

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, 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:**

**AXA INSURANCE COMPANY**

**Applicant**

**- and -**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CGU INSURANCE COMPANY  
OF CANADA**

**Respondent**

**DECISION**

**Appearances:**

**Thomas J. McEwen  
Counsel for the Applicant**

**Todd J. McCarthy  
Counsel for the Respondent**

**ISSUES:**

1. Is AXA or State Farm obligated to pay accident benefits to or on behalf of Adam Botting?

**DECISION:**

Pursuant to section 268 (2)(1)(i), State Farm is in priority and therefore must pay accident benefits to or on behalf of Mr. Adam Botting.

**HEARING:**

This hearing was held in Toronto, Ontario, on May 12, 2005 before me, M. Guy Jones, arbitrator.

**FACTS AND ANALYSIS:**

Mr. Adam Botting was injured in a motor vehicle accident which occurred on August 22, 2001. At the

time of the accident Adam Botting was a passenger in a 1990 Mazda truck owned by Mr. Carlos Linde, an insured by AXA. For the purposes of this preliminary hearing only, I have been asked to assume that Adam Botting was a listed driver on an Ontario Automobile Policy (OAP 1) owner's policy with State Farm Mutual Insurance Company. This assumption may be the subject matter of a later hearing if the parties cannot agree on that point.

### **STATE FARM'S POSITION:**

Briefly stated, it is State Farm's position that section 268 (2)(1)(i) of the Insurance Act applies to this situation and that AXA is the "insurer" for the purposes of that subsection.

Priority disputes are determined in accordance with section 268 (2) of the Insurance Act, which states:

(2) the following rules apply for determining who is liable to pay no-fault 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 of which he or she was an occupant,

(iii) If recovery is unavailable under subparagraph (i) or (ii), the occupant has recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund.

It is State Farm's position that section 268 (2)(1)(i) includes Adam Botting, not only as a "listed driver" under the State Farm policy but also as an insured driver because he was an occupant of the AXA insured vehicle. State Farm then goes on to rely on section 268 (4) of the Insurance Act, which provides that when a person has recourse against more than one insurer for the payment of accident benefits, that person may choose from which insurer he prefers to receive benefits. In this case, the insured chose AXA.

In support of its position, State Farm first points to the definition of insured person found in section 2 (1) of the Statutory Accident Benefits Schedule, which includes:

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent,

(b) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile. . .

It is worthwhile to note that this definition was amended in 1994 to include the words "any person specified in the policy as a driver of the insured automobile". Any cases decided prior to that amendment should be read with caution. There is no doubt but that Adam Botting would fit within this definition of "insured person" under the State Farm policy, given the assumptions that I have been asked to make in this case.

State Farm goes on to point to section 224(1) of the Insurance Act, which defines an "insured" as a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract, whether or not described therein as insured person.

Section 270 of the Insurance Act states:

Any person insured by, but not named in a contract to which section 265 or 268 applies may recover under the contract in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefore.

Put in perhaps its' most basic form, State Farm's argument is that, as an occupant of a motor vehicle, a person becomes entitled to statutory accident benefits and therefore is an insured for the purposes of section 268(2)(1)(i) of the Insurance Act, and as such AXA having been chosen by the injured party, must pay the accident benefits.

In support of this position counsel for State Farm relies upon the decision of the Ontario Court of Appeal in Warwick vs. Gore Mutual Insurance Company [1997] I.L.R. 1-3415.

#### **AXA'S POSITION:**

Axa takes the position that as a listed driver under the State Farm policy section 268(2)(1)(i) applies and State Farm is responsible for payment of accident benefits. It takes the position that section 268(2)(1)(i) does not include AXA. AXA specifically comes under section 268(2)(1)(ii) "if recovery is unavailable under subparagraph (i), the occupant has recourse against the insurer of the automobile in which he or she is an occupant."

With the greatest of respect for the arguments forcefully presented by counsel for State Farm, I am of the view that section 268(2)(1)(i) includes only the State Farm insured in this particular fact situation and not AXA.

Section 3(3) of the Statutory Accident Benefits Schedule directs that benefits paid under the Schedule are to be paid by the insurer that is liable to pay under the priority rules found in section 268(2) of the Insurance Act.

If one looks then to section 268(2)(1) there is a clear indication that you first look to the insurer of the automobile in respect at which the occupant is an insured, and only if recovery is unavailable under subparagraph (i) do you have recourse against the insurer of the automobile in which he or she was an occupant.

If one were to adopt State Farm's position, then merely by being an occupant one would become an insured for the purposes of section 268(2)(1)(i) and this would make section 268 (2)(1)(ii) largely, if not entirely, meaningless.

Counsel for State Farm relies upon a comment made by Lasken, J., in Warwick vs. Gore , cited above, wherein he stated:

"Gore argues that if Morin, J. is correct, section 268(4) is meaningless because a person cannot be an occupant of two cars at the same time. I disagree that Morin, J.'s decision makes section 268(4) meaningless. Although the need to resort to section 268 (4) for claims under section 268(2)(1)(i) does not arise under the Schedule, in issue in this appeal, amendments to the Schedule may trigger its' application. The expanded definition of "insured person" for accidents on or after January 1, 1994, which are referred to at the end of these reasons could well trigger section 268(4) of the Act. I consider section 268 (4) to be a general provision to which a claimant may resort when permitted under the Schedule".

It is important to remember that Warwick vs. Gore was not a priority case. Warwick tells us that you look to the Statutory Accident Benefits Schedule to determine if you are entitled to statutory accident benefits. It does not, however, deal with actual priorities. You look to the Insurance Act to dictate priority.

In my view, to accept State Farm's interpretation would at best provide a very tortured interpretation of the legislation.

In dealing with statutory interpretation, words are to be taken in total context, as Mr. Justice Sopinka stated in Prasad vs. Canada (Minister of Employment and Immigration) [1989] S.C.R. 560: In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear.

Section 268(2)(1) lays out a fairly straightforward and logical system for determining priority disputes. You look first to the insurer of an automobile in respect to which the occupant is an insured, and only if the insurance is not available there do you look to the insurer of the automobile in which he was an occupant. To simply, in essence, make an occupant an insured and thereby make section 268(2)(1)(ii) essentially or almost meaningless, to me makes little sense. Reading the subparagraphs in the way suggested by AXA makes perfect sense and provides a full and effective priority system.

It is also consistent with the general approach taken to accident benefit priorities since expanded no-fault legislation was brought into place in Ontario in 1990, which is that insured parties should first generally look to their own insurers for the payment of accident benefits.

Counsel for AXA has referred me to the testimony of the Deputy Minister of Financial Institutions given at the Standing Committee on General Government on December 14, 1989, when the Legislature was considering the adoption of the applicable no-fault legislation, including the priority provisions. In that testimony the Deputy Minister certainly sets out his, and presumably the Government's, understanding of how the priority system should work. This is consistent with Axa's position. Counsel for Axa also submitted the portion of Mr. Allan O'Donnell, Q.C.'s book entitled "Automobile Insurance of Ontario" dealing with priority disputes. Finally he filed a Bulletin issued by the Insurance Bureau of Canada which outlines its' interpretation of how the priority system of Ontario is to operate. Both of these take the same position as Axa has set out at this hearing.

None of these opinions are in any way binding on me. They do, however, refer to a logical and coherent system for dealing with priority disputes in Ontario. In my view, when reading section 268(2)(1) in its entirety, one is drawn to the conclusion that section 268(2)(1)(i) applies to State Farm in this situation and section 268(2)(1)(ii) applies to Axa. As such State Farm is responsible for the payment of accident benefits to or on behalf of Mr. Adam Botting.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this 14th day of July, 2005.

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M. Guy Jones  
Arbitrator