

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Appearances:

Aviva Insurance Company of Canada (Applicant): Cara Boddy

Economical Mutual Insurance Company (Respondent): Ashleigh Leon

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991 to arbitrate a dispute between two insurers with respect to a priority issue pursuant to the *Insurance Act* and its Regulations (specifically Regulation 283/95 as amended).

This claim arises out of a motor vehicle accident that occurred on September 24, 2016. At that time Mr. A.S. was a pedestrian crossing the street to catch a City bus when he was struck by a motor vehicle insured by the Applicant, Aviva Insurance Company of Canada (hereinafter called "Aviva"). A.S. applied to Aviva and they have been paying Statutory Accident Benefits pending this priority dispute. Aviva claims that Economical Mutual Insurance Company (hereinafter called "Economical") is the priority insurer pursuant to Section 268(2) of the *Insurance Act* on the grounds that A.S. is a "person specified in the policy as a driver of the insured automobile".

This priority dispute involves an interpretation of the OPCF-28A / Excluded Driver Endorsement in the context of the facts of this case and specifically the Certificate of Insurance issued by Economical.

The parties retained me on consent as an arbitrator to hear this matter. Submissions were made before me with respect to the issue in dispute on November 29th. Counsel filed Factums. In addition the following were marked as Exhibits:

1. Exhibit 1: Arbitration Agreement dated November 5, 2018;
2. Exhibit 2A: Agreed Statement of Facts dated November 6, 2018, together with tabs A through K;
3. Exhibit 2B: Supplemental Agreed Statement of Facts;
4. Exhibit 3: Book of Documents of the Respondent with two tabs.

As Arbitrator Shari Novick rendered a decision in a similar matter on December 6, 2018 after this matter was argued before me I gave counsel an opportunity to make supplementary submissions. Both counsel provided supplementary submissions in February, 2019. In addition counsel provided extensive Books of Authority.

Issue in Dispute:

The issue for my determination as set out in the Arbitration Agreement is as follows:

1. A determination of priority with respect to the payment of accident benefits to A.S. arising out of a motor vehicle accident which took place on September 24, 2016;
2. As a sub-issue to the issue described in sub-paragraph 2(1), a determination of whether A.S. is a "person specified in the policy as a driver of the insured automobile" vis-à-vis the policy issued by the respondent to 1394409 Ontario Inc.

In addition the parties claim their costs.

Facts:

The facts are by and large agreed upon and I set out the facts which I have distilled from both the documents filed as an Exhibit and the Agreed Statement of Facts and Supplementary Agreed Statement of Facts:

1. Aviva issued a policy of insurance to its named insured, M.M., bearing policy number A10320977PLA. The Aviva vehicle struck A.S. as a pedestrian in the accident of September 24, 2016 and A.S. sustained significant injuries;
2. K.S. is the owner of 1394409 Ontario Inc. o/a K-W Farh Foods. This is a business insured by Economical. K.S. is also the father of A.S., who was injured in the accident. At the time of the accident Economical had a valid policy under which the company was the named insured and K.S. and F.S. were listed as the principal drivers. Two vehicles were insured under that policy: A 2012 Nissan and a 2014 Mercedes-Benz;
3. At the end of the 2013 to 2014 policy term Economical determined that due to the poor driving record of A.S. that it would not renew the policy with the company because of the claims made against the policy;
4. K.S.'s broker recommended that in order to remain insured with Economical that A.S. should execute an OPCF-28A Excluded Driver Endorsement which would exclude A.S. from driving any of the vehicles insured by Economical;
5. A.S. and K.S. executed the OPCF-28A Excluded Driver Endorsement on November 12 and November 13, 2014 respectively. On executing it they both understood that A.S. was not to drive the insured automobile under any circumstances due to the risk associated with insuring him as a driver;
6. Aviva received the application for accident benefits in or around October 26, 2016;
7. On November 10, 2016 Aviva issued a "Notice to Applicant of Dispute Between Insurers" to Economical dated November 10, 2016;
8. On April 18, 2017 Aviva commenced an arbitration to determine whether Aviva or Economical had priority for the handling of A.S.'s accident benefit claim;
9. The Certificate of Automobile Insurance issued by Economical has an effective date of December 21, 2015 to December 21, 2016. The information set out in that document with respect to rating information and chargeable claims is reproduced below:

CERTIFICATE OF AUTOMOBILE INSURANCE (ONTARIO)
ECONOMICAL MUTUAL INSURANCE COMPANY

• • •
economical

HEAD OFFICE
WATERLOO
ONTARIO
PAGE 3

RATING INFORMATION

C 20060171P

Policy No. 30000000000000000000

DRIVER NO.	Driver Name		Age	Marital Status	Yrs Lic.	Driver's Training	Assignment Auto No.				Convictions		
	Last Name	Given Names					Principal	Secondary	Occasional	Excluded	Serious	Major	Minor
1	KARSEN	KAREN	55	MAR	36		2	1					
2	FREY	FRANCIS	28	MAR	12		1	2					
3	ANSON	ANDREW	24	SGL	7						1	1	2
3	ANSON	ANDREW	24	SGL	7						2	1	2

AUTO NO.	Chargeable Claims as Indicated (X)				Surcharges		Discounts	
	Date of Loss Day Month Year	Liability (Bodily Injury and/or Property Damage)	Accident Benefits	Collision/ All Perils	%	Description	%	Description
1	08 08 2008			X				CONVICTION FREE DISC
1	24 10 2007	X		X				MULTI-VEHICLE
2	24 08 2014	X		X				CONVICTION FREE DISC
2								MULTI-VEHICLE

AUTO NO.	Kilometres Driven		Gross Vehicle Weight Rating (Commercial vehicles only)	Class Description	
	Annually	To Work 1-Way		Class	Description
1	15000	5		03	BUSINESS < 4,800 KMS
2	16000	1		01	PLEASURE

AUTO NO.	Driving Record				Rate Group			Rating Territory				
	BI	PD	AB	DCPD	COLL/AP	AB	DCPD/COLL/AP	SP/COMP	Terr. Code	Description		
1	6	6	6	6	8	33	36	17	59	SOUTH KITCHENER AREA		
2	9	9	9	9	9	28	48	61	59	SOUTH KITCHENER AREA		

This Certificate is proof of a contract of insurance between the Named Insured and the Insurer subject in all respects to the Ontario Automobile Policy (OAP). In return for the premium charged and the statements contained in the Application, the contract provides the coverage outlined in this Certificate. You only have particular coverage for a specific automobile if this Certificate shows a premium for it, or shows the coverage is provided at no cost. All other terms of the Policy remain the same unless stated otherwise in this Certificate. Your Insurer will provide you with a copy of the Policy if you request it. This Certificate is only valid if it is signed by an authorized representative of the Insurer.

Kerry Soren

PRESIDENT AND CHIEF EXECUTIVE OFFICER

This certificate contains important information about your automobile insurance.
For purposes of the Insurance Companies Act (Canada), this document was issued in the course
of the Insurer's insurance business in Canada.

10. The OPCF-28A Excluded Driver Endorsement signed by A.S. and K.S. is also reproduced below:

OPCF-28A
EXCLUDED DRIVER

WARNING: BY SIGNING THIS FORM YOU AGREE THAT IF THE EXCLUDED DRIVER DRIVES ANY AUTOMOBILE DESCRIBED BELOW:

- THIS POLICY WILL NOT PROVIDE THE INSURANCE REQUIRED BY LAW;
- THIS POLICY WILL NOT PROVIDE COVERAGE FOR DAMAGE OR INJURIES CAUSED BY THE EXCLUDED DRIVER; AND
- BOTH THE AUTOMOBILE OWNER AND THE EXCLUDED DRIVER MAY BE PERSONALLY RESPONSIBLE FOR DAMAGE OR INJURIES CAUSED BY THE EXCLUDED DRIVER.

Please sign and return this form. Keep a copy for your records.

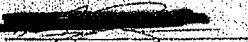
1. **Purpose of This Change** - This change is part of the policy. Except for certain Accident Benefits, it excludes all coverage when the person (the "Excluded Driver") named in paragraph 3 below drives the automobile(s) described in paragraph 2 below.
2. **Exclusions from Coverage** - Except for certain Accident Benefits under Section 4 of your policy, we will not provide coverage while the Excluded Driver is driving the automobile(s) listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy:

Auto #	Model Year	Trade name (Make)	Serial #/VIN
ALL VEHICLES LISTED ON THE POLICY			

3. **Acknowledgement of Excluded Driver** - I promise that I will not drive the automobile(s) described in paragraph 2 above. I understand that if I do:
 - there is no coverage under the policy for:
 - property damage and bodily injury,
 - damage to the automobile(s), and
 - most Accident Benefits;
 - I may be charged with driving without insurance;
 - I may be held personally liable for injuries or damage caused by me;
 - the policy may be cancelled; and
 - in future, I may have more difficulty finding car insurance and it will likely cost more.

Name of Excluded Driver:
Ameer Shala

Driver's Licence #: S-1111111111111111
X

 Signature of Excluded Driver

Nov. 12, 2014
Date

4. **Acknowledgement of Named Insured(s)** - I promise that I will not permit the Excluded Driver to drive the automobile(s) described in paragraph 2 above. I understand that if I do:
 - there is no coverage under the policy for:
 - property damage and bodily injury,
 - damage to the automobile(s), and
 - most Accident Benefits;
 - I may be charged with permitting the automobile to be driven without insurance;
 - I may be held personally liable for injuries or damage caused by the Excluded Driver;
 - the policy may be cancelled; and
 - in future, I may have more difficulty finding car insurance and it will likely cost more.

 Signature of Named Insured

NOV. 13/2014
Date

All other terms and conditions of your policy remain the same.
Attached to and forming part of Policy No. 20060171 of Economical Mutual Insurance Company.
Issued to K-W Farah Food Retailers Ltd.
This endorsement shall be effective from December 21 2014.

Broker: ADVOCATE INSURANCE GROUP 8302

(06/2005)

Position of the Parties:

Aviva takes the position relying on a long line of cases (five, including a decision from the Court of Appeal) that an individual who has executed an OPCF-28A: Excluded Driver Endorsement is a "listed driver" in accordance with Section 3(1) of the Statutory Accident Benefits Schedule which defines the term insured person.

Aviva submits that as an excluded driver is a listed driver that the Economical policy must rank above the Aviva policy in accordance with Section 268(2) of the *Insurance Act*. Aviva takes the position that one must distinguish when looking at the excluded driver issue as to whether an insured is excluded from certain coverage **when driving the vehicle** as opposed to whether that individual is excluded from making all claims for SABS coverage. Aviva submits that in this case where A.S. was not driving the insured vehicle that the Excluded Endorsement is irrelevant and the Certificate of Insurance which lists A.S. as Driver #3 under the rating information results in him being a listed driver for the purposes of SABS coverage. Aviva submits that this is consistent with at least five cases from previous arbitration decisions with similar facts and submits that the decision of the Court of Appeal in the *Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA, 101, is binding on me and supports their position.

Economical takes the position that an excluded driver under the Endorsement cannot be considered a listed driver. They argue that if one is excluded from driving the insured vehicle how can they also be given coverage as a listed driver of the vehicle that they have no right to drive. Economical in that regard relies on the decision of Justice Wright in *Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, Court File No. CV-15-533119, October 26, 2015. Economical takes the position that the Court of Appeal while overturning Justice Wright's decision did not do so on the grounds of her conclusion with respect to the excluded driver but rather with respect to the issue of standard of review.

While Economical recognizes that there are a number of arbitration level decisions which have reached different conclusions, Economical relies upon the decision of Arbitrator Lee Samis in *The Dominion of Canada General Insurance Company v. Unifund Assurance Company* dated September 23, 2016 which they submit supports their position. In addition, Economical submits that the Certificate of Insurance that was issued by Economical is different than the one considered by the Arbitrators and Court of Appeal in the cases cited by Aviva. Economical submits that those cases are distinguishable on the following grounds:

1. In the Certificate of Insurance provided by Economical there is no heading "Listed Drivers" or "Driver Name". The only place where A.S.'s name appears is under Rating Information. Under that we see that A.S. is noted as an excluded driver from both vehicles under the policy. Economical submits that this is to provide information to the purchaser of the insurance as to how the policy premium has been related. Similarly, under chargeable claims A.S. does not appear as there are no chargeable claims that would affect the rating. Under the rating information there is no reference to a listed driver. All that shows is the driver number and the driver name. A.S. is listed as driver number 3, while his parents are drivers 1 and 2. This is in contrast to the policies that Economical submits were considered in the previous cases. A copy of the Dominion Certificate of Insurance considered in the Court of Appeal case (*supra*) was provided. In that Certificate of Insurance there is a separate heading entitled **Listed Drivers**. Under that was the name of the excluded

driver as well as the principal drivers and the occasional drivers of the vehicles to be insured. There was then a separate heading for rating information in which the claimant's name appeared again noting that he was excluded. For ease of reference I have attached the Dominion Certificate of Insurance (pages 1-4) as an Appendix to my Decision;

2. Economical also refers to the FSCO Bulletin issued on September 18, 2015 with respect to the Revised Certificate of Automobile Insurance. This document is referred to as the "Revised Certificate of Automobile Insurance Form and Date of Elements - Bulletin A-8/15 Issued by the Superintendent of Financial Services Brian Mills." This document indicates that a new Certificate of Insurance is being issued and must be used for all policies. The Certificate of Automobile Insurance that is attached is similar in form to the one that Economical used for their insureds in this case. The Form does not have a specific heading for listed drivers but does provide a specific heading for rating information which requires the driver's name and whether the driver is a principal driver, secondary driver, occasional driver or an excluded driver. Explanatory notes attached to this Bulletin indicate that all the elements set out in the data field of the Certificate of Insurance must be used by the insurer unless otherwise provided. Also as part of this bulletin is a document that lists what those data elements for the Certificate of Automobile Insurance are. Element 109 indicates that a mandatory provision is to set out the assignment to automobile - principal, secondary, occasional and excluded. Therefore Economical submits that it is obliged based on this Bulletin and on the approved required form to specifically provide the rating information it did and to list the "driver's" names and their category as driver. Economical submits that the reason for this is to give the policyholder's precise information about "what coverages they have purchased and to show them what data was used to determine the premium they paid";
3. Economical submits as it was obliged to put in the rating information with respect to A.S. that they could not be said to specifically intend to make A.S. a listed driver as defined under Section 3(1) of the SABS (insured person) but were rather simply complying with their obligations in law. Economical further submits that the fact that their Certificate only places the excluded driver's name under the rating information and not specifically as a "listed driver" makes the facts in their case distinguishable and therefore the case law relied upon by Aviva as inapplicable;
4. Economical agrees with Aviva that there are circumstances where A.S. would be insured for the purposes of Statutory Accident Benefits. Economical acknowledges that its policy would extend full coverage to A.S. if he were a passenger in the insured vehicle. Economical was also prepared to accept that subject to the exclusions under Section 31 of the SABS if A.S. was an actual driver of the vehicle despite being excluded he would have limited access to accident benefits. However, in the circumstances of this case where A.S. is neither a passenger in nor a driver of

the insured vehicle coverage should not be extended considering the nature of the Certificate, the relevant legislation and the signed Excluded Driver Endorsement.

In reply Aviva submits that the differing form of Endorsement in the Economical case is irrelevant. A.S. is still listed as a driver for the purposes of rating which in their submission is no different than him being under the title Listed Driver. Aviva also relies upon the recent decision of Arbitrator Shari Novick in Aviva General Insurance Company & Security National Insurance Company (released December 6, 2018, where Arbitrator Novick concluded in identical circumstances that the Certificate of Insurance relied upon by Security (excluded driver only listed under Rating Information) still resulted in the claimant being a listed driver and thus an "insured person" pursuant to Section 3(1) of the SABS.

Relevant Provisions:

I turn first to Section 268(2) of the *Insurance Act*. The relevant Sections are set out below:

Section 268(2.2) of the *Insurance Act* is set out below:

Liability to Pay

The following rules apply for determining who is liable to pay statutory accident benefits:

2. In respect of non-occupants,
 - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant.

Section 268(2.2) therefore directs us to look at who is an insured. This takes us to Section 3(1) of the Statutory Accident Benefit Schedule for accidents on or after September 1, 2010 which provides the following definition of "insured person":

"'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 dependent of the named insured or of his or her spouse."

Section 224(1) of the *Insurance Act* is also relevant in that it defines what is an excluded driver:

“Excluded driver’ means a person named as an excluded driver in an endorsement under Section 249.”

Also relevant is Section 240 to the *Insurance Act*:

“If the 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 Benefit Schedule.”

This latter reference is with respect to the exclusion provisions under Section 31 of the Statutory Accident Benefit Schedule which provides under (a) i, ii, iii that a person who is the driver of an automobile at the time of the accident is not entitled to receive income replacement benefits, non-earner benefits or benefits under Section 21, 22 or 23 if that driver is an excluded driver under the contract of automobile insurance. This is modified by Section 31(2) which provides that that excluded driver would have the right to recover accident benefits under a motor vehicle liability policy where he is the named insured.

In addition to the relevant statutory provisions it is also important to review the Excluded Driver Endorsement itself. The relevant extracts are set out below:

1. This policy will not provide coverage for damage or injuries caused by the excluded driver;
2. This change is part of the policy. Except for certain accident benefits, it excludes all coverage when the person (excluded driver) named in paragraph 3 below drives the automobiles described in paragraph 2 below;
 - i. Exclusions from Coverage: except for certain accident benefits under Section 4 of your policy we will not provide coverage while the excluded driver is driving the automobile listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy.

The excluded driver is then asked to acknowledge and promise that he will not drive the automobile described in the document (in this case all vehicles listed on the policy) and notes that he understands that if he does there will be no coverage on the policy for property damage, bodily injury, damage to the automobile and “most accident benefits”. The Excluded Driver Endorsement and the relevant provisions primarily address the situation where the individual who is excluded is driving the vehicle he has promised not to drive.

The question remains whether an excluded driver who is not driving the vehicle he has promised not to drive is a “person specified in the policy as a driver of the insured automobile”. I pause here to note that the wording under Section 3(1) does not make reference to a listed driver “but rather to a person who is specified in the policy as a driver of the insured automobile”.

Let us now turn to the body of case law that has developed surrounding this difficult issue.

Analysis:

The starting point for the analysis is to note the decision of the Court of Appeal in *Warwick v. Gore Mutual Insurance Company* (1997) CanLII, 1732. The court in that case provides a clear direction that an automobile insurance policy insures those persons who meet the definition of “insured person” under the SABS and not just under the *Insurance Act*. When looking at priority one must therefore look to the Regulation first. Therefore, before embarking on a review of the relevant case law I keep in mind that the key issue to be addressed is whether A.S. was specified in the policy as a driver of the insured automobile.

I first examine the case law that is in favour of Economical’s position. To say the least that case law is sparse and there is no doubt that arguably the majority of the cases are in favour of Aviva’s position. The first case in favour of Economical’s position is *Dominion of Canada General Insurance Company & Unifund*, a private arbitration decision of Lee Samis dated September 23, 2016. Arbitrator Samis was asked to determine whether Unifund was the priority insurer over Dominion on the grounds that the claimant was an individual specified in the policy as a driver of the insured vehicle based on a Certificate, and an OPCF-28A, indicating that the claimant was an excluded driver.

Arbitrator Samis concluded that the listing of an excluded driver in the Certificate of Insurance did not elevate him to the position of someone “specified in the policy as a driver of the insured automobile”. Arbitrator Samis stated that conceptually “an excluded driver” is in fact the opposite of someone specified in the policy as a driver. Rather, the endorsement specifies them as someone who will not drive the insured automobile. In reaching his conclusion Arbitrator Samis reviews the Certificate of Insurance where the claimant’s name was listed under the heading noted “Rating Information” and under a heading noted “Driver Information”. In both cases while the person’s name was listed he was identified as an excluded driver. Arbitrator Samis stated:

“The fact that Unifund, for its systems or other reasons, chose to mention this person’s name under the rating information about drivers is not sufficient to specify him as being a driver of the vehicle. In fact, it is the contrary. It is an explicit recognition that this person would not be a driver of the vehicle under any circumstances.”

Arbitrator Samis reviews other arbitrators' decisions and notes that he is in respectful disagreement with their conclusions. At the time Arbitrator Samis rendered his decision Justice Wright had rendered her decision in *Dominion of Canada v. State Farm* (supra) and Arbitrator Samis indicated that he agreed with Justice Wright.

The only other decision that Economical argues is in their favour is Justice Wright's decision even though overturned by the Court of Appeal. Turning to that case it is important to note that the appeal to the Court of Appeal was from two decisions. The appeal included the case of *Belair Direct Insurance v. Dominion of Canada General Insurance* (an appeal from the decision of Arbitrator Cooper which was upheld by Justice Akbarali, (2017) O.J. No. 339) and the case of the *Dominion of Canada General Insurance Company & State Farm Mutual Automobile Insurance Company* (an appeal from Arbitrator Bialkowski overturned by Justice Wright (supra)).

Turning first of all to the decision in *Dominion of Canada & State Farm*. In that case the claimant was injured in February, 2012 when he was a passenger in his girlfriend's car. His girlfriend's car was insured by State Farm. The claimant applied to his parent's insurer, Dominion. Dominion took the position that the claimant did not meet the statutory definition of an insured person as he was not "specified in the policy as a driver of the insured automobile" because he was listed as an excluded driver. Dominion therefore took the position that State Farm was the priority insurer. State Farm took the position that Aviva does here claiming that by virtue of listing the driver on the policy that he became a specified driver irrespective of his excluded status. The arbitrator agreed with State Farm. He concluded that because the Certificate of Insurance specifically listed the claimant as a "listed driver" that he was entitled to accident benefits from Dominion as long as he was not injured while driving one of the vehicles in respect of which he was an excluded driver.

Justice Wright allowed the appeal and concluded that the claimant was not an insured person. Justice Wright acknowledged that the claimant was listed as a driver on the Certificate of Insurance but concluded that did not mean he became "an insured person". Justice Wright stated:

"I find the arbitrator fell into error when he found Rupolo to be an insured person in accordance with the SABS. The arbitrator concluded that because Rupolo was listed in the Certificate of Insurance as a driver, he fell within the definition of an insured driver, despite being an excluded driver and was entitled to some insurance coverage. The legislation clearly states that an insured driver is one who was specified in the policy as a driver of the insured automobile. Despite being listed as a driver, Rupolo was clearly not a driver of an insured automobile and therefore not entitled to coverage."

Before turning to the Court of Appeal's comments in overturning Justice Wright's decision it is important to review the other case that the Court of Appeal also addressed.

Arbitrator Cooper decided the first level of *Belair v. Dominion* (decision April 19, 2016). In that case Matthew was the operator of an uninsured motorcycle which was involved in an accident in August of 2013 with a vehicle owned by a Michael G. Belair insured Michael G. and Matthew applied for and received benefits from Belair.

Matthew's parents were insured with Dominion. Dominion issued a policy in which Matthew was noted under the Certificate as a "Listed Driver". Additionally under rating information Matthew's name appears as Driver No. 3 but excluded with no convictions and no chargeable claims as he is an excluded driver. Under Listed Drivers he is noted as being Driver No. 3 and his age, years licenced, driver's training and marital status. The arguments before Arbitrator Cooper were identical as the arguments made in *State Farm & Dominion*. However, there was also an argument as to whether Arbitrator Cooper was bound by the decision of Justice Wright in the *Dominion & State Farm* decision. Arbitrator Cooper ultimately determined that he was bound by the decision of Justice Wright and therefore ruled that Matthew was not an insured person under the Dominion policy. However, Arbitrator Cooper indicated that but for that decision he would have concluded in favour of Matthew being a specified driver under the Dominion policy irrespective of his excluded status.

Arbitrator Cooper's decision was appealed to Superior Court and was heard by Justice Akbarali with a Judgment date of January 16, 2017. Justice Akbarali felt that the standard of review for her to consider was reasonableness. She concluded that Arbitrator Cooper's analysis was reasonable and as Justice Akbarali was not bound by Justice Wright's decision she overturned Arbitrator Cooper's decision. Justice Akbarali felt that the reasoning advanced by Arbitrators Cooper, Bialkowski and Densem were all reasonable. (Arbitrator Scott Densem's decision is found at *State Farm Insurance Company v. Wawanesa Mutual Insurance Company*, decision March 10, 2016). The key points from Justice Akbarali's decision are set out below:

1. While Matthew is an excluded driver under the Dominion policy he is not excluded from all coverage under the policy. The policy by its terms provides some limited coverage even if he is driving the vehicle but is explicitly excluded from driving. Neither the policy nor the relevant statutory provisions limit the accident benefits available to Matthew if he is involved in an accident when he is not driving the insured vehicle;
2. The Excluded Driver Endorsement is ambiguous with respect to accident benefit coverage available to an excluded driver when they are not driving the excluded vehicle;
3. By virtue of being a "listed driver" under the policy Matthew was a "specified driver" in the Dominion policy with respect to the insured vehicle. By virtue of being listed as a driver he is therefore specified in the policy as a driver. The word "specified" is not meaningfully different than "listed".

Turning now to the decision of the Court of Appeal from both these decisions rendered on February 2, 2018. These appeals were heard together as they gave rise to the same main issue which was the standard of review applicable to insurance arbitral decisions involving priority disputes. The court concluded that the proper test was reasonableness. As Justice Wright had applied a correctness test her decision was overturned. As Justice Akbarali had applied a reasonableness test that decision was not overturned. However, in my view the court goes beyond just looking at the standard of review and does make comments with respect to the results in the priority dispute itself. It was important to do so with respect to the *Belair & Dominion* decision as the Judge in that case had provided the correct standard of review. The court therefore had to address whether the Judge's decision was appropriate. The court stated:

“The appeal Judge in the Dominion appeal, who was not similarly bound, appropriately applied the reasonable standard of review. I see no error in her thorough review of the arbitrator’s decision. For the reasons that she expressed, I agree with her conclusion that the arbitrator’s underlying conclusion was reasonable.”

Therefore, I disagree with Economical’s submissions that I am not bound by the decision of the Court of Appeal as it only looked at the question of the standard of review. I am satisfied that the court also looked at the question of the priority decision itself and concluded that the court’s determination that the claimant became a specified driver by being listed as an excluded driver was a reasonable conclusion.

The question now becomes whether there is something so distinguishable on the facts of this case that I can find that I am not bound by the decision of the Court of Appeal. The only argument that is relied upon by Economical that may distinguish this case from the facts before the Court of Appeal is the nature of the Certificate of Insurance issued by Economical. The difference is that there is no category of “listed driver” or “driver information” (as in Arbitrator Samis’ case). Rather there is only rating information where the excluded driver is listed as required by the FSCO Bulletin and the required format of the Certificate of Insurance. This issue was dealt with by Arbitrator Jones in his decision in *Economical Insurance Group v. Security National and Royal and SunAlliance* (decision July 16, 2018) and by Arbitrator Shari Novick in her decision in *Aviva General Insurance Company & Security National Insurance Company* (decision private arbitrator December 6, 2018). Both Arbitrator Jones and Arbitrator Novick had the benefit of the decision of the Court of Appeal in *State Farm & Dominion*. Both arbitrators concluded that the Certificate of Automobile Insurance where the excluded driver was only listed under the “rating information” did not change the result that the driver would still be considered to be “a person specified in the policy as a driver of the insured vehicle”.

In Arbitrator Jones’ decision the claimant was riding his bicycle when he was struck by a motor vehicle insured by Security National. The claimant submitted an application to Economical which insured a motor vehicle owned by his father. The claimant and his father had signed an OPCF-28A. The Certificate of Insurance which was attached to Arbitrator Jones’ decision did

not have the heading "listed driver". Under Policy Change Forms (OPCF) there was a note: 28A Excluded Driver: Mr. V.V.G. Under rating information six drivers were listed. The rating information indicated that it listed the driver information, driver number and name. In addition it had date of birth, marital status, date licenced, driver's training, convictions and the assignment to which automobile. The names in items 1 through 5 included the principal driver and secondary drivers. The claimant was listed as Driver No. 6 with one serious conviction and noted as an excluded driver. Arbitrator Jones reviewed all the case law. He noted that he was somewhat confused by the form used by the insurer in that it "has only one list under 'Rating Information' and not a separate list for listed drivers". Having noted that Arbitrator Jones finds that a reasonable person reading the policy and signing the OPCF-28A would conclude that they would be entitled to certain accident benefit coverage as long as they were not driving the described automobile at the time of the accident. Arbitrator Jones examined the decisions of Arbitrators Densem, Bialkowski and Cooper as well as the decision of the Court of Appeal and noted:

"I accept that an excluded driver comes within the meaning of a 'person specified in the policy as a driver of the insured automobile'".

Turning now to Arbitrator Novick's decision which is more or less on all fours in terms of facts as the matter before me. The claimant in that case was an occupant of the Aviva car which was involved in an accident in June of 2016. Security insured the claimant's parents. The claimant was an excluded driver under that policy. Security argued that their Certificate of Insurance was different than the ones considered in the other cases and that there was such a difference that it would justify Arbitrator Novick not feeling bound by the decision of the Court of Appeal. The reproduction of the Certificate of Insurance in that case suggests that it is identical to the one before me from Economical. Arbitrator Novick was also referred to the Superintendent of Financial Services Bulletin, A-03/10 and the Revised Certificate of Automobile Insurance that was mandatory. The requirement to list the excluded driver under the rating information as a mandatory aspect of the Certificate of Insurance was also argued before her.

Arbitrator Novick provides an excellent analysis of all the various decisions dealing with the question of the excluded driver endorsement in circumstances where the individual is not driving the insured vehicle. Arbitrator Novick notes that the claimant's name is only listed in the rating information section of the Certificate of Insurance issued by Security but also notes that that is the only place where the secondary or occasional driver on the policy (those individuals who are not the named insured) are listed. Arbitrator Novick quite rightly points out that if those individuals (the secondary or occasional drivers) are only listed under the rating information then accepting the argument of Security in that case and Economical in this case those individuals would not meet the definition of an insured person as they are not listed anywhere in the Certificate of Insurance as a specified driver. They are only listed for the purposes of rating.

I agree with Arbitrator Novick that there is nothing in the Certificate of Insurance of Economical that would distinguish it from the Certificate of Insurance considered by the Court of Appeal. I

conclude I am bound by the Court of Appeal and even if I were not, I would conclude this issue in favour of Aviva.

Having carefully reviewed all the decisions on this issue and in particular the decision of the Court of Appeal and having carefully reviewed the two types of Certificate of Insurance that have been put before me, I am satisfied that having placed Mr. A.S.'s name as Driver No. 3 under rating information on the Economical Certificate of Automobile Insurance that that is sufficient for Mr. A.S. to be "a person specified in the policy as a driver of the insured automobile".

I therefore find that Economical Mutual Insurance Company is the priority insurer with respect to the claim of Mr. A.S. pursuant to Section 268 of the *Insurance Act*.

Award:

In response to the issue put before me as set out in the Arbitration Agreement I conclude the following:

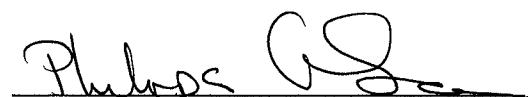
1. A.S. is a person specified in the policy as a driver of the insured automobile vis-à-vis the policy issued by Economical to 1394409 Ontario Inc. and therefore is the priority insurer with respect to the payments of statutory accident benefits to A.S. arising out of the motor vehicle accident of September 24, 2016.

Costs:

The Arbitration Agreement provides that the Arbitrator has discretion to award costs; both legal costs and the cost of the arbitrator. As Aviva was entirely successful in this matter I find that Economical should pay legal costs to Aviva with respect to this Arbitration and that Economical is also responsible for the arbitrator's costs.

If costs cannot be agreed upon between the parties I can be contacted to schedule a cost hearing.

DATED THIS 11th day of April, 2019 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP

APPENDIX “A”

THE DOMINION

Domestic and International Insurer

P.O. Box 1227, Guelph, Ontario N1G 2J7

E-mail: info@thedominion.ca

thedominion.ca

Automobile 1

Described automobile

Lienholders (to whom loss may be jointly payable)

None

Model year	1997
Make / Model	MAZDA B4000 CAB P
Body type	Pickup
Serial number / V.I.N.	4F4CR16X9VTM26022

Rating information

Kilometres driven	15,000 km driven each year; 10 km driven to work one way		
Vehicle code	0984		
Rate group			
Accident Benefits	1		
Direct Compensation - Property Damage	7		
All Perils / Collision			
Comprehensive / Specified Perils			
Rating territory	11.	Toronto	
Class	14	Principal driver age 25 or greater, pleasure use, commuting to and from work, school or transit station permitted up to 10 km one way, not driven more than 24,000 km annually.	
Driving record	Ideal	Driver 35 years of age or greater, licensed 10 years or more (past 6 years in North America). All drivers, no cancellations for non-payment in the past 3 years and no chargeable accidents or licence suspensions in the past 6 years. Not more than 1 minor conviction (all drivers), and no major or serious convictions in the past 3 years.	
Discounts	10%	Dual Policy Discount - Applies to all related drivers in your household where we insure your principal residence on a Homeowners, Tenants or Condominium policy, provided there are no surcharges for accidents or convictions.	
	10%	Multi-Vehicle Discount - Applies if you have two or more private passenger automobile(s) insured with us for mandatory road coverages and operated by family members living in the same household, provided there are no surcharges for accidents or convictions.	

Driver number	Driver name	Assignment	Chargeable claims		
			Date of loss	Type of loss	
1	RUPOLI,PASQUALE	Principal	1 minor	None	
4	RUPOLI,UMBERTO	Excluded	None	None	

Insurance coverages			Principal driver premium
Coverage	Limit	Deductible	
Liability			
Bodily Injury	\$2,000,000		\$476
Property Damage	\$2,000,000		\$11
Accident Benefits (Standard Benefits)	As stated in Section 4 of Policy		\$941
Optional Increased Accident Benefits			
Income Replacement (\$600/\$800/\$1,000)	Up to \$... per week		
Caregiver, Housekeeping & Home Maintenance	As stated in Section 4 of Policy		
Medical & Rehabilitation (\$100,000)	As stated in Section 4 of Policy		
Attendant Care (\$72,000)	As stated in Section 4 of Policy		
Medical, Rehabilitation (\$1,100,000) & Attendant Care (\$1,072,000)	As stated in Section 4 of Policy		
Death & Funeral	As stated in Section 4 of Policy		
Dependant Care	As stated in Section 4 of Policy		
Indexation Benefit (Consumer Price Index)	As stated in Section 4 of Policy		
Uninsured Automobile	As stated in Section 5 of Policy		\$18
Direct Compensation - Property Damage		\$0	\$124
<i>This policy contains a partial payment of recovery clause for property damage if a deductible is specified for direct compensation - property damage</i>			
Loss or Damage			
<i>This policy contains a partial payment of loss clause. A deductible applies for each claim except as stated in your policy.</i>			
Specified Perils (excluding Collision or Upset)			
Comprehensive (excluding Collision or Upset)			
Collision or Upset			
All Perils			
Policy change forms			
OPCF 2BA Excluded Driver			\$23
OPCF 44R Family Protection Coverage	\$2,000,000		
Subtotal for Automobile I			\$1,593

Your total premium for Automobile 1 is \$1,593

Remarks: Accident Forgiveness is included at no charge subject to eligibility.

THE DOMINION

Automobile Insurance - Ontario - Canada

Domestic
Automobile
Coverage
Plan
P.O. Box 10000
The Dominion
theDominion.ca

Automobile 2

Described automobile

Model year	2003
Make / Model	CHEVROLET VENTURE
Body type	Van
Serial number / V.I.N.	1GNDU03E53D115520

Lienholders (to whom loss may be jointly payable)

None

Rating information

Kilometres driven	12,000 km driven each year; 5 km driven to work one way	
Vehicle code	S474	
Rate group		
Accident Benefits	3	
Direct Compensation - Property Damage	23	
All Perils / Collision	22	
Comprehensive / Specified Perils	16	
Rating territory	1L	Toronto
Class		
Principal driver	14	Principal driver age 25 or greater, pleasure use, commuting to and from work, school or transit station permitted up to 10 km one way, not driven more than 24,000 km annually.
Occasional driver	06	Occasional driver, male under age 25.
Driving record		
Principal driver	Ideal	Driver 35 years of age or greater, licensed 10 years or more (past 6 years in North America). All drivers, no cancellations for non-payment in the past 3 years and no chargeable accidents or licence suspensions in the past 6 years. Not more than 1 minor conviction (all drivers), and no major or serious convictions in the past 3 years.
Occasional driver	5	Driver licensed 5 years in North America. All drivers, no more than 2 cancellations for non-payment in the past 3 years and no chargeable accidents for any driver in the past 5 years. Not more than 2 minor convictions (per driver), and no major or serious convictions in the past 3 years.
Discounts	10%	Dual Policy Discount - Applies to all related drivers in your household where we insure your principal residence on a Homeowners, Tenants or Condominium policy, provided there are no surcharges for accidents or convictions.
	10%	Multi-Vehicle Discount - Applies if you have two or more private passenger automobile(s) insured with us for mandatory road coverages and operated by family members living in the same household, provided there are no surcharges for accidents or convictions.

Rating information (continued)

Driver number	Driver name	Assignment	Convictions	Chargeable claims
				Date of loss
				Type of loss
2	RUPOLI,GIUDITTA	Principal	None	None
3	RUPOLI,ROCCO	Occasional	2 minor	None
4	RUPOLI,UMBERTO	Excluded	None	None

Insurance coverages

Coverage	Limit	Deductible	Principal driver premium	Occasional male driver premium
Liability				
Bodily Injury	\$2,000,000		\$476	\$240
Property Damage	\$2,000,000		\$11	\$5
Accident Benefits (Standard Benefits)	As stated in Section 4 of Policy		\$1,177	\$684
Optional Increased Accident Benefits				
Income Replacement (\$600/\$800/\$1,000)	Up to \$ _____ per week			
Caregiver, Housekeeping & Home Maintenance	As stated in Section 4 of Policy			
Medical & Rehabilitation (\$100,000)	As stated in Section 4 of Policy			
Attendant Care (\$72,000)	As stated in Section 4 of Policy			
Medical, Rehabilitation (\$1,100,000) & Attendant Care (\$1,072,000)	As stated in Section 4 of Policy			
Death & Funeral	As stated in Section 4 of Policy			
Dependant Care	As stated in Section 4 of Policy			
Indexation Benefit (Consumer Price Index)	As stated in Section 4 of Policy			
Uninsured Automobile	As stated in Section 5 of Policy		\$18	\$18
Direct Compensation - Property Damage		\$0	\$344	\$174
<i>This policy contains a partial payment of recovery clause for property damage if a deductible is specified for direct compensation - property damage.</i>				
Loss or Damage				
<i>This policy contains a partial payment of loss clause. A deductible applies for each claim except as stated in your policy.</i>				
Specified Perils (excluding Collision or Upset)				
Comprehensive (excluding Collision or Lapse)				

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