifted from being a “driver” to that of a supportive friend, as he was engaged in a series of activities that were not related to his vehicle when he was struck.

25. Ms. Rogers highlighted the fact that unlike many of the situations described above, the interruption in Ms. MacDonald’s journey had nothing to do with the use of her own vehicle, and her presence at the scene was explained by the fact that she had stopped in order to assist another driver. She contended that an objective observer who was familiar with the considerations outlined by the Court of Appeal in the *AXA v Markel* decision would not consider her to have been a driver of the Aviva insured vehicle when she was struck, and urged me to reach that conclusion.

ANALYSIS & REASONS:

26. As noted above, the Court of Appeal has provided some principles to guide the analysis in determining whether someone remains an “occupant” of a vehicle when they are injured after leaving that vehicle, in its decisions in *AXA v Markel* and the *McIntyre Estate* case. Simply put, the key factors to consider are whether the individual maintains some degree of physical connection with their vehicle, and whether they can be said to have retained their “status” as a driver or passenger of the vehicle at the time that they are injured. While the court did not provide specific criteria to apply when determining whether that status is retained, Justice Goudge’s reasoning in *AXA v Markel* suggests that maintaining an element of control over the vehicle at the time the individual is struck is an important factor to consider.

27. I have applied these principles in the four earlier cases I have decided on this issue, cited by the parties above. While I agree with counsel for Aviva that the judgment in *AXA v Markel* does not specify that a driver will retain that status if he or she was in the course of employment while injured outside of the vehicle, the reasons provided certainly imply that a truck driver who has not yet completed the steps in a delivery retains “driver” status even if they leave the vehicle, as long as they remain nearby. I relied on that finding in *Co-operators v. Intact Insurance and Northbridge, supra*, and applied this principle in *Traders General v. Guarantee Company, supra*, a case involving a police officer who was struck while standing in a ditch interviewing a driver whose car had slid off the road.

28. However, these decisions and principles are of limited assistance in this case, where the surrounding facts and context are quite different. Ms. MacDonald was not performing any work duties at the time that she decided to stop her car at the side of the road to see if she could assist the occupants of another vehicle. The circumstances set out in *The Personal v. Dominion, supra*, and *Intact Insurance v Unica Insurance, supra*, are closer to those faced by Ms. MacDonald – in the first case, I found that a passenger retained his status as an occupant of a vehicle with a flat tire, when he left the vehicle in order to seek assistance. In contrast, I determined in *Intact v Unica Insurance* that the claimant who was called by a friend to help out when her vehicle became disabled on the shoulder of a

highway did not remain an occupant of his vehicle when he was injured while assisting with steps to have his friend's vehicle towed away.

29. The reason for different results being reached in these two cases become clear when the underlying facts are closely examined. In *The Personal v Dominion*, I determined that all of the steps that the passenger had taken from the point he left the vehicle with the flat tire to the time that he was struck while standing behind the car after returning from the house across the road, were related to his efforts to fix the tire. I stated — (at para.33)

There is clearly a "line" that exists, beyond which the Claimant would no longer remain a passenger. If he had wandered away from the vehicle to eat dinner at a restaurant and been struck by another car as he crossed the street upon leaving the restaurant, he would no longer be a "passenger". Had he hailed a taxi, arrived at a gas station or store that sold tires and been struck by a car in their parking lot while waiting to purchase the tire, he would similarly have lost his status as a passenger. In my view, the application of the Court of Appeal's reasoning in the McIntyre case must lead to the conclusion that as Mr. Ahou was struck by the Burkimsher vehicle while he was in the midst of a sequence of events that stemmed from the initial event of the tire deflating, while also remaining in close proximity to the vehicle, he retained his status as a "passenger" and was therefore an "occupant" of the vehicle at that time.

30. In *Intact v Unica* I found that Mr. Woolner ceased to be a driver of his vehicle once he approached his friend's stalled car some distance down the shoulder of the highway from where he had parked, and began to discuss how to best extricate it with the tow truck driver. I noted there that the claimant was struck several minutes after arriving at the scene, after he had separate discussions with both his friend and the tow truck driver. I found that he had engaged in a series of activities that were unrelated to his vehicle before being struck, and that his status had shifted from that of driver of his vehicle to supportive friend and mechanic. I stated that these intervening steps mandated a different result than was reached in the *Axa v Markel* and *McIntyre Estate* decisions.

31. I find that the analysis in the *Personal v. Dominion* case is more germane to the circumstances here. Ms. MacDonald pulled over on the shoulder of the road for the express purpose of providing help to the passengers in a vehicle that had slid into a ditch on the

opposite side of the road. She left her vehicle, had a brief chat with the passenger of another car that had also pulled over to help, and then started to cross the road toward the stranded vehicle. She was struck by the Allstate insured vehicle while she was crossing the road, before she arrived at the other side where the stranded vehicle was located. It is not disputed that she was physically close to her vehicle when she was struck.

32. The question then becomes – did she retain her status as a “driver” of that vehicle at that point, or had she become a pedestrian? I find that she remained the “driver” of her vehicle, at the time that she was struck. It is clear that not much time passed from the moment she left her vehicle to the point at which she was hit. There was no dispute that she maintained control over the vehicle, and would have resumed her journey in that vehicle after providing whatever assistance she could, if the accident had not intervened.

33. Most importantly, Ms. MacDonald was in the midst of offering to provide help to the stranded motorists, and had not become involved in any other or intervening activities. In keeping with the Court of Appeal rulings set out above, I find that an objective observer properly informed would have no trouble finding that she remained the driver of the Aviva insured vehicle, and was therefore an “occupant” of that vehicle at the time that she was struck.

34. Aviva contends that the circumstances of this case are analogous to those in *Intact Insurance v Unica*, and that the same result should apply. I acknowledge that both Mr. Woolner, the claimant in that case, and Ms. MacDonald here had both stopped their vehicles in order to assist drivers of other vehicles that were in distress. However, the similarities end there. Mr. Woolner was called to the scene because he was a mechanic and owner of a body shop. He used his vehicle to transport himself to the location where his friend’s car was stopped at the side of the highway, with the express intention of providing assistance. His presence at the scene was explained by him having been called to help, and his having heeded that call. As explained above, he took various steps from the point at which he left his vehicle to the moment he was injured several minutes later, which were unrelated to the fact that he drove his vehicle to the scene.

35. In contrast, Ms. MacDonald happened upon a car in a ditch as she was driving to meet a friend for dinner. She had not been called to come to the scene and had not planned to make this stop. She had not formed an intention to engage in activities that were unrelated to her vehicle; she merely responded spontaneously to a situation that she observed as she was driving on the road, and pulled over. She left her vehicle and was struck by the Allstate insured car as she crossed the road shortly after pulling over. In my view, she had not engaged in any activities that could be considered unrelated to her vehicle.

36. For the reasons explained above, I find that Ms. MacDonald remained an “occupant” of the Aviva vehicle when she was struck. Section 268(2)1(ii) of the *Act* therefore applies, and results in a finding that Aviva is in higher priority to pay Ms. MacDonald’s claim.

37. Finally, given my finding on this issue, there is no need to determine whether Ms. MacDonald was principally dependent for financial support on the Aviva insureds.

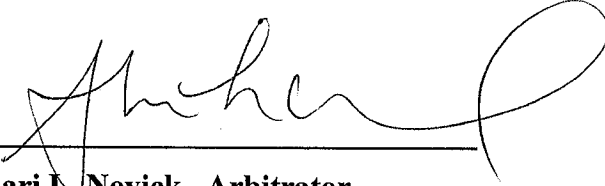
ORDER:

The Application for Arbitration is hereby dismissed.

COSTS:

As noted in paragraph 5 of the parties’ Arbitration Agreement, Allstate, as the successful party, is entitled to recover its costs from Aviva on a partial indemnity basis. If the parties are unable to agree on the quantum of costs payable, I invite them to contact me and a process will be arranged for the determination of this issue.

DATED at TORONTO, ONTARIO this 13th DAY OF MAY, 2020



Shari L. Novick, Arbitrator