

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

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

**AND IN THE MATTER OF THE *MOTOR VEHICLE ACCIDENT CLAIMS ACT*,
R.S.O. 1990, c.M.41**

**AND IN THE MATTER OF AN ARBITRATION RESPECTING PRIORITY DISPUTE FOR
PAYMENT OF STATUTORY ACCIDENT BENEFITS**

B E T W E E N :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by
THE MINISTER OF FINANCE (aka MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

David Murray – Matthews, Abogado LLP
Counsel for the Applicant, Allstate Insurance Company of Canada
(hereinafter referred to as “Allstate”)

Paul H. Philp/Jeffrey R. Goit – Agro, Zaffiro LLP
Counsel for the Respondent, Her Majesty the Queen in Right of Ontario as represented by
the Minister of Finance
(hereinafter referred to as “MVACF and/or the Fund”)

ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95 with respect to a motor vehicle accident which occurred on March 21, 2013, in the State of New York the preliminary issue before me is to determine whether:

- a) the claimants Madissen, Joshua and Jessie Martineau are entitled to Statutory Accident Benefits?
- b) the claimants Madissen, Joshua and Jessie Martineau have recourse to the Fund pursuant to Section 268 of the *Insurance Act*?

PROCEEDINGS

The determination of these preliminary issues proceeded on the basis of Agreed Facts, Books of Authority and written submissions.

AGREED FACTS

For the purposes of the preliminary issue hearing only, the parties have agreed that the following may be accepted as true without the necessity of calling evidence as proof:

1. David Martineau was involved in a single vehicle accident on March 21, 2013 in New York State, while operating a 2006 Ford 350 Van.
2. At all material times, the 2006 Ford 350 Van was insured by Allstate Insurance Company of Canada (hereinafter "Allstate") under policy number #046738284 (hereinafter the "Policy").
3. David Martineau was rendered a quadriplegic as a result of the accident and has since died.
4. The named insureds under the Policy are Leo and Heather Martineau, who are David Martineau's parents.
5. David Martineau and his wife, Beverly Martineau, were listed drivers under the Policy.
6. David and Beverly Martineau have three children, Madissen, Joshua and Jessie Martineau, who are currently 18, 17 and 15 respectively.

7. Madissen, Joshua and Jessie Martineau applied to Allstate for Statutory Accident Benefits on March 27, 2014, claiming entitlement to benefits as a result of psychological or mental injury resulting from the death of their father.
8. The application was accepted by Allstate pursuant to Section 268 of the *Insurance Act* R.S.O. 1990, Chapter I.8. as the first insurer to receive a completed application for benefits.
9. Allstate paid death and/or funeral benefits to Beverly Martineau under the Policy.
10. Allstate delivered to the Respondent, Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance (hereinafter the “Fund”), three Notices to Applicant of Dispute Between Insurers on April 14, 2014 with respect to the Applicants.
11. At all material times, Madissen, Joshua and Jessie Martineau were not named insureds, spouses of a named insured, dependants of a named insured, listed drivers or regular users with respect to the Policy.
12. Madissen, Joshua and Jessie Martineau were not involved with and had no connection to the vehicle involved in the subject accident nor were they present at the accident scene.

ANALYSIS AND FINDINGS

This is a preliminary issue determination which was initiated by the Respondent MVACF. The Fund seeks a determination that the claimants, Madissen Martineau, Joshua Martineau, and Jessie Martineau (collectively, “the claimants”) are not entitled to receive benefits under the *Statutory Accident Benefits Schedule — Effective September 1, 2010* (“the SABS or the Schedule”) from the Fund. In particular, the Fund alleges that none of the individual claimants meet the definition of an “insured person” found in s.3(1) of the SABS, thereby vitiating their entitlement to benefits at the outset. The Fund further maintains that, for this very reason, the claimants may also not receive statutory accident benefits from the Applicant Allstate.

Allstate maintains that the above position is untenable. Allstate agrees that the claimants do not have recourse as against Allstate since none of them meets the definition of an “insured person” under s.3(1) of the *SABS*. However, Allstate maintains that this does not relieve the Fund of its obligation to provide the claimants with statutory accident benefits in light of the various provisions contained in the *Insurance Act*, R.S.O. 1990, c. I.8 and the *Motor Vehicle Accident Claims Act*, R.S.O 1990, c. M.41. Allstate maintains that the claimants’ recourse to statutory accident benefits lies with the Fund. Consequently, according to Allstate, the Fund’s prayer for relief must be denied and the preliminary issue hearing must be dismissed with costs payable to Allstate.

Is Allstate Insurance Company liable to pay Statutory Accident Benefits to the claimants under Section 268 of the *Insurance Act*?

The payment of statutory accident benefits is governed by various provisions of the *Insurance Act*. In particular, s.268(1) of the *Insurance Act* provides that “every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule*”.

According to Allstate, the obligation to pay statutory accident benefits to an injured individual is outlined in s.268(2) of the *Insurance Act*, which provides for payment of statutory accident benefits to both occupants and non-occupants of automobiles. The following provisions govern the payment of statutory accident benefits to non-occupants (the claimants here are non-occupants) and create a cascading priority scheme and tie-breaking mechanism in the event that more than one insurer is liable to pay benefits under the *SABS*:

268(2) The following rules apply for determining who is liable to pay statutory accident benefits:

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.

However, the provisions of s.268(2)(2) of the *Insurance Act* outlined above do not automatically create an entitlement to statutory accident benefits for every injured non-occupant of a motor vehicle. Pursuant to s.268(1) of the *Insurance Act*, entitlement to statutory accident benefits is subject to the terms, conditions, provisions, exclusions, and limits set out in the *SABS*.

One such restriction on the scope of entitlement of non-occupants to receive statutory accident benefits according to Allstate, is found in s.2(4) of the *SABS*. This provision mandates that statutory accident benefits are available to an “insured person”, a term which is defined in s. 3(1) of the *SABS* as follows:

“insured person” means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario;

In this instance, it is clear that none of the claimants meet the definition of an “insured person” as outlined in s.3(1) of the *SABS*. In particular, none of the claimants had any

involvement in the subject accident or were a named insured, a spouse of a named insured, a dependant of a named insured, a listed driver, or a regular user with respect to the policy. They therefore do not fall under the umbrella of coverage for statutory accident benefits typically afforded to non-occupants who sustain an injury as a result of a motor vehicle accident.

It is therefore the position of Allstate that, given that none of the claimants meet the definition of an “insured person” as outlined in s.3(1) of the *SABS*, its obligation to pay statutory accident benefits under s.268(1) and s.268(2) of the *Insurance Act* cannot be triggered. This position is also supported by The Fund. In particular, Allstate notes the following:

- (a) Given that they do not meet the definition of an “insured person” under s.3(1) of the *SABS*, none of the claimants are an “insured” in respect of an automobile and are therefore not entitled to statutory accident benefits from Allstate under s.268(2)(2)(i) of the *Insurance Act*;
- (b) Given that they were not struck by an automobile, the claimants are not entitled to statutory accident benefits from Allstate under s.268(2)(2)(ii) of the *Insurance Act*; and,
- (c) Given that they do not have recourse against the insurer of any automobile involved in this single-vehicle accident, the claimants are not entitled to statutory accident benefits from Allstate under s. 268(2)(2)(iii) of the *Insurance Act*.

In sum, Allstate maintains that the claimants do not have recourse for statutory accident benefits as against it. Allstate’s duty to pay statutory accident benefits to the claimants only arises if the claimants fall within one of the three categories above as enumerated in s.268(2)(2)(i), s.268(2)(2)(ii), and s.268(2)(2)(iii) of the *Insurance Act*. Given that they do not, then Allstate’s obligation to pay statutory accident benefits is not triggered and the claimants may not look to it for benefits under the *SABS*.

On the facts before me, I am satisfied that the claimants do not meet the definition of “insured person” as contained in s.3(1) of the *Statutory Accident Benefits Schedule* and there would be no obligation on the part of Allstate to pay accident benefits to the claimants.

Is the Fund is Liable to Pay Statutory Accident Benefits to the Claimants under Section 268 of the *Insurance Act*?

Allstate maintains that pursuant to s.268(2)(2)(iv), where a non-occupant of an automobile is unable to obtain coverage for statutory accident benefits under s.268(2)(2)(i), s.268(2)(2)(ii), or s.268(2)(2)(iii) of the *Insurance Act*, then he/she has recourse for same against the Fund.

Allstate further maintains that the Fund is considered to be the "payer of last resort" because it provides compensation to people who suffer impairments as a result of motor vehicle accidents when no insurance exists to respond to their claim. Allstate has produced a copy of the current website page of the Motor Vehicle Accident Claims Fund which so indicates.

In this instance, the Fund agrees that the claimants are unable to recover statutory accident benefits as against Allstate under s.268(2)(2)(i), s.268(2)(2)(ii), or s.268(2)(2)(iii); however, it argues that the claimants do not have recourse to it pursuant to s.268(2)(2)(iv) of the *Insurance Act*. The Fund takes the position that in order for the claimants to qualify for statutory accident benefits from the Fund, they too "would have to first meet the definition of 'insured person' as described in Subsection 3(1) of the *SABS*", just as Allstate did. Given that the claimants do not meet any of the requirements in this section, the Fund maintains that they "are not eligible for accident benefits" and therefore do not have recourse against it. The Fund relies on three decisions to support its position.

Arbitrator Blackman in *Acosta v. Motor Vehicle Accident Claims Fund* [2003] O.F.S.C.I.D. No. 112. found at paragraph 21 that:

"the Schedule does not provide unlimited benefits for everyone. Rather, it provides limited benefits, as enumerated, for a limited segment of society ... The limitations on the definition of "insured person" set out in section 2 which are the subject of this preliminary issue hearing are not inconsistent with the with that general purpose of the Schedule, but rather are consistent with the intent of subsection 268(1) of the *Insurance Act*."

The facts in *Acosta* are admittedly similar to the facts before me. In *Acosta*, the claimant was the spouse of an individual who sustained personal injuries when struck by a truck. The claimant claimed to have sustained psychological injuries. The claimant was not involved in the accident nor did she observe it. Neither the claimant or her spouse was a named insured or specified driver under any policy of motor vehicle insurance and simply had no other insurance available. The arbitrator determined that the claimant did not meet the definition of

“insured person” as set out in s.2 (as it then was) of the *Statutory Accident Benefits Schedule* and that no benefits were payable by the Fund.

Similarly, Director’s Delegate Makepeace found in the appeal of *Areal v. Liberty Insurance Co. of Canada* [2005] O.F.S.C.I.D. No. 78, that the approach in *Acosta* was correct and that the intent of requiring a claimant to fit the definition of an “insured person” was to limit the scope of coverage and to ensure against unlimited liability. In that case, the claimant was the mother of a son who was injured in a motor vehicle accident. The claimant mother made claim for accident benefits with respect to psychological impairments and was paid having met the definition of “insured person” as defined in the SABS. In the course of providing attendant care to her son, she injured her back and claimed further accident benefits on the basis of physical injury. It was held that the claimant did not meet the definition of “insured person” with respect to her physical injuries as s.2(1)(a)(ii) of the “insured person” definition was not met. She was not involved in the accident. Her recovery of accident benefits was restricted to psychological or mental injury.

Also, in *Wawanesa Mutual Insurance v. Her Majesty the Queen in Right of Ontario and Allstate Insurance* (Arbitrator Robinson – August 14, 2009), the claimant, mother of the injured party, was found not to be entitled to accident benefits from either the insurer of the vehicle in which her son was an occupant, nor the Fund, as the claimant did not meet the definition of “insured person” as contained in the SABS. The vehicle was owned by the ex-spouse of the claimant and father of the son injured in the accident. The claimant was divorced from the father of her child and therefore no longer the spouse of the named insured. The arbitrator found that accident benefits were limited to those situations where the claimant was “an insured” as defined in the SABS and the claimant simply did not meet such definition. She was not the spouse of the named insured nor specified in the policy. The arbitrator applied the same test with respect to access to the Fund for payment of accident benefits.

All three cases deal with the definition of “insured person” as contained in the SABS. The *Acosta* and *Wawanesa* decisions would suggest that an individual would have to meet that definition of “insured person” to have access to accident benefits from the Fund.

It is the position of Allstate that the above arguments are incorrect and must be rejected. In particular, Allstate maintains that the Fund's position in this instance is fundamentally flawed as it fails to consider the interplay between s.268 of the *Insurance Act*, the provisions of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, and the provisions of its enabling statute, the *Motor Vehicle Accident Claims Act*.

Allstate has taken the position that entitlement to accident benefits arises by virtue of s.268 of the *Insurance Act*. According to Allstate, that section clearly makes the Fund responsible for payment of those benefits where there is no other insurer available.

Allstate submits s.6(2)(a) of the *Motor Vehicle Accident Claims Act* effectively prohibits the Fund from asserting that the claimants in this case are not "insured persons", as it expressly contemplates that coverage will be extended to an individual who "has recourse against the Fund for statutory accident benefits". Once it is determined that the claimants do not have recourse to Allstate under s.268(2)(2)(i), s.268(2)(2)(ii), and s.268(2)(2)(iii), then they have recourse against the Fund pursuant to s.268(2)(2)(iv). They are therefore captured by s.6(2) of the *Motor Vehicle Accident Claims Act* and as a result, are deemed to be "insured persons" under s.3(1) of the *SABS* and to be entitled to receive statutory accident benefits without the restrictions as to availability as contained in s.3(1) of the definition of "insured person" in the *SABS*. Simply stated, the claimants become "deemed insured persons".

Section 6(2) of the *Motor Vehicle Accident Claims Act* provides as follows:

6(2) If a person has recourse against the Fund under section 268 of the *Insurance Act*,

(a) a reference to an insurer in the *Statutory Accident Benefits Schedule* shall be deemed to be a reference to the Fund and **a reference to an insured person shall be deemed to be a reference to the person who has recourse against the Fund**; and

(b) sections 274 and 279 to 282 of the *Insurance Act* apply with necessary modifications. [emphasis added]

In support of its position, Allstate has referred to the decision of *Janousek and Canadian Surety Liberty Mutual and MVACF* (OIC A96-000449, Arbitrator Majl - January 19, 1998). In *Janousek*, the claimant was struck by an uninsured vehicle that proceeded to collide with a concrete and metal fence, causing debris to fall on to three cars that were parked nearby.

The Fund refused to pay statutory accident benefits to the claimant (who did not have access to any other insurance) on the grounds that she had recourse to the insurers of the three damaged cars. After finding that the three cars had not been “involved” in the accident and that recovery under their policies was not available to the claimant, Arbitrator Manji concluded that the claimant had recourse to the Fund for payment of her statutory accident benefits:

I have concluded that Ms. Janousek was not involved in an accident in Ontario involving the three insured automobiles, therefore she is not an “insured person” under the Schedule in respect of the motor vehicle liability policies of Halifax, Canadian Surety and Liberty Mutual. She also does not fall within the extended definition of “insured person” in subsection 2.2.3(g) of their policies. Therefore, she is not entitled to statutory accident benefits under their policies...

Since Ms. Janousek is not entitled to statutory accident benefits under any other available policy of insurance, I find that she has recourse against MVACF for payment of statutory accident benefits, pursuant to subsection 268(2)2.iv of the Act. Subsection 268(3) of the Act provides that an insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. Accordingly, MVACF is liable to pay the benefits.

Accordingly, Arbitrator Majl ordered that the Fund pay the accident benefits to which the claimant was entitled. In reaching her decision she made specific reference to s.6(2) as outlined above.

After careful consideration of the applicable legislation and the jurisprudence outlined above, I am satisfied that where recourse is not available under any policy of insurance, then recourse is available from the Fund by reason of s.268(2)(2)(iv) as per the reasoning of Arbitrator Majl in *Janousek*. However, I do not accept the argument advanced by the Fund that in order for the Fund to be responsible, the claimant must meet the definition of “insured person” as set out in what is now s.3(1) of the SABS. Such definition in my view only restricts access to the policies of insurance which arguably may have provided accident benefits in the circumstances. The very wording so indicates:

“insured person” means, in respect of a particular motor vehicle liability policy
[emphasis mine]

To hold that the claimant must meet the definition to have access to the Fund would in my view not make sense. For example, how would an occupant of an uninsured vehicle or a pedestrian struck by an unidentified or uninsured vehicle sustaining physical injury make

claim to the Fund if the claimant had no access to other insurance. Such individual would not meet the definition set out in s.3(1):

“insured person” means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario

I therefore do not agree with the decisions in *Acosta* or *Wawanesa* so far as they restrict liability for payment of accident benefits to those meeting the SABS definition of “insured person”. That does not mean that there are not restrictions and limitations on that payable by the Fund. In my view, the entitlement to accident benefits must be viewed replacing the word “insurer” with “the Fund” and reference to the words “insured person” with “person who has recourse against the Fund” as required by s.6(2) of the Motor Vehicle Claims Fund Act:

6(2) If a person has recourse against the Fund under section 268 of the *Insurance Act*,

(a) a reference to an insurer in the Statutory Accident Benefits Schedule shall be deemed to be a reference to the Fund and **a reference to an insured person shall be deemed to be a reference to the person who has recourse against the Fund**; and

(b) sections 274 and 279 to 282 of the *Insurance Act* apply with necessary modifications. [emphasis added]

Under the SABS, each benefit to which an individual may access has eligibility requirements. Each one requires, among other things, that the individual “suffer an impairment as a result of an accident”. “Accident” is defined in s.3(1) of the SABS as well:

“accident” means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescriptive eyewear, denture, hearing aid, prosthesis or any other medical or dental device”

Such interpretation would provide an individual without any other access to insurance, access to the Fund for payment of accident benefits, but limit claims to those suffering impairments who were involved in the accident and not family members not involved in the accident. This would be in keeping with the words of arbitrator Blackman in *Acosta*:

“the Schedule does not provide unlimited benefits for everyone. Rather, it provides limited benefits, as enumerated, for a limited segment of society ...”

Most importantly and not to be overlooked, is the geographical restrictions with respect to payments out of the Fund. Section 6 of the *Motor Vehicle Accident Claims Act* deals with the payment of statutory accident benefits and this too provides a further limitation on that payable by way of accident benefits by the Fund. Section 6(3.1) deals with situations where the accident giving rise to the claim occurs outside of Ontario:

Accidents outside Ontario

(3.1) Subject to section 6.1, no payment out of the Fund shall be made in respect of statutory accident benefits if the accident from which the entitlement to statutory accident benefits arose occurred outside Ontario. 2002, c. 22, s. 145 (2).

The accident giving rise to the claims herein took place in the State of New York. The section above creates a complete restriction of payments by the Fund where the accident occurred outside Ontario. That in itself would preclude the claims of the claimants against the Fund.

The geographical restriction created by s.6(3.1) above provides yet another reason why the definition of “insured person” in the SABS should not be used to dictate who has access to the Fund for payment of accident benefits. The definition of “insured person” in the SABS includes payments for the specified individuals who may have been involved in accidents outside of Ontario which would be in direct conflict with s.6(3.1) of the *Motor Vehicle Accident Claims Act* which limits payments to those arising from accidents which occurred in Ontario.

The findings herein are consistent with the copy of the present Motor Vehicle Accident Claims Fund website provided in Allstate's Book of Authorities, which states:

The Motor Vehicle Accident Claims Fund (MVACF) is considered to be the "payer of last resort" as it provides compensation to people injured in automobile accidents when no automobile insurance exists to respond to the claim.

The major functions of MVACF are:

- to provide statutory accident benefits directly to persons involved in an automobile accident who have not recourse to automobile insurance ...

[emphasis mine]

The claimants here were not involved in the accident but were children of the person who was involved in the accident and who sustained personal injury.

By way of summary, I find that an individual who does not have access to accident benefits under s.268(2)(1)(i, ii or iii) or s.268(2)(2)(i, ii or iii) of the *Insurance Act*, has access to the Fund for accident benefits if the individual suffers from an impairment directly caused by an accident which occurs in Ontario and subject to any other limitations as contained in the Schedule. As the claimants did not suffer an impairment directly caused by an accident in Ontario, they are not entitled to or eligible for accident benefits from the Fund.

ORDER

I hereby order:

1. That the claimants do not qualify for statutory accident benefits either as against Allstate or the Fund.
2. That the priority dispute claim herein as against the Fund is dismissed with costs payable to the Fund on a partial indemnity basis
3. That Allstate pay the costs of the Arbitrator.

DATED at TORONTO this 18th)
day of April, 2017.)

KENNETH J. BIALKOWSKI
Arbitrator