

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**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*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AXA INSURANCE

Plaintiff

- and -

BELAIR DIRECT INSURANCE COMPANY

Defendant

AWARD

COUNSEL

Catherine Bruder
Counsel for the Applicant, AXA Insurance Company

Ian C. Lambert
Counsel for the Respondent, Belair direct Insurance Company

ISSUE

The issue in this Arbitration is to determine which of two insurers is the insurer liable to pay Statutory Accident Benefits to Simone Steer (hereinafter referred to as "Steer") by reason of injuries sustained by Steer in a motor vehicle accident, which occurred on October 22, 2001.

AGREED STATEMENT OF FACTS

The parties have consented to this Arbitration proceeding on the basis of an Agreed Statement of Facts. The agreed upon facts are as follows:

1. The claimant, Simone Steer, was struck while walking through a parking lot at Etonville Public Library on October 22, 2001.

2. The vehicle that struck her was insured by AXA Insurance on a policy issued to Ms. Lillian Borodczak.
3. The claimant suffered injuries including a laceration to her right foot.
4. The claimant was on her way back to a vehicle which was owned by her sister, Audrey Steer, which vehicle is insured with Belair (the Steer vehicle).
5. On the day of the accident, Simone Steer had driven the Steer vehicle to the library on her own. When she was struck by the Borodczak vehicle, Simone Steer was walking back through the library parking lot to the Steer vehicle. There was no one else in the Steer vehicle at the time.
6. Subsequent to the collision between the Borodczak vehicle and Ms. Steer, the Borodczak vehicle went on to collide with the Steer vehicle and caused the Steer vehicle, a 1992 Honda Accord, property damage totalling \$1,513.48.
7. Simone Steer filed an Application for Accident Benefits with AXA Insurance. A Notice to Applicant of Dispute Between Insurers was provided to Belair by AXA Insurance on November 1, 2001. Belair denied that it is the primary insurer for benefits.
8. AXA continues to pay Simone Steer accident benefits.
9. At the time of the accident, Simone Steer did not own her own vehicle. She did not have access to a company vehicle. She was not listed on any insurance policies.
10. The essential dispute has to do with whether there is a connection to the vehicle insured by Belair.

APPLICABLE LEGISLATION

Section 268 (2) of the *Insurance Act* establishes priority rules for determining liability to pay Statutory Accident Benefits to occupants and non-occupants involved in motor vehicle accidents. The relevant section reads as follows:

Section 268 (2) – Liability to pay – 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 non-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 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.”*

The Applicant herein contends that Steer was an “occupant” of the vehicle insured by Belair at the time of this accident. In other words, it is contended that she was an “occupant” of the parked vehicle towards which she was walking. Section 224 (1) of the *Insurance Act* defines “occupant” as follows:

“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.*

APPLICANT’S SUBMISSIONS

The Applicant submits that at the time of the accident, Steer was an “occupant” of the vehicle insured by Belair, so as to make it liable for payment of her accident benefits.

The Applicant relies on the definition of an "occupant" as found in Section 224 of the *Insurance Act* wherein an occupant 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.

The Applicant submits that Steer was clearly the driver of the vehicle insured by Belair and therefore an occupant. The Applicant submits that the approach taken by the Ontario Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada [2001] O.J. No.294 (C.A.) supports its position. A copy of that decision is attached to this Award for easy reference.

The issue before the Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada was whether a Mr. Ferguson was an occupant of the tractor-trailer insured by Markel. Mr. Ferguson drove the tractor-trailer to the Stelco South Billet Yard to make a delivery of steel. He parked the tractor-trailer outside of the loading bay, exited the vehicle and entered the loading bay to wait his turn to unload the tractor-trailer. He was standing about 30 feet away from the tractor-trailer when he was struck by a piece of wood that had been propelled off another truck exiting the loading bay. As a result of that accident, Mr. Ferguson sustained serious injuries, causing his death. In his reasons, Justice Goudge on behalf of the Court of Appeal found Mr. Ferguson to be the "driver" of the tractor-trailer and therefore an "occupant" making Markel, as insurer of the tractor-trailer, liable to pay Statutory Accident Benefits.

The Applicant submits that the present agreed upon facts meet the three considerations found relevant by the Court of Appeal to the determination of whether someone is the driver of a vehicle:

- 1) There must have been some degree of physical connection with the vehicle for the person to be the driver;
- 2) The status of driver does not attach permanently to the person, but it is something that depends on the circumstances of the case at the time of the accident;
- 3) The person can only have been the driver of one vehicle at the time of the accident.

The Applicant indicates that Justice Goudge noted that keeping in mind the above considerations, the question to ask to determine if a person was the driver of a vehicle is whether an objective observer of this incident, 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 was clearly yes.

The Applicant contends that Steer had a physical connection with the Steer vehicle. She had driven the vehicle to the library and at the time of the accident, was walking back to the vehicle. It is submitted that she was in close physical proximity to the vehicle, close enough that the Borodczak vehicle collided with the Steer vehicle after striking Steer. It is submitted that Steer was likely not more than 30 feet away from the Steer vehicle at the time of the accident.

The Applicant further submits that Steer maintains some element of control over the Steer vehicle. It is submitted that there is also no evidence that Steer had relinquished control of the Steer vehicle. She was walking towards the vehicle and just like Mr. Ferguson, would have undoubtedly have driven it away when she got to it. The Applicant submits that Steer had driven by herself to the library that day and that there was no one else in the Steer vehicle who could possibly have assumed the role of driver.

The Applicant submits that that application of the "objective observer" test as used by the Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada to the present facts, leads to the conclusion that Steer was the driver of the Steer vehicle at the time of the accident.

RESPONDENT'S SUBMISSIONS

The Respondent submits that Steer does not meet the definition of "occupant" as set out in Section 224 (1) of the *Insurance Act*. The Respondent submits that Steer could not be said to be a passenger in the vehicle or a person getting into or out of it as she was merely leaving the library and walking through its parking lot. It further submits that she was also not "the driver" at the time of the accident.

The Respondent relies upon the same decision of the Ontario Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada to support its position. The Respondent submits that the application of the "objective observer" test to the agreed upon facts, ought lead one to conclude that Steer did not meet the three considerations set out by the Ontario Court of Appeal. It is submitted that the facts in Axa Insurance v. Markel Insurance Co. of Canada are distinguishable from the agreed upon facts here.

The Respondent submits that Steer had driven her sister's vehicle to the library to engage in activities at the library. In Axa Insurance v. Markel Insurance Co. of Canada, the claimant drove his tractor-trailer to the Stelco yard in order to make a delivery of steel. The Respondent submits that Steer's activities at the library were totally unrelated to her sister's vehicle and did not have a "physical connection" with the vehicle. The Respondent submits that Steer relinquished her control over the vehicle when she entered the library. Whereas in Axa Insurance v. Markel Insurance Co. of Canada, the delivery of steel and the unloading of steel were activities that fully involved the claimant's tractor-trailer. The Respondent further submits that the claimant in Axa Insurance v. Markel Insurance Co. of Canada maintained a "physical connection" to his tractor-trailer, as he continued to wait with it until he could unload. The Respondent submits that Steer did not have a "physical connection" with her sister's vehicle at the time of the incident as she relinquished her physical connection when she left the vehicle to engage in activities at the library and was merely walking through a parking lot as a pedestrian. The Respondent submits that an "objective observer" would have the view that Steer relinquished her status of being "the driver" when she left her vehicle to attend the library. It is submitted that she had not regained her status as a driver at the point she was struck down by the vehicle insured by AXA.

The Respondent further submitted that it is unknown whether or not Steer even intended to drive her sister's vehicle after leaving the library. It is submitted that she may have been returning to the vehicle to drop off a book, pick up some other objects such as a cellular phone or a pack of cigarettes. It is submitted that it is possible that Steer was not even walking back to her sister's vehicle, but rather was walking through the parking lot in order to meet a friend, smoke a cigarette, purchase an ice cream, sit on a park bench to read a book,

or just wanted to go for a walk in order to stretch her legs. It is submitted that the answers to these questions are unknown and cannot be answered by using the facts set out in the parties Agreed Statement of Facts.

The Respondent submits that to find Steer an "occupant" on the present facts, would push the envelope of "occupant" beyond all logical bounds.

ANALYSIS AND FINDINGS

On the basis of the Agreed Statement of Facts herein and the submissions of both parties, I find that Steer was an "occupant" of the vehicle insured with Belair at the time of this accident. I feel bound by the law as set out by the Ontario Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada and find the facts of the present case not sufficiently distinguishable so as to come to a different conclusion.

The Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada made it clear that the *Insurance Act* criterion for the definition of occupant did not focus on the person's activity, nor their precise location, but on the description of the person claiming benefits. Justice Gouge on behalf of the Court noted that there was nothing in the definition of occupant that required the person to be engaged in the act of driving at the time of the accident, merely that he or she be the "driver of the vehicle".

I find that the facts herein meet the considerations determined by the Ontario Court of Appeal in Axa Insurance v. Markel Insurance Co. of Canada relevant to determine whether someone is the driver of a vehicle:

- 1) There must have been some degree of physical connection with the vehicle for the person to be the driver;
- 2) The status of driver does not attach permanently to the person, but it is something that depends on the circumstances of the case at the time of the accident;
- 3) The person can only have been the driver of one vehicle at the time of the accident.

I find that Steer had a "physical connection" with the Steer vehicle. She had driven the vehicle to the library and at the time of the accident, can reasonably be inferred to have been walking back to the vehicle. I find that Steer was in close physical proximity to the Steer vehicle, close enough that the Borodczak vehicle collided with the Steer vehicle after striking Steer. In Axa Insurance v. Markel Insurance Co. of Canada, Mr. Ferguson was noted to have been 30 feet away from the tractor-trailer. On the basis of the agreed upon facts, I find it reasonable to infer that Steer was as physically proximate to the vehicle or sufficiently proximate to the vehicle to meet the physical proximity test.

I find that Steer maintained an element of control over the Steer vehicle. In Axa Insurance v. Markel Insurance Co. of Canada, it was found that Mr. Ferguson was waiting to unload the tractor-trailer and inferred that he undoubtedly would have driven it away ultimately. There is no evidence in the present case that Steer had relinquished control of the Steer vehicle. She had driven by herself to the library. It can reasonably be inferred on the balance of probabilities, that no one other than Steer was going to assume the role of driver.

On the basis of the aforesaid, I find that Steer was the "driver" of the Steer vehicle at the time of this accident and hence an "occupant" of the Steer vehicle, for the purposes of the application of Section 268 of the *Insurance Act*.

ORDER

I hereby order Belair Direct Insurance Company to reimburse AXA Insurance for the reasonable accident benefits paid to Steer to date, for any future accident benefits and for reasonable related expenses incurred by AXA Insurance in its investigation and handling of the Steer accident benefits claim, arising from injuries sustained by her in a motor vehicle accident on October 22, 2001.

It was agreed by the parties that the issue of quantum would be stayed pending resolution of the priority issue. I would be happy to deal with the quantum issue should the need arise.

COSTS

I order that Belair Direct Insurance Company pay to AXA Insurance their costs of the within Arbitration throughout on a partial indemnity basis. In the event that the parties cannot resolve the issue as to the quantum of costs, I would be happy to hear submissions in that regard.

DATED at TORONTO this)
day of September, 2005.)

KENNETH J. BIALKOWSKI
Arbitrator

