

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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY OF CANADA

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Grant R. Dow for the Applicant

D'Arcy McGoey for the Respondent

ISSUE:

1. Was Samir Ahou an “occupant” of the vehicle insured by the Personal Insurance Company of Canada, when he was struck by a vehicle insured by Dominion of Canada ?

RESULT:

1. Yes, Mr. Ahou was an “occupant” of that vehicle, as defined by section 224(1) of the *Insurance Act*, when he was struck by the Dominion-insured vehicle.

The Personal is therefore in higher priority to pay his accident benefits claim.

ARBITRATION AGREEMENT:

1. The parties agreed to the following terms, and requested that I include them in this decision:
 - (i) **Appeal rights** – either party has the right to appeal this decision, without leave, on an issue of law, or mixed fact and law, within thirty days of the decision having been issued.
 - (ii) **Costs** – costs will be awarded to the successful party, with the quantum to either be agreed upon or assessed by the Arbitrator.

BACKGROUND:

2. On March 1, 2008 Samir Ahou was driving with his brother Tony Ahou in a 1992 Honda Civic owned by his sister-in-law, and insured by The Personal Insurance Company of Canada (“The Personal”). The brothers were going to visit their parents, who live in Aurora, Ontario. Tony was driving the vehicle, and Samir was the front-seat passenger. As they were proceeding westbound on Davis Drive near McCowan Road in Newmarket, one of their tires deflated. Tony pulled the car over to the side of the road, and they both exited the vehicle in order to change the tire.

3. Samir felt that they did not have enough light by the side of the road with which to change a tire. He decided to cross Davis Drive to see whether he could borrow a flashlight, and rang the doorbell at a house across the road. A woman answered the door, and loaned him a large flashlight. She also suggested that the brothers pull the car into her driveway, as it would be safer to change the tire there, away from passing traffic.

4. Samir then crossed the street back to where the car was stopped on the side of the road. He told Tony that the woman had suggested that they change the tire in her driveway, and that he would direct him into the driveway on the other side of the road. As he was standing near the Honda and preparing to direct his brother into the driveway, Samir was struck by a vehicle proceeding westbound on Davis Drive. He was thrown several meters down the road, and lost consciousness. That vehicle was insured by Dominion of Canada General Insurance Company (“Dominion”).

5. The Claimant submitted an application for accident benefits to The Personal, the insurer of the vehicle that his brother had been driving. It accepted the claim and has paid benefits to him. The Personal contends that Dominion is in higher priority to pay the claim in accordance with section 268(2)2 of the *Insurance Act*, claiming that Mr. Ahou was not an “occupant” of its vehicle as defined in section 224(1) of that *Act*.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act - Section 268

(2) 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,

2. In respect of ***non-occupants***,

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

Insurance Act - Section 264

(1) In this Part,

“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 EVIDENCE:

6. No witnesses were called at the hearing. Counsel referred to and relied on the transcript of the Claimant’s examination for discovery held in the tort claim. Prior to the hearing, counsel had conducted examinations under oath of Tony Ahou, the driver of the vehicle, and Francesca Bertone, the woman who had loaned the flashlight to the Claimant, and relied on the transcripts of their evidence at the hearing.

7. None of the important facts are in dispute. Aside from the background facts set out above, counsel highlighted the fact that the incident occurred at approximately 7 p.m., and that it was dark outside. Once Tony realised that they had a flat tire, he pulled the car over onto the shoulder of the road, and both brothers exited the vehicle. Tony opened the trunk, and they began to remove the items that were in there, in order to access the spare tire. Samir noted at that point that there was not enough light in the area, and decided to cross the street to see if he could borrow a flashlight.

8. While Tony remained with the vehicle, the Claimant crossed the street and rang the doorbell at the home of Ms. Bertone, who operated a dog kennel on the premises. She agreed to loan him a flashlight. She also suggested that they change the tire in her driveway, as there was a high volume of traffic passing on Davis Drive and she felt it

might be unsafe. The Claimant took the large flashlight that she had provided, and crossed back across the street to return to the vehicle where his brother was waiting.

9. Samir then advised Tony of Ms. Bertone's offer to move the car into her driveway. They reloaded the items that had been removed from the trunk back into the car. Tony re-entered the vehicle, and Samir remained outside, intending to direct Tony into the driveway. Tony recalled seeing his brother in his rear view mirror, standing behind the vehicle, before he started to reverse the vehicle. He then heard a "bang" and realised that Samir had been struck by another vehicle. That vehicle was driven by Robin Burkimsher, and was insured by Dominion.

10. The witnesses were asked to estimate the time that had elapsed from the point at which the car initially pulled over on the shoulder of the road, to the point at which the Claimant was struck. The Claimant was not able to provide evidence on this point. Tony Ahou estimated that it all took "some minutes".

PARTIES' ARGUMENTS:

11. Counsel agreed that the focus of the analysis is the definition of the term "occupant" set out in section 224(1) of the *Act*, reproduced above. They also agreed that neither subsection (a) nor (c) of that definition are relevant to the discussion, as Mr. Ahou was not the driver of the vehicle or "a person getting into...or out of the automobile". The crux of the dispute between the parties is whether the Claimant could accurately be described as "a passenger, whether being carried in or on the automobile" as set out in subsection (b) of that provision.

Applicant's submissions

12. Counsel for the Personal contended that Mr. Ahou was not a passenger of the vehicle that his brother had been driving when he was struck by Ms. Burkimsher's vehicle. He noted that the Claimant had exited from the vehicle once it pulled over, spent a few minutes at the back of the car as he and his brother opened the trunk and discussed how to change the tire, and then crossed the street to get a flashlight. After ringing the

doorbell and speaking with Ms. Bertone he waited at the door while she went to find the flashlight. He then crossed back to the other side of the street, and stood outside of the vehicle talking to his brother, and prepared to direct him across the street before he was hit.

13. He submitted that various steps were taken and actions initiated between the point at which he left the vehicle and the moment that he was struck, and that as each moment passed, Mr. Ahou's status as a passenger diminished.

14. Mr. Dow also noted that Mr. Ahou never re-entered the vehicle prior to being struck by the other vehicle. He acknowledged that he would have regained his status as a passenger upon re-entering the vehicle to continue their journey, but contended that several steps would have had to occur prior to this happening, such as directing the car across Davis Drive into Ms. Bertone's driveway, crossing the street to join his brother at the vehicle and changing the tire.

15. Counsel discussed the "objective observer" test developed by the Court of Appeal in *AXA Insurance Company v. Markel Insurance Company of Canada* (O.J. No. 294, February 2, 2001). Mr. Dow submitted that when that test is applied to the circumstances in this case, the fact that Mr. Ahou left the vicinity of the vehicle and crossed the street to get the flashlight, with "some minutes" having transpired, should lead to the conclusion that he was no longer an "occupant" of the vehicle at the point at which he was struck.

16. Mr. Dow contended that a finding that the Claimant remained a passenger (and therefore an "occupant" of the vehicle) in these circumstances would stretch the definition of that term too far. He submitted that the second part of section 268(2) of the *Act* relating to "non-occupants" is meant to apply in circumstances such as these, and that to describe Mr. Ahous as an "occupant" would effectively gut the "non-occupant" provision of any meaning.

Respondent's submissions

17. Counsel for Dominion contended that the Claimant remained “a passenger” of the Personal-insured vehicle when he was struck. He noted that Samir had remained in close proximity to the vehicle, and that not much time had elapsed between the time he left the vehicle and the point at which he was struck. He also noted that the only reason that Mr. Ahou had exited from the vehicle was to assist with changing the flat tire, so that he and his brother could resume their journey. He submitted that their trip was interrupted by the flat tire, and that if Mr. Ahou had not been struck by the Burkimsher vehicle, he would have re-entered the vehicle and resumed the trip as a passenger.

18. Mr. McGoey noted that the “objective observer” test first arose in *Axa v. Markel*, *supra*, another priority dispute between insurers. In that case, the Court of Appeal considered the question of whether a truck driver who was killed while standing in a loading bay thirty feet away from where he had parked his truck moments earlier could be described as a “driver” within the meaning of section 224(1) of the *Act*. He also referred to the Court of Appeal’s decision in *McIntyre Estate v. Scott* (O.J. No. 3997, October 17, 2003), in which the “objective observer” test was extended to the question of whether the person claiming damages or benefits was a “passenger”.

19. Counsel noted that the court in *McIntyre* found that the word “passenger” identifies a “status rather than a physical activity”. He contended that the facts of this case are on all fours with those in *McIntyre*, *supra*, noting that Ms. McIntyre was also struck by a vehicle during a temporary interruption in her journey, and stated that the Court of Appeal’s findings are therefore binding on me. He urged me to conclude that Mr. Ahou remained a “passenger” in his brother’s vehicle, and therefore fell within the definition of “occupant” in section 224(1).

ANALYSIS & FINDINGS:

20. After considering the parties' arguments and closely reviewing the Court of Appeals' decisions in *AXA v. Markel, supra*, and *McIntyre, supra*, I conclude that Mr. Ahou was a passenger of the vehicle that his brother was driving at the time that he was struck, and that he therefore fits within the definition of "occupant" in section 224(1) of the *Act*.

21. While the two decisions cited above arise in different contexts and focus on different parts of the definition of "occupant" in section 224(1), the results reached by the court send a clear message that a broad approach should be taken when interpreting the words "driver" and "passenger". Both judgments stress that the person's status at the time of the incident causing injury is more important and should be focused on, as opposed to where they were physically located at the time.

22. In *AXA v. Markel, supra*, Mr. Ferguson was driving a tractor trailer to the Stelco yard to deliver a load of steel. He stopped the truck outside of the loading bay, exited the vehicle, and entered the loading bay to await his turn to unload the truck. While standing approximately thirty feet away from the truck, he was struck by a piece of wood that was propelled off the back of another truck leaving the loading area, and unfortunately died. Arbitrator Fidler determined that he was the driver of the truck at the time of the incident and therefore remained its "occupant". The result of that finding was that Markel Insurance, the insurer of the tractor trailer, was in higher priority than was AXA, the insurer of Mr. Ferguson's private vehicle.

23. On appeal to the Superior Court, Justice Matlow overturned the arbitrator's decision, and concluded that the claimant was not the "driver" of the truck at the time of the incident. Markel appealed that decision to the Court of Appeal. That court found that section 224(1) focuses on the description of the person claiming benefits, rather than the activity being engaged in or the person's precise location at the time of injury. In overturning the lower court's decision and restoring the arbitrator's original award,

Justice Goudge stated that nothing in the definition of “occupant” requires that the person be engaged in the act of driving, or be present in the vehicle at the time of the incident.

24. In examining the legislative context surrounding the provision, Justice Goudge suggested that the driver should have “some degree of physical connection” with the vehicle. He also noted section 268(5.2) of the *Act*, which dictates that the insurer of the vehicle in which the person claiming benefits was an occupant stands in higher priority to other insurers of which that person is an “insured”, and concluded that this suggests that the status of “driver” would not be something “that attaches permanently to a person, but rather, would depend on the circumstances at the time.”

25. He stated that with these considerations in mind, the question to ask is whether an objective observer of the incident would be of the opinion that Mr. Ferguson was the driver of the tractor trailer. Answering affirmatively, Justice Goudge noted that Mr. Ferguson was injured while in close proximity to the vehicle, that he had driven the truck to the location and would have driven it away had the incident not occurred, and that he maintained some control over the vehicle when he was struck.

26. Two years after this decision, the question of how the term “passenger” appearing in section 224(1) should be interpreted was put to the Court of Appeal in the *McIntyre, supra*, case. Ms. McIntyre was a passenger on a motorcycle driven by her husband. The couple pulled off onto a shoulder of the Don Valley Parkway under an overpass when it started to rain. They got off the bike, and intended to wait out the rainstorm under the shelter of an overpass. After a few minutes, Ms. McIntyre walked back to the motorcycle in order to retrieve some dry clothing from the saddlebag, and was struck by an uninsured motorist and seriously injured.

27. Initially, counsel brought a Rule 21.01 motion to determine a question of law, asking the Superior Court to decide whether Ms. McIntyre was an “occupant” of the motorcycle when she was struck. Justice Ferguson referred to the Court of Appeal’s decision in *AXA v. Markel, supra*, and concluded that in order to qualify as a passenger, a

person must be engaged in the described activity of “being carried or getting into or on or out of or off the automobile” at the time of the accident. On the facts before him, Justice Ferguson found that Ms. McIntyre was not an “occupant” as defined in section 224(1).

28. Pilot Insurance appealed the decision. The Court of Appeal overturned the lower court’s ruling, and found that Ms. McIntyre was an “occupant” of her husband’s motorcycle at the time of the accident, as she met the definition of “passenger” in that section.

29. Justice Sharpe explicitly disagreed with the lower court judge’s finding that the words “whether being carried in or on the automobile” in subsection (b) of the definition of “occupant” limit the word “passenger” to a person actually engaged in the physical activity of being on a motorcycle at the time of the incident. He reasoned that if the legislators intended this narrower meaning to apply, they would have replaced the word “whether” with “while”, and it would then be clear that a person is a “passenger” *while* being carried in or on the automobile.

30. He cited the court’s reasoning in *AXA v. Markel, supra*, and noted Justice Goudge’s emphasis on the status of the person at the time, rather than the activity that they were engaged in at the time of the incident. He also stated that the “objective observer” approach set out in the *Axa* case should be used to interpret the word “passenger”, and that like the word “driver”, it identifies “a status rather than a physical activity” (at para.15). In support of his conclusion that an objective observer would describe Ms. McIntyre as a “passenger” of the motorcycle at the time she was struck by the driver, Justice Sharpe noted – (at para.19):

Her presence at the scene...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.

31. I agree with Mr. McGoey's assertion that the facts described in *McIntyre, supra*, above are "on all fours" with those in the instant case. Instead of a rainstorm, it was a flat tire that caused the Claimant and his brother to interrupt their journey, and pull their vehicle over onto the shoulder of the road. Like Mr. and Ms. McIntyre, they also intended to resume their journey, once the tire was repaired. Although Samir crossed the street to seek a flashlight, he remained in relatively close proximity to the vehicle.

32. The court also noted that Ms. McIntyre had not "engaged in any other activity" except wait for the rain to stop. While there is no analysis accompanying that comment, it suggests that if she had participated in other activities (presumably limited, given that she was stranded in the rain on the side of a raised highway), she would have lost her status as a passenger. I find that in the same way, Mr. Ahou had not engaged in any activities outside of those related to him being a passenger in his brother's car, taking steps to assist in changing a flat tire. Mr. Dow's assertion that the Claimant's status as a "passenger" diminished with each step that he took while engaged in the process of changing the tire is in direct contrast to the Court's reasoning in *McIntyre, supra*.

33. Having said that, there is clearly a "line" that exists, beyond which the Claimant would no longer remain a passenger. If he had he wandered away from the vehicle to eat dinner at a restaurant and been struck by another car as he crossed the street upon leaving the restaurant, he would no longer be a "passenger". Had he hailed a taxi, arrived at a gas station or store that sold tires and been struck by a car in their parking lot while waiting to purchase the tire, he would similarly have lost his status as a passenger. In my view, the application of the Court of Appeal's reasoning in the *McIntyre* case must lead to the conclusion that as Mr. Ahou was struck by the Burkimsher vehicle while he was in the midst of a sequence of events that stemmed from the initial event of the tire deflating, while also remaining in close proximity to the vehicle, he retained his status as a "passenger" and was therefore an "occupant" of the vehicle at that time.

34. In *Wawanesa Mutual v. Aviva Insurance Company of Canada* (August 18, 2009) Arbitrator Jones found that the Claimant had lost her status as a passenger when she left the vehicle that she had been occupying, and spent a few hours at the home of her brother, having tea. He concluded, however, that she regained that status when she left his house, walked across his lawn and stepped onto the roadway heading toward the car that she had arrived in, with the intention of getting into it, when she was struck by another vehicle. Arbitrator Jones commented that he considered the facts to be “very close to the line of what would be considered an occupant” and cautioned that each case must be determined on its own facts.

35. Given my finding above that Mr. Ahou was in the midst of a series of events that stemmed from the precipitating event of the tire deflating, he never lost his status as a passenger, and I therefore need not consider whether he had regained that status prior to being struck.

36. Mr. Dow contended that to conclude that the Claimant was an “occupant” of the Personal-insured vehicle would effectively ‘gut’ the “non-occupant” part of section 268(2) of the *Act* of any meaning. I do not agree with this assertion. There will be many circumstances in which a person who was a driver or passenger loses this status, by leaving the vehicle and engaging in activities that are outside of a sequence of events directly related to the initiating incident. The “non-occupant” provisions are also clearly applicable to pedestrians and cyclists.

CONCLUSION:

37. For the reasons expressed above, I find that Samir Ahou was an “occupant” of the Personal-insured vehicle in which he had been driving, and therefore find that The Personal is in higher priority to pay his accident benefits claim under section 268(2)(2)(i) of the *Act*.

COSTS:

38. In accordance with the parties' agreement outlined above, Dominion is entitled to its costs. If counsel cannot agree on the quantum of costs payable to Dominion by the Personal, I invite them to contact me and I will entertain submissions on the point.

I thank counsel for their able submissions, and the efficient manner in which the hearing was conducted.

DATED at TORONTO, ONTARIO this ____ DAY OF JUNE, 2013.

Shari L. Novick
Arbitrator