

***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, as amended;***

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA GENERAL INSURANCE COMPANY

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Andrew Smith and Martina Sagermann for the Applicant

Derek Greenside for the Respondent

ISSUE:

1. Is Mr. Lumsden an “insured person” under a policy issued to his parents by Security National, and therefore entitled to accident benefits from them in accordance with section 268(2)1(i) of the *Insurance Act* ?

RESULT:

1. Yes, Mr. Lumsden is a “person specified in the policy as a driver of the insured automobile” and meets the definition of “insured person” in the *SABS*. Security National is therefore in higher priority to pay his claim in accordance with section 268(2)1(i) of the *Act*.

BACKGROUND:

1. James Lumsden was an occupant in a vehicle insured by Aviva General Insurance Company (“Aviva”) that was involved in an accident on June 24, 2016. Unfortunately, the driver of the vehicle died as a result of injuries suffered in the accident. Mr. Lumsden submitted an application for payment of accident benefits under the *Statutory Accident Benefits Schedule* (“*SABS*”) to Aviva.
2. Aviva paid benefits to him, and provided written notice to Security National Insurance Company (“Security National”) of its intention to dispute its obligation to pay benefits under section 3 of *Regulation 283/95*. His parents, John Lumsden and Cynthia Duncan–Lumsden, were named insureds under a policy issued by Security National at the time of the accident. James was noted to be an “excluded driver” under the policy. Aviva contends that as an “excluded driver”, the Claimant was an “insured person” under the policy and that Security National would therefore be in higher priority to pay his claim under section 268(2)1(i) of the *Insurance Act*.
3. Aviva relies on recent cases that have determined that a person who has signed an OPCF 28A Excluded Driver Endorsement form, but whose name appears on a List of Drivers on a policy, may still meet the *SABS* definition of an “insured person”. Security National acknowledges these cases, but submits that the Certificate of Insurance that it

issued for the Lumsden policy differs from the ones considered in the other cases, and that a different result is merited.

THE EVIDENCE:

4. The parties filed an Agreed Statement of Facts, most of which are set out above. There is no dispute that both the Aviva policy covering the vehicle in which Mr. Lumsden was an occupant, and his parents' policy with Security National were in effect at the time of the accident. Counsel filed written submissions and attended before me at a hearing at which they made oral submissions. No *viva voce* evidence was called.

5. The parties also filed a copy of Security National's Certificate of Automobile Insurance for the Lumsden policy. Aside from the name of the insurer and the broker who placed the policy, the first page provides the policy number, the time period covered, and the make, model year and serial number of the "Described Automobile". A heading titled "Named Insured" appears toward the top of the page, under which appear the names John Lumsden and Cynthia Duncan-Lumsden, the Claimant's parents, and their address. James Lumsden's name does not appear anywhere on page one of this document. The various coverages, premiums charged and deductibles are also set out.

6. The second page of the Certificate lists the applicable Policy Change Forms – including an OPCF 28A Excluded Driver Endorsement – and provides the total premium payable. Below that is a chart titled "Rating Information", which includes columns for Driver Name, Age, Marital Status, Years Licensed and Driver's Training, among other things. It also includes a column entitled "Assignment to Automobile". The chart appears as follows:

Rating Information

Driver No.	Driver Name	Age	Marital Status	Yrs Lic.	Driver's Training	Assignment to Auto			Convictions		
						Principal	Occasional	Excluded	Serious	Major	Minor
1	John Lumsden	54	M	38		1					
2	Cynthia Duncan-Lumsde	55	M	26			1				
3	James Lumsden	25	S	6	X			1			

Auto No.	Chargeable Claims					Surcharges Description	Discounts Description
	Date yyyy/mm/dd	BI	PD	AB	COLL/AP		
1							LOYALTY DISCOUNT - INCLUDED
1							Multi-Line Discount – included
1							DRIVER EXCELLENCE – INCLUDED

Auto No.	Kilometers Driven		Gross Vehicle Weight Rating (commercial vehicles only)	Class Description	
	Annually	To Work (One Way)		Class	Description
1	20,000	15		02	Pleasure and driven to work

	Driving Record	Rate Group	Auto No.	Terr. Code	Rating Territory Description
Auto No.	1	1			
BI	7	28	1	717	METROPOLITAN TORONTO DISTRICT, MARKHAM, RICHMOND HILL, VAUGHAN PEEL DISTRICT
PD	7				
AB	7				
DC PD	7	28			
COLL – AP	7				
COMP - SP		30			

7. It is agreed that the only place on the Certificate on which the Claimant's name appears is in this chart titled Rating Information. I note that the format of the Security National Certificate follows that of the "Sample Certificate" described in the attachments to the FSCO Bulletin A-03/10, issued by the Superintendent of Financial Services in March 2010 titled "Revised Certificate of Automobile Insurance Form and Data Elements".

8. As noted on the Certificate, the Claimant and his parents executed an OPCF 28A Excluded Driver Endorsement that formed part of the policy.

RELEVANT PROVISIONS:

The priority obligations of insurers are set out in section 268(2) of the *Insurance Act*. The relevant sections appear below –

Insurance Act:

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,

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,

Various other provisions of the *Insurance Act* were cited by the parties in their submissions. They are -

227. *(1) An insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent:*

- 1. An application for insurance.*
- 2. A policy, endorsement or renewal.*
- 3. A claims form.*
- 4. A continuation certificate.*

Standard policies

(5) *The Superintendent may approve the form of standard policies containing insuring agreements and provisions in conformity with this Part for use by insurers in general.*

232. *(5) If an insurer adopts a standard policy approved under subsection 227 (5), it may, instead of issuing the policy, issue a certificate in a form approved by the Superintendent.*

249. *A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract.*

Section 225 and 240 of the Act are also relevant. They provide –

225. Except as provided in the Statutory Accident Benefits Schedule, the insured under a contract shall be deemed not to include any person who sustains loss or damage while any automobile insured under the contract is being used or operated by an excluded driver.

240. If a contract evidenced by a motor vehicle liability policy names an excluded driver, the insurer is not liable to any person under the contract or under this Act or the regulations for any loss or damage that occurs while the excluded driver is driving an automobile insured under the contract, except as provided in the Statutory Accident Benefits Schedule.

Statutory Accident Benefits Schedule (“SABS”)

The definition of “insured person” in section 3(1) of the SABS is also relevant to my determination. It provides –

3. (1) In this Regulation,

“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;

Finally, section 31(1)a of the SABS provides –

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

(a) in respect of a person who was the driver of an automobile at the time of the accident,

(i) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy,

(ii) if the driver was driving the automobile without a valid driver's licence,

(iii) if the driver is an excluded driver under the contract of automobile insurance, or

(iv) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent;

The parties agree that the SABS definition of “insured person” is the one to be applied to the determination of whether the Claimant is an “insured” under the first branch of the priority ladder set out above in section 2682) of the Act.

RELEVANT JURISPRUDENCE:

9. There has been much arbitral and judicial focus on the question of whether an “excluded driver” is an “insured” under the first rung of the priority ladder over the last few years. While counsel for Security National contends that the form of his client’s Certificate of Insurance differs from those considered in these cases, and that the argument he raises here was not presented in these earlier cases, I will summarise the findings reached by my colleagues and by judges on appeal, in order to provide context for the arguments presented.

10. *In Pafco Insurance Company v. Cumis General Insurance Company* (Bialkowski, March 31, 2014), the claimant was involved in an accident while he was a passenger in a car insured by Cumis. He was identified as an “excluded driver” on that policy. He was also a listed driver on a policy issued by Pafco, and submitted an application for accident benefits to them. Pafco pursued Cumis for priority.

11. Several questions were posed to Arbitrator Bialkowski in that case, one of which was whether the claimant was an “insured” under the Cumis policy, given his status as an “excluded driver”. The form of the Cumis Certificate was not discussed in detail in the decision, but it appears that the claimant’s name appeared on a List of Drivers on that document. Arbitrator Bialkowski determined that while the policy was subject to an Excluded Driver Endorsement and the claimant was excluded from driving the described vehicle, he was nevertheless “specified in the policy as a driver” and therefore met the definition of “insured person” in the *SABS*.

12. Arbitrator Bialkowski addressed the same issue in his decision in *Dominion of Canada General Insurance v. State Farm Mutual Automobile Insurance* (June 26, 2015). The claimant in that case was injured while he was a passenger in his girlfriend’s car, which was insured with State Farm. His parents were named insureds under a Dominion policy in force at that time, and he applied to Dominion for payment of accident benefits. The claimant’s name appeared under the heading “Listed Drivers” on page 1 of the Dominion Certificate evidencing the policy. He was also noted in the “Rating Information” section of the policy as being an “excluded driver”. The issue put to the arbitrator was whether the Claimant was an “insured person” under the Dominion policy.

13. Arbitrator Bialkowski found that although he was excluded from driving both vehicles listed on the Dominion policy, the claimant was nevertheless specified in the policy and was therefore entitled to coverage, provided that he was not driving the listed vehicles. He noted, however, that the evidence provided at the hearing by a Dominion underwriter made clear that it was not Dominion’s intention to treat the claimant as an “insured person”, given that he was an “excluded driver” under the policy.

14. Arbitrator Bialkowski suggested that in order to avoid exposure to pay accident benefits in these circumstances, an insurer could either choose not to include the name of the excluded driver on the Certificate, or, it could alter the form of the Certificate to show a list of “listed drivers” and a separate list of “excluded / non-specified drivers in the household or business”. As will be discussed below, counsel for Security National contends that his client has done this on the Lumsden certificate.

15. This decision was appealed by Dominion. Applying a “correctness” standard of review, Justice Wright determined that the Arbitrator Bialkowski made an error and reversed his decision¹. The brief endorsement does not include any useful analysis of the issue.

16. Arbitrator Densem addressed this issue shortly afterward in *State Farm Insurance v. Wawanesa Mutual Insurance* (March 10, 2016). As in the above cases, the claimant was a passenger in a car insured by State Farm that was involved in an accident. His sister and brother-in-law were named insureds under a policy issued by Wawanesa, and the policy included an Excluded Driver Endorsement stipulating that the claimant was an excluded driver. He applied to State Farm for benefits. State Farm contended that as someone specified in the Wawanesa policy, he was an “insured person” under that policy, and that Wawanesa was in higher priority to pay the claim.

17. Arbitrator Densem noted that the claimant’s name appeared on a list of “Drivers’ Names” on the second page of the certificate, and that he was noted to be excluded from driving both vehicles listed. Arbitrator Densem stated that the appearance of a person’s name on the list of Drivers Names in a policy is what dictates whether they are a “specified driver” and therefore an “insured person” under the policy. He found that as Wawanesa had specified that the claimant was a driver of the insured automobiles, he therefore met the *SABS* definition of “insured person” under the policy.

¹ Unreported, endorsement dated October 26, 2015.

18. Arbitrator Densem also noted that the General Exclusions sections in the *SABS* provide that an excluded driver who drives the vehicle(s) that he has promised not to drive remains entitled to receive some accident benefits under the Schedule such as Medical/Rehabilitation benefits and Attendant Care. He reasoned that if that individual is injured while a passenger in the vehicle, and has not breached the promise made not to drive it, he or she should be entitled to receive full benefits under the *SABS*, without any limitations. He states (at p. 40):

It must be remembered that the only situation where the SABS recoverable by a specified driver who is also an excluded driver are less than full is the situation where the excluded driver drives the insured vehicle. Otherwise he is entitled to full SABS benefits just like any insured person.

19. Finally, Arbitrator Densem stated that a person's status as an excluded driver derives from the OPCF 28A Excluded Driver Endorsement executed, rather than from the designation of "excluded" on the Certificate of Insurance.

20. Arbitrator Cooper also addressed this question in *Belair Direct Insurance v. Dominion of Canada General Insurance* (April 19, 2016). The issue in that case was whether the claimant was an "insured person" under the Dominion policy issued to his parents. His name appeared on a list of Listed Drivers in the policy, and also appeared on the Rating Information list of drivers, in which he was identified as an "excluded driver". He had also executed an Excluded Driver Endorsement OPCF 28A form.

21. Arbitrator Cooper agreed with the analyses and findings of Arbitrators Bialkowski and Densem in the cases outlined above. He stated that because the claimant was specified in the policy as a driver of the vehicle, he was an "insured person" under the Dominion policy, and would be entitled to full coverage of accident benefits, as long as he did not drive the described vehicle. He concluded, however, that he was bound by Justice Wright's ruling in *Dominion v State Farm, supra*, and was therefore compelled to find that the claimant was not an "insured person" under the Dominion policy.

22. Arbitrator Cooper’s decision was then appealed to the Superior Court. Justice Akbarali determined that the claimant was an “insured person” under the Dominion policy. She noted Arbitrator Cooper’s agreement with the approach taken by Arbitrator Bialkowski and Arbitrator Densem in the above cases, and set out the gist of Arbitrator Densem’s findings. She stated that the reasoning advanced by Arbitrator Cooper, and that of Arbitrators Bialkowski and Densem as adopted by Arbitrator Cooper, and the conclusion that an excluded driver is an “insured person” when the driver is also a “listed driver” was reasonable. Importantly, Justice Akbarali stated – (at para.49)

*Although [M.B.] is an excluded driver under the Dominion policy, he is not excluded from all coverage under the policy. The excluded driver endorsement makes clear that, when driving the [described vehicle under the policy], [M.B.] is excluded from coverage under the policy for property damage and bodily injury, damage to the automobile and most - but not all – accident benefits. The policy, by its terms, makes available, under the policy, some limited coverage to [M.B.] even if he is driving the vehicle that he is specifically excluded from driving. **Neither the policy, nor the relevant statutory provisions, limit the accident benefits available to [M.B.] if he is involved in an accident when he is not driving the [described vehicle under the policy].***

(emphasis added)

23. She also made the following statement-

*The Excluded driver endorsement is, at most, ambiguous with respect to the accident benefits coverage available to an excluded driver when she is not driving the excluded automobile. The ambiguity must be construed against the insurer. Moreover, the ambiguity relates to a coverage exclusion. Exclusions to coverage must be construed strictly against the insurer: see *Schneider v. Maahs Estate* (paras.15 and 22)*

24. Dominion sought leave to appeal Justice Akbarali’s decision. State Farm had also previously sought leave to appeal Justice Wright’s ruling outlined above. The Court of Appeal granted the leave applications, and heard both cases together. Their ruling was issued in February 2018. While the decision is lengthy, it focuses on the appropriate standard of review to be applied in the circumstances, and unfortunately does not provide any guidance on the question of whether a person designated as an “excluded driver” may be an “insured person” on a policy. The Court upheld Justice Akbarali’s decision in *Belair v Dominion, supra*, and agreed with her conclusion that the Arbitrator’s analysis

was reasonable. It set aside Justice Wright’s decision in *Dominion v State Farm, supra*, and restored Arbitrator Bialkowski’s decision.

25. I note that Arbitrator Jones has now also issued a decision in *Economical Insurance Group v Security National and Royal and SunAlliance Insurance Company (July 16, 2018)* in which he found that an excluded driver falls within the section 3(1) SABS definition of an “insured person”.

26. As outlined above, four different arbitrators and three judges (one writing for a panel of the Court of Appeal) have considered this issue over the last four years. The Court of Appeal did not provide any specific guidance on this question in its ruling, but upheld the comments and findings of Justice Akbarali in *Belair v Dominion, supra*. Accordingly, these findings must be given the most weight, unless the underlying facts are sufficiently distinct so as to render them distinguishable.

PARTIES’ ARGUMENTS:

Aviva’s submissions

27. Counsel for Aviva relies on the decisions above. He contends that by listing James Lumsden on its Certificate, Security National has identified him as a “specified driver” and that he is therefore an “insured person” under the policy by virtue of section 3(1) of the SABS. Counsel notes that while Mr. Lumsden was excluded from driving the vehicle described on that policy, he was not doing so at the time of the accident. Aviva claims that consequently, Security National is in higher priority to pay the claim as a “first rung” insurer under subsection 268(2)1(i) of the *Act*.

28. Counsel submits that the Claimant can be both an “insured person” under a policy and an “excluded driver” under the same policy, and that these concepts are not mutually exclusive. He cited Justice Akbarali’s adoption of Arbitrator Densem’s statement in *State Farm v Wawanesa, supra*, that the fact that a person’s name appears on the list of Drivers Names on a Certificate is sufficient to determine that they are “specified in the policy as a driver of the insured automobile” and therefore an “insured person” under the policy. He

noted that these comments were endorsed by the Court of Appeal, and contended that this dictates the result in this case.

Security National's submissions

29. Counsel for Security National acknowledged the case law summarised above, but submitted that the facts of this case are sufficiently distinct and that the above precedents are therefore distinguishable. He contended that the Certificate issued by Security National to the Claimant's parents is fundamentally different than those considered in the cases above, in that the only place that Mr. Lumsden's name appears on the document is in the Rating Information section. He emphasized that unlike in the certificates considered in the above cases, his name does not appear on a list of Driver Names elsewhere in the document.

30. Mr. Greenside further suggested that the only reason that the Claimant's name appears in the Rating Information on the certificate is to identify him as an "excluded driver" risk, as required by the FSCO Bulletin A-03/10 referred to above, titled Revised Certificate of Automobile Insurance Form and Data Elements. He referred to the list of "Data Elements" for Certificates of Automobile Insurance attached to the bulletin, and noted that it requires the following information to be provided – Rating Information, Driver Number, Driver Name, Age, Marital Status, Years Licensed, and Assignment to Automobile – Principal, Secondary, Occasional, Excluded. Counsel contended that the legislators could not have intended that an insurer be saddled with providing coverage to someone that they specifically intended to exclude from coverage, simply because they have complied with these stated requirements.

31. Counsel also noted that Arbitrator Bialkowski suggested in *Dominion General v. State Farm, supra*, that an insurer could avoid exposure to pay accident benefits in these circumstances by simply not naming the person it did not want to extend coverage to in the List of Drivers on the certificate. He submitted that this is precisely what Security National has done in this case, and argued that as no court has addressed this to date, this approach remains open to insurers.

Reply submissions – Aviva

32. In response to the above submission, Mr. Smith contended that given that *SABS* coverage is mandated by the provisions in that regulation and in the *Insurance Act*, an insurer does not have the option of removing coverage for accident benefits for an “excluded driver” by individualising its policy documents in the manner suggested. He noted the various authorities that have provided that the *Schedule* is consumer protection legislation, and that for policy reasons, and in instances of ambiguity, an interpretation favouring coverage should be preferred over one excluding coverage (*Schneider v. Maahs Estate*, [2001] 56 O.R. (3d) 321).

REASONS & ANALYSIS:

33. As detailed above, the “last word” on the question of whether an individual designated as an “excluded driver” on a policy meets the *SABS* definition of “insured person” under that policy is the Court of Appeal’s recent decision, upholding Justice Akbarali’s ruling in *Belair v Dominion*, *supra*. Justice Akbarali determined that the fact that a person’s name appears on a Certificate on a list of drivers renders him or her as someone “specified in the policy as a driver of the insured automobile” and hence an “insured person” under the *SABS*. Security National essentially argues that in spite of this precedent, a different result is merited if a claimant’s name appears only in the Rating Information section of the Certificate, as that is mandated by the FSCO bulletin referenced above.

34. Mr. Greenside also contends that Arbitrator’s Bialkowski’s suggestion in *Pafco Insurance v Cumis General Insurance*, *supra*, repeated in *Dominion v State Farm*, *supra*, that an insurer can avoid exposure to pay accident benefits in these circumstances by simply not including the name of the individual who has signed an Excluded Driver Endorsement on the face of the Certificate, remains open to insurers.

35. I find this last argument to be confusing. While I have no way of knowing for certain, I suspect that the FSCO bulletin filed by the parties in this case was not put

before Arbitrator Bialkowski in the cases referred to above. It clearly stipulates that as of March 2010, insurers have two choices: They can use a certificate that mirrors the “Sample Certificate” attached to the bulletin, which includes “Assignment to Auto” information, or, they can apply for approval for their preferred certificate from FSCO. If opting for a customised certificate, insurers must include details such as a driver’s name and their “Assignment to the Automobile” be it principal driver, occasional driver or excluded driver on the certificate.

36. It is clear that either way, an insurer must note the name of a person designated as an excluded driver on its Certificate. Given this requirement, I must dispute the feasibility of Arbitrator’s Bialkowski’s suggestion. In any event, given that Mr. Lumsden’s name does appear on the Certificate of Insurance issued by Security National in this case, Mr. Greenside’s contention in this regard is not supported by the facts before me.

37. Turning to the “main issue”, Security National clearly faces an uphill battle in its contention that the Claimant was not an “insured person” under its policy, given the authorities cited above. Mr. Greenside acknowledges this jurisprudence, but asserts that the format of Security National’s Certificate is different, and that it is essentially unfair that an insurer is required to indicate a driver’s name and his or her “Assignment to an Automobile” on its certificate - whether it be as principal driver, occasional driver or excluded driver - yet it is that very fact that the courts have determined deems him to be an “insured person” under the policy. While I appreciate that at first glance this may seem to be circular logic, I find that a consideration of the “bigger picture” warrants that result.

38. The parties agree that it is the execution of the OPCF 28A Excluded Driver Endorsement form that cloaks someone with the status of an “excluded driver”. It is important to note that the reason for the excluded driver designation is to insulate insurers from the increased risk posed by drivers with poor driving records. The “excluded driver” essentially promises not to drive the vehicles described in the policy, and in return, the policyholder pays a lower premium for coverage, reflecting the fact that

there is less risk than if the driver with the poor driving record was permitted to drive the vehicles. The provisions of the *Act* and *Schedule* set out above essentially support the idea that if that “excluded driver” breaches their promise not to drive the vehicle(s) in question, they will be penalised by coverage either being denied (in regard to tort claims) or restricted (accident benefits claims).

39. However, these considerations do not arise if the person identified as an “excluded driver” under the policy makes a claim as a result of injuries suffered while a passenger in the car described under the policy, or while a passenger in another vehicle, as was the case here. The fact that Mr. Lumsden was injured while he was a passenger in his friend’s vehicle is completely unrelated to his status as an “excluded driver” under the Security National policy. Both parties agree that the fact that Mr. Lumsden signed an OPCF 28A endorsement is not relevant to the issue in dispute.

40. In my view, the answer to the question posed by this case does not lie in the specific format of the Certificate in question, or whether the Claimant’s name appears on the Certificate in one place or in two. The analysis must take place on a broader level, and with a “priority lens”. The priority ladder set out in section 268(2) of the *Act* is structured in such a way that insurers who have a relationship with any of the people defined in section 3(1)a of the *SABS* stand at the front of the line, followed by insurers of vehicles in which a claimant was an occupant, then followed by insurers who insure any vehicle involved in the incident and lastly, the Fund.

41. The real question raised here is whether Mr. Lumsden’s connection to the Security National policy is such that Security National becomes a “first rung” insurer for the purpose of the priority analysis. Aviva contends that it does, as he meets the definition of an “insured person” under the policy. Security National disagrees, and states that the Claimant should be essentially treated as a “stranger” to the policy, given that his name only appears on the Certificate due to the requirement that excluded drivers be listed in the Rating Information.

42. I agree with Aviva on this point. Considering the “big picture”, it is settled law that the definition of “insured person” in section 3(1) of the *SABS* is what dictates whether an occupant of an automobile is an “insured” for the purpose of section 268(2)1(i) of the *Insurance Act* (see *Warwick v Gore Mutual Insurance Co. (1997) 32 O.R. (3d) 76 (C.A.)*). It is also clear that the *SABS* is consumer protection legislation, and its provisions must be interpreted broadly.

43. The language used in the definition of “insured person” in section 3(1) of the *SABS* is certainly broad. An individual can meet the definition under subsection (a), by being the named insured, their spouse or dependant, or “any person specified in the policy as a driver of the insured automobile” as discussed above. Subsection (b) then includes any person who is involved in an accident involving the insured automobile if the accident occurs in Ontario. Subsection (c) casts the net even wider, to include an occupant of an involved vehicle even if the accident occurs outside Ontario, as long as that person is or was an Ontario resident within sixty days of the accident. Given the all-encompassing nature of this definition, it is clear that the legislators have determined that the category of “insured person” under a policy should be defined and interpreted broadly.

44. As noted by Arbitrator Densem and Justice Akbarali in the cases cited above, the courts have also made it clear that any ambiguities in how the wording of a policy is to be interpreted should be resolved against the insurer asserting that coverage is excluded (see *Schneider v. Maahs Estate, supra*).

45. With these principles in mind, I find that Mr. Lumsden fits the definition of “insured person” in the *SABS*. Firstly, Justice Akbarali stated in *Belair v Dominion, supra*, that “neither the policy, nor relevant statutory provisions, limit the benefits available to ..a claimant if he is involved in an accident when he is not driving” the vehicle described in the policy. I find that the fact that the Claimant’s name is only listed in the Rating Information section of the Certificate of Insurance issued by Security National does not disqualify him from meeting the definition of an “insured person”. To

find otherwise would mean that a driver who is identified as a secondary or occasional driver on the policy (and not a named insured) on that chart would not be considered an “insured person” under the policy for the purpose of entitlement to *SABS* or for priority purposes. In my view, that would not be consistent with the legislative intention expressed in section 3(1) of the *SABS*, and the overall context of the priority scheme.

46. I find further support for my conclusion in section 31(1) of the *SABS* and sections 225 and 240 of the *Insurance Act*. Sections 225 and 240 of the Act make clear that an insurer is not liable to compensate an excluded driver for any loss occurring while they are driving the vehicle that they undertook not to drive. Both of these sections, however, specifically make exceptions for what is “provided in the *SABS*”.

47. Section 31(1)(a) of the *Schedule* then provides that an insurer is not required to pay certain weekly benefits and other expenses under the *Schedule* when an excluded driver is injured while driving the vehicle that he or she has promised not to drive. I acknowledge that the provision is silent on the benefits that would be payable to an excluded driver under the policy when he is a passenger in the described or another vehicle. I agree with Arbitrator Bialkowski’s statement in *Dominion v State Farm, supra*, that it is only logical to assume that the drafters of the legislation did not intend that someone who has not breached the promise not to drive the described vehicle, and was injured while a passenger in a vehicle, would be entitled to fewer benefits under the same policy.

48. For the reasons cited above, I find that James Lumsden was an “insured person” under the Security National policy issued to his parents, and that Security National is therefore the priority insurer in accordance with section 268(2)1(i) of the *Act*.

ORDER:

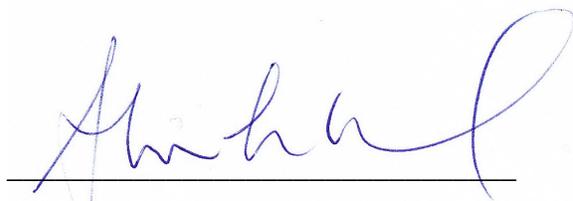
Security National is the insurer with highest priority to pay Mr. Lumsden's claim.

I hereby order Security National to repay Aviva for any accident benefits paid to James Lumsden under the *Schedule* to date, with interest, and to take over the adjusting of his claim if it remains open.

COSTS:

Given the result, Aviva is entitled to recover its legal costs, on a partial indemnity basis, from Security National. If counsel cannot agree on the quantum owing, they should contact my assistant and a further teleconference will be scheduled.

DATED at TORONTO, ONTARIO this ___6th___DAY OF DECEMBER, 2018



Shari L. Novick

Arbitrator