IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by

THE MINISTER OF FINANCE ("THE MOTOR VEHICLE ACCIDENT CLAIMS FUND")

Applicant

and

AXA INSURANCE (CANADA) and ELITE INSURANCE COMPANY

Respondents

AWARD

Heard: August 5, 2019

Counsel:

Marie Sydney for the Applicant

Mark S. Wilson for the respondent AXA INSURANCE (CANADA)

SCOTT W. DENSEM: ARBITRATOR

**Overview and Issue:**

This is the second arbitration Award to be issued as a result of arbitration involving the parties to this matter. This SABS priority dispute arbitration between the parties arises as a result of an accident occurring December 29, 2011.

My initial Award (issued May 12, 2016) dealt with a SABS priority issue between the applicant ("HMQ"), and the respondents, ("AXA"), and ("Elite"). The issue in the first arbitration hearing involved a determination of whether Elite had a valid policy of motor vehicle insurance in force at the time of the accident. I determined that Elite did not have a valid policy of motor vehicle insurance in force at the time of the accident, and therefore Elite was not the priority insurer for the payment of SABS to Arpad Vadasz ("the claimant"). My Award was ultimately upheld by the Court Of Appeal (2018, ONCA 809, October 9, 2019).

The issue for determination in this second arbitration Award is whether AXA is the priority insurer for the payment of SABS, or whether HMQ, which has been dealing with the claimant's SABS claim, retains responsibility for the claim.

My findings of fact will be crucial to the determination of the issue, so I will deal with the facts in more detail later in this Award. For the purposes of framing the issue however, it is sufficient to summarize the facts as follows:

The claimant was standing on the surface of a private parking lot when he was struck by a vehicle which, it is agreed for the purposes of arbitration, was uninsured.

The claimant had been transported to the parking lot as a passenger in a vehicle owned and operated by his friend, Lucia Martins ("the Martins vehicle"). The Martins vehicle was insured by AXA. The claimant had exited the Martins vehicle a short period of time before being struck by the uninsured vehicle.

There are two subsections of section 268 of the *Insurance Act* (R.S.O. 1990, c. I.8, as amended) which require examination to determine this priority issue.

The first subsection which must be considered is subsection 268 (2) 1. ii. It reads as follows:

> 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,…
>
> 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,…

The second Insurance Act section to consider is 268 (2) 2. iii. It reads as follows:

> 268 (2) Liability to pay – the following rules apply for determining who is liable to pay statutory accident benefits:
>
> 2. In respect of non-occupants,…
>
> 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,…

The first question for determination is whether the claimant was an "occupant" of the Martins vehicle when he was struck by the uninsured vehicle. If the claimant was an

occupant of the Martins vehicle when he was struck by the uninsured vehicle, then AXA is the priority insurer. If the claimant was not an occupant of the Martins vehicle when he was struck by the uninsured vehicle, then it must be determined whether the Martins vehicle was “involved in the incident”. If it was involved in the incident, then AXA is the priority insurer.

It will be seen from this analysis then that if the claimant was either an occupant of the Martins vehicle, or the Martins vehicle was involved in the incident, or both, AXA is the priority insurer. If the claimant was not an occupant of the Martins vehicle, and the Martins vehicle was not involved in the incident, then AXA is not the priority insurer and HMQ must retain responsibility for the claimant’s SABS claim.

**The Evidence**

The evidence in this case was submitted by way of an Agreed Facts and Documents Brief (“AFDB”). This document contained a seven paragraph summary of agreed facts (Tab 1), followed by 11 more tabs (Tabs 2 – 12) of documents which I will refer to, as necessary in the analysis portion of my Award.

In addition, the parties filed written submissions and briefs of authorities which will be referenced, as necessary in my Award.

**Analysis**

**The Facts**

As I have indicated, the facts are crucial to the determination of the issues in this arbitration. In my opinion, the most important evidence relevant to the determination

of the issues before me are the police statements, and the examination under oath evidence given by the claimant, and his friend, Lucia Martins, as well as the Statutory Declaration made by the claimant.

I propose to review the evidence of the claimant and Lucia Martins in detail and to make findings with respect to the credibility, and reliability of their evidence. Although I did not have the benefit of seeing and hearing the witnesses testify in person, I am satisfied that for the purposes of the issues I must decide, their evidence can be adequately evaluated from the documents which have been provided to me.

I will begin with the evidence of the claimant. The claimant's first recorded account of the incident is a statement he gave to one of the investigating police officers, Constable Jokakelian (AFDB, Tab 4). I could not find a specific time that the statement was taken, but it is noted that was taken at the Humber Finch Hospital the same day as the accident.

According to the police officer's summary, the claimant stated that he and Ms. Martins arrived at the Lawrence Mall at approximately 3 PM. He described Ms. Martins as his girlfriend. She was driving her car, and the claimant was a passenger. Also in the car was Ms. Martin's seven-year-old nephew.

The claimant described two empty parking spots at the edge of the parking lot by the Canadian Tire store. According to the diagram in the police Collision Field Notes (AFDB, Tab 4), as confirmed by a Google Satellite and Street View image of Lawrence Plaza (AFDB, Tab 11), these parking spaces and the Canadian Tire store are located on the north side of the Lawrence Plaza.

After referencing the two empty parking spaces the claimant is reported to have said, "*There was a car and Lucia tried to drive around, and the gentleman was on the phone he was in a white car*". It is common ground that the white car the claimant described is the uninsured vehicle which subsequently struck him after he exited the Martins vehicle.

The claimant is reported to have said:

> …when she tried to park he just drove right at her and almost broadsided us at the passenger side door and he prevented her from parking in that spot, and he was blocking a spot and half. I waited for a couple of seconds and he was still on the phone, so I got out of the car to guide her in and I went to the passenger side of his car he rolled his passenger side window down, and at that time even (sic) he was on the phone, and I ask him to back up his car so Lucia can park and he can park right beside her.

According to the claimant's statement, the driver of the uninsured vehicle remained on the phone which reportedly caused the claimant to yell at the uninsured driver, *'get off the phone you idiot.' "I yelled at him like three times and he did not care"*.

The statement continues:

> So at that time Lucia backed out so we can leave. I was walking away from the gentleman towards our car and his car was behind me, and what I saw he just sped up…hit me with the passenger side door...As soon as I hit the floor he backed out. When Lucia saw that she got out of the car and I told her to write his license plate (sic). Then he just took off.

Chronologically, the next statement given by the claimant about the accident is his Statutory Declaration (AFDB, Tab 11). This appears to have been provided in the presence of his counsel who actually commissioned the Declaration, and a

representative of SCM Adjusters Canada who were retained by HMQ to deal with the claimant's SABS claim. The Statutory Declaration was sworn March 1, 2012. This was approximately two months after the accident.

The relevant part of the Statutory Declaration is quite brief and reads, "*I was walking in the Plaza parking lot and a car hit me in the parking lot. The driver backed up and drove away.*"

The claimant was examined under oath on February 5, 2014 and a transcript of the examination produced (AFDB, Tab 10). This was just over two years after the accident. As might be expected, the examination under oath was far more comprehensive in scope than the previous accounts of the incident provided by the claimant. It also was a source of other evidence, some of which is relevant to the issue of whether the claimant was an occupant of the Martins vehicle when the accident happened.

On examination, when first asked what he was doing at the Plaza, the claimant replied that his "ex-girlfriend" had called him and asked him if he wanted to go to the mall. He stated that he had intended to go to the mall in any event, because there was an unemployment centre in the mall. The claimant testified that Ms. Martins suggested they do some shopping and that her sister's son was with her and would want to go with them to the mall. He agreed, and stated that she attended at his home to pick him up in her car (Tab 11, p. 15).

Following this evidence he was asked, "*Were you planning on leaving the mall with her?*" He replied, "*I was not sure. I do not think so… I would take a bus…so I would*

*not rely on her…I figured that she would go home, and I would take the bus home… Probably she would not want to sit in the unemployment office with me."* (Tab 11, p. 16).

In terms of the claimant's description of the events up to the point at which he exited the Martins vehicle, I found it to be fairly consistent with his statement to the police on the day of the accident.

The claimant described Ms. Martins driving west on the north side of the mall near the Canadian Tire, and then described what occurred as follows:

> There was (sic) two empty parking spots…As she was going to drive into the parking spot, a white car came in, and as she was going to pull in, this gentleman just came up and just blocked her. And it happened so quickly; she had to do an emergency braking…The car refused to move – to let her park. I noticed the gentleman was on the phone.

It is at this point in the claimant's evidence that I notice a difference between his police statement and his examination under oath testimony. The claimant's examination under oath testimony leaves a different impression about the claimant's thinking and intentions when he exited the Martins vehicle when compared to his police statement.

In my view however, this is not because the claimant's evidence lacks credibility or reliability. My impression from reading the totality of the claimant's accounts of this matter is that he was attempting to give a truthful description of what occurred. His evidence was also internally consistent in its basic details, so I found it to be generally reliable. In my view the reason for the different impression created by the claimant's examination under oath evidence is that it was generated by more thorough questioning of the claimant on issues relevant to this arbitration than would have been conducted by

the police officer who was understandably interested in getting a more “bare-bones” description of the events. The police officer was also more concerned about trying to identify the driver of the white car which struck the claimant, and certainly not with trying to answer questions such as whether the claimant was an “occupant” of the Martins vehicle at the time of the accident or whether the Martins vehicle was “involved in the incident”.

The difference in the evidence which I am referring to relates to the claimant’s thinking and intention when he exited the Martins vehicle. The claimant’s police statement suggests that the reason he exited the Martins vehicle when he did was that he intended to assist Ms. Martins to park her vehicle. The statement attributed to him by the police officer says, “*I got out of the car to guide her in and I went to the passenger side of his car…and I ask him to back up his car so Lucia can park*.”

The claimant’s examination under oath evidence suggests that the claimant’s initial intention when he exited the Martins vehicle was to remove himself from a situation of potential conflict. He indicates in his evidence that he does not like interpersonal conflict or arguments and prefers instead to avoid them. The claimant also indicates that Ms. Martins was aware of this personality trait of the claimant. Ms. Martins confirms this in her own examination under oath evidence.

According to the claimant’s examination under oath evidence, when he exited the Martins vehicle after its near collision with the uninsured vehicle he intended to leave the parking lot area and enter the Lawrence Mall at the Canadian Tire entry doors.

His first evidence on examination on this point is as follows:

*"I noticed the gentleman was on the phone, and I said to her, 'That's fine. You guys take care of this and meet inside the mall.'"*

Later in his evidence the claimant again confirms that when he exited the Martins vehicle it was his intention to leave the area and enter the mall through the Canadian Tire doors. He elaborates on this and indicates that although this was his initial intention upon exiting the Martins vehicle, he changed his mind a few seconds after getting out of the car and decided to go over and speak to the driver of the uninsured vehicle.

The claimant's evidence on his examination under oath is as follows:

*What happened was, he came – he almost caused this accident, I would say… She* (Lucia) *yelled at him, or whatever, to move. I think she said, 'Move'. The guy just did not pay attention."* The claimant confirms that this occurred when he was still in the car and after about five seconds he exited the car and told Lucia, "*I will see you inside*".

It was suggested to the claimant that he got out of the car partly with the intention of trying to get the uninsured driver to move his vehicle. He responded, *"…I figured I am going to walk by him anyways so I might as well…First, I was going to ask him nicely to move his car, so she can park. And that is what I told him."*

In response to further, persistent questioning on the point the claimant testified as follows:

> …I got out from the car, I was going to walk into the mall, and let them decided (sic) whatever they do, and what they have to do, and then when I got out of the car and I close the door. It took like five, seven seconds or so, and I seen (sic) he still refused to move, so then I figured I am going to go talk to him, and ask him to move his car…I was going to go in…and he still not moving…

> And then I changed my mind and I told him – I figured I am going to go tell him to move his car.

It was suggested to the claimant that he decided to talk to the uninsured driver because he thought that what the uninsured driver was doing was wrong, to which the claimant responded: "*Yeah. Basically, he is blocking her way to park the car, and the other part was he endangered us, and we had a child in the car…you could see he did this intentionally."*

The claimant later repeats essentially the same evidence upon further questioning:

> I was going to go – I exited the car, and I was going to go into the Canadian Tire, and at that time I still saw him. He refused to move, then I took like two steps towards the door, then I saw he refused to move, so I said, 'I will go talk to him." It was not my intention when I was getting out of the vehicle…I close the car door. I was going…Then I made a decision; I am going to go talk to him.

The claimant's evidence on his interaction with the uninsured driver is that he decided to approach the uninsured driver's vehicle on the passenger side to be safe. He knew that he was going to talk to the uninsured driver and did not want to do it in close proximity such as at the driver side window so that the uninsured driver could possibly strike him. The claimant's evidence is that the uninsured driver rolled down the passenger side window after the claimant arrived at the vehicle. The claimant started the interaction by saying *"What are you doing? Are you crazy? You almost hit us."* The claimant's evidence is that the uninsured driver did not respond to this, or to anything that the claimant said to him. He appeared to ignore the claimant and remained in conversation on his cell phone.

Later in his evidence and again after persistent questioning the claimant conceded that he could not remember exactly what he said to the uninsured driver. When prompted, he did say that he said to the uninsured driver something to the effect of, "*can you move your car, so she* (Lucia) *can park*?

One clearly consistent feature of the claimant's statement to the police officer on the day of the accident and his examination under oath, is that his interaction with the uninsured driver appears to have ended with the claimant's remark to the uninsured driver to the effect of the claimant referring to the uninsured driver as an "idiot".

This appears to have been the claimant's "parting shot" so to speak to the uninsured driver. The claimant's police statement and his examination under oath evidence might possibly be seen as conflicting on what his intentions were after finishing his one-sided conversation with the uninsured driver. His police statement might be interpreted as suggesting that he was headed back towards the Martins vehicle after the interaction because he says, *"I was walking away from the gentleman towards our car."*

I am of the view that the claimant's examination under oath explains this and confirms that the claimant was not intending to return to the Martins vehicle when he finished his interaction with the uninsured driver. As his examination under oath evidence indicates, he decided to walk around the front of the uninsured driver's vehicle and then walk directly into the mall via the Canadian Tire doors. To reach the front of the uninsured driver's vehicle which was facing in a south easterly direction the claimant would have had to walk east in the general direction of the Martins vehicle. Once he

reached the front of the uninsured driver's vehicle he could then turn north and head towards the Canadian Tire entrance.

It should also be noted that the claimant testified on his examination under oath that at some point after he exited the Martins vehicle and before the uninsured vehicle struck him, Ms. Martin's had reversed her vehicle some distance away from the uninsured vehicle and the claimant's position. It was the claimant's surmise that Ms. Martin's had done this so that the uninsured driver had a clear path to move his vehicle out of the way of the parking spaces which she was trying to enter had he been willing to do so. Ms. Martins confirms this in her evidence on examination under oath.

The claimant's evidence following his "idiot" remark to the uninsured driver is as follows:

> When I turned around, I figured he is not moving, so I am going to go into the mall, and I am finished with him…I turned around. I was walking away from him, and I was going to go. By that time Lucia moved her car, and I was going to go around him and go into the mall.

I will now review the evidence of Lucia Martins. Contrary to the evidence of the claimant, I found the evidence of Ms. Martins to be inconsistent, and at times exaggerated or misleading – but not necessarily intentionally so. I would not say that her evidence lacked credibility mainly because there does not appear to be to be any clear reason for her to want to deliberately misrepresent what occurred. She has nothing to gain or to lose from what I can see in connection with the claimant's SABS claim. Although her relationship with the claimant appears to have ended, there is no evidence before me to suggest that the termination of the relationship created ill will

between the claimant and Ms. Martins' to the point that it would influence her evidence on the matter of the claimant's SABS claim.

Nevertheless, I find Ms. Martins' evidence to be less reliable than the claimant's evidence, and where there is disagreement on any important points in their evidence, I prefer the evidence of the claimant.

Ms. Martins gave a statement to an investigating police officer at the scene of the accident while waiting for an ambulance to arrive for the claimant. It does not appear that the same officer who took the claimant's statement, obtained a statement from Ms. Martins. The officer who took Ms. Martins' statement neglected to put their name and badge number on the statement. I conclude it was a different officer than the officer who took the statement from the claimant because the handwriting is quite different. This point is made more by way of observation than anything else. I do not think anything of importance turns on the fact that the statements were taken by different officers.

In her police statement Ms. Martins describes her approach to the two parking spots where this incident occurred. She states that they entered the Plaza from the south entrance, turned left at the end of the road to travel to the parking area in front of Canadian Tire. This would have had her travelling in a westerly direction at the north side of the Plaza as the claimant described in both his police statement and his examination under oath.

Ms. Martins describes one of the two parking spots available being blocked by the white, uninsured vehicle. She describes the second parking spot as having just become available because a black SUV was exiting from it. Ms. Martins says that she

was about 25 feet from this parking space on the main road facing westbound waiting with her signal on while the SUV departed the in a southbound direction.

The police officer records Ms. Martins as saying,

> …I slowly pull into the spot turning in to my right. This white Mercedes…was on a slant across the parking spot. (The driver was) talking on the phone. I noticed he began moving towards me still driving across the parking spot – still on the phone, not knowing if he was going to hit me I stopped my truck…

There is some inconsistency in the statement as to exactly when the claimant exited the Martins vehicle (due to the way it was taken or the way it was given) because it suggests that Ms. Martins said that at this point the claimant "*proceeded to get out of my truck to see what the problem was…*" with the driver of the uninsured vehicle.

Ms. Martins then goes on to say in her statement:

> He (the uninsured driver) kept inching closer to my truck – still on the phone talking and ignoring my gesture to stop …the sole occupant of (the uninsured vehicle) – he began swearing at me – his window on the passenger side was open – he said 'what the fuck are you doing'?"

Then the police statement records Ms. Martins as saying that the claimant, *"…now gets out of my car to see what the problem was…"*

According to the officer, Ms. Martins stated:

> As (the claimant) stepped outside I proceeded to back up and try to pull in more to my left because this driver was now blocking my space to prevent me from completing my parking…While attempting to back out (the claimant) is exchanging words with this man in the white Mercedes at which point he swears once again at (the claimant), pulls close to him – about 1 foot – still on a slight

> angle – stops right beside him… (The claimant) kept telling him to get off his cell phone – but he ignored (the claimant)… Driver of white Mercedes kept swearing at him… (The claimant) swears back at (the uninsured driver) advising him he is much too close and to back off. Driver of white Mercedes now accelerates and hits (the claimant).

Ms. Martins was examined under oath on February 5, 2014, the same day as the claimant. Unfortunately I do not think her memory for the events remained as sound as the claimant's. I had the impression from reading her transcript that she really did not have a clear recollection of the incident by that time. It seemed to me that some of the details she was inserting into her narrative were embellishments which were more literary license designed to make the tale sound more interesting, as opposed to an accurate recollection of what actually occurred.

Her recollection of the reason why she and the claimant were at the Lawrence Plaza on the day of the accident is initially entirely different than the claimant's. She suggests that she was driving the claimant to the subway as part of a journey to take her nephew home. The claimant suggested they go to the Lawrence Plaza because he wanted to look at a new phone at Public Mobile and she decided to go to the Plaza as well because she wanted to get her mother a phone.

Then at the end of her examination under oath evidence she is asked if the claimant mentioned the unemployment office and she confirms that he did say he thought that he would go there. It is not clear whether this was going to be before or after going to Public Mobile, but what is clear is that Ms. Martins told the claimant that she was not going to stay while the claimant went to the unemployment office. She would have left with her nephew, and the claimant could make his own way home.

Ms. Martins' examination under oath evidence concerning the events immediately preceding the incident involving the uninsured driver contradicts her police statement, and the claimant's version of events both in his police statement and in his examination under oath.

Ms. Martins' examination under oath version makes it sound as if the claimant was almost obsessive about directing her to park in a particular place, and then exiting her vehicle with the intention of literally searching out and directing her into a parking space. She has the claimant getting out of her car and walking towards Canadian Tire, pointing out parking spaces to her where she should park, and then standing in or near those spaces signalling her into them.

Contrary to her own police statement, let alone the claimant's version of events, she has the claimant undertaking this parking direction operation before they encountered the uninsured vehicle, and before any of the events she describes in her police statement occurred which she claims prompted the claimant to get out of her vehicle – not to assist her with parking, but to "see what the problem was" with the uninsured driver.

In addition, she claims that there were up to five empty parking spaces in the vicinity of where the claimant was conducting his parking direction operation. This availability of parking spaces close to the mall entrance contradicts the claimant's evidence – he said that the mall was quite busy that day with what I will describe as "boxing week" type shopping.

It seems unlikely to me that the claimant would have to undertake such an involved exercise in assisting Ms. Martins to park if there were as many as five open spaces in the vicinity of where the incident occurred. I would also point out that her evidence on the availability of parking spaces contradicts her own police statement where she described there being two spaces in the area where the incident occurred, one of which was being vacated by an SUV moments before she arrived, and the other being occupied by the uninsured vehicle also moments before her arrival.

Ms. Martins goes on to testify on her examination under oath that the claimant was standing either in or very close to the parking spaces into which Ms. Martins was intending to park her car, pointing to her and signalling, when the uninsured vehicle entered the mall and pulled up into the spaces honking its horn. Again, this contradicts Ms. Martin's police statement and adds details not previously mentioned.

What follows in Ms. Martin's evidence on examination under oath is a play-by-play with specific dialogue of an argument she claims to have overheard between the claimant and the uninsured driver. She attributes several statements to the claimant, and responses by the uninsured driver – mostly profane, directed at the claimant, and which she claims to have heard because the passenger side window of the uninsured driver's vehicle was open.

Once again I have difficulty accepting that Ms. Martins could obtain as clear an account as she gave of the interaction between the claimant and the uninsured driver. It was wintertime. She was as much as 20 feet away and perhaps more from the uninsured vehicle, inside her own vehicle. There is no evidence one way or the other as

to whether Ms. Martins had her window open, but one would think that was unlikely since it was December 29. In any event, the uninsured driver was also conversing on his cell phone. In my view it would be very difficult for her to determine whether the uninsured driver was speaking to the claimant or whether what she witnessed was his cell phone conversation, let alone hear exactly what he said.

The main difficulty I have with this evidence however, is that it is completely contradictory to what the claimant himself says about his interaction with the uninsured driver. The claimant says that the uninsured driver said nothing to him. In fact, the uninsured driver ignored the claimant and continued speaking on his cell phone. This is what prompted the claimant to terminate the engagement by exclaiming “idiot” to the uninsured driver, and then turn to leave to go into the mall.

The main reason for my extensive review of the contradictions in Ms. Martins’ evidence is not to disparage Ms. Martins as a witness. It is to establish the reasons for my conclusion that the claimant’s version of what took place on December 29, 2011 is more reliable and to be preferred over Ms. Martins’ version, especially in the important areas relevant to the issues in this arbitration.

Therefore, based on my review of the evidence, and my findings with respect to which evidence is most reliable, I find that the evidence establishes that the following events occurred on December 29, 2011:

The claimant and his friend, Lucia Martins, attended at the Lawrence Plaza Mall in Ms. Martins vehicle shortly before 3 PM. The claimant was a front seat passenger in the Martins vehicle.

Their journey together was going to end with their attendance at the mall. Before the incident involving the unidentified driver intervened, they intended to shop at one or more of the same stores in the mall, but the claimant also wished to attend at the unemployment office. Ms. Martins, who had her nephew with her, was not going to attend at the unemployment office with the claimant and would have left the mall with her nephew leaving the claimant to attend on his own at the unemployment office. The claimant would have made his own way home, perhaps by subway or otherwise, after finishing his business at the unemployment office.

After entering the Lawrence Plaza parking lot Ms. Martins travelled west along the main lane immediately south of the Plaza entrance located on the north side of the parking lot. When she reached the vicinity of the Canadian Tire store entrance, she intended to park her vehicle in one of two parking spaces located at or near the northern end of the lane of parking spaces approximately in front of the Canadian Tire store entrance.

As she was attempting to enter one of the parking spaces, an uninsured vehicle pulled across one or perhaps part of both parking spaces and stopped, effectively blocking Ms. Martins' path of entry into one of the parking spaces. The driver of the uninsured vehicle was speaking on a cell phone.

I find that the evidence is unclear as to the distance which separated the Martins vehicle and the uninsured vehicle at this point. Based on the claimant's evidence, which I accept, I conclude that the vehicles were very close together because the claimant

said Ms. Martins had to perform “emergency braking”, and that he was angry with the uninsured driver for almost causing a collision.

Several seconds passed. The uninsured driver remained in conversation on his cell phone. He appeared to ignore the presence of the Martins vehicle, and showed no intention of moving from his position across one or both of the parking spaces.

The claimant decided at this point to leave it to Ms. Martins to deal with the situation. He did not like situations of this nature which involved, or could involve unpleasant interpersonal confrontations. He decided to exit the Martins vehicle, and go into the Lawrence Plaza mall by the Canadian Tire entrance doors, and effectively remove himself from a situation of possible conflict. He indicated to Ms. Martins that this was his intention. She understood that this was his nature.

After exiting the Martins vehicle, and starting towards the Canadian Tire entrance, he changed his mind and decided to approach the uninsured driver’s vehicle and to speak to the uninsured driver. Based on the evidence, I conclude that the claimant’s purpose in approaching the uninsured driver was first to determine what the uninsured driver’s intentions were, or to put it another way – to find out why the uninsured driver had positioned his vehicle as he had, and was not moving. Second, he intended to point out the uninsured driver that Ms. Martins was attempting to park in one of the spaces the uninsured driver was blocking, and to try to persuade him to move his vehicle so Ms. Martins could park.

At some point either just before the claimant reached the passenger side of the uninsured vehicle, or during the claimant’s attempts to engage the uninsured driver in

conversation, Ms. Martins moved her vehicle out of the immediate vicinity of the parking spaces and the uninsured vehicle by reversing it so that she was at least 15 to 20 feet away.

The claimant was unsuccessful in accomplishing either of his objectives. He did not receive any response from the uninsured driver after speaking to him through the open passenger door window. The claimant became frustrated, and concluded that the uninsured driver was going to remain where he was. The claimant decided to conclude his interaction with the uninsured driver and to revert to the initial plan he had upon exiting the Martins vehicle – to go into the Lawrence Plaza Mall via the Canadian Tire store entrance.

After making a derogatory remark to conclude his interaction with the uninsured driver, the claimant turned and began walking easterly toward the front of the uninsured vehicle. He intended to turn to his left at the front of the uninsured vehicle, and walk in north or northeast direction across the front of the vehicle into the Canadian Tire store entrance. Almost immediately after he turned away from the uninsured vehicle's passenger door window and began walking, the uninsured driver moved his vehicle forward and collided with the claimant.

There is no evidence in this case to make a determination as to why the uninsured driver moved his vehicle when he did. It would also be inappropriate to speculate as to whether he deliberately targeted the claimant, or whether he unintentionally struck him.

After striking the claimant, the uninsured driver then departed the scene and his identity does not appear to have been resolved with sufficient certainty to take any official steps against him, despite subsequent police inquiries.

I will now deal with the issues of “occupant”, and “involved in the incident”.

**Occupant**

**I**n my view this is the less difficult of the two issues to determine. I think it best to begin my analysis with a statement of the definition of “occupant”, and then to review the most important case law dealing with the definition.

Section 224 (1) of the *Insurance Act* defines occupant as follows:

> 224 (1) “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.

The two decisions which in my opinion are the most relevant to this issue are Ontario Court of Appeal cases. Both were SABS priority dispute cases. Chronologically, the first decision is *AXA v. Markel* (2001 CanLII 24143, ONCA). The second decision is *McIntrye v. Scott* (2003 CanLII 31493, ONCA).

The definitional issue in *AXA v. Markel* was not the same as the one before me. In that case, the court had to determine whether the claimant was “the driver” of a tractor-trailer at the time of the accident.

The reasoning in the decision is important however, because the court applied it in its *McIntyre v. Scott* decision just over two years later.

The facts of *AXA v. Markel* were that the SABS claimant had driven a tractor-trailer to a Stelco Billet Yard to deliver steel. He parked his vehicle outside the loading bay, exited his vehicle and entered the loading bay to wait his turn to unload. He was standing about 30 feet outside his truck waiting in the loading bay when he was struck and killed by a piece of wood propelled from the back of another tractor-trailer exiting the loading bay.

The Court interpreted section 224 (1) (a) as containing no requirement that the person be engaged in the act of driving at the time of the incident. In other words, "driver" is to be interpreted as describing the status of a person at the time of an incident, as opposed to describing an activity engaged in by a person at the time of an incident.

The Court then seems to place some limits on how expansively this definition should be applied.

First, it notes that because the definition of "driver" has been placed in the *Insurance Act* alongside two other subsections which appear to require a physical connection to or proximity with the automobile, the Court concludes, "*it suggests that there must be some degree of physical connection with the vehicle for the person to be the driver*" (*AXA v. Markel*, paragraph 18).

Second, because section 268 (5.2) requires that the person be the driver "at the time of the incident", *"…suggests that this is not a status that attaches permanently to a person but, rather, something that depends on the circumstances at the time*" (*AXA v. Markel* paragraph 19).

The Court then prescribes the proper method for applying the criteria set out above to the circumstances:

> Keeping in mind these considerations, the question is whether in all the circumstances at the time of the incident (the claimant) was the driver of the tractor trailer. Would an objective observer of this incident…who had in mind these considerations answer affirmatively if asked whether (the claimant) was the driver of the tractor trailer? (*AXA v. Markel* paragraph 21).

In *AXA v. Markel* the Court of Appeal found that the claimant was the driver of the tractor trailer, reasoning as follows:

> When he was injured (the claimant) 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. (*AXA v. Markel* paragraph 22).

About two and a half years later in *McIntrye Estate* v. *Scott* ([2003] O.J. No. 3997) the Court of Appeal once again had to consider the section 224 (1) definition of "occupant", this time in relation to the 224 (1) (b) definition of "passenger". This is the same definitional issue before me.

The Court used the "status" reasoning in *AXA v. Markel* to overturn a lower Court ruling finding that the definition of "passenger" was limited to a person actually engaged in the physical activity of being in or on an automobile at the time of an accident. The Court applied its "objective observer" test to find that the claimant in that case was a passenger in respect of a motorcycle at the time of the accident.

The facts in *McIntrye Estate v. Scott* involved a husband and wife travelling on a motorcycle. The husband was operating the motorcycle and the wife was seated behind him. A rainstorm started and they stopped the motorcycle under a highway overpass. Both of them dismounted the motorcycle and waited on an embankment in what was described as “close proximity” to the motorcycle intending to resume their journey as soon as the rain cleared. The wife was returning to the motorcycle to retrieve some dry clothing from a saddlebag when an uninsured motorist struck both she and her husband. The evidence was clear that the wife was not mounted on or operating the motorcycle when the accident occurred.

In reaching its conclusion the Court stated the following:

> I would apply the *AXA* “objective observer” test. In my view, an objective observer of the accident would describe Deborah McIntyre as a passenger of the motorcycle at the time she was struck by the uninsured driver. Her presence at the scene of the accident was entirely explained by the fact that she was a passenger on the motorcycle. She and her husband had stopped by the roadside to avoid the rain. She intended to resume the journey as soon as the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. Finally, she did not engage in any other activity except to wait for the rain to abate (*McIntyre v. Scott* paragraph 19).

HMQ argues that the claimant satisfies the definition of “passenger” using the principles set out by the Court of Appeal in *McIntyre v. Scott*. It emphasizes the continuous series of events from the claimant’s arrival at Lawrence Plaza in the Martins vehicle up until the time he was struck by the uninsured vehicle. HMQ emphasizes that a very short amount of time passed between the claimant exiting the Martins vehicle

and being struck by the uninsured vehicle, and the fact that the claimant was at all times in close proximity to the Martins vehicle.

AXA does not dispute these facts but submits that an essential element of the Court of Appeal's "status" analysis in *McIntyre v. Scott*, and other decisions to which both parties have referred, is missing from the facts in this case. That element is the fact that the journey of the claimant in *McIntyre v. Scott* was found by the court to have only been interrupted by a rainstorm which caused the claimant to have to dismount from the motorcycle and wait until the rain abated to continue the journey. As the court held, the claimant intended to continue the journey once the rain stopped.

The same was true for the unfortunate driver in *AXA v. Markel*. The court found that it he would undoubtedly have returned to his tractor-trailer to drive it away from the loading dock once the unloading procedure had been completed.

In other words, although the claimant's journey was interrupted in both of these cases, the claimant's status as "driver" in *AXA v. Markel*, and "passenger", in *McIntyre v. Scott* remained in place when an accident intervened, because the journey was going to be resumed.

AXA submits that in this case, the claimant's journey terminated when he exited the Martins vehicle, and was not going to resume. Therefore, his status as "passenger" was also terminated.

I agree with AXA's position on this issue. The evidence in this case confirms that when the claimant exited the Martins vehicle his journey as a passenger in that vehicle was at an end. He had no intention of returning to the vehicle. The fact that he may

have initially intended to go into the mall after exiting the Martins vehicle but then changed his mind and went over to the uninsured vehicle to engage the uninsured driver, does not change the fact that he had ended his journey in the Martins vehicle. Other evidence confirms that the claimant was not going to return to the Martins vehicle. After concluding his business at the mall he was going to find his own way home. The evidence is also clear that after he engaged the uninsured driver and began walking away from the uninsured vehicle, it was his intention to enter the mall, not to return to the Martins vehicle.

The facts of this case are distinguishable from the “interrupted journey” cases I have discussed and others which were cited by the parties in their written argument and briefs of authorities. The claimant’s status as “passenger” in the Martins vehicle ended when he exited the vehicle in the parking lot of the Lawrence Plaza. The evidence confirms that he had no intention of returning to the vehicle either immediately after engaging the uninsured driver, or later, after completing his business in the mall.

In my view, an objective observer with these considerations in mind would not consider the claimant to be a “passenger” in the Martins vehicle when he was struck by the uninsured vehicle.

Therefore, on this issue, I find that the claimant was not an “occupant” of the Martins vehicle at the time of the accident.

**“Involved in the Incident”**

In my opinion this is the more complicated of the two issues to decide. The phrase is not defined in the relevant insurance legislation.

One must consider the purpose of legislation when trying to give it the most reasonable and sensible meaning which will promote that purpose.

Simply put, the purpose of the SABS legislation defining “accident” is to insure the payment of benefits to persons who have suffered impairment when those impairments have been sustained through the use or operation of an automobile. In other words, for SABS purposes, an accident is defined by the manner of its occurrence, and its consequences. It is not defined in the more general, common parlance of being simply an “unexpected occurrence”.

The purpose of the priority scheme in section 268 is to provide a predictable, albeit sometimes arbitrary system to resolve priority of payment disputes between sophisticated litigants – insurers, based on legislative judgments about how that priority should be fairly determined.

Determining whether “*any automobile is involved in the incident*” for the purposes of 268 (2) 2. (iii) requires an adjudicator to determine the facts of the incident.

It makes sense that there could be more than one, and in some cases, several vehicles at the scene of an incident (I am deliberately avoiding the use of the term “involved” for the purposes of this discussion) in which a person sustains impairments. Not all of those vehicles may have caused or contributed to that person’s impairments, and here I am referring to factual – cause and effect causation, not liability – or legal causation. Whether liability or legal fault for the incident rests with an automobile is irrelevant for SABS purposes. An automobile may not be legally at fault for an incident,

but it may nevertheless have factually caused, or contributed to the cause of a person's impairment from an incident.

In my opinion however, to achieve the fair application of the SABS priority scheme in section 268, at a minimum there must be a factual cause and effect connection between the use or operation of any automobile and impairments sustained by a person to conclude that the automobile was "*involved in the incident*". In my view this is the threshold to be met to conclude that an automobile "played a role", or had the requisite "proximity of time, space and participation" to be "*involved in the incident*" (these phrases derive from the case law which I will review).

If a factual cause and effect connection between an automobile and the claimant's impairments is not necessary for "involvement", the determination of what constitutes "involvement" becomes entirely subjective. Without a factual cause and effect relationship between an automobile and a claimant's impairments, is it not left entirely to the predilections of the adjudicator as to whether a given set of facts does, or does not amount to "playing a role", or "participating" in an incident? In my view this would not be a desirable situation for the development of consistent jurisprudence, nor would it promote the objectives of predictability and consistency in the application of the SABS priority dispute legislation.

There are several cases which are useful in interpreting what "*involved in the incident*" means. There is no binding authority. It is necessary to review some of the cases in detail.

One of the earliest cases to deal with the issue is the FSCO decision of Arbitrator Manji in *Janousek v. Halifax Insurance Co*. ([1998] O.I.C.D. No. 8 Ins. Comm.).

The facts were that an uninsured vehicle mounted a sidewalk and struck a pedestrian who became the SABS claimant. The uninsured vehicle carried the claimant onto the road and the claimant fell off the vehicle onto the road. The uninsured vehicle continued across the road, mounted a sidewalk, and struck a fence. Three unoccupied vehicles were parked in a private parking lot behind the fence. These vehicles were all insured. None of the vehicles came into contact with the claimant or with the uninsured vehicle. The parked, insured vehicles were damaged by debris falling from the fence after it was struck by the uninsured vehicle.

HMQ was presented with the claimant's SABS claim, handled it, and sought to have one or more of the insured vehicles take over the claim on the basis that they were "*involved in the incident*".

Since the phrase "*involved in the incident*", or the words "involve", or "involved", are not terms of art – *i.e.* not defined in the legislation, the Arbitrator referenced dictionary definitions for guidance. She stated:

> The word "involving" is not defined in the Schedule. It is not a term of art. In the circumstances, it is appropriate to give it its plain and ordinary meaning. To this end reference to the dictionary definition of the word is helpful. In the *Concise Oxford Dictionary of Current English*, "involve" is defined as "1. cause (a person or thing) to participate, or share the experience or effect (in a situation, activity, etc.) 2. imply, implicate (a person in a charge, crime, etc.) entail, make necessary 3. implicate (a person in a charge, crime, etc.) 4. include or affect in its operations. 5. concerned or interested. 6. complicated in thought or form. 8th Edition, Clarendon Press, Oxford, 1990. According to *The Houghton Mifflin*

*Canadian Dictionary of the English Language*, "involve" means 1. To contain or include as part. 2. To have as a necessary feature or consequence, 3. To draw in as an associate or participant; embroil 4. To occupy or engross completely; absorb. 5. To make complex or intricate; complicate. 6. To wrap; and envelop. Morris William, Editor, Houghton Mifflin Canada Limited, Markham, Ontario, 1982.

The Arbitrator continued as follows:

> The plain or ordinary meaning of "involve" is quite broad. Based on the plain or ordinary meaning of the word "involve"…the word "involve" does not require a causal element. A person may be involved in an accident "involving" an insured automobile even though the insured automobile may not have caused the accident directly or indirectly. Based on the ordinary meaning of "involve," I also accept that contact between the injured person or the automobile that caused the injury and the insured automobile may not be necessary, in order for the insured automobile to be involved in the accident.

The Arbitrator found HMQ's argument compelling that the sequence of events in the case commencing with the uninsured vehicle striking the claimant and ending with the uninsured vehicle striking a fence, causing debris to fall upon the insured vehicles, was a single incident. In spite of this however, the Arbitrator did not agree that the claimant was involved in an accident involving the insured vehicles. She concluded:

> …In this case, the insured vehicles played no role in the incident in which the use or operation of an automobile caused injury to (the claimant). In my view, an automobile can play a role in an incident in which the use or operation of another automobile causes injuries without being the cause of or contributing to the injuries. They were not even passive objects at the scene when she was struck and when she fell off the uninsured vehicle onto (the road) after being struck. I am unable to accept that the insured automobiles were drawn into the "accident" as associates or participants or share the experience or effect of the "accident" or became embroiled in the "accident" or became implicated or

> wrapped or enveloped in the "accident" (see definitions of "involve" *supra*) 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.

In my view, the facts of this case support the conclusion that the claimant suffered an accident in the SABS definition sense when the uninsured vehicle collided with her and caused her injuries. That was the end of the accident. There was a subsequent collision between the uninsured vehicle and the fence which resulted in damage to the parked vehicles. This was not an accident in the SABS sense because it did not cause any injuries to the claimant. Therefore, the parked vehicles were not "involved" in the claimant's accident because their use or operation did not cause her injuries.

I do not agree that the facts of the case support the Arbitrator's comment, *"…In my view, an automobile can play a role in an incident in which the use or operation of another automobile causes injuries without being the cause of or contributing to those injuries.*" This was unnecessary for the Arbitrator's decision and in my view is unsupported *obiter dicta*.

The next relevant decision to consider is *Seetal v. Quiroz; Minister of Finance on behalf of the Motor Vehicle Accident Claims Fund, Intervenor* (97 O.R. (3d) 780. "*Seetal v. Quiroz*").

This was a decision of Justice Perell who was dealing with interlocutory motions arising out of a tort lawsuit. The facts were that the plaintiff, also a SABS claimant, was a pedestrian when an uninsured vehicle entered the intersection and collided with her.

While carrying the claimant on its hood, the uninsured vehicle continued through the intersection and collided with an insured vehicle stopped in the intersection waiting to make a left turn. A fact which in my view is essential to the result is that the claimant was still on the hood of the uninsured vehicle when it collided with the stopped, left turning vehicle, which caused the claimant to be ejected from the hood of the uninsured vehicle and thrown to the ground.

Justice Perell concluded that the stopped, left turning vehicle was involved in the accident, even though its driver did not cause the collision between the uninsured vehicle and the claimant, or the subsequent collision between the uninsured vehicle and the stopped, left turning vehicle. He granted the motion dismissing the negligence claim against the stopped, left turning vehicle, but allowed the motion entitling the claimant to seek uninsured motorist coverage from the insurer of the stopped, left turning vehicle.

The parties disagree on the extent of the applicability of Justice Perell's reasoning in the case since it was directly concerned with the availability of uninsured motorist coverage in section 265 of the *Insurance Act*, not SABS priority under 268 (2) 2. (iii).

AXA seeks to circumscribe its application on this same basis as did Arbitrator Novick in a subsequent case (*Personal Insurance Co. v. Unifund Assurance Co.* 2016 CarswellOnt 14837, June 3, 2016 "*Personal v. Unifund*"). In that case Arbitrator Novick suggested that there was nothing in Justice Perell's analysis involving a discussion of the relevant phrase for section 268 (2) 2. (iii) of the *Insurance Act.*

HMQ's position is that the reasoning in the case is very persuasive, albeit not binding authority. HMQ notes that as a result of the Court of Appeal decisions (*Taggart (Litigation Guardian of) v. Simmons* (20010, 52 O.R. 704, [2001] O.J. No. 642 (C.A.), and *McArdle v. Bugler* (2007), 87 O.R. (3d) 433, [2007] O.J. No. 3614 (C.A.)), Justice Perell had to consider whether the claimant was entitled to be paid SABS, in order to determine whether the claimant was also entitled to uninsured motorist coverage. This makes his discussion of the phrase "*involved in an accident*" for section 265 purposes relevant to interpreting the 268 (2) 2. (iii) phrase, "*involved in the incident*".

In my opinion, *Seetal v. Quiroz* is a case that is relevant to how the phrase "*involved in the incident*" should be interpreted, but like *Janousek v. Halifax*, its result should be strictly confined to its own facts and the relevant *Insurance Act* law it was concerned with. It is important to note that "accident" is not a defined term in part IV of the *Insurance Act* which applies to the section 265 uninsured automobile coverage with which Justice Perell was concerned. Section 265 uninsured automobile coverage also contemplates accidents which involve property damage only. "Accident" for SABS purposes however, requires that the use or operation of an automobile result in impairment to a person.

Justice Perell approves of the approach taken by the Arbitrator in *Janousek v. Halifax,* and concludes that the result in every case will be a fact driven exercise.

Justice Perell states (at para. 41):

> "Involved in an accident" and "accident involving the insured vehicle" are not defined terms, but even before seeking the assistance of dictionaries and the case law, one immediately senses that the nature of "involvement" is somewhat

> vague and very dependent of the particular facts of the particular case. Intuitively, one senses that **involvement depends upon some proximity in place and time and participation** between a person and an event or activity (Arbitrator's emphasis).

After stating that he agreed with the Arbitrator's reasoning and decision in *Janousek v. Halifax*, Justice Perell continued as follows (at para 55):

> …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**…**in** my opinion, the circumstances of **the case at bar** bring (the stopped, left turning vehicle) within the temporal, spatial and participatory factors sufficient to conclude **there was involvement in Ms. Seetal's accident notwithstanding that (the stopped, left turning vehicle) was not a cause or a contributing cause to the accident** (Arbitrator's emphasis).

In my view, what Justice Perell is saying in this passage could be restated in terms of the SABS definition of "accident", and the Insurance Act section 268 (2) 2. (iii) "*involved in the incident*" priority scheme as follows:

There were two, separate collisions in *Janousek v. Halifax*, but the claimant was injured in only the first one – the collision between the uninsured vehicle and the claimant which caused her injuries. In SABS definition terms this was the "accident", since it was the incident in which the use or operation of an automobile directly caused the claimant's impairments. The accident was "completed" at that point, and then the second, separate collision followed when the uninsured vehicle collided with the fence showering debris onto the parked, insured vehicles.

In common parlance, or even for the purposes of section 265 uninsured automobile coverage, this collision might be referred to as an “accident”, but it was not an “accident” in the SABS definition sense because it did not directly cause any impairment to the claimant, and in any case it was a separate accident from the one in which the claimant sustained her impairments.

In *Seetal v. Quiroz* however, the two collisions (the first between the uninsured vehicle and the claimant, and the second between the uninsured vehicle and the stopped, left turning vehicle causing the claimant to be ejected from the hood of the uninsured vehicle) constituted one “accident”. As noted by Justice Perell, the stopped, left turning vehicle did not cause these collisions, but it was “involved” in the accident because the second collision between it and the uninsured vehicle caused the claimant to be ejected from the hood of the uninsured vehicle, thus being a contributing cause of her injuries.

I draw support for this analysis from the following excerpt from Justice Perell’s judgment in *Seetal v. Quiroz* (at para 42):

> For example, one would not hesitate in concluding that (the driver of the uninsured vehicle) was involved in Ms. Seetal’s accident because he caused it. One would also not hesitate to conclude that if (the stopped, left turning vehicle) had been struck several blocks distant…during (the uninsured driver’s) flight from the scene that this would not be involvement in Ms. Seetal’s accident but a separate accident involving (the stopped, left turning vehicle). However, the case at bar is more difficult because although (the stopped, left turning 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.

Justice Perell's reference on the facts of *Seetal v. Quiroz* to the stopped, left turning vehicle not being, "*the cause of the accident*" can create confusion unless one carefully distinguishes between "accident" as a defined term in the SABS (*i.e.* which requires impairments to have been caused to a person by the use or operation of an automobile), and "accident" for the purposes of section 265 uninsured automobile coverage which is undefined, broader, and includes property damage collisions not involving impairment to persons.

In my view, the context of Justice Perell's comments, especially considered in light of his review of the case law and applicable statutory provisions, are much better understood for SABS priority purposes by interpreting the phrase, *"…the stopped, left turning vehicle was not the cause of the accident*…" as "…the stopped left turning vehicle was not the cause of the collisions".

Any suggestion that the result in *Seetal v. Quiroz* can be seen as having application beyond its specific facts and law, is diminished further by the concluding comments in Justice Perell's judgment. He discusses as support for his conclusions section 7 (3) of the *Motor Vehicle Accident Claims Act* which defines a person involved in an accident as a person who has caused or contributed to the accident, and a person against whom the injured person might reasonably be considered as having a cause of action.

Justice Perell then goes on to suggest that it was reasonable and necessary for Ms. Seetal to sue the driver and owner of the stopped, left turning vehicle because it was conceivable the stopped, left turning driver could have created a situation of danger

and emergency by having encroached on the uninsured vehicle's right-of-way or having intruded too far into the intersection in anticipation of making a left turn. He then contrasts this with the facts in the *Janousek v. Halifax* case and says that there would have been no reasonable basis to sue the drivers (or presumably the owners) of vehicles parked behind a fence on the other side of the street from where the accident occurred.

Justice Perell ultimately granted summary judgment dismissal of the claim against the stopped, left turning driver because the evidence did not bear out the allegations of fault against him. This seems to me to be very much a causation analysis, and a fault based causation analysis at that.

In my opinion, *Seetal v. Quiroz* does not support the argument that a vehicle can be "*involved in the incident*" for SABS priority purposes in the absence of some type of cause and effect connection between that vehicle and injuries suffered by a SABS claimant.

I have already mentioned the next case which I will discuss, *Personal v. Unifund*.

This was a decision of Arbitrator Novick. The facts were that two insured vehicles collided in an intersection. One of the vehicles was travelling eastbound straight through the intersection while the other vehicle was travelling westbound and turning left. As a result of this collision, one of the vehicles subsequently struck a pedestrian who was the SABS claimant. The other vehicle struck a third vehicle which was stopped at the northbound entrance to the intersection waiting for the traffic signal to change.

The priority issues amongst the parties required a determination of whether this third vehicle which was stopped at the northbound entrance to the intersection waiting for the traffic signal to change was "*involved in the incident*".

Arbitrator Novick referred to *Seetal v. Quiroz* , but found applying the reasoning of that case the facts before her to be an "*awkward exercise*". She did say however (at para. 41), that Justice Perell's statement, *"…'involvement depends upon some proximity in place and time and participation between a person and an event or activity' serves as a good general guideline."*

Arbitrator Novick held that vehicle stopped at the northbound entrance to the intersection waiting for the traffic signal to change was not "*involved in the incident*" even though it was struck in a separate collision by one of the other vehicles involved in the first collision.

She reasoned as follows (at para 42):

> While the requirements of proximity in place and time are met here, I find that the requirement for "participation" is lacking. While the vehicle insured by The Personal was struck by one of the vehicles involved in the initial collision, I would describe that as "collateral damage" rather than "involvement" in the incident that led to the Claimant's injuries.

Arbitrator Novick clearly felt that there is a need for an active connection between a vehicle and injuries suffered by a SABS claimant in the "cause and effect" sense, to conclude that a vehicle is "involved in the incident" (at para. 47).

> …while the vehicles may have been physically proximate and the events may have occurred within a short time of each other, there is no evidence before me to suggest a causal relationship between the actions of (the vehicle stopped

at the northbound entrance to the intersection waiting for the traffic signal to change) and the impact that caused the Claimant's injuries.

Another recent arbitration decision bears consideration. The case is *Allstate Insurance Co. of Canada v. Gore Mutual Insurance Company and The Motor Vehicle Accident Claims Fund*, June 6, 2018, Arbitrator Ken Bialkowski, "*Allstate v. Gore & MVACF*").

Two snowmobiles were travelling one behind the other about 10 metres apart on a snowmobile trail. The lead snowmobile was not insured. The following snowmobile was insured. The lead snowmobile collided with a fallen tree resulting in the death of the lead snowmobile operator and injuries to the passenger on the lead snowmobile who became the SABS claimant. Moments after the lead snowmobile collided with the fallen tree, the following snowmobile also collided with the fallen tree, resulting in the death of the following snowmobile operator. The Arbitrator found on the evidence that there was no contact between the two snowmobiles. The following snowmobile also did not collide with either the deceased operator of the lead snowmobile, or with its SABS claimant passenger.

The priority issue for determination was whether the insured, following snowmobile was "involved in the incident". Arbitrator Bialkowski refers in his decision to case law which has developed under the *Insurance Act,* section 275 loss transfer scheme (see *Dominion of Canada General Insurance Co. v. Kingsway General Insurance Co.* [1999 CarswellOnt 7019 (Ont. Arb.)], (unreported decision of Arbitrator Lee Samis, August 23, 1999, affirmed in [2000 CarswellOnt 9870 (Ont. S.C.J.)].

Arbitrator Bialkowski applies the guidelines from this decision as reference points for interpreting the phrase “involved in the incident”. These include:

1) Whether there is contact between the vehicles;

2) The physical proximity of the vehicles;

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

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

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

Like Arbitrator Novick in *Personal v. Unifund*, I am of the view that these concepts from the loss transfer regime ought not to be imported *holus bolus* into the priority dispute analysis under section 268 (2) 2. (iii) of the *Insurance Act*.

Justice Perell held in *ING Insurance Company of Canada v. Farmers Mutual Insurance Company (Lindsay)* (2007 CanLII 20197 ONSC) that the guidelines enumerated above are to be used in determining whether a heavy commercial vehicle was involved in an incident to answer the threshold question of whether the loss transfer scheme in section 275 of the *Insurance Act* is available to an insurer based on the facts of an accident. They are not to be used in determining which, if any, of the Fault Determination Rules is applicable to those facts, and thus the percentage, if any, of loss transfer indemnity to which an insurer may be entitled.

As Arbitrator Novick also points out, there are often cases in priority dispute matters where the highest priority vehicle is not even at the scene of an accident, and fault is not a determining factor in priority disputes as it in loss transfer.

Nevertheless, like both Arbitrator Novick and Arbitrator Bialkowski, I find that the enumerated loss transfer concepts are in part useful guidelines for the inquiry into determining whether there is the necessary proximity in place, time, and participation for a vehicle to be "*involved in the incident*".

In *Allstate v. Gore & MVACF*, Arbitrator Bialkowski determined that the following snowmobile was not "*involved in the incident*". His reasoning is as follows (at para 38):

> In my view, **for there to be "involvement" in a priority dispute context not only must there be proximity of time and space, but there must still be some link or nexus between the actions of the operator of the alleged "involved" vehicle to the injuries sustained by the claimants.** (Arbitrator Densem's emphasis). In the case before me, there was clear proximity of time and space, but the facts cannot support the participatory component. I am satisfied that the injuries sustained by the occupants of the lead snowmobile would have occurred whether the (insured snowmobile) was following or not…I am of the view that in a priority dispute **where there is an absence of contact between the vehicles, there must be some action on the part of the driver of the alleged "involved" vehicle that caused or contributed to the collision giving rise to the injuries sustained by the claimants**…(Arbitrator Densem's emphasis). There is no evidence before me to suggest that the actions of the driver of the (following snowmobile) in any way contributed to the collision of the lead snowmobile with the fallen tree.

As will be seen from my preceding analysis, I agree with approach taken to this issue by Arbitrators Novick and Bialkowski.

In my opinion, the facts of the case before me are analogous to *Janousek v. Halifax, Personal v. Unifund, and Allstate v. Gore & MVACF*, and distinguishable from the facts of *Seetal v. Quiroz*.

There is no factual cause and effect relationship between the Martins vehicle and the claimant's injuries. Therefore, it "played no role", or did not "participate" in the incident which caused the claimant's injuries.

The claimant's connection with the Martins vehicle ended before he was struck by the unidentified vehicle. He had terminated his journey in the Martins vehicle. He had ceased to be an occupant of the Martins vehicle. At the time he was struck by the uninsured vehicle he was a pedestrian and had been a pedestrian for some period of time since exiting the Martins vehicle.

It was not argued, nor would the evidence have supported such an argument, that the claimant was still an "occupant" of the Martins vehicle because he was "getting out of" the Martins vehicle when the accident occurred. Too much time had passed. The claimant had exited the Martins vehicle and started towards the Canadian Tire entrance intending to leave the area. It was between five and seven seconds later that he changed his mind and decided to go over to the uninsured vehicle to speak to the uninsured driver. That would have taken several more seconds. Then the claimant spent some more time trying to engage the uninsured driver in conversation. There is no clear evidence as to how long this took, but an inference can be reasonably drawn

that it would have taken at least several more seconds. During this time the Martins vehicle, although still nearby, was sitting motionless, and according to the evidence of the claimant and Ms. Martins, was essentially being ignored by the uninsured driver. Even the claimant was not sure where the Martins vehicle was by this time. He knew only that it had reversed away from the area where he was standing talking to the uninsured driver.

In my view, the fact that part of the reason the claimant decided to speak to the driver of the uninsured vehicle was to see if he could persuade the uninsured driver to cooperate in the parking of the Martins vehicle does not create a factual cause and effect relationship between the Martins vehicle and the injuries sustained by the claimant.

It does not matter that the claimant may have been thinking about the Martins vehicle. He was not the driver of that vehicle on an interrupted journey. He was not a passenger in that vehicle on an interrupted journey. He was a pedestrian who had terminated his connection with the Martins vehicle for a sufficient amount of time that one could question whether even the proximity of time factor was satisfied in this case.

The focus of the inquiry as to whether an automobile is involved in the incident must be on that automobile and whether through its movements, or even because of its positioning, a cause and effect relationship exists between that vehicle and the claimant's injuries.

In my opinion, in this case the claimant's injuries were caused entirely as a result of the actions of the uninsured driver and from the collision between the uninsured

vehicle and the claimant. There was no contact between the claimant and the Martins vehicle. There was no collision between the uninsured vehicle and the Martins vehicle contributing to the claimant's injuries (as in *Seetal v. Quiroz*). The Martins vehicle was a stationary object, at least 15 to 20 feet from where the claimant was struck by the uninsured vehicle, completely unconnected with that collision. There is nothing about the actions (or inaction) of Ms. Martins or her vehicle that can be said to have caused or contributed to the claimant's injuries.

It is always submitted in these cases that the SABS Regulation is remedial, and should be broadly interpreted. In addition, in cases involving HMQ it must be kept in mind that HMQ is intended to be a payor of last resort since the funds required for the payment of claims come directly out of the public purse.

While I recognize these as valid points in general, I will borrow and endorse Arbitrator Bialkowski's comments addressing these matters in *Allstate v. Gore & MVACF*:

> …this is not the case of the claimant not having access to accident benefits, but a priority dispute as to which insurer is obligated to pay such benefits. The test to be applied ought to be the same whether it is two private insurers which are involved or whether one of the insurers is the Fund.

There is nothing in Section 268 (2) 2. (iii) of the *Insurance Act* or in the Regulation 283/95 relevant to the issues before me which would suggest that the involvement of HMQ in this matter should alter the analysis which I have set out.

**Conclusion**

For the foregoing reasons I conclude that claimant was not an “occupant” of the AXA insured vehicle, nor was the AXA insured vehicle “involved in the incident.”

Therefore, HMQ is responsible for the payment of SABS to the claimant.

AXA, as the successful party on this arbitration, is entitled to its costs from HMQ. I encourage the parties to agree on costs. If they are unable to do so I direct as follows:

1) AXA shall serve its Bill of Costs on HMQ, accompanied by written submissions, within 45 days of the release of my Award.

2) HMQ shall serve its response on AXA within 15 days thereafter.

3) AXA shall serve its reply, if any, HMQ within 10 days thereafter.

4) The parties’ main written submissions shall be limited to 5, double-spaced pages (not including the Bill of Costs or copies of case law) with any reply by AXA being limited to 2, double-spaced pages.

5) Counsel should provide the Arbitrator with their costs submissions concurrently with their service upon opposing counsel.

Dated at Toronto, March 31, 2020

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Scott W. Densem, Arbitrator