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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

INTACT INSURANCE COMPANY

Applicant

- and -

CO-OPERATORS INSURANCE COMPANY

Respondent

DECISION

COUNSEL

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(hereinafter referred to as "Intact")

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(hereinafter referred to as "Co-operators")

ISSUES: "SPOUSE" ?, "OCCUPANT" ?, "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 Kurt Lawangen with respect to personal injuries sustained in a motor vehicle accident which occurred on July 4, 2018. Intact insured the claimant's personal automobile. On the date of loss, Kurt Lawangen had been an "occupant" of a vehicle being operated by Kriszella Canonigo. The Canonigo vehicle was insured by Co-operators. It is alleged by Intact that Canonigo was the "spouse" of the claimant. It is alleged by Co-operators that the claimant

jumped out of the moving vehicle and was no longer an “occupant” nor did his injuries arise from an “accident”.

PROCEEDINGS

[2] The matter proceeded on the basis of document briefs, which included Examination Under Oath transcripts and police file, books of authority, and written submissions.

GENERAL BACKGROUND FACTS

[3] The claimant Kurt Lawangen was a named insured in a policy issued by Intact with respect to a personal vehicle that he owned but such vehicle was not involved in the subject incident.

[4] At the time of the July 4, 2018 incident, the claimant had been living with Kriszella Cananigo since April 1, 2017, and had a child born on April 23. 2017. They were not married. Canonigo owned an automobile insured by Co-operators. It was this vehicle that was involved in the subject incident giving rise to this priority dispute.

[5] On the date of loss, the claimant Lawangen had been an occupant in the vehicle owned by Cananigo. The two of them had been arguing earlier that day. The claimant was sitting in the back seat with his infant daughter. He was sitting behind the driver. They were going grocery shopping to buy milk for their daughter. As the vehicle reversed from the driveway of their home the argument became heated. Once on the street as the vehicle started to pull forward Lawangen exited the moving vehicle and on hitting the pavement, sustained serious personal injuries.

[6] There is conflicting evidence as to whether the claimant jumped out of the moving vehicle or fell out. At one point in his Examination Under Oath, he stated that he jumped out. Later, when asked whether he had jumped out or fallen out he said he couldn’t remember.

[7] Lawangen presented an accident benefits claim to Intact which insured his personal automobile not involved in this incident. Intact has been paying accident benefits to the claimant and brings this priority dispute claiming that the Co-operators is the priority insurer.

ANALYSIS AND FINDINGS

[8] A priority dispute arises when there are multiple motor vehicle liability policies that might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or

hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[9] It is alleged by the Applicant, Intact, that the claimant Kurt Lawangen was an occupant of a vehicle owned and operated by his spouse, Kriszella Canonigo and insured by the Co-operators at the time of the accident. If so proven, the following rules with respect to priority of payment apply:

> *(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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii)* *If recovery is unavailable under (1) or (2), 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 (1), (2), or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*
>
> [emphasis mine]

[10] Section 3(1) of the *Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10* defines an "insured person" as follows:

> (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 dependent of the named insured or of his or her spouse
>
> [emphasis mine]

[11] The Applicant Intact has claimed that as spouses of one another the claimant would be an "insured person" under both his own policy with Intact but also under the Co-operators policy as the "spouse" of their named insured, thereby bringing into play the tie-breaking mechanism of s. 268 of the *Insurance Act* which reads:

> *(4) Choice of insurer – If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.*
>
> *(5) Same – Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.*

> *(5.1) Same – Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her own discretion, may decide the insurer from which he or she will claim the benefits.*
>
> *(5.2) Same – If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*
>
> [emphasis mine]

[12] Intact has claimed that the claimant was an insured under both, the Intact and Co-operators policies, and that application of the tie-breaking mechanism of s. 268(5.2) would make the Co-operators the priority insurer. However and in response, the Co-operators have claimed that Lawangen and Cananigo were not "spouses". They also claim that given the circumstances of how the claimant's injuries occurred, he could not be considered an "occupant" of the vehicle insured by Co-operators. Furthermore, Co-operators have claimed that his injuries did not arise from an "accident". Accordingly, Co-operators have maintained that the claimant was not entitled to accident benefits in the first place, as the injuries must arise from an "accident" for there to be an entitlement to an accident benefits claim.

a) Was the claimant Kurt Lawangen the "spouse" of Kriszella Cananigo?

[13] Neither Canonigo nor Lawangen have ever been married. Canonigo met Lawangen in July 2014 and their relationship became exclusive on August 4, 2015. Canonigo and Lawangen first moved in together on April 1, 2017.

[14] When Canonigo first moved in with Lawangen it was to a basement apartment at 42 Sparrow Avenue. Lawangen's family lived on the main floor. In late September or the beginning of October 2017, they moved from Sparrow Avenue to Ravencliff, again sharing the premises with Lawangen's parents.

[15] Canonigo and Lawangen had fights mostly with respect to financial matters and Canonigo also had issues with Lawangen's parents. Those fights did not result in any periods of separation.

[16] Canonigo and Lawangen had a daughter, Kursten, who was born April 23, 2017, more than a year prior to the subject incident.

[17] Section 224 of the *Insurance Act* defines "spouse" as follows:

> "spouse" means either of two persons who,

(a) are married to each other,

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this *Act*, or

(c) have lived together in a conjugal relationship outside of marriage,

(i) continuously for a period of not less than three years, or

(ii) **in a relationship of some permanence, if they are the**

natural or adoptive parents of a child.

[Emphasis Added]

[18] Jurisprudence has evolved identifying the criteria to be considered when determining whether or not a “spousal” or “conjugal” relationship existed in a particular case.

[19] In *M. v. H., [1999] 2 S.C.R. 3* at paragraph 59, the Supreme Court of Canada held that the leading authority on the "generally accepted characteristics of a conjugal relationship" is *Molodowich v. Penttinen [1980] O.J. No. 1904* In *Molodowich,* Kurisko J. enumerated the following questions:

(1) **SHELTER:**

(a) Did the parties live under the same roof?
(b) What were the sleeping arrangements?
(c) Did anyone else occupy or share the available accommodation?

(2) **SEXUAL AND PERSONAL BEHAVIOUR:**

(a) Did the parties have sexual relations? If not, why not?
(b) Did they maintain an attitude of fidelity to each other?
(c) What were their feelings toward each other?
(d) Did they communicate on a personal level?
(e) Did they eat their meals together?
(f) What, if anything, did they do to assist each other with problems or during illness?
(g) Did they buy gifts for each other on special occasions?

(3) **SERVICES:**

What was the conduct and habit of the parties in relation to:

(a) Preparation of meals;
(b) Washing and mending clothes;
(c) Shopping;
(d) Household maintenance;
(e) Any other domestic services?

(4) **SOCIAL:**

(a) Did they participate together or separately in neighbourhood and community activities?
(b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) **SOCIETAL:**

What was the attitude and conduct of the community towards each of them and as a couple?

(6) **SUPPORT (ECONOMIC):**

(a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?
(b) What were the arrangements concerning the acquisition and ownership of property?
(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) **CHILDREN:**

What was the attitude and conduct of the parties concerning children?

[20] These decisions above involve an analysis of an alleged spousal relationship from a *Family Law Act* perspective and should only be used as a general guide when applied to priority disputes. Recent appellate decisions involving priority disputes assist in the analysis of the spousal issue in priority disputes.

[21] In *Royal & SunAlliance Insurance Company of Canada v. Desjardins Insurance / Certas Direct insurance Company 2018 ONSC 4284,* Justice E.M. Morgan stated at paragraph 27:

> "Unlike the *Family Law Act*, the *Insurance Act* provides automatic benefits to spouses regardless of need. It therefore requires a context-specific approach of its own. More specifically, the insurance context contains no imperative to deviate from the ordinary understanding of what it means for two persons to 'live together'. In the family law sense of the term, where dependency is crucial to the spousal support context, persons can 'live together' - i.e. live inter-dependent lives - but maintain separate physical residences. In most non-family law contexts, and particularly in the insurance law context of automatic benefits without a broad sociological foundation on which to base those benefits, people who 'live together' can be considered spouses, but only if they do so in the normal sense of those words and for the requisite period of time."

[22] In *Intact Insurance Company v. The Dominion Of Canada General Insurance Company et. al. 2020 ONSC 7982,* Justice Lemay stated in paragraph 75:

> "The interpretation of spouse under the *Insurance Act* is different from the interpretation of spouse under the family law statutes. The interpretation of live together in a conjugal relationship needs to be interpreted with regard to the clear meaning of the two phrases. All of the words need to be given meaning. Lived together means living in the same residence."

[23] Arbitrator Guy Jones in *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company* (April 2005), identified the criteria to be considered in a priority dispute as including the following:

(a) duration of relationship;
(b) existence of children;
(c) stability of the relationship;
(d) interdependence of the parties;
(e) cohabitation;
(f) conjugal relationship;
(g) personal relations;
(h) responsibility for household services;
(i) interaction in a family and social context;
(j) financial arrangements and support;
(k) responsibility towards children;
(l) temporary interruptions in physical living arrangements;
(m) the expectation of the parties; and
(n) the intention of the parties.

[24] Arbitrator Guy Jones found in the aforesaid decision that not all of the components had to exist in order for there to be a spousal relationship and some individual components may be more important than others. Each case must be determined on its own facts.

[25] Applying the guidance of the jurisprudence set out above, I find that the claimant was the “spouse” of Kriszella Canonigo and therefore an “insured person” with respect to the Co-operator’s policy. I find the facts in this case satisfying s. 224(c) of the definition of “spouse” as contained in the *Insurance Act.* Although not having lived together for 3 years, I do find that they were living together in a conjugal relationship of some permanence outside of marriage and were the natural parents of a child.

[26] In reaching this conclusion I have considered several factors. The evidence would indicate that the two had been dating since July 2014, some four years prior to the subject accident. Their relationship became exclusive in August 2015. They had been living together since their child was born in April 2017. Since that time, they shared finances, slept in the same bed, shared meals together, travelled together, and socialized with friends and family together. There were no periods of separation. On the evidence before me, I am satisfied that they would be viewed by others as a couple and that they shared a determined commitment to one another.

[27] The Co-operators have submitted that the relationship was not one of permanence, as there was evidence to suggest that the two of them had frequent arguments and were certainly having a major argument at the time of this accident. Earlier on the date of this incident it is clear that Lawangen and Canonigo were involved in an argument. The argument started over the telephone when Lawangen was on his way home from work, continued after he got home and after they got into Canonigo's vehicle to go to the store. The argument in the car became very heated with harsh words being exchanged. The topic of the argument changed from financial issues to issues Canonigo had with Lawangen's family. Lawangen recalls having been involved in a heated argument and remembers "I jumped out of the vehicle".

[28] I have considered the submissions of Co-operators, and the evidence put forward with respect to "permanence". I find the evidence sufficient to prove that this was a relationship of some permanence. I am not satisfied that the frequency of arguments and the nature of the July 4, 2018 argument would have led to their separation, especially in a situation where there was a young child at home. In fact, Canonigo testified on her Examination Under Oath that they never considered separating. To suggest that the two of them were likely to separate would be mere speculation. In the appellate decision of *Intact Insurance Co. v. Allstate Insurance Co. of Canada 2016 ONCA 609* the Ontario Court of Appeal made it clear that in assessing the permanency of a relationship there cannot be speculation as to the future of the relationship. Without speculating as to what the future may have held for them, I am satisfied that the relationship at the time of the accident was of "some permanence" and that all of the factors considered leads to a conclusion that they meet the definition of "spouse" as set out in s. 224(c) of the *Insurance Act.*

b) Was the claimant Kurt Lawangen an "occupant" of the vehicle insured by Co-operators?

[29] There is no doubt that the claimant had been an "occupant" of the Canonigo vehicle, but Co-operators claims that the injuries sustained occurred after he had jumped out of the vehicle and was no longer an "occupant". Co-operator claims that at the point he jumped out of the vehicle, the claimant had no intention of returning to the vehicle.

[30] An "Occupant" under s.224(1) of the *Insurance Act* is defined as:

> (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.
>
> [emphasis mine]

[31] I am satisfied with the evidence that Kurt Lawangen was in the process of getting out of the Canonigo vehicle when his injuries occurred. Furthermore, I find that he would also be considered a “passenger” at the time of this loss. The “Objective Observer” test as set out in *AXA Insurance Company v. Markel Insurance Company of Canada* [2001] O.J. No. 294, is the overriding principle to determine whether a person is considered an “occupant” under s.224(1). The “Objective Observer” test poses the question of whether, in all of the circumstances at the time of the incident, an objective observer of this incident would answer affirmatively if asked whether Kurt was a passenger in the vehicle.

[32] In *AXA,* Mr. Ferguson drove a tractor-trailer in order to make a delivery of steel. Once there, he stopped his vehicle outside the loading bay, exited his vehicle, and entered the loading bay to wait his turn to unload his truck. He was outside his truck standing about 30 feet away when he was struck by a piece of wood that had been propelled off the back of another tractor-trailer exiting the loading bay. As a result, he suffered serious injuries which ultimately led to his death. In looking at the physical connection of the insured to the vehicle, it was held that he was in close proximity to the vehicle and therefore the insured driver of the trailer. It was determined that the definition of occupant contains no requirement that the person be engaged in driving at the time of the incident, but simply to an objective observer, that he would have been considered “the driver” of the vehicle.

[33] In *Mcintyre Estate v. Scott* (“*Mcintyre*”) *2003 CanLii 31493 (ONCA)*, a wife was considered a passenger of a motorcycle and thereby an occupant. The injured party, in that case, was travelling as a passenger on a motorcycle driven by her husband when a rainstorm started. They stopped and took shelter under an overpass. As the plaintiff approached the motorcycle to retrieve some dry clothing from a saddlebag, an uninsured motorist struck her and her husband, killing him and seriously injuring her. This case applied the “Objective Observer” test to determine whether the wife was a passenger. It was determined that section 224(1) of the *Insurance Act* should be interpreted in a coherent and consistent manner. The word "passenger", like the word "driver", was found to be a status rather than a physical activity. As the objective observer test is to be used to interpret "driver", so too should it be used to interpret "passenger".

[34] It appears that *Mcintyre* widened the scope of who is considered a passenger. A passenger is not limited to a person being carried in or on an automobile. Nor is it limited to a person getting into or getting out of or off an automobile. A passenger is not limited to a person actually being conveyed.

[35] On the basis of this jurisprudence and the evidence overall I find that the claimant was an “occupant” of the vehicle insured by the Co-operators at the time of this loss as I have found that he was both a “passenger” and a “person getting out of the automobile”.

c) Was the claimant Kurt Lawangen involved in an "accident"?

[36] **I**t is the position of the Respondent, Co-operators 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, requiring the Applicant to demonstrate that the impairments giving rise to the accident benefits claim arose as a result of an "accident". Co-operators claims that the incident herein was not an "accident".

[37] The Statutory Accident Benefits Schedule O. Reg.34/10 sets out the various benefits which may be available to a claimant. With respect to each available benefit where a claimant has sustained injury the following words are found:

> "an insurer is liable to pay the following benefits to or on behalf of the insured person who sustains an impairment as a result of an accident"
>
> [emphasis mine]

[38] 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]

[39] In *Unifund Assurance Company v Security National Insurance Company 2016 ONSC 6798,* Justice Matheson concluded that for an insurer to have access to the priority dispute mechanism, it must first be determined that accident benefits were available to the claimant. The threshold in s.2(1) of the SABS, that statutory accident benefits shall be provided in respect of an "accident" must be met before the priority provisions can be considered.

[40] 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 by the Ontario Court of Appeal in *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).

Causation

[41] There is really no causation issue in the case before me. Clearly, the claimant's impairments were caused by injuries sustained when he struck the pavement while attempting to exit the slowly moving vehicle operated by Cananigo.

Purpose Test

[42] The Applicant Intact has claimed that Kurt Lawangen was a passenger in the vehicle insured by Co-operators and sustained injuries while attempting to exit the vehicle thereby satisfying the purpose test. Co-operators claims that the circumstances in the case before me involve an incident where a passenger jumped out of a moving vehicle. Co-operators claims this is not something that is in the ordinary course of things associated with the use or operation of a vehicle and therefore not an "accident".

[43] It is clear from the jurisprudence to which I was referred, that there are situations involving a vehicle in one way or another that cannot be considered an "accident". For example, a situation where the driver of a vehicle had a heart attack was not considered an "accident". See *Wawanesa Mutual Insurance Company v. Zurich Canada (Arbitrator Bialkowski - May 26, 2018)*. In *Chisolm v. Liberty Mutual Insurance Group (2002) 60 O.R. (3d) 776,* it was held that gunshots from an unknown assailant injuring the driver of an automobile was not an "accident" as the involvement of the automobile was merely ancillary. In *Martin et al. v. 2064324 Ontario Inc. cob Freeze Nightclub (2013) 113 O.R. (3d) 338,* it was held that injuries sustained by a claimant during an assault when being forced into the trunk of a car did not arise from an "accident". In *H.A. v. Intact Insurance Company 2019 ONLAT 18-002501/AABS,* it was that an assault on a taxi driver sitting in his taxi-cab was not an "accident".

[44] In the recent case of *Montesano v. Western Assurance Co*. *2021 CanLii 54817*, the Applicant's injuries were considered to be the result of an "accident" when she tripped and fell walking in her driveway and struck her face against her parked car. There is no active use component to the purpose test and it was held that a vehicle does not have to be in active use for an incident to be considered an "accident". Further, Adjudicator Boyce deemed that an applicant's journey or potential journey is not relevant where there is a direct collision with a vehicle causing impairments. Adjudicator Boyce further found that "but for" her vehicle being parked in the driveway, she would not have struck her face on the bumper when she fell. It was therefore decided that there was no intervening act or event from an independent source that broke up the causal link between the Applicant's fall and her injuries.

[45] In *C.K.D v Wawanesa Mutual Insurance 2020 CanLii 80305,* the Applicant's fall while getting into his car was considered to be an "accident". Adjudicator Makhamra found that the Applicant would not have been injured "but for" being in the process of re-entering his vehicle. The Adjudicator further stated that the incident consisted of one continuous chain of events with no intervening act to break the chain of causation. The event began when he

unlocked his car and walked toward the vehicle to re-enter it. In other words, when the Applicant fell and suffered his injuries, he was in a continuous process of getting into the vehicle – the slip and fall was not a separate event. Adjudicator Makhamra opined that while there was no dispute that the slip and fall was the cause of his injuries, this was secondary to the fact that the applicant was getting into the vehicle when he fell, the very act that initiated the incident. The dominant feature of the incident was therefore the Applicant's attempt to get into his car which confirmed direct causation.

[46] In the case of *16-003163 v. Intact Insurance Company 2017 CanLii 69443,* the claimant was injured while "car surfing". The claimant was standing on the rear bumper of the vehicle holding on to its roof rack when the driver made a sudden turn. The claimant fell to the ground and sustained injury. Arbitrator Treksler of the Licence Appeal Tribunal held that the injuries were a result of an "accident" as defined in s. 3(1) of the Statutory Accident Benefits Schedule. Many of the comments made by the Arbitrator are helpful to the analysis before me:

> "I agree with the applicant that many people use vehicles in a dangerous way and are not excluded from receiving benefits. Some examples include, people standing on the back of a pick-up truck while it is in motion and falling; people texting while driving and getting into an accident, and people sitting on car windows while the car is in motion and falling.
>
> …
>
> I note that the *Schedule* does not use any qualifying words such as "aberrant", "abnormal" or "off-beat". The *Schedule* defines an accident as an incident in which the use and operation of an automobile directly causes an impairment. There is no question in this case that the use or operation of the automobile directly caused the applicant's impairment. In my view, the language of the definition in s. 3 (1) creates a presumption that the applicant is entitled to benefits unless the behaviour was so abnormal that it could not have been contemplated by the Legislature in drafting the definition.
>
> …
>
> While "car surfing" is illegal, it is not any more aberrant, abnormal or off-beat than speeding or texting while driving. Speeding and texting while driving are illegal activities, but would not necessarily disentitle a person to accident benefits.
>
> …
>
> The *Schedule* is designed to give benefits to the insured irrespective of fault. Further, the purpose of the *Schedule* is to provide consumer protection."

[47] Of particular assistance to the analysis of the case before me, is the decision in case *Gill v. Certas Direct Insurance Co*. *2005 Carswell Ont 2817,* as the facts are most similar to those herein. This was a decision of Director's Delegate Evans in an appeal from an Arbitrator's decision. Mr. Gill was severely injured after jumping out of his car and then running over to the guardrail and jumping off a bridge. The issue that was considered was

whether he was injured in an "accident" as defined in s. 3(1) of the *SABS*. At the arbitration level, it was held that the claimant's injuries arose out of an "accident" involving the insured vehicle. The analysis of the case suggests that Mr. Gill's act of rolling out of the vehicle itself could fall within the ordinary use of the vehicle. Had Mr. Gill's injuries been sustained from exiting the moving vehicle and not from jumping off a bridge, the act of rolling out of the vehicle could have been considered an "accident". In paragraph 17 of *Gill*, it was stated:

> "some activities are so clearly involved with the use or operation of an automobile that the purpose can be taken as a given. In this case, Mr. Gill was still engaged in an activity that involved the use or operation of his own automobile when he fell out of it."

[48] It was further elaborated in paragraph 18 that the initial action of rolling out of the car passed the purpose test:

> "Implicitly, the arbitrator also found that the initial mishap of rolling out of the car passed the purpose test. Essentially, Mr. Gill was driving his car when the incident started and exiting a car is part of its use or operation. Accordingly, I see no error in law in this part of the arbitrator's finding."

[49] The Director's Delegate had difficulty though, with the issue of causation. The question being dealt with was whether the claimant's impairments were caused by his falling out of his moving vehicle or the separate event of jumping off a bridge. It was concluded that the Arbitrator's reasons did not support his conclusions and the matter was sent back for a new hearing.

[50] In the case at bar, Lawangen was injured while he was a passenger in the car that was being driven by his common-law spouse. Clearly, exiting and entering a vehicle is part of its ordinary use. The "but for" consideration confirms that Kurt would not have been injured "but for" being in the process of exiting the vehicle.

[51] In *Chisholm v. Liberty Mutual Group (supra),* the Court of Appeal held that factors that are reasonably foreseeable risks of operating an automobile will not break the chain of causation. It was stated: "An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car -- if it is "part of the ordinary course of things."

[52] In *V.B. v Economical Insurance Company 2020 CanLii 87992*, the Applicant sustained injuries when he slipped and fell while exiting his vehicle in an icy parking lot. In that case, the Applicant relied on *Chisholm,* that reasonably foreseeable risks related to operating a motor vehicle will not break the chain of causation. He submitted that slipping and falling while getting out of a vehicle is a reasonably foreseeable risk of operating a motor vehicle and falling on ice was not an intervening event outside the ordinary course of use or operation of a vehicle capable of breaking the chain of causation. Adjudicator McGee ultimately agreed with the Applicant and decided that the Applicant's use or operation of his vehicle, namely disembarking his vehicle, directly caused his impairment.

[53] Kurt was exiting the vehicle when he was injured. He was injured by the very act of disembarking the automobile. There was no intervening act that interrupted the causal link between Kurt's injuries and the use and operation of the vehicle. Kurt's intentions were simply to exit the vehicle. There is no evidence that Kurt was attempting to injure himself. No medical evidence was adduced to suggest that he was suicidal or suffered from psychological issues or of any kind. In fact, in a statement to police on September 10, 2018, he specifically stated that it was not his intention to harm himself but that he just wanted to get out of the environment he was in.

[54] In my view, the use and operation of the automobile was the dominant feature of the accident involving Lawangen. Exiting a vehicle meets the definition of normal and ordinary use and as such, the manner in which Lawangen was using the vehicle was the dominant feature.

[55] Kurt's behaviour was not so abnormal or abhorrent to not be considered an accident. In my view, whether or not he deliberately exited the slow-moving vehicle is irrelevant to his entitlement to benefits. The *SABS* is designed to give benefits to the insured irrespective of fault. The facts before me support a finding that he made the poor decision of trying to exit a slow-moving vehicle in the heat of an argument, not realizing the full extent of the risk of injury in so doing. His injuries were directly caused through the use and operation of the automobile. Kurt's incident, therefore, satisfies both the purpose and causation tests and is considered and is found to be an "accident" pursuant to s. 3(1) of the *Statutory Accident Benefits Schedule.* This would entitle him to claim for accident benefits and entitle Intact to engage in the priority dispute process.

[56] By way of summary, I find that Lawangen's injuries arose out of an "accident". I find that Lawangen was the "spouse" of Co-operators insured, making the claimant an "Insured" under the Co-operators policy. The claimant was, therefore, an "insured" under both the Intact and Co-operators policies at the time of the accident. Applying the tie-breaking mechanism of s.268(5.2) results in a finding that Co-operators is the priority insurer.

ORDER

[57] On the basis of the findings aforesaid I hereby order that:

1. Co-operators is the priority insurer.

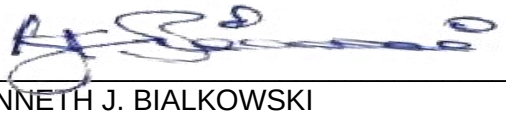
2. Co-operators is to assume carriage of the claimant's accident benefit claim and indemnify Intact with respect to all benefits reasonably paid to or on behalf of the claimant together with interest calculated in accordance with the *Courts of Justice Act*.

3. Co-operators is to pay the legal costs of Intact with respect to this arbitration on a partial indemnity basis

4. Co-operators is to pay the Arbitrator's account

DATED at TORONTO this 25th)

day of May, 2022.)



KENNETH J. BIALKOWSKI
Arbitrator