IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, and Ontario Regulation 293/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

GORE MUTUAL INSURANCE COMPANY

Applicant

- and -

THE GUARANTEE COMPANY OF NORTH AMERICA

Respondent

AWARD

Counsel Appearing

Philippa Samworth for the Applicant

Terry Shillington for the Respondent

Introduction

The parties have brought this arbitration before me pursuant to the provisions of the *Arbitration Act, 1991*, and the provisions of the *Insurance Act*, and regulations thereunder.

Both the Applicant and the Respondent are insurance companies carrying on business in the province of Ontario. In respect of the dispute between the parties, it is relevant that these insurers carry on the business of automobile insurance.

There is a dispute between the insurers as to which insurer is obliged to pay statutory accident benefits in relation to an injured claimant, Clayton M. Gore Mutual is the insurer of F. F was the owner of a car which was apparently being used without the owner's consent at the time that an accident occurred. The accident benefits claimant, Clayton M, was one of the occupants of the stolen vehicle. As a result of the accident it is understood that Clayton M. has sustained serious injuries necessitating extensive attendant care and related expenses.

Gore Mutual received an application for accident benefits and is paying some benefits with respect to this claim. Gore Mutual seeks to recover its outlay and to establish that

priority for this loss rests with Guarantee Company of North America. Guarantee Company is the insurer of the Hamilton Street Railway, the operator of a municipal transit system including buses.

The question to be decided by this arbitration is:

> "Is the insurer of the Hamilton Street Railway, Guarantee Company of North America, obligated to pay statutory accident benefits with respect to the injuries of Clayton M[1].?"

Legal Framework

The dispute between the insurers in this case arises because of their potential obligations to pay statutory accident benefits with respect to the injuries sustained by Clayton M.

Those statutory accident benefits are part of an extensive scheme of no-fault, first party, benefits that are available to persons who are injured in motor vehicle accidents that occur in Ontario (and elsewhere in some circumstances). The *Insurance Act* provisions deem all automobile insurance policies in the province of Ontario to include these elaborate benefits. *Ontario Regulation 403/96* under the *Insurance Act* describes the particulars of those benefits.

For the purpose of making the no-fault accident benefits widely available to people who are injured in car accidents, the regulations broadly define the individuals who may be entitled to benefits from any one insurer. An insurer has obligations with respect to accident benefits to its named insured, a spouse of a named insured, a dependant of a named insured, or to an occupant of a vehicle that is insured, or a person involved in an accident with a vehicle that is insured by the insurer.

Under the scheme there is always at least one entity obliged to pay accident benefits. This priority controversy does not potentially affect Clayton M's access to benefits but only affects which of two insurers has the obligation to pay those benefits.

The scheme's very broad approach to making available benefits necessarily means that any individual injured in a car accident might have the status of being an insured person under more than one contract of insurance, if the accident happens in Ontario. Under section 268 of the Insurance Act, the legislation sets out the priority of the obligations of the involved insurers. The priority scheme is intended to sort out the various obligations so that insurers can have some certainty about their responsibilities, and injured accident victims can be clear about which insurer should be approached for the necessary benefits.

Nonetheless, the priority provisions require evaluation of factual and legal obligations that can readily give rise to controversy. The Legislature has been mindful of the fact that insurers may have disputes as to which insurer has highest ranking priority for the payment of benefits. Accordingly, the Legislature has promulgated a regulation that

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[1] In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

governs how these disputes should be resolved. *Ontario Regulation 283/95*, entitled *"Disputes Between Insurers",* sets out the procedure to be followed. Included in that Regulation is the obligation to resolve such disputes through arbitration under the *Arbitration Act, 1991.* That is the course that the parties have taken.

In furtherance of this, the parties have executed an arbitration agreement, which has been marked as an exhibit to these proceedings.

Issue

The issue for determination in this arbitration is the status of the Clayton M., or his mother, as a "named insured" person in relation to a policy of insurance issued by the Respondent, The Guarantee Company of North America. Guarantee is the insurer of vehicles operated by the Hamilton Street Railway as public transit vehicles. Clayton M., and his mother, Lisa M., were, from time to time, passengers of vehicles operated by Hamilton Street Railway in its capacity as provider of public transit in the Hamilton area.

Clayton M. was injured on February 20, 2006. At the time of this incident he was the occupant of a stolen vehicle. He suffered moderately serious injuries such that he is eligible for payment of certain accident benefits. No vehicle owned or operated by Hamilton Street Railway was involved in the incident giving rise to the injury.

The issue for determination in this arbitration is whether, by virtue of Clayton M.'s and/or Lisa M.'s utilization of, or access to, public transit, either one is to be considered "named insured" under the policy of insurance issued by the Respondent to Hamilton Street Railway.

The Evidence in This Proceeding

The parties submitted an evidentiary record in this matter consisting of an arbitration agreement, an agreed book of documents, and an agreed statement of facts.

The agreed statement of facts was marked as Exhibit 2 to this proceeding. This document discloses that Clayton M. was involved in a motor vehicle accident on February 22, 2006. The accident occurred when Clayton M., an unrestrained rear seat passenger in a stolen vehicle, was injured when that vehicle collided with a tree. The injuries are described as a moderate brain injury accompanied by a fractured clavicle. It is indicated that Clayton M. was determined to be catastrophically impaired, although, that term as employed by the benefits schedule, might simply be an indication of a lack of consciousness with or without significant impairment.

At the time of the accident Clayton M. was 16 years of age. He lived with his mother and two siblings in the Hamilton area. They lived in their place of residence for three months prior to the accident. Previously they had lived at another address for five years.

It appears that Clayton M.'s mother, Lisa M., was steadily employed in various capacities prior to the accident. Clayton M. has never held a job. The record indicates that had certain learning challenges but did not require any special care. However, he was not a regular high school student any longer at the time of the accident. He had dropped out

of school sometime during the early part of 2005. He did undertake special education classes at the Hamilton Native Center commencing in January 2006 and continuing up until the accident. He attended classes for the morning, Monday to Friday of each week.

During the weeks that preceded the accident Clayton M. was under house arrest. He was permitted to attend his special education class but otherwise he was to be accompanied by his mother, Lisa M., when he was outside of the home.

The parties have agreed that Clayton M. was principally dependent for financial support and/or care upon his mother, Lisa M., at the time of the accident.

The agreed statement of facts describes the involvement of Clayton M. and Lisa M. with vehicles operated by the Hamilton Street Railway. Their residences were both serviced by bus routes operated by the Hamilton Street Railway. These buses were driven on regular urban or suburban bus routes with multiple defined stops and were operated on fixed schedules.

The right to ride on the buses was obtained through the payment of a fare at the time of boarding, or through the use of tickets, or by use of monthly bus passes. All of these options are made available to members of the public.

Importantly, it is acknowledged that during the seven weeks prior to the accident Clayton M. used buses operated by Hamilton Street Railway each day to travel to and from classes. For any other trips his mother would ensure that Clayton M. either had bus tickets or cash fare. Previously, prior to dropping out of school in 2005, Clayton M. had also used public transit operated by Hamilton Street Railway to travel to and from school.

Clayton M.'s mother, Lisa M., also was a user of the Hamilton Street Railway public transportation system. The evidence states that she "mostly" used the public transportation in order to go to and from work. Not infrequently, Lisa M. received a ride to work or home from work.

Lisa M. used monthly transit passes, bus tickets, and cash fare when using the public transit.

It is clear that at some time in the past Lisa M. had used monthly transit passes. There is however uncertainty in the record about whether or not she held such a pass in February of 2006.

The parties have filed a book of documents which was marked as Exhibit 3 to the proceedings. At Tab five of the document brief there is a statement signed by Lisa M. dated June 7, 2006. In that statement she indicates that she has never had a motor vehicle license. She indicates that her mode of transportation has been walking or Hamilton Street Railway. She indicated that she had used the Hamilton Street Railway for the past six years. She indicated that she would generally buy a monthly bus pass, but not every month. At page 2 of that statement is stated "I did have a bus pass in February 2006."

There is a further statement from Lisa M. which was filed. That statement is dated August 17, 2006. That document is found at Tab 6 of the joint book of documents. That statement, indicated that Lisa M. bought a bus pass every month "until February 2006".

In addition to the two handwritten statements proffered, the parties have also put before me the transcript of examination under oath of Lisa M. taken May 29, 2007. That transcript is 73 pages covering 467 questions. In that record, Lisa M. indicates that she doubts that she purchased a bus pass for the month of February 2006. She was cross-examined about this extensively.

From paragraph 18 of the agreed statement of facts, I note that the monthly bus pass cost for an adult was $79. A single fare for ticket was $1.85. This would indicate that the value for the bus pass might be lost for an individual who was getting a ride to and from work more than a couple of times a week. In Lisa's situation the economic case for purchasing a monthly pass might not be compelling. But the record does indicate her use of public transit for other purposes, beyond going to and from her place of employment.

It is difficult for me to reconcile the evidence that is before me on this point. There is clearly a contradiction between the transcript and the preceding statements. The statements were made at an earlier point in time but they appear to be statements prepared by others, and simply signed by the claimant. In the discovery environment with a wide ranging number of questions, and with cross examination, the witness took a different position. Ultimately she conceded, at the cross examination, that she did not remember.

Forced to choose between this contradictory evidence, and doing so without the benefit of seeing the witness testify, I prefer the evidence found in the earlier statement and conclude Lisa M. did have a monthly bus pass during February 2006. I so find because the statements were consistent, and made earlier on in time than the testimony. In addition Lisa M.'s indication that she could not remember at the time of the testimony negates her contrary assertion about the pass on that occasion. On balance I find that the evidence found in the statements at Tabs 5 and 6 of the joint document brief are to be preferred.

The record as filed also indicates that the Applicant, Gore, is the insurer of the vehicle involved in the incident giving rise to the injury. At the time of the incident the vehicle was stolen which necessarily limits Gore's obligation to respond to various insurance claims. At the least, however, as the first insurer receiving a completed application Gore has properly responded to the claims and has initiated this dispute process.

Guarantee Company of North America is acknowledged to be the insurer of the Hamilton Street Railway. The documents filed a show a contract of insurance providing coverage in respect of all vehicles owned and/or leased by Hamilton Street Railway.

Based on the record before me, I conclude that Lisa M. and Clayton M. were both individuals who made use of Hamilton Street Railway transportation at the time of the incident giving rise to this claim. They did so as would any members of the public, by paying fares or by having a monthly pass, as I have found Lisa had.

The nexus between the Lisa and the Hamilton Street Railway is evidenced by a monthly bus pass. The nexus between Clayton M. and the Hamilton Street Railway is evidenced by the use that he made of the services, as fare paying passenger.

It remains for me to consider the legal effect of these findings.

Law

Section 268 of the *Insurance Act* sets out the priority rules. As mentioned, the insurance regime provides a broad array of possible coverage for person who is injured in a motor vehicle accident in Ontario. As a result a single injured individual may have access to many different policies. Section 268 of the *Insurance Act* is the legislature's attempt to sort out which insurer, amongst many, has the obligation to pay the statutory accident benefits to an injured victim.

For this purpose it is important to be mindful of the ranking provisions found in section 268. Those subsections provide as follows:

Statutory accident benefits

268. (1) (not applicable)

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) 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. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) 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. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) 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 discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(5.2) 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. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

On the facts which are before me, Clayton M. would be entitled to be paid benefits from the Guarantee Company of North America if he were a named insured under their policy. Similarly, as Clayton M. is principally dependent for financial support on Lisa M., he would be entitled to be paid benefits from the same policy if it is determined that Lisa M. was a named insured under the policy.

The certificate of insurance is filed and, of course, neither Lisa M. nor Clayton M. is actually named in the policy. However, the regulations that define the benefits schedule contain a provision extending coverage to certain individuals as a follows:

COMPANY AUTOMOBILES AND RENTAL AUTOMOBILES

66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

- **(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or**
- **(b) the insured automobile is being rented by the individual for a period of more than 30 days. O. Reg. 403/96, s. 66 (1); O. Reg. 462/96, s. 12 (1).**

Hence Gore argues that section 66 has the effect of deeming Lisa M. and/or Clayton M. to be named insureds. If Lisa M. is deemed to be a named insured, then Clayton M., as a dependant, is required by s. 268 (5) to claim benefits from Guarantee Company of North America. Similarly, if Clayton M. is deemed to be a named insured, then he would be obliged to claim the benefits from Guarantee Company of North America.

Section 66 and similarly worded provisions has been the subject of various arbitration and court decisions. Those decisions make it clear that the deeming provision of section 66 can have the effect of broadening the application of section 268. The decisions have

noted that the operative language of section 66 is that a vehicle is made available for regular use. It is not a requirement of the regulation that the use be personal, exclusive or frequent. In fact the use is not the determining factor. It is the availability for use that governs. Evidence of use is evidence of availability but the test is about the availability.

This is important in this case because counsel for Gore has argued that the nexus between Lisa M. and GCNA is enhanced by the bus pass. In my view it matters not whether Lisa M. used a pass or a ticket or cash fare. In any variation she was paying for the opportunity to ride a bus along a route defined by someone else, at a time defined by someone else, stopping only at places selected by someone else. At its highest the pass arrangement gave Lisa the opportunity to be a passenger without paying an additional fare.

Similarly, with respect to Clayton M., his use of the bus for school is subject to the same characterization. Only the method of payment was different.

In my view it does not matter whether Lisa M. had a monthly pass or not. In either case it is the nature of the relationship with the transit authority that needs to be examined. That relationship is not materially altered by the existence of a pass.

It remains for me to consider whether or not these circumstances result in a vehicle being made available to Clayton M. or Lisa M. for his/her regular use.

Counsel have put before me various dictionary definitions and have referenced arbitration and court decisions that touch on the interpretation of the regulation. The dictionary definitions illustrate the imprecision of the words used by the regulation. The case law shows the development of a broad approach to “regular use” claims, always driven by the particular facts before the court or arbitrator. Gore asks me to extrapolate from the existing case law to conclude that, on the facts before me, the Hamilton Street Railway vehicles were “made available” for the regular use of Lisa M. and/or Clayton M. with the effect that the insurer of the Hamilton Street Railway is liable to pay for the accident benefits in this case.

Necessarily this requires consideration of the facts of this case and comparison to the regulation. But the language of the regulation is imprecise. The words employed can be interpreted in different ways. The concept of “made available” is particularly noteworthy for the uncertainty it creates.

In respect of passengers, the vehicles of a public transit system are either “made available” for no one’s use or for everyone’s use. Everyone is entitled to be a passenger on a scheduled route, simply by payment of a fare. If this means that the vehicles are made available for regular use in accordance with the regulation, the result is that all of those persons (and spouses and dependents) are entitled to SABS benefits from the transit’s insurer -- and such entitlement would apply to accidents that do not involve transit vehicles, that are outside the Hamilton area, and indeed might be outside of Canada[2].

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[2] Of course nothing in this award affects access to benefits when an injury is sustained by a person who is an occupant of a Hamilton Street Railway vehicle, or otherwise is injured in an accident involving one of those vehicles. In those cases the persons would be “insured persons” without resorting to the deeming provision of section 66.

I am troubled by the suggestion that someone in Clayton M.'s or Lisa M.'s position might be "deemed" a named insured under the public transit system insurance program solely by virtue of his/her past or potential role as a fare paying passenger. Bearing in mind that the regulation requires consideration of availability for use, not actual use, I recoil from the suggestion that potential users of public transit are to be deemed named insureds under the transit's insurance program. Such a conclusion would mean that potential users of transit systems would enjoy the very substantial benefits of being considered a "named insured" under a program of insurance that they have paid nothing for. The insurer of the transit system is in no position to consider or underwrite the risk involved. This would amount to transfer of an astounding amount of risk to the insurer. From a public policy perspective, this would make no sense, as the ultimate effect would be to increase the cost of transit in order to pay benefits to persons injured in accidents that do not involve transit vehicles or transit activities.

I am further concerned about the effect of Gore's proposition on the priority scheme crafted by the Legislature and embodied in section 268 of the statute. If we were to accept the notion that a potential user of a public transit system is to be deemed a named insured, the priority ranking scheme set out in subsection 268 (2) of the Insurance Act would become meaningless. The subservient categories enumerated in clauses 1. ii, iii, iv and 2. ii, iii, iv would cease to have any meaning. No claimant would be able to access these tiers of coverage because nearly every claimant would be someone who had the services of public transit "available" to him/her to the same extent that the services of Hamilton Street Railway are "available" to Clayton M. and Lisa M. Moreover, this access would not be limited to claims against the Hamilton Street Railway's insurance program but would extend to claims against all common carriers including municipally organized transit authorities, private bus lines, taxi services and others. In all of these cases a person could credibly assert "availability" of vehicles, just as it is argued that Clayton and Lisa have Hamilton's public vehicles made "available" to them for their "regular use".

Guarantee, in its materials has graphically pointed out the effect of Gore's argument in respect of McMaster students. All McMaster students receive a bus pass from Hamilton Street Railway. Gore's position would result in all of these students, and their spouses, and their dependants, having priority recourse to Hamilton Street Railway's insurance program with Guarantee. Again, the scope of risk would include accidents that have no connection with Hamilton Street Railway, nor any proximity to Hamilton.

In argument counsel for Gore sought to avoid this absurd implication by suggesting that the extension of "deemed insured" status in this case is justified by a special nexus created by the purchase of a bus pass. I do not accept this as a valid distinction. The regulation directs us to look at "availability" and "availability" is no different for a pass holder than it is for anyone else.

It is my view that a contextual and fact sensitive approach to interpretation of the regulation is required. The regulation does not operate in isolation. To the contrary, there are broad implications that impact multiple insurance coverages, and respond to various fact patterns of "nexus" between injured individuals and vehicles in the community. The comments found in *Ontario v. Canadian Pacific Ltd*[3] provide some

[3] [1995] 2. S.C.R. 1031 at paragraphs 16, 65 *inter alia*.

insight. In that case the court was also considering the meaning of "use", but in connection with interpretation of environmental protection legislation. It was noted that, on its own, the term "use" is somewhat ambiguous.

The court endorsed the approach that an interpretation should be applied that would avoid absurd results. The court accepted the observation of Cote, *The Interpretation of Legislation in Canada,* that examination of the consequences of competing interpretations which reveal unjust or inequitable results will assist interpretation. In those circumstances we should adopt an interpretation that avoids such results, that avoids absurdity.

The Ontario case of *Beattie v. National Frontier*[4] bears comment. In that case the Court of Appeal had the unusual circumstance of interpreting a provision of the SABS regulation that had been repealed and replaced by the time of the hearing. An argument was made that the absurdity of the former provision, evidenced by its repeal, should cause the court to interpret the provision other than in accordance with its plain meaning.

The *Beattie* case is quite different than this case, or the *Ontario v. Canadian Pacific* case. In *Beattie* the plain language of the regulation was clear.

Here the language is less clear. The regulation strings together a series of imprecise terms "available", "regular" and "use". Each of these terms is liable to cause uncertainty. A wide range of meanings might be ascribed to each of the terms used. In such cases the contextual and fact sensitive search to avoid absurdity is the method of interpretation to be preferred. I adopt that approach and I conclude that the position argued by the Applicant would create a result that is unjust, inequitable and absurd. Furthermore, it is an outcome that is not in accord with insurance business practices and principles, and which would render parts of the Insurance Act meaningless.

I do not accept the argument that the transit vehicles operated by the Respondent's insured were "made available" for the use of Clayton or Lisa at the relevant time. In addition, I consider it doubtful that being a passenger on a public transit vehicle is "use" within the context of the regulation.

Neither Clayton M. nor Lisa M. is deemed to be a named insured under the policy of insurance issued by the Respondent.

The Question posed above - "Is the insurer of the Hamilton Street Railway, Guarantee Company of North America, obligated to pay statutory accident benefits with respect to the injuries of Clayton M.?" is answered in the negative.

[4] 2003 CanLII 2715 (ON C.A.)

Conclusion

The Respondent succeeds on the issue that was brought before me. If counsel wish to bring any other issue before me, or address me with respect to question of costs of this arbitration, please advise within 30 days.

Dated at Toronto this 22nd day of May, 2009.

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LEE SAMIS
Arbitrator