IN THE MATTER OF ARBITRATION under THE *ARBITRATION ACT,* 1991
and pursuant to the provisions of Section 268 of THE *INSURANCE ACT*,
and ONTARIO REGULATION 283/95 thereunder

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and –

ZURICH CANADA

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Brenda Cuneo – Bell, Temple LLP
Counsel for the Applicant, Wawanesa Mutual Insurance Company
(hereinafter referred to as "Wawanesa")

Kevin Adams – Rogers Partners LLP
Counsel for the Respondent, Zurich Canada
(hereinafter referred to as "Zurich")

ISSUE - INVOLVED IN AN "ACCIDENT"?

[1] 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, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, with respect to fatal injuries sustained by Karl Sloan in an incident which occurred on September 23, 2016. Mr. Sloan had a heart attack while driving a truck. The preliminary issue to be determined is whether the death was as a result of an "accident" as defined in the Statutory Accident Benefits Schedule ("SABS"), so as to be entitled to statutory benefits in the first place and make the priority scheme set out in O. Reg. 283/95 and this priority dispute available to the Applicant Wawanesa.

PROCEEDINGS

[2] The preliminary issue proceeded on the basis of a Joint Document brief, Books of Authority and written submissions in April and May 2018.

FACTS

[3] On September 23, 2016, Mr. Sloan (DOB: October 25, 1957) was operating a 2012 Volvo truck in Trenton, Michigan on Interstate 75. He was in the course of his employment as a truck driver. He was driving from Texas to his home in Kitchener, Ontario.

[4] Mr. Sloan had a heart attack while driving with his cruise control on. Police had received numerous calls that Mr. Sloan was slumped over the wheel while the vehicle was being operated. Mr. Sloan's truck and trailer came in contact with the left side guard rail and continued along the guardrail for quite some time. The police had no way of getting the truck to stop, so held the traffic back until the truck finally came to a rest after the guard rail ended, when it struck the median. By this time, the tires of the truck were worn down to the rims. There is no specific evidence before me as to how many seconds or minutes elapsed between when the claimant was first observed slumped over the wheel of his truck and the time first responders were able to enter the cab of his truck so as to possibly provide treatment or initiate transport to hospital.

[5] When the truck came to a rest, the police got inside the vehicle. EMS found Mr. Sloan unresponsive on the console between the two seats. According to the medical records, he had suffered an asystolic cardiac arrest. The history provided by EMS personnel indicated that he was not breathing on their arrival. He was essentially "flat line" according to the definition of "asystole". He had no pulse and his heart rate was "0". There was no oral medical evidence called in this proceeding. Available were only the hospital and EMS records and the medical dictionary meanings of "asystole".

[6] Mr. Sloan was taken to the ER at Beaumont Hospital in Trenton, Michigan, and was treated with oxygen, IV access, intubation, epinephrine, CPR/thumper, IV fluids, and sodium bicarb but to no avail. He was declared dead on September 23, 2016 at Beaumont Hospital.

[7] The colour photographs of Mr. Sloan's truck show extensive damage to the driver's side of the vehicle, including the chassis/frame, rims, and axles.

[8] Mr. Sloan's wife, Christine Sloan, submitted an Application for Accident Benefits and a Death and Funeral Benefits Application dated October 26, 2016 to Wawanesa Mutual Insurance Company ("Wawanesa"), her personal automobile insurer. It was noted that Mr. Sloan was survived by Christine Sloan and his son, Ethan Sloan.

[9] On October 26, 2016, Wawanesa advised Ms. Sloan that as the accident occurred outside of Ontario, she had the right to choose whether to receive benefits under the SABS or benefits payable under the laws of the jurisdiction in which the accident occurred.

[10] Ms. Sloan elected to receive SABS from Wawanesa on October 26, 2016.

[11] On November 1, 2016, Wawanesa approved funeral expenses in the amount of $6,000 and death benefits to Christine Sloan and Ethan Sloan in the amounts of $25,000 and $10,000, respectively.

[12] On November 1, 2016, Wawanesa sent notice of priority to Zurich Canada, the insurer of the 2012 Volvo truck, on the basis that Mr. Sloan was an occupant of their insured vehicle at the time of the accident.

[13] On July 13, 2017, counsel for Zurich Canada responded by stating that Mr. Sloan's accident was not caused by the use or operation of a motor vehicle and therefore, there was no entitlement to payment of accident benefits.

ANALYSIS AND FINDINGS

[14] Part V of the SABS addresses death and funeral benefits. Section 26(1) of the SABS states:

> "The insurer shall pay a death benefit in respect of an insured person who dies as a result of an accident…"

[15] Section 27(1) of the SABS provides for funeral benefits and states:

> "The insurer shall pay a funeral benefit in respect of an insured person who dies as a result of an accident…"

[16] Section 3(1) of the SABS defines "accident" as follows:

> "Accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damages to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.
>
> [emphasis mine]

[17] At risk of oversimplification, it is the position of the Respondent Zurich that before an Applicant can pursue priority against another insurer, it must first demonstrate that it was obligated to pay such benefits in the first place, showing that the death arose as a result of an "accident" as defined above. In other words, did the use or operation of a motor vehicle directly cause the death of Mr. Sloan.

[18] Zurich claims that in the context of a priority dispute, the wording of s. 268 of the *Insurance Act* requires that an arbitrator consider whether, on the facts of the case, the relevant conditions specified in the *SABS* existed which would render the insurer obligated to pay the statutory accident benefits at issue. They rely on *TTC Insurance Company Limited v.*

Lombard Canada (Arbitrator Densem - May 29, 2012) where it was found that, in order to succeed on a priority dispute, the Applicant must prove on a balance of probabilities that the requirements of s. 268 of the *Act* are met – specifically that the insurer was required to pay accident benefits as a result of an "accident". In that case, Arbitrator Densem stated:

> "This may involve an examination of the very same issue (was there an accident?) that TTC could have argued at FSCO or in the courts when presented with the claim, but in my view that is what the Regulation 283/95 procedure and section 268 require."

[19] Similarly, the Arbitrator in *Unifund Assurance Company v Security National Insurance Company 2016 ONSC 6798,* held that the threshold in s.2(1) of the *SABS*, that statutory accident benefits shall be provided in respect of <u>accidents</u>, must be met before the priority provisions can be considered. On appeal, Justice Matheson confirmed that the starting point in conducting an analysis under the priority provisions in s.268 (2) of the *Act* is to consider whether accident benefits are available at all and that this required a consideration of the *SABs* "terms, conditions, provisions, exclusions and limits" as outlined in s.268 of the *Act*. It was held that the priority scheme is available if multiple policies potentially provide for payment of statutory accident benefits, but this will depend on accident benefits being available to the claimant in the first place. Justice Matheson stated at paragraphs 35 and 36:

> Resort to the priority list in s. 268(2) is only available, and only needed, if more than one policy provides statutory accident benefits: *Security National Insurance Co. v. Markel Insurance Co.*, 2012 ONCA 683, 117 O.R. (3d) 1, at paras. 40 and 41.
>
> In accordance with the above statutory scheme, the starting point is whether statutory accident benefits are available at all. Under s. 268(1), this requires a consideration of the *SABS* "terms, conditions, provisions, exclusions and limits." Therefore, the threshold in s. 2(1) of the *SABS* must be met. Under s. 2(1), statutory accident benefits under the *SABS* shall be provided "under every contract evidenced by a motor vehicle liability policy in respect of accidents."

[20] On the basis of these cases I am satisfied that for Wawanesa to pursue this priority dispute, it must demonstrate that the death of Karl Sloan was caused by an "accident". Otherwise, Wawanesa had no obligation to pay (and should not have paid) accident benefits arising from the death of Karl Sloan and therefore, is not in a position to pursue priority as against Zurich.

[21] Both parties agree that the appropriate test to determine whether a claimant was in an "accident" as per the SABS originated from the Supreme Court in *Amos v. Insurance Corp. of British Columbia* [1995] 3 SCR 405 and was later modified in the Ontario Court of Appeal cases of *Chisholm v. Liberty Mutual Group* [2002] ONCA 3135 and *Greenhalgh v. ING Halifax Insurance Co* .[2004] ONCA 3485:

> 1) Was the use or operation of a vehicle the cause of the injuries? (the "***purpose***" branch of the test).

2) If the use or operation of a vehicle was the cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things?" In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries? (the "***causation***" branch of the test).

A. The "Purpose" Branch of the Test

[22] Since the Supreme Court of Canada's decision in *Stevenson v. Reliance Petroleum Ltd.* [1956] SCR 936, judges and arbitrators have confirmed that the term "use or operation" of a motor vehicle must be broadly interpreted to mean "ordinary" and "well-known" uses.

[23] The 2016 FSCO appeal decision *Salamone v. Aviva Canada Inc*. [2016] OFSCD No. 191, has facts similar to the case at bar. Mr. Salamone had a heart attack while driving and lost consciousness. The vehicle hit one guardrail and slid along it until it hit a second. Then the vehicle left the road and ended up angled over a ditch. The issue was whether this was an "accident" as defined in section 3(1) of the SABS. The parties all agreed in this case that the purpose branch of the test was satisfied, as Mr. Salamone was driving his van down the highway when the heart attack occurred.

[24] In the case at bar, Mr. Sloan was in the course of employment, driving his vehicle home from Texas. This is an ordinary and well-known use of a vehicle.

[25] It is clear that this branch of the test is satisfied. In fact, Zurich has admitted that the "purpose test' has been met.

B. The "Causation Branch" of the Test

[26] In *Greenhalgh v ING Halifax Insurance Co.* (supra), the Court of Appeal expanded on the second branch of the test, stating that a consideration of the following can provide useful guidance in an analysis of causation:

a. the 'but for' test can act as a useful screen;
b. in some cases, the presence of intervening causes may serve to break the link of causation where the intervening events cannot be said to be part of the ordinary course of use or operation of the automobile; and
c. in other cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident; if not, it may be that the link between the use or operation and the impairment is too remote to be called 'direct'.

[27] In the analysis of causation both parties have referred me to different cases in support of their positions. Both cases have facts similar to the facts before me.

[28] The Applicant Wawanesa relies on the decision in *Salamone* (supra). In *Salamone,* Director's Delegate Evans considered the causation branch of the test. Mr. Salamone had a heart attack while driving and lost consciousness. A bystander who was a former paramedic had seen Mr. Salamone's vehicle slide along the guardrail, however he could not enter through the vehicle's damaged driver's door. From the passenger side, he could not perform CPR on Mr. Salamone or extricate him safely from the vehicle. By the time EMS personnel arrived to remove and treat Mr. Salamone, he had sustained a severe neurological impairment. Director's Delegate Evans considered three parts to the causation test, as outlined by the Court of Appeal for Ontario in Greenhalgh and concluded that the claimant's impairments were caused by an "accident" as one of the direct causes of the impairments was the delay in providing treatment by reason of the fact that the claimant was entrapped in the vehicle with such delay increasing the claimants impairments.

[29] The Respondent Zurich relied on the FSCO arbitration decision of Arbitrator Novick in *Waters v. Royal and Sun Alliance Insurance Company of Canada* 2001 CarswellOnt 5860. In *Royal*, Mr. Walters had a heart attack while operating an automobile in Hamilton where at slow speed his vehicle hit a planter, then a pole and came to rest against a building. No other vehicles were involved. A post mortem showed that Mr. Walters' death was as a result of a heart attack due to his pre-existing severe ischemic heart disease. Arbitrator Novick concluded that on the evidence before her, the death was not directly caused by an "accident" and death benefits were denied to the claimant.

i. "But For" Test

[30] In *Salamone*, Director's Delegate Evans considered the "but for" test. It was noted that caselaw has held that the "but for" test is "a very low bar." Director's Delegate Evans held: "the proper question is: but for the insured's car entrapping him, would Mr. Salamone have received treatment sooner? …the answer is yes…" Therefore, Director's Delegate Evans found that the test was satisfied.

[31] Zurich took the position that the facts here are distinguishable from the facts in *Salamone* as there is no evidence to suggest that any delay in the claimant's treatment due to his use or operation of the vehicle resulted in increased impairment or death. Further, there was <u>no</u> evidence to suggest that there were any road conditions, actions of another driver, or other factors related to the use and operation of a motor vehicle that may have triggered the cardiac event or caused his death.

[32] Zurich submitted that it is insufficient and inappropriate for Wawanesa to suggest that "Mr. Sloan's continued use of his vehicle increased his impairment" without reliable (or any) medical evidence in support of that allegation.

[33] It should be noted that in *Salamone*, medical evidence was adduced and it was accepted that Salamone's impairments were increased by reason of the fact that Salome's entrapment within the vehicle delayed necessary treatment. Had he not been entrapped within the vehicle, he would have received medical treatment sooner and his impairments

would have been less. Specifically, Dr. Rathbone and Dr. Myers testified that it was probable that there would have been a good neurological outcome had CPR been initiated when an individual with CPR training arrived within one minute. This evidence was preferred to contradictory evidence that was also adduced at the hearing.

[34] Wawanesa describes Mr. Sloan's condition of "asystolic cardiac arrest" as a "life threatening condition that requires immediate medical attention" and cites no medical or legal authority in support of this assertion that it required immediate medical attention or that medical attention would have made a difference in the facts of this case.

[35] Stedman's Medical dictionary defines "asystole" as an "absence of contractions of the heart."

[36] MedicineNet defines "asystole" as a "dire form of cardiac arrest in which the heart stops beating and there is no electrical activity in the heart."

[37] Zurich submitted that Wawanesa's bald assertion that Mr. Sloan's condition required immediate medical attention, with no medical evidence or opinion whatsoever, is insufficient proof that his impairments were increased or exacerbated and/or his death was caused by his use or operation of the vehicle. Zurich claimed that as stated at paragraph 17 by the Arbitrator in *Waters,* that although it may be difficult to find such evidence, the arbitrator must ultimately base his decision on the evidence that is presented to him.

[38] Therefore Zurich has submitted that Wawanesa has not met its onus to prove that the death of Karl Sloan was caused directly by an "accident", given the absence of medical opinion.

[39] Clearly each case must be decided on its own facts. I am satisfied that the medical evidence before me is insufficient to prove that the death of Mr. Sloan was caused directly by his use and operation of his motor vehicle. In *Salamone*, the claimant survived unlike Mr. Sloan here. There was oral evidence adduced from doctors that the neurological impairments of the claimant would have been less if CPR would have been commenced earlier. "But for" the fact that he was entrapped in his vehicle, such treatment was delayed even though an individual with CPR training was on the scene. This individual could not get to the claimant due to the damage to the driver's door of the vehicle and had to wait 14 minutes for EMS to arrive and then extricate the claimant. These facts are far different than those before me. There is no evidence that Mr. Sloan was entrapped in his vehicle delaying the treatment received. There was no medical evidence adduced that earlier treatment would have prevented the fatal result. For all we know, nothing by way of treatment may have helped Mr. Sloan. There is simply insufficient medical evidence for Wawanesa to prove that the death of Mr. Sloan would not have occurred "but for " his use or operation of his motor vehicle.

ii. Intervening Act

[40] The Applicant Wawanesa pointed out that in *Salamone*, Director's Delegate Evans considered whether there was an intervening act that resulted in the injuries that cannot be said to be part of the "ordinary course of things." Director's Delegate Evans found that the heart attack was not an intervening event that broke the chain of causation, as Mr. Salamone never stopped using the van, conscious or not.

[41] Zurich submits that Mr. Sloan's cardiac event was an intervening cause of his death, which emanated from a new and independent source. As such, the chain of causation was broken and the use or operation of the vehicle was <u>not</u> a cause of the claimant's impairments.

[42] *Waters* (supra) considered very similar factual circumstances. In that case, the claimant suffered a heart attack while driving along the highway. The Arbitrator found in paragraph 22 that the heart attack represented "the intervention of a force that emanated from a 'new and independent source'" and was "precisely the type of act which would have the effect of breaking the chain of causation."

[43] As stated by the Arbitrator in *Waters* at paragraph 23:

> "The fact that Mr. Waters experienced his fatal heart attack while he was operating his vehicle, as opposed to while walking down the street, is simply not enough to bring these circumstances within the meaning of the term "accident" as defined in the Regulation."

[44] According to Zurich, the circumstances in this case are directly analogous to those in *Waters.* The chain of causation was similarly broken by Mr. Sloan's cardiac event, such that the use or operation of the vehicle cannot be considered to be a direct cause of his death. The fact that Mr. Sloan suffered a fatal heart attack while operating his truck as opposed to walking down the street, is not enough to bring his circumstances within the meaning of "accident" as defined in the *SABS.*

[45] I agree with and accept the submissions made by Zurich as set out in the paragraphs above. In my view, the heart attack was an "intervening act" separate and apart from the usual use and operation of a motor vehicle.

iii. Dominant Feature

[46] In *Salamone*, Director's Delegate Evans considered whether the use or operation of the automobile was the dominant feature of the accident. He found:

> *"[T]he 'dominant feature' inquiry is not required in every case, since the court in Greenhalgh stated that 'in **<u>some</u>** cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the accident.' I do not believe it is necessary to consider it here where Mr. Salamone remained an occupant of the*

> *vehicle, and that occupancy delayed treatment, causing the impairment from which Mr. Salamone now suffers."*

[47] Director's Delegate Evans went on to find that "the delay in treatment worsened the outcome of Mr. Salamone's heart attack. To that extent, this is really a case dealing with a pre-existing impairment – even though it had pre-existed for only moments – caused by an unrelated incident and whether the incident at issue made a material contribution to it."

[48] Director's Delegate Evans noted that there can be more than one direct cause of impairment:

> *"Mr. Salamone suffered a heart attack, which was one direct cause of impairment. However, he continued to use the vehicle, which increased his level of impairment, so the use of the motor vehicle was another direct cause of impairment, as found by the Arbitrator. Mr. Salamone therefore meets the test for an "accident" under the SABS… Furthermore, pursuant to Monks, there is no apportionment between the two direct causes, so Mr. Salamone is entitled to all benefits related to the impairment."*

[49] On the facts before me, I cannot help but find that it was a heart attack that was the "dominate feature" leading to the death of Mr. Sloan. I accept the proposition that there may well be in certain circumstances multiple "dominant features" contributing to an individual's injury or death. I find a second "dominant cause" other than the heart attack has not been established here on the evidence. Unlike *Salamone*, there was no entrapment of the driver preventing or delaying treatment from a trained individual at the scene, nor was there medical evidence confirming that early treatment would have reduced the ultimate level of impairment. Those "dominant features" did not exist in the case before me.

Application of the three part "Causation" test

[50] I am satisfied that the application of the three part "causation" test leads to the inescapable conclusion on the evidence presented to me, that the death of Mr. Sloan was not <u>directly</u> caused by the use of operation of a motor vehicle and therefore not as a result of an "accident" as defined in s. 3(1) of the SABS. The facts and evidentiary findings in *Salamone* were quite different than the facts before me which were most similar to those in *Waters*.

[51] In reaching my decision, I have considered the fact that the Court of Appeal for Ontario relied on *Salamone* in the recent decision of *Dittman v. Aviva Insurance Company of Canada* [2017] ONCA 617. In that decision, the Respondent sustained serious burns to her lower body when the contents of a coffee cup she ordered at a McDonald's drive-through spilled as she attempted to transfer the cup from the drive-through window to the cup holder in her vehicle. The Court of Appeal for Ontario confirmed the motion judge's findings that the use and operation of the Respondent's vehicle was a direct cause of her injuries. The motion judge is quoted:

> *"I come to this conclusion because but for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee cup while in the seated position, would not have been transferring the coffee cup to the cup holder across her body, and would not have had the coffee spill on her lap. In addition, but for her being seated and restrained by a lap and shoulder harness she may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on her."*

[52] The Court of Appeal for Ontario found that the restraint of the Respondent's seatbelt increased her exposure to the scalding liquid and thereby increased the level of her impairment. The Court further concluded that there was no intervening act:

> *"As pointed out in **Salamone v. Aviva Canada**, 2016 OFSCD No 191, at para. 31, the issue is not, what was the "triggering event" of the incident, but rather, what caused the impairment. In this case, the use of a running motor vehicle in gear to access the drive-through and the seatbelt restraint were direct causes and dominant features of the impairment the respondent suffered."*

[53] I have considered the submissions advanced by Wawanesa that, as in *Dittman*, "but for" Mr. Sloan being in his vehicle driving, he may have been able to take evasive action to avoid the heart attack altogether or lessen the effects of the heart attack. The fact that he was restrained in his moving vehicle, with police and EMS not being able to enter the vehicle for a period of time until it came to a gradual stop, increased his level of impairment and ultimate death. The difficulty in the case before me, is that there was simply no medical evidence called to support such findings. Specifically, there was no medical evidence called that the delay in getting police to attend to him while his vehicle gradually came to a stop on the highway, made a medical difference to the outcome. There was no evidence that his seatbelt restraint contributed in any way to the ultimate outcome.

[54] My findings herein find support in a series of decisions where drive-by shootings or assaults involving automobiles were found not to be an "accident". In *Chisolm v. Liberty Mutual Group* [2001] O.J. No. 3294, the victim of a drive-by shooting was not entitled to accident benefits as it was found that the claimant was not involved in an "accident" as defined in the SABS. Similar results occurred in *Sarkisian v. Co-operators General Insurance Company* (FSCO A99-000966, January 17, 2001), where a claimant was shot in an underground parking garage while performing maintenance on his car and in *Kumar v. Coachman Insurance Company* (FSCO-A00-000201, April 27, 2001), where taxi drivers were assaulted by passengers they picked up.

[55] In reaching my decision, I have also considered that a broad and liberal approach should be taken when interpreting the provisions of the SABS to expand coverages rather than restrict same. However, adopting a broad and liberal approach does not mean that the clear and unambiguous wording of a definition provision can be ignored. Here, there was no "accident" as defined in the SABS as the evidence falls short of establishing that the use or operation of an automobile directly caused the death of Mr. Sloan.

ORDER

[56] On the basis of my findings, I hereby order:

1. That Mr. Sloan was not involved in an “accident” as defined in s. 3(1) of the SABS;

2. That the priority dispute herein is dismissed;

3. That Wawanesa pay to Zurich the legal costs of this priority dispute on a partial indemnity basis.

4. That Wawanesa pay the Arbitrator’s account.

DATED at TORONTO this 26th)

day of May, 2018.) ______________________________________

KENNETH J. BIALKOWSKI
Arbitrator