IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 Section 268, as amended AND
REGULATION 283/95, as amended AND ALL OTHER REGULATIONS THERETO
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

\- and -

WAWANESA MUTUAL INSURANCE COMPANY, CERTAS DIRECT INSURANCE COMPANY, UNIFUND INSURANCE COMPANY and MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

AND BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

\- and –

ECONOMICAL MUTUAL INSURANCE COMPANY, CERTAS DIRECT INSURANCE COMPANY, UNIFUND INSURANCE COMPANY, and MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

PRIORITY DISPUTE ARBITRATION DECISION

LAWYERS

Christopher Schnarr
Lawyer for the Applicant, Economical Insurance Company

Tricia Hannigan
Lawyer for the Respondent and Applicant, Wawanesa Insurance Company

Todd Wasserman
Lawyer for the Respondent, Motor Vehicle Accident Claims Fund

Kimberley Tye
Lawyer for the Respondent, Certas Insurance Company

John Graham
Lawyer for the Respondent, Unifund Insurance Company

ISSUES IN DISPUTE

This complicated priority dispute arises out of a motor vehicle accident which occurred on September 14, 2008. The Somasundaram vehicle (1996 Toyota 4-runner) came into collision with the Shaloum motor vehicle (1996 Dodge Caravan) in the westbound lanes of Queen St. East in the City of Brampton. Debris from this collision struck and damaged the Rowe-Dawes vehicle (2001 Ford Explorer), which was travelling in the oncoming eastbound lanes of Queen St. East. The occupants of the Somasundaram vehicle, Mr. Vigneswaramoorthy Somasundaram and Ms. Yogeswary Vigneswaramoorthy made claims for accident benefits to the Economical Mutual Insurance Company (hereinafter referred to as “Economical”). Economical has been paying statutory accident benefits to these claimants, but maintain that their policy of insurance had been properly cancelled prior to the date of this loss and that the other insurers herein or the Motor Vehicle Accident Claims Fund ought to be paying these benefits. At the time of the accident, the occupants of the Shaloum vehicle (Ms. Poleet Shaloum and Ms. Jacqueline Stapleton) presented accident benefit claims to the Wawanesa Mutual Insurance Company (hereinafter referred to as “Wawanesa”). Wawanesa has been paying accident benefit claims to Poleet Shaloum and Jacqueline Stapleton, but claim that their policy of insurance had been properly cancelled and that one of the other insurers involved herein or the Motor Vehicle Accident Claims Fund ought to be paying those benefits. It is alleged that if the Wawanesa policy had been properly cancelled, then Shaloum had insurance available to her by reason of insurance on another vehicle that she owned (1992 Toyota Camry, a policy with the Unifund Insurance Company (hereinafter referred to as “Unifund”). Unifund claims that its policy of insurance with respect to the 1992 Toyota Camry had also been properly cancelled, making one of the other insurers herein or the Motor Vehicle Accident Claims Fund responsible for the payment of accident benefits to Poleet Shaloum and Jacqueline Stapleton. The Motor Vehicle Accident Claims Fund (hereinafter referred to as “The Fund”) maintains that the Economical, Wawanesa and Unifund policies were not properly cancelled. The parties claim that the debris from the Somasundaram/Shaloum collision striking the Rowe-Dawes vehicle (insured with Certas) makes it an “involved vehicle” and responsible for payment of accident benefits to claimants if the aforesaid policies were properly cancelled.

The issues for determination on this Arbitration are as follows:

1. Which insurer has the priority obligation to pay accident benefits to Ms. Jacqueline Stapleton?
2. Which insurer has the priority obligation to pay accident benefits to Mr. Vigneswaramoorthy Somasundaram?
3. Which insurer has the priority obligation to pay accidents to Ms. Yogeswary Vigneswaramoorthy?
4. Which insurer has the priority obligation to pay accident benefits to Ms. Poleet Shaloum?
5. In the absence of an insurer, is the Motor Vehicle Accident Claims Fund liable to pay accident benefits to Jacqueline Stapleton, Vigneswaramoorthy Somasundaram, Yogeswary Vigneswaramoorthy and Poleet Shaloum?

LAW

An individual involved in a motor vehicle accident may have accident benefit coverage available to him or her from more than one policy of motor vehicle policy. The rules for determining which

insurer stands in priority are set out in the following relevant portions of Section 268 of the Insurance Act, R.S.O. 1990, c.I.8:

> *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.*
>
> *(3) Liability – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.*
>
> *(4) Choice of insurer – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.*
>
> *(5) Same – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.*
>
> *(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.*
>
> *(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.*

ANALYSIS

In determining the issues in this priority dispute, the following questions must be addressed:

A. Was the Economical policy properly cancelled and not reinstated on the date of loss?

It is the position of Economical that its policy on the Somasundaram vehicle was not valid on the date of loss as it had been properly cancelled for non-payment prior to the accident. Economical maintains that the Somasundaram vehicle was an uninsured motor vehicle at the time of this loss. Economical states that its policy was cancelled effective September 12, 2008, in accordance with the requirements set out in statutory conditions 11 and 12. On August 12, 2008, Economical sent notice of cancellation due to non-payment of premiums to the claimant Somasundaram via registered mail. In accordance with the statutory conditions, the notice stipulated that the policy would be cancelled 30 days following the date of the notice, as of September 12, 2008 at 12:01 a.m., should the outstanding premiums not be paid prior to that date. The notice set out the amount due in order to avoid cancellation and provided instruction to Mr. Somasundaram regarding payment. The notice of cancellation was sent by registered mail. The envelope in which the registered letter was sent indicates the letter was postmarked on August 12, 2008. According to Canada Post tracking history for the registered letter, the registered letter was received by the claimants on August 13, 2008 and was signed by V. Somasundaram. The subject collision occurred on September 14, 2008. The letter was not returned as undeliverable to Economical.

I have previously dealt with the issue of proper cancellation of a policy of insurance in my decision of Gore Mutual Insurance Company v. Lombard General Insurance Company of Canada and Motor Vehicle Accident Claims Fund (June 21, 2010). I am of the view that the power of cancellation must be strictly exercised. This proposition is supported by the following three decisions:

1. London & Lancashire Fire Insurance Co. v. Veltre, (1918), 56 S.C.R. 588, 1918 CarswellOnt 6;

2. Lumbermens Mutual Casualty Co v. Stone, [1955] S.C.R. 627, [1955] 4 D.L.R. 167;

3. Prior v. Dominion of Canada General Ins. Co., 2008 CarswellOnt 7241, FSCO Arb., Arbitrator Bayefsky.

In London & Lancashire Fire Insurance Co. v. Veltre, (1918), 56 S.C.R. 588, 1918 CarswellOnt 6, the Supreme Court of Canada dealt with the purported cancellation of a fire policy by way of a letter forwarded by registered letter to the insured. At page 9 of the decision, Justice Anglin indicated that the "power of cancellation must, no doubt, be strictly exercised". Justice Brodeur states at page 11 of the decision:

> *"The right which the company possesses to cancel a valid contract is contrary to the ordinary rules affecting contractual relations. If the legislature intended to avoid the necessity of a tender being made personally, they would then have so provided in the clearest of language."*

In Lumbermens Mutual Casualty Co v. Stone, [1955] S.C.R. 627, [1955] 4 D.L.R. 167, the Supreme Court of Canada, dealing with the purported cancellation of an automobile policy of insurance, once again indicates that the conditions must be "exactly complied with". Mr. Justice Rand states at page 635 of the decision the following:

> *"No doubt, apart from statutory provisions, if the parties to a contract of insurance for a definite term, the premium for which is paid in advance, choose to do so they may agree that the insurer may cancel the policy and leave the insured without protection although neither the notice of cancellation nor the unearned premium to which he is entitled are received by him and he remains, to the knowledge of the insurer, in ignorance of the fact that the policy has ceased to be in force. But conditions in the contract having such an effect must be exactly complied with by the insurer if it seeks to take advantage of them. If such conditions are ambiguous they will not be construed in favour of the insurer whose words they are. This follows from s.1019 of the Civil Code, which gives statutory force to the maxim verba chartarum fortius accippiuntur contra proferentem."*

In Prior v. Dominion of Canada General Ins. Co., 2008 CarswellOnt 7241, FSCO Arb., Arbitrator Bayefsky, in dealing with the purported cancellation of an automobile policy by way of registered letter, at paragraph 58 states the following:

> *"As is evident from this version of the legislation, and consistent with my finding on the nature of the notice required under the earlier version, termination of a policy can only be effected on the basis of clear and straightforward notice (as to the timing of the termination, the amount due on the policy and the circumstances under which the insured can avoid termination)."*

I am satisfied that for a letter of termination to be effective, there must be strict compliance to the extent that the "essential elements" of the legislative requirements are contained in the notice letter. I accept the proposition set out in Conway v. Judgment Recovery (N.S.) Ltd., 1990 CarswellNS 262, 111 N.S.R. (2d) 414, that the requirement does not necessarily mean that "every punctuation mark and capitalization in the notice of termination must be correct", but I do believe that the "essential elements" of legislative requirements must be for the termination to be effective.

In my view, the "essential elements" as required by Statutory Condition 11 are as follows:

1. The amount due, together with any administration fee being sought;
2. The date on which the termination is to take place; and
3. That the insured has a right to avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination is to take place.

I am satisfied that the Economical policy was properly terminated prior to Somasundaram's involvement in this accident. The notice of cancellation contained all of the essential elements of the legislative requirements.

B. Was the Wawanesa policy properly cancelled and not reinstated on the date of loss?

Wawanesa contends that the policy of insurance issued by it to Poleet Shaloum had been properly cancelled prior to her involvement in the September 14, 2008 motor vehicle accident. Wawanesa contends that it properly mailed a notice of cancellation to the claimant on September

27, 2007, effective October 27, 2007, for non-payment of premium. At no time was the policy reinstated. Shaloum testified at her Examination Under Oath held June 1, 2010, that her Wawanesa policy was cancelled because she did not pay premiums. She also indicated that her van (1996 Dodge Caravan) had been at the mechanic for one month before the accident on September 14, 2008 and that she “forgot about insurance”. Wawanesa submits that the actions of Ms. Shaloum in entering into subsequent auto insurance contracts with Unifund in 2008, is consistent with the contention that she understood that she did not have valid insurance from Wawanesa after receiving its notice of cancellation, dated September 27, 2007.

On the evidence before me, I am satisfied that the notice of cancellation, dated September 27, 2007, contained the “essential elements” as required by statutory condition 11, namely:

1) The amount due, together with any administration fee being sought;

2) The date on which termination is to take place;

3) That the insured has a right to avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination is to take place.

I am of the view that the wording with respect to the third “essential element” aforesaid was not as clear as it otherwise could have been, but that an insured reading the notice of cancellation would reasonably have concluded that the policy would be reinstated by contacting the broker for payment options. The notice indicated “in order to have this policy reinstated, please contact your broker for your payment options”. The notice clearly set out the name and address of the broker, the amount due of $240.60, the reinstatement date and time of October 27, 2007 at 12:02 a.m..

C. Was the Unifund policy properly cancelled and not reinstated on the date of loss?

Unifund takes the position that its policy of insurance with Poleet Shaloum on a 1992 Toyota Camry was not in force at the time of this accident as it had been cancelled properly for non-payment prior thereto. Unifund indicates that it never insured the 1996 Dodge Caravan driven by Poleet Shaloum at the time of the accident. Unifund maintains that its policy was cancelled effective August 27, 2008, but has been unable to locate the registered letter notifying Ms. Shaloum of the cancellation. However, at her Examination Under Oath, Ms. Shaloum recalled receiving the registered letter from Unifund cancelling the policy.

As I have indicated previously, the power of cancellation must be strictly exercised. The insurer must be in a position to demonstrate that the “essential elements” as required by statutory condition 11 have been met. Unifund’s inability to produce a copy of the cancellation notice makes it impossible for me to say whether there was wording advising the insured of her right to reinstatement by payment of an amount due was to be contained on the face of the cancellation notice or wording of the date that the cancellation was to be effective. I have considered the fact that Shaloum confirmed the receipt of a cancellation notice but that is insufficient to satisfy me that the “essential elements” of a proper cancellation were on the face of the cancellation notice.

The concern that I have is that Unifund’s notice of cancellation may not have included the “essential elements” and in particular, the fact that the insured had a right to avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination was to take place. There was a change in the legislation effective June 1, 2005, when Statutory Condition 11 was amended to require notice to the insured that he or she had a right to avoid termination upon payment of the outstanding amount and the specified administration fee. The predecessor to Statutory Condition 11 reads as follows:

"11. (1) Subject to section 12 of the Compulsory Automobile Insurance Act and section 237 & 238 of the Insurance Act, this contract may be terminated by the insurer giving to the insured fifteen days notice of termination by registered mail or five days written notice of termination personally delivered."

Effective June 1, 2005, Statutory Condition 11 was revoked and replaced with the following version:

Statutory Conditions – Automobile Insurance, O. Reg. 777/93.

Termination

11. (1) Subject to section 12 of the Compulsory Automobile Insurance Act and sections 237 and 238 of the Insurance Act, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract.

(1.2) Subject to subcondition (1.7), if the insurer gives a notice of termination under subcondition (1) for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the notice of termination shall comply with subcondition (1.3) and shall specify a day for the termination of the contract that is no earlier than,

(a) the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or

(b) the 10th day after the insurer gives the notice, if the insurer gives the notice by personal delivery.

(1.3) A notice of termination mentioned in subcondition (1.2) shall,

(a) state the amount due under the contract as at the date of the notice; and

(b) state that the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the business day before the day specified for termination.

(1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that the insured is permitted to pay the premium under the contract in installments, the amount due under the contract as at the date of the notice shall not exceed the amount of the installments due but unpaid as at the date of the notice.

(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specifies, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

(1.7) If, on two previous occasions in respect of the contract, the insurer has given a notice of termination mentioned in subcondition (1.2) and the full amount payable under clause (b) of subcondition (1.3) has been paid by the time and in the manner that the notice specifies and if a non-payment again occurs of the

> whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract and subcondition (1.1) applies to the notice, instead of subcondition (1.2).
>
> (2) This contract may be terminated by the insured at any time on request.
>
> (3) Where this contract is terminated by the insurer,
>
> (a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified;
>
> (c) if the termination is for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract and if subcondition (1.7) does not apply to the termination, the refund shall be made as soon as practicable after the effective date of the termination.
>
> (5) For the purpose of clause (a) of subconditions (1.1) and (1.2), the day on which the insurer gives the notice by registered mail shall be deemed to be the day after the day of mailing.
>
> (6) All references in this condition to times of day shall be interpreted to mean the time of day in the local time of the place of residence of the insured.

The new wording aforesaid appears to have included a consumer-oriented provision set out in Statutory Condition 11(1.3)(b) to give the insured an opportunity to continue coverage, regardless of the insurer's intention. Clearly, the Ontario Legislature made the insurer's requirements to provide the insured with a Notice of Termination for Non-payment of Premium more explicit and even stricter. Unfortunately, not all insurers amended their standard "Notice of Cancellation" to incorporate the new stricter requirements. This is evidenced by my decision in Gore Mutual Insurance Company v. Lombard General Insurance Company of Canada and Motor Vehicle Accident Claims Fund (June 21, 2010) where I found that the Gore Mutual Notice of Cancellation did not include a statement advising the insured that he had a right to avoid termination by paying the outstanding premium prior to the date of cancellation. In light of Unifund's inability to produce a copy of the Notice of Cancellation, I cannot conclude that the essential elements of a proper cancellation were forwarded to their insured. I must conclude that Poleet Shaloum remained an insured with Unifund with respect to a policy insuring a 1992 Toyota Camry. It should be noted that this 1992 Toyota Camry was not involved in the subject motor vehicle accident. At the time of the subject motor vehicle accident, Poleet Shaloum was operated a 1996 Dodge Caravan.

D. Was the vehicle insured by Certas "involved" in this accident?

The parties, save and except Certas, take the position that the Rowe-Dawes motor vehicle insured with Certas was "involved in the incident" within the meaning of Section 275 of the Insurance Act. Certas states that the Rowe-Dawes vehicle was not a vehicle "involved in the incident" within the meaning of Section 275 of the Insurance Act. They point out that the collision took place on the opposite side of the road from the Rowe-Dawes vehicle, with a cement curb separating the eastbound and westbound lanes. The vehicles that collided did not come into contact with the Rowe-Dawes vehicle.

I am satisfied that the criteria to be considered in determining whether an automobile is "involved in the incident" is as set out in the Dominion of Canada General Insurance Company v. Kingsway

Insurance Company (unreported decision of Arbitrator Lee Samis, released August 23, 1999, affirmed in an unreported decision of H. Sachs, J. of the Ontario Superior Court of Justice, released January 11, 2000), 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.

In the Dominion of Canada General Insurance Company v. Kingsway Insurance Company, the court properly took into consideration the actions of another vehicle "involved" in the collision, rather than simply applying the fault chart depiction with respect to only the two vehicles actually in collision with one another. The facts of that case disclosed that the operator of the heavy commercial vehicle, insured by Kingsway, exited from a truck stop on the east side of Highway 11 and was moving through the northbound lane of Highway 11 while making a left turn. Rock Russeau was driving a vehicle insured by Dominion. He was driving north on Highway 11 when he saw the heavy commercial vehicle making its turn. Believing the northbound lane was obstructed by the heavy commercial vehicle, Mr. Russeau applied his brakes, lost control of his vehicle and skidded into collision with a parked pickup truck. Mr. Russeau sustained injuries that entitled him to statutory accident benefits from the insurer of his vehicle, Dominion. Dominion sought reimbursement from the insurer of the heavy commercial vehicle, Kingsway. Kingsway denied liability for any loss transfer payment and the two insurers proceeded with an Arbitration. Arbitrator Samis found that although the heavy commercial vehicle exiting from the truck stop was not involved in any collision, it was still a vehicle "involved" in the incident, using the criteria aforesaid. He found that the incident at hand could not be characterized by simply taking into account the actions of only the two vehicles actually involved in the collision. As a result, it was found that the Fault Determination Rules called for the determination of fault in accordance with the ordinary rules of law. The decision of Arbitrator Samis was appealed to the Superior Court of Justice wherein Justice Sachs accepted the analysis of Arbitrator Samis.

In applying the criteria aforesaid, I am of the view that the Rowe-Dawes vehicle was not an "involved vehicle" within the meaning of Section 275 of the Insurance Act. There was no contact between the Rowe-Dawes vehicle and any of the other vehicles. The vehicles were physically separated by a cement median. The actions of the Rowe-Dawes vehicle had no impact on the actions of the other vehicles. It was not foreseeable that the actions of the Rowe-Dawes vehicle might directly cause harm or injury to the other vehicles or their occupants.

Further support for my finding is found in the decision of Janousek v. Halifax Insurance Company, et al., Arbitrator Shemin Manji, January 19, 1998. In that case, a pedestrian was struck by an uninsured vehicle that carried her onto the roadway where she fell off the vehicle. The vehicle then continued to cross a street, where it struck a concrete and metal fence. Three insured vehicles were parked behind the fence that was struck by the uninsured vehicle. The only damage to the parked vehicles occurred as a result of debris from the fence falling on them. Arbitrator Manji concluded that the three parked insured vehicles were not "involved".

In Janousek v. Halifax Insurance Company, et al., Arbitrator Manji noted that the insured vehicles played no role in the incident in which the use or operation of an automobile caused injury to the claimant. She went on to say:

> *"I am unable to accept that the insured automobiles were drawn into the "accident" as associates or participants or shared the experience or effect of the "accident", or became embroiled in the "accident" or became implicated or wrapped or enveloped in the "accident"…merely because some debris from the fence which was subsequently struck by the uninsured vehicle, fell on them. In my view, the nexus or link between the insured automobiles and the accident is remote in this case."*

I have also considered the decision of Seetal v. Quiroz (2009) O.J. No.2394. In that case, an uninsured vehicle struck a pedestrian, carrying her on its hood when then struck by a nearby taxicab. In the Seetal decision, it was determined that there was sufficient proximity in time and place and there were sufficient "spatial and participatory factors to conclude that there was involvement in the accident" by the taxicab. There was no evidence in the Seetal decision that the taxicab was in any way a cause of the pedestrian being struck, or that the conduct of the taxicab driver contributed to the damages. Justice Perell made it clear in his decision that the determination of whether a vehicle was "involved" was fact-based. His comments at paragraphs 42, 55, 56 and 57 of his decision are helpful. They read as follows:

> *42. Being fact-based, involvement or non-involvement will be easy to determine in some cases but not in others. For example, one would not hesitate in concluding that Mr. Quiroz, Jr. was involved in Ms. Seetal's accident because he caused it. One would also not hesitate to conclude that if Mr. Bali's vehicle had been struck several blocks distant from Jane St. and Driftwood Ave. during Mr. Quiroz's flight from the scene, that this would not be involvement in Ms. Seetal's accident but a separate accident involving Mr. Bali's vehicle. However, the case at bar is more difficult because although Mr. Bali's vehicle was not the cause of the accident, nevertheless, it was at least in very close proximity in time and place to Ms. Seetal's accident.*
>
> *55. I agree with Arbitrator Manji's reasoning and decision but it is not dispositive of the case at bar. As I indicated earlier in these Reasons for Decision, determining whether there is involvement in an accident will be more or less difficult depending on the facts of the particular case. Janousek strikes me as an easy case to find no involvement given that there was some significant separation in time, place and participation of the parked and unoccupied vehicles and the accident that occurred on the other side of the street and that was completed before the uninsured vehicle struck the fence.*
>
> *56. I also agree with the fact-based approach of the Hannam line of authorities, where courts without providing a comprehensive definition, simply recognize involvement when they see it. The common law sometimes develops that way before a clear rule emerges and in my opinion, the circumstances of the case at bar bring Mr. Bali and his vehicle within the temporal, spatial and participatory factors sufficient to conclude that there was involvement in Ms. Seetal's accident, notwithstanding that Mr. Bali was not a cause or a contributing cause to the accident. [emphasis added]*
>
> *57. However, I think I can go further. Without providing a comprehensive definition, I think that "a person who is involved in an accident involving the insured vehicle" includes: (a) a person who caused or contributed to the accident, and (b) a person who – to borrow from S.7 (3) of the Motor Vehicle Accident Claims Act – is a person against whom the injured person might reasonably be considered as having a cause of action.*

In applying the criteria set out by Arbitrator Samis in Dominion of Canada General Insurance Company v. Kingsway Insurance Company and the analysis of Arbitrator Manji in Janousek v. Halifax Insurance Company and the analysis of Justice Perell in Seetal v. Quiroz (supra), I am satisfied that the Rowe-Dawes vehicle was not an "automobile involved in the incident" so as to make Certas priority insurer by application of Section 268(2)(1)(iii) of the Insurance Act. There was no contact between the Rowe-Dawes vehicle and the other two vehicles involved in the collision. Although there was some physical proximity, the debris from the initial collision struck the Rowe-Dawes vehicle which was on the other side of the road, separated by a concrete curb. Even Justice Perell in Seetal v. Quiroz adapted the reasoning of Arbitrator Manji in Janousek v. Halifax Insurance Company quoting the fact that there was significant separation in time, place and participation of the parked and occupied vehicles and the accident that occurred on the other side of the street. In the present case, the debris struck the Rowe-Dawes vehicle on the other side of the street. Furthermore, there was no causal relationship between the actions of the Rowe-Dawes vehicle and the collision which occurred on the other side of the street between the Somasundaram vehicle and the Shaloum vehicle. Finally, it was not foreseeable that the actions of Rowe-Dawes might directly cause harm or injury to another vehicle or its occupants. As indicated by Justice Perell in Seetal v. Quiroz, this is simply a case where the facts are more in support of non-involvement than involvement. In my view, the Rowe-Dawes vehicle was not involved in the incident in any meaningful way.

E. Is the Fund responsible to pay statutory accident benefits to Jacqueline Stapleton, Vigneswaramoorthy Somasundaram, Yogeswary Vigneswaramoorthy or Poleet Shaloum?

On the basis of my findings that the Economical and Wawanesa policies were properly cancelled prior to the subject accident, no claimant has access to those policies for payment.

In light of my finding that the Unifund policy was not properly cancelled, the claimant Shaloum has access to the Unifund policy. She qualifies pursuant to Section 268(2)(1)(i) below.

268(2)(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 subparagraphs (i) or (ii), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no fault benefits arose;*
> *(iv) if recovery is unavailable under subparagraphs (i), (ii) or (iii), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

The issue which must next be dealt with is whether Unifund's "driver's policy" extends accident benefit coverage to passengers in the vehicle being operated by their insured Shaloum, or occupants of other vehicles involved in a collision with a vehicle to which Unifund's "driver's policy" extends coverage.

The Ontario Court of Appeal has dealt with the issue of whether a passenger in an uninsured motor vehicle has accident benefits through coverage from the policy of insurance available to the driver of that vehicle. The Court of Appeal has held that a "driver's policy" does extend coverage to the occupants of the vehicle being operated by its insured, provided no other insurance is available to such occupant. The Co-operators General Insurance Co. v. Pilot Insurance Co.

(1998) (O.J.) No.5551 decision involved an occupant of a vehicle, Ms. Capelazo, who was injured whether the vehicle in which she was an occupant collided with another vehicle. Ms. Capelazo was not a named insured on any policy, nor a spouse or dependant of a named insured. The vehicle in which she was an occupant, owned by a Mr. Sobka but being driven with his consent by a Mr. Huard, was uninsured. Mr. Huard, the driver, had a policy insuring his own vehicle with Co-operators Insurance. The second vehicle involved in the accident was insured by Pilot Insurance. The question of which insurer was in higher priority under Section 268 of the Insurance Act arose and Co-operators brought an application seeking a determination of whether it was not the "insurer of the automobile" in which Ms. Capelazo was an occupant. The Court of Appeal concluded that it was the insurer of the automobile in which Ms. Capelazo was an occupant. The Court indicated that the wording of the policy from Section 2.2.2 (now 2.2.3) extended accident benefit coverage to Mr. Huard (driver) for automobiles driven by him. By extension, it was concluded that Co-operators was the "insurer of the automobile" in which Ms. Capelazo (the passenger) was an occupant.

Two recent Arbitration decisions of Arbitrator Shari Novick also dealt with extended accident benefit coverage to individuals being struck by an uninsured vehicle driven by an individual who was a named insured on another policy insuring a vehicle that he owned. The two decisions of Arbitrator Novick are as follows:

> *The Economical Insurance Group* v. *Her Majesty the Queen in Right of Ontario, represented by the Minister of Finance*, *Security National Insurance Company* and *Kingsway General Insurance Company*, decision of Arbitrator Shari Novick, dated January 2009.
>
> *Perth Insurance Company* v. State *Farm Automobile Insurance Company* and *Her Majesty the Queen in Right of Ontario, as represented by The Minister of Finance*, decision of Arbitrator Shari Novick, dated May 2009.

In Economical Insurance Group v. HMQ, et al., Arbitrator Novick was presented with a situation where a claimant was a pedestrian struck by an automobile which was uninsured. She concluded that the provisions of Section 2.2.3 of the standard owner's policy extended accident benefits coverage to the claimant through the driver's spouse's policy with Security National. The Fund, who was seeking to avoid priority, took the position that Section 4.1 of the standard owner's policy (OAP 1) specified that accident benefits coverage was available to insured persons under the Statutory Accident Benefits Schedule and "any person who is injured…in an automobile accident involving the automobile" who was not otherwise covered by a policy. Arbitrator Novick held that insurance available to the driver of the uninsured vehicle was available to extend accident benefits coverage to the pedestrian struck by the uninsured vehicle. Arbitrator Novick reached a similar conclusion in Perth Insurance Company v. State Farm Automobile Insurance Company and HMQ (supra).

The rationale of Arbitrator Novick's decisions aforesaid were premised on her findings that Section 2.2.3 of the standard auto policy (OAP 1 – Ontario Automobile Policy) extended coverage to other automobiles operated by the insured, including liability and accident benefit coverage.

Section 2.2.3 of OAP 1 – Ontario Automobile Policy states as follows:

> *2.2.3 Other Automobiles – Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.*
>
> *The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:*
>
> - *Liability*
> - *Accident Benefits*

- Uninsured Automobile
- Direct Compensation – Property Damage

Special Conditions: For other automobiles to be covered, the following conditions apply:

1. Both the other automobile and a described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

2. The named insured is an individual, or if the described automobile is owned by two people, the named insureds are spouses of each other.

3. Neither you nor your spouse is driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.

4. The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.

5. For all coverages, except Accident Benefits, the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses. (For the purposes of this paragraph, we don't consider use of an automobile rented for 30 or few days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile, this policy will provide Liability and Uninsured Automobile Coverages while you drive that automobile.

6. If you are a corporation, unincorporated association, partnership, sole proprietorship, business or other entity, the employee or partner for whose regular use a described automobile is supplied, and their spouse who lives with that person, will be covered when they drive the other automobile, under the following conditions:

- Both the other automobile and the described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

- Neither the employee nor partner who is provided with a described automobile, nor their spouses if they live with the employee or partner, are driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.

- The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.

- The other automobile must not be owned, hired, leased, or regularly or frequently used by you or by your employee or any partner, or by anyone living in the same dwelling as these persons.

- Except as provided under subsection 2.2.4, this policy doesn't cover the employee or partner or their spouse if they own, lease or rent any automobile and it is insured as the law requires and does not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

7. For Direct Compensation – Property Damage Coverage the other automobile cannot be a described automobile in a motor vehicle liability policy.

It should be kept in mind that the Statutory Accident Benefits Schedule defines "insured automobile" as follows:

> *"insured automobile" means, in respect of a particular motor vehicle liability policy, an automobile covered by the policy."*

The accident benefits coverage flowing from the driver's policy is set out at Section 4.1 of OAP 1 – Ontario Automobile Policy:

> *Section 4 – Accident Benefits Coverage:*
>
> > *4.1 – Who is covered – For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy and is not covered under the policy of an automobile in which they were an occupant, or which struck them.*

The policy would then extend coverage to all "insured persons" as defined in the Statutory Accident Benefits Schedule. A Statutory Accident Benefits Schedule – Ontario Regulation 403/96 provides a definition for "insured person" defined as follows:

> *"Insured person" in respect of a particular motor vehicle liability policy, means,*
>
> > *(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,*
> >
> > > *(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or*
> > >
> > > *(ii) 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) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, and***
> >
> > *(c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident."*

I have dealt with the issue as to the extent to which a "driver's policy" extends accident benefit coverage to others involved in an accident with the vehicle being driven by the insured. In the decision of Royal & Sun Alliance Insurance Company v. Zurich Insurance Company (Arbitrator Bialkowski, February 7, 2011), I followed the Ontario Court of Appeal decision in Co-operators General Insurance Co. v. Pilot Insurance Co. (1998) O.J. No.5551 and the two Arbitration decisions of Arbitrator Novick referred to at page 12 of this decision. I am of the view that the "driver's policy" provides accident benefit coverage to other persons involved in an

accident involving the vehicle driven by the insured, provided no other priority insurance is available.

In the case at hand, Jacqueline Stapleton, Vigneswaramoorthy Somasundaram and Yogeswary Vigneswaramoorthy qualify for benefits, either as a "person who was involved in an accident involving the insured automobile" or as one of the additional insureds set out in the second sentence of Section 4.1 of OAP 1 – Ontario Automobile Policy set out above.

I find that Unifund is priority insurer with respect to the claim of all four claimants.

ORDER

I order that Unifund is obligated as the priority insurer, to adjust and fund the accident benefits claims of Poleet Shaloum, Jacqueline Stapleton, Vigneswaramoorthy Somasundaram and Yogeswary Vigneswaramoorthy.

I order that Unifund reimburse Economical for all payments made to Vigneswaramoorthy Somasundaram and Yogeswary Vigneswaramoorthy, which are subject to indemnity, together with interest calculated pursuant to the Rules of Civil Procedure and its costs of this Arbitration on a partial indemnity basis.

I order that Unifund reimburse Wawanesa for the payments made to Jacqueline Stapleton and Poleet Shaloum, which are subject to indemnity, together with interest calculated pursuant to the Rules of Civil Procedure and its costs of this Arbitration on a partial indemnity basis.

I order that Unifund pay the costs of Certas and the Fund on a partial indemnity basis.

I order that Unifund pay the costs of the Arbitrator.

I am pleased to remain involved should the parties not be able to resolve the issues of indemnity, interest or costs.

DATED at TORONTO this 8th)

day of February, 2011.)

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KENNETH J. BIALKOWSKI
Arbitrator