

MARKEL and AXA

Court File No. 99-CU-162095

ONTARIO COURT (GENERAL DIVISION)  
Proceeding commenced at Toronto

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APPEAL RECORD

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RACHLIN & WOLFSON  
390 Bay Street  
Suite 1500  
TORONTO, Ontario  
M5H 2Y2

T.H. Rachlin, Q.C.  
Ms. Barbara L. Doherty  
tel. (416) 367-0202  
fax: (416) 367-1820

Solicitors for the Appellant

BLD:jea

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This appeal is allowed and the award of the arbitrator is set aside.

Counsel may make further submissions to me with respect to costs in chambers.

I am persuaded that the arbitrator erred in law in holding that Ferguson was an "occupant" of the Markel vehicle because he was the "driver". Although Ferguson may have been the "driver" of the vehicle for some purpose, he was not the driver "at the time of the incident" (not accident) for the purpose of determining whether or not he was an "occupant".

In my view, the definition of "occupant" set out in S.224 (1) of the Insurance Act requires persons coming within the definition to have the close physical connection with the vehicle described in (b) and (c) and implied in (a).

At the time of the incident, Ferguson's physical connection with the vehicle had been suspended while he was waiting some distance away from the vehicle. He was not then engaged in any aspect of driving the vehicle and the incident had nothing to do with the physical act of driving. The cases cited by counsel for the respondent can all be distinguished on their facts.

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Justice Matlow