

**IN THE MATTER**  
of the *Insurance Act*, R.S.O. 1990, c.1.8, as amended  
s.268, as amended, and all regulations thereto; and in particular,  
Ontario Regulation 283/95, as amended (Disputes Between Insurers);

**AND IN THE MATTER**  
of the *Arbitration Act*, S.O. 1991, c.17, as amended;

B E T W E E N :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

TRADERS GENERAL INSURANCE COMPANY (AVIVA INSURANCE COMPANY OF CANADA) and  
UNIFUND ASSURANCE COMPANY

Respondents

**DECISION**

**Appearances:**

Frank A. Benedetto: Counsel for the Applicant, Allstate Insurance Company of Canada (hereinafter called Allstate)

Matthew C. Owen: Counsel for the Respondent, Traders General Insurance Company (hereinafter called Traders)

Laura Castellucci: Counsel for the Respondent, Unifund Assurance Company (hereinafter called Unifund)

**Background:**

The case comes before me pursuant to Section 268 of the *Insurance Act*, as amended, and in particular Ontario Regulation 283/95. This is a dispute among three insurers as to which is the priority insurer with respect to the payment of Statutory Accident Benefits to 4 individuals

(hereinafter referred to as the claimants) arising out of an accident that occurred on June 20, 2018.

The claimants are all members of a family: mother, father, and two daughters. The mother was a pedestrian who was injured in a motor vehicle accident on June 20, 2018. One of her daughters was present when the injury occurred. The husband and other daughter were not present at the scene of the accident. Originally this Arbitration included a question as to whether there was any coverage under the respective policies of the Applicant or Respondents for these two individuals. However, after some discussions and submissions, before proceeding with the main Hearing I made an Order on consent in which I concluded that the husband and daughter (who were not at the scene of the accident) were not spouses of, dependents of, or people insured under any automobile policy issued by any of the parties to this Arbitration at the time of the June 20, 2018 accident and accordingly there was no entitlement to any Statutory Accident Benefits from the Applicant, Allstate. There being no entitlement to any Statutory Accident Benefits from Allstate, then Allstate could not pursue a claim for priority as against Traders and Unifund and the Arbitration in that regard was stayed.

I issued the following Order with respect to these two claimants and the Arbitration insofar as it relates to them:

I am staying the Arbitration solely as it pertains to SM and IM and I am providing Allstate Insurance Company of Canada the right to reinitiate the priority dispute before me and have the stay lifted as long as it does do so no later than 60 days from:

- A. June 4, 2023 being 1 year after the expiry of the limitation period for SM to dispute the denial of his claims at the License Appeal Tribunal to claim Statutory Accident Benefits from the June 20, 2018 accident; and,
- B. July 7, 2023 being 1 year after the expiry of the limitation period for IM to dispute the denial of her claims at the Licensing Appeal Tribunal to claim Statutory Accident Benefits from the June 20, 2018 accident.

This matter therefore proceeded before me solely on the issue of who has priority to pay Statutory Accident benefits to the mother who was struck by a motor vehicle while sitting on a bench waiting for a TTC bus on June 20, 2018 and the daughter who was waiting at the bus stop with her mother.

**Proceedings:**

This Arbitration proceeded before me by way of written submissions, witnesses, and oral submissions. Each party submitted a Factum as well as a Book of Authorities. I received a Joint Statement from the parties, a Book of Documents from Traders, as well as some documents from Unifund. I also had a signed Arbitration Agreement.

The matter proceeded to a Hearing on October 28 2021 at which time two witnesses were called: Neil Bigelow, a licenced professional engineer, and Jamie Catania, also a licenced professional engineer.

**Issue:**

While the issue before me is identified as a priority dispute, at the heart of the claim is the applicability of the transmission of force theory. Which of the Traders insured vehicle (Honda) or the Unifund insured vehicle (Toyota) transmitted the force that resulted in the Toyota ultimately striking the pedestrian.

**Facts:**

On June 20, 2018, the claimant (mother) was sitting on a bench waiting for a TTC bus. Her daughter was waiting at the same bus stop. The daughter managed to avoid being physically struck by the vehicle but witnessed the incident.

Her mother was reportedly pinned under the vehicle that struck her for some time and sustained some significant injuries particularly to her left leg.

The vehicle that struck the mother was a Toyota RAV-4 insured by Unifund.

Traders insured a white Honda Civic that struck the Toyota before the Toyota hit the pedestrian.

Unifund takes the position that it was not the force of its vehicle that resulted in striking the pedestrian. Unifund submits that the impact from the Honda caused the transmission of force resulting in the Toyota striking the pedestrian. Accordingly, Unifund takes the position that the Honda is in fact the striking vehicle.

The claimants applied for Statutory Accident Benefits from Allstate. This is because the driver of the Honda, at the scene of the accident, produced an old insurance slip indicating that Allstate insured his vehicle. That was not in fact the case. The Allstate policy had been cancelled. No one disputes that. Traders in fact insured the Honda.

Nevertheless, both claimants applied to Allstate for Statutory Accident Benefits which resulted in Allstate initiating this Arbitration as against Unifund or Traders. There is no dispute that the Allstate policy had been properly terminated before the incident occurred and that Allstate did not insure the Honda. The focus in this priority dispute is therefore between Traders and Unifund.

Therefore, unusually for a priority dispute the facts as to how this accident occurred are of considerable importance to the parties various positions.

The evidence shows that the Toyota was travelling westbound on Lawrence Avenue East approaching the light with Thornton Park Road. The vehicle was in the right-hand lane.

At roughly the same time the Honda was driving through an Ultra Mart Gas Station located on the Northwest corner of Lawrence Avenue and Thornton Park Road. The driver exited the gas station lot and entered the right lane (westbound lanes of Lawrence Avenue). This was the same lane in which the Toyota was travelling. There was an impact between the two vehicles.

The Toyota lost control and ended up mounting the curb where it struck the pedestrian at the bus stop.

CCTV footage from the Ultra Mart Gas Station was put into evidence. It clearly shows the Honda driving through the Ultra Mart Gas Station, exiting the station onto Lawrence Avenue East without coming to a complete stop. The video then shows the Honda striking the rear-passenger side of the Toyota resulting in it appearing to lose control and rotate. The video then shows the Toyota mounting the curb at the bus stop.

The two engineers who were retained, both submitted engineering reports as well as giving evidence at the hearing. This evidence will be examined in more detail below but essentially Mr. Bigelow's position was that the vehicle to vehicle impact between the Honda and Toyota resulted in the Toyota being forced out of control, rotating, losing road to tire traction which resulted in a yaw. Mr. Bigelow's evidence was that the forces generated by the impact caused the Toyota to experience an angular velocity which caused it to rotate and travel toward the pedestrian. The collision, Mr. Bigelow says, was due to the velocity or force of the Honda not the Toyota's own momentum.

By way of contrast, Mr. Catania's position was that prior to the impact the Toyota had westerly momentum as it was driving under its own speed towards the west. The impact with the Honda altered the orientation of the Toyota but it still had its pre-existing westerly momentum and it was that momentum that caused it to continue forward and resulted in the collision with the pedestrian.

Mr. Bigelow therefore takes the position that it is the striking vehicle (the Honda) that caused the transmission of force to the Toyota that then caused it to strike the pedestrian.

Mr. Catania, says that the Toyota continued to travel under its own force albeit with a change of direction as a result of the impact and it was still under its own force when it struck the pedestrian. In the latter case, the Toyota would therefore be the striking vehicle and stand in priority. In the former case, the Honda would be the striking vehicle and it would be the priority insurer.

Let us now turn to a more detailed examination of the reports and evidence of the two engineers.

### **Evidence of Neil Bigelow**

Neil Bigelow is a consulting engineer who has worked in accident construction and cause analysis since 1994. He submitted 2 reports under the name Bigelow Accident Reconstruction Inc. The first was dated May 26, 2021 and the second July 27, 2021. Mr. Edwin Wang, also a professional engineer assisted in the completion of the report. Mr. Wang did not give evidence at the Hearing. Mr. Bigelow was accepted as an expert in the field of engineering.

Mr. Bigelow was retained by Ms. Castellucci, counsel for Unifund, to prepare an accident reconstruction report. According to his evidence at the Hearing, Mr. Bigelow understood his retainer to determine how the vehicle to vehicle collision occurred and how the vehicle to pedestrian collision occurred. With the greatest of respect to Mr. Bigelow, both his reports and evidence seem to focus more on how the accident occurred and who caused the accident rather than the question of “transmission of force”. How this accident occurred and who should have done what is not relevant to this priority dispute.

Mr. Bigelow reviewed the discovery transcripts of the two drivers and as well the two claimants. He had the motor vehicle accident report, the police collision and investigation file, property damage documents, and the CCTV video records. He also did a site inspection at 3930 Lawrence Avenue East. As to how the incident occurred, Mr. Bigelow concluded that the Honda accelerated out of the gas station and entered the roadway without stopping and its front end contacted the right side of the Toyota. On impact, the Toyota began to rotate clockwise out of control in an arced yaw path of travel. The Toyota then mounted the north road curb and contacted the pedestrian on the wooden bench.

The area of impact between the Toyota and Honda was in the westbound, right lane on Lawrence Avenue. The Honda front end struck the right/rear door and right-rear tire of the Toyota during the collision. Mr. Bigelow’s evidence was that the collision force was oriented at the 3 o’clock position laterally at the Toyota’s right side and behind its mass center which would have increased the likelihood of rotation on impact.

He also pointed out that there were yaw marks on the road and in reviewing the CCTV footage that you could see the Toyota rotating on impact from the Honda. The result of the impact to the Toyota’s right-rear door and right-rear tire by the Honda caused the Toyota to destabilize, rotate clockwise out of control in an arced yaw path.

The Toyota’s speed at impact was calculated at 38.7 km/h. The Honda’s speed at impact was likely 9.5 km/h.

Mr. Bigelow's main conclusions are set out below:

1. The Honda was the striking vehicle during the impact phase of the vehicle to vehicle collision event
2. The collision force from the Honda caused the Toyota to rotate clockwise out of control which then resulted in it striking the pedestrian on the wooden bench
3. The Toyota became out of control on impact with the Honda and remained out of control up until the pedestrian impact

The remaining conclusions deal primarily with what could have been done to avoid the accident. Mr. Bigelow comments, for example, that the driver of the Toyota could have avoided the collision if she had time to brake or steer, that she did not have sufficient emergency stopping distance and that the driver of the Honda's actions resulted in a collision hazard reducing the driver of the Toyota's available time to avoid the collision.

Mr. Bigelow's second report was to provide a critique to the report of Mr. Catania. Again, I find that most of the critique reflects more on fault for the accident rather than transmission of force. On that point, however, Mr. Bigelow states:

"It would be more correctly stated that impact from the Honda generated a yaw angular velocity on the Toyota which then directed the Toyota to travel north away from the initial westerly direction towards the north road curb".

Mr. Bigelow was cross-examined on both his oral evidence and his reports. He maintained his position that the Toyota was out of control not through any steering effect from the driver but as a result of the impact with the Honda. It was this yaw angular velocity to the Toyota that caused it to go out of control and therefore one could not say that it was under its own speed or its own force when it struck the pedestrian.

Mr. Bigelow was asked if part of the Toyota momentum would have caused it to go in the direction of the pedestrian. Mr. Bigelow answered "no" taking the position that the Toyota's momentum was westerly which was a linear momentum. It was the angular velocity or angular moment was as a result of the impact that caused it to veer over onto the curb and that was only as a result of the Honda impact.

Mr. Bigelow was asked about the fact that the Honda just before impact was travelling on his estimate of a speed of 9.5km/h. He confirmed that speed was propelling the Toyota in a westerly direction just before the collision. He also agreed that the Toyota travelled about 12 meters after the impact. He also agreed that had the Toyota been stopped when the Honda struck it and had not had that westerly momentum that it would not have struck the pedestrian. In my view, this is a significant admission.

The following is a relevant exchange with Mr. Bigelow on cross-examination:

Q. The distance travelled by the Toyota after the impact with the Honda was at least in part dependant on the Toyota's speed before the impact. Is that fair?

A. Yes

Similarly, we see at question 76 the following:

Q. But if the Toyota had no pre-accident speed at all, it wouldn't have had any northerly travel? Isn't that fair?

A. It wouldn't have any travel, any motion at all. Correct.

Finally, Mr. Bigelow confirmed in answers to questions I proposed to him that the Toyota would have had the same or at least some speed that it still had from its original momentum post-impact that would have carried it forward initially and then the angular velocity would have kicked in to turn it to a northerly direction. Mr. Bigelow agreed that was a correct statement.

### **Evidence of Jamie Catania**

Mr. Catania completed two reports under the corporate company 30 Forensic Engineering. The reports were dated May 31, 2021 and September 22, 2021. Mr. Catania is president of 30 Forensic Engineering. He has a Masters of Engineering. He has worked over the last 20 years in collisions, mechanical failures, and all aspects of collision reconstruction. He was also qualified on consent as an expert witness.

Mr. Catania had the same information available for him to review as did Mr. Bigelow.

The basis for Mr. Catania's retainer was different then that of Mr. Bigelow. He was retained to render an opinion regarding the forces involved in the incident of June 20, 2018. The different opinion that Mr. Catania was asked to render reflects perhaps on why these two engineers had a different approach with respect to the focus of their respective reports. Mr. Catania's report does not focus on how the accident occurred or whose fault it was, but focuses exclusively on what force resulted in the Toyota striking the pedestrian. I found Mr. Catania's reports and his evidence to be more helpful considering the issue that I have been asked to determine.

Mr. Catania's evidence as to how the accident occurred was the same really as Mr. Bigelow's. Again, there is little argument as to the circumstances of this collision.

Mr. Catania estimated the speed of the Toyota just prior to impact between 35 km/hr to 41 km/hr. This was consistent with Mr. Bigelow's evidence. He estimated the speed of the Honda at impact at about 7 km/hr to 9 km/hr, again, consistent with Mr. Bigelow.

Mr. Catania noted that prior to the collision the Honda speed did not change suggesting there was little or no braking. Mr. Catania did try to estimate the Toyota speed post-collision but noted it was difficult given the post impact rotation. He estimated that the pre-accident speed of the Toyota was slowed by less than 5 km/hr as a result of the impact with Honda.

Mr. Catania noted that the Honda was travelling at a slower speed than the Toyota at the time of impact and as a result of the slower speed the collision was like a side-swipe contact. I note Mr. Bigelow took issue with the description of this as a side-swipe. Mr. Catania explained it was the movement of the two vehicles on each other rather than the description of the collision. He explained that in a side-swipe contact, the contacting surfaces slide along each other and the collision forces remain relatively low. Mr. Catania therefore concluded that after the impact both vehicles continued predominantly in their pre-impact directions. However, the collision forces applied to the Toyota caused the rear of it to move to the south leading to a clockwise rotation of the vehicle. This would have caused it to slow slightly in terms of its westerly speed and also created a steering effect that directed the vehicle slightly to the north of the west and ultimately on the path to the collision with the pedestrian.

With respect to the Toyota, Mr. Catania's evidence was that the westerly motion of the Toyota post-impact leading up to the collision with the pedestrian was as a direct consequence of its own independent pre-impact westerly speed. The impact with the Honda caused the Toyota to steer north of its westerly direction. It was the Toyota's own pre-collision westerly speed that moved it onwards and ultimately into contact with the pedestrian.

Mr. Catania concludes that the impact with the Honda did not contribute to the westerly travel speed of the Toyota and in fact the impact with the Honda would have reduced that travel speed.

Mr. Catania also concluded that if the collision circumstances were identical except the Toyota was stopped at the time of the impact and there was no westerly motion prior to impact then the Toyota would not have come into collision with the pedestrian. I note this fact was agreed to by Mr. Bigelow.

Mr. Catania's second report was primarily responsive to the critique from Mr. Bigelow. In reviewing that report and hearing Mr. Catania's evidence on this point, I am satisfied that he responded fully and explained some of the terminology that he used that Mr. Bigelow took issue with.

Mr. Catania presented extremely well as a witness. I found his evidence clear and I did not feel that his conclusions were challenged in any way during cross-examination. Perhaps the clearest statement of Mr. Catania's expert opinion is found in response to a question from counsel for Traders at question 26. This occurs during the discussion of the principle of the conservation of linear momentum. Mr. Catania states:

“So it’s not because of the collision that the Toyota continued to the west. The collision altered its orientation, but its westerly momentum caused it to continue to the west after the vehicle to vehicle collision toward the pedestrian existed prior to the incident”.

Similarly, Mr. Catania went back over the scenario as to what would have happened if the Toyota had not been moving. Mr. Catania states at question 29:

“If it was stopped (Toyota) and the Honda came out of the driveway and hit it in the exact same way, it would not move to the west. It would move to the south. And so we know that all the westerly motion of the Toyota after the impact was a product of it having westerly momentum before the impact”.

Having carefully reviewed the expert reports of both Mr. Bigelow and Mr. Catania, and carefully listened to their evidence at the Hearing, and re-reviewed their transcripts in preparation of this decision I am satisfied that the Toyota was under its own force as a result of its pre-accident westerly momentum when it struck the pedestrian. While the impact with the Honda resulted in the Toyota moving to the north leading up the impact with the pedestrian, it was not the force of the Honda that caused the impact but rather the pre-existing force of the Toyota.

**Relevant Statutory Authority and Case Law:**

Both Traders and Unifund agree that the transmission of force is a concept that can be applied to determine what insurer is responsible in a priority dispute. The parties, however, differ as to how the transmission of force principle will be applied in the circumstances of this case.

Unifund takes the position that it does not dispute that there was an impact between its Toyota and the pedestrian. However, Unifund’s position is that its vehicle was not carried into the pedestrian under its own momentum but rather at least 51% of the force that caused it to travel into the pedestrian emanated from the Honda. As a result, Unifund takes the position that the Honda was in fact the striking vehicle as it provided the transmission of force that resulted in the Toyota striking the pedestrian. Unifund submits that Section 268 of the *Insurance Act* and case law with respect to the issue of transmission of force allows that this type of argument to be advanced. Unifund submits that this principle is not limited to cases where an object or vehicle is stationary and struck by a moving vehicle causing the stationary object to strike an individual and result in the injury. Unifund submits that the transmission of force theory applies in priority disputes in collisions where both vehicles are moving but where there is evidence that the transmission force of one vehicle is more than 51% responsible for speed at the time of impact.

Unifund particularly relies upon a decision of Arbitrator Silver in *Progressive Casualty Insurance and Coseco Insurance Company*, Award released October 26, 1998.

In that case, the insured was travelling north on Dufferin on his bicycle. He was waiting for a van insured by Progressive to make a left hand turn on Dufferin and to clear the intersection. As the

Progressive van proceeded to make its left turn, the insured passed behind the Progressive van and hit another van insured by Coseco which was also making a left hand turn. This resulted in a T-bone collision. Progressive took the position that the facts demonstrated that not only did the insured hit the Coseco van with his bike but at the same time the Coseco van struck the bike thus making it the striking vehicle. Arbitrator Silver's analysis of this case involved the meaning of the word "struck" in Section 268 of the *Insurance Act*. The relevant provision provided that there can be recovery for a non-occupant against "the insurer of the automobile that struck the non-occupant". Arbitrator Silver was asked therefore to determine whether the Coseco van could have been said to have "struck" the bike in the circumstances of this case. Arbitrator Silver found as a fact that at least 51% of the force involved in this accident emanated from when the insured's bike hit the Coseco van. He found that in order to look at what the word "struck" means, one must look at where the transmission of force originated. He noted this was not the same thing as assigning fault, but rather the question is "who transmitted the force or who was the principal force which created the accident". He noted that this was a case by case analysis. Ultimately on the facts of his case, Arbitrator Silver concluded that the Coseco van did not strike the bike but the bike struck the van within the meaning of Section 268 of the *Insurance Act*. However, Unifund relies on Arbitrator Silver's comments that in cases such as this one can compare the magnitude of velocity between the two striking objects in order to determine the transmission of force. I am not convinced that that was Arbitrator Silver's intent.

Traders on the other hand argues that the transmission of force theory while applicable to priority disputes should be limited to circumstances where the striking object is stationary and then is struck by a moving object. Traders submits that otherwise priority disputes would end up in being an argument as to which of two cars transmitted the most force when a pedestrian is struck by one of those vehicles. Traders argues that that could not have been the intent of Section 268 of the *Insurance Act* or indeed the transmission of force theory.

Unifund points to a series of cases dealing with the transmission of force noting that by and large these decision involve stationary objects. See:

*Esard v Warwick*, (1978) CarswellOnt 1287 (Ontario Court of Appeal)

*Unifund Assurance Company v ACE INA Insurance Company*, 2017 ONSC 3677

I agree with Traders that as a general principle the transmission of force theory in priority disputes should be limited to cases where an injury is caused by a stationary object that has been struck by a moving automobile. To rule otherwise would open up a can of worms for priority disputes where pedestrians or even occupants of stationary vehicles are involved. It could lead to an endless analysis with evidence from engineers and lengthy Hearings on how accidents occurred, the speed of the various vehicles, and the transmission of force between two moving vehicles as indeed I heard in this case. The priority dispute provisions were intended to be a quick method of determining which as between a variety of insurers is responsible in the cascading scale of priority set out under Section 268 of the *Insurance Act* for the payment of Statutory Accident Benefits. I do not believe it was intended to allow parties to launch on an exhaustive

analysis in a fault like manner as to how the collision occurred and what force was exerted where. In any collision between two moving vehicles there can be a transmission of force argument if one of those vehicles ends up post-collision in striking a pedestrian.

The concept of the “transmission of force” was introduced into Ontario jurisprudence in the case of *Strum v. Co-operators Insurance Assn.*, (1973) 42 D.L.R. (3d) 52. In that case, a pedestrian was hit by a pole. The pole had been hit by a motor vehicle. The issue was whether or not the pedestrian had been “struck by” the moving vehicle for the purposes of claiming under their insurance policy for the injuries sustained. It was concluded in that case that the force of the vehicle was transmitted to the object which then struck the individual and this amounted to the car striking the individual within the meaning of the policy.

In the case of *Re McGillivray* [1975] I.L.R. (I-695) a pedestrian was standing between two parked cars. One of those parked cars was struck by another vehicle. This resulted in pinning the pedestrian between the two stationary vehicles. Once again, the question was who should be paying benefits under the automobile policy. The court concluded that the third vehicle that had struck the parked vehicle provided the transmitting force and therefore was obliged to pay benefits. I pause here to note that in both these leading cases, the injured individual was struck by a stationary object that had been hit by a moving vehicle.

In the case of *Ezard v Warwick* (supra) the Court of Appeal also considered this issue. In that case a car was stopped on a roadway. It was then rear-ended by another vehicle. The occupant of the vehicle that was stopped exited and the car that had originally rear-ended his vehicle was struck by yet another car. This resulted in the now pedestrian (ex-occupant) being pinned between the first two vehicles and sustaining injuries. He claimed to be entitled to benefits from the third vehicle that struck the stationary car and the Court of Appeal held that the transmission of force theory was applicable.

The case of *Traham v Royal Insurance Company of Canada*, 32 O.R. (2d) 143, 121 D.L.R. did consider the case of two moving vehicles. This was a decision of Justice Grange from 1981. In that case a car was proceeding south on Parliament Street with a green light. The other vehicle which was an ambulance was travelling west on Queen Street into the red light. The two vehicles collided and the force of that collision knocked the non-ambulance vehicle off its course and struck the plaintiff who was standing on the sidewalk. Justice Grange was alert to the fact that all the cases leading up to the one before him involved stationary vehicles. He did conclude that the principle of transmission of force could apply to a moving vehicle as well as to a stationary vehicle. However, he noted that it should not be applied in the case before him. He noted that the independent force of the private vehicle would never have hit the plaintiff but for the collision with the ambulance but it was still a moving force nonetheless. Therefore, the non-ambulance vehicle struck the injured individual within the meaning of the *Insurance Act*. The facts before Justice Grange are in many ways similar to the facts before me. While I am bound by Justice Grange’s comments that the transmission of force theory could apply to a moving vehicle as well as to a stationary vehicle I see the circumstances in which that could occur must be very limited.

As in the case before me and before Justice Grange where there are two vehicles moving forward under their own force, I see little room for an argument that the transmission of force theory is needed in order to determine “who struck” a pedestrian. This theory is also consistent with the decision of Justice Brown in *Unifund v ACE* (supra) where Justice Brown overturned Arbitrator Novick’s decision and noted that where there are two moving vehicles that collided which results in one being diverted to strike a pedestrian that the application of the transmission of force theory is not appropriate.

Therefore, both the evidence and the applicable law leaves me to conclude that the independent force of the Toyota while being diverted into a more northerly direction as a result of its impact with the Honda was still under its own force when it struck the pedestrian. Accordingly, the Toyota “struck” the pedestrian. It is not appropriate to apply the transmission of force analysis in the circumstances of this case. I therefore conclude that Unifund Assurance Company of Canada is the priority insurer with respect to the claim for Statutory Accident Benefits for the mother who was injured.

#### **Daughter:**

There were arguments made before me as to whether the daughter’s “injuries” were such that the priority provisions of Section 268 of the *Insurance Act* would be applicable to her and whether my findings with respect to priority would be applicable. This arises out of the fact that the daughter was not actually struck by the Unifund vehicle. The question is whether one can argue that she was in essence struck by the Unifund vehicle due to the close proximity to her of the incident and her witnessing her mother being struck by the vehicle. The Factum filed on behalf of Traders described the daughter’s involvement as having witnessed a terrifying sequence of events that led her mother to being pinned under a vehicle and requiring emergency care. She is described as having narrowly escaped being struck herself.

Traders submits that the word “struck” is to be broadly interpreted when dealing with insurance coverage. It can include “vision impacts, sensory impacts, sensory invasions” or “a reasonable apprehension of being struck”. Therefore, Traders argues that if I conclude that the mother was struck by the Unifund vehicle and that they are in priority that similarly I should conclude that the daughter was struck by the Unifund vehicle and they are also in priority with respect to her claim.

I was provided with a copy of the decision of Justice Fleury of the Ontario Superior Court of Justice in the decision of *Talbot v GAN General Insurance Company*, (1999) 44 OR (3d) 252. In that case the plaintiff lost control over his bicycle allegedly due to the result of the careless conduct of an unidentified vehicle. However, as there was no contact between the unidentified driver and the cyclist it could not be said the cyclist had been struck or hit by the motor vehicle. The court found that based on an unreported decision from Justice Granger in *McIntyre v Superintendent of Insurance* that even in the absence of actual physical striking that an individual can be found to have been struck by a car within the meaning of the policy if there was a reasonable apprehension

of being struck. Specific reference was made to circumstances where there may be a group of pedestrians some of whom were quick enough to jump out of the way of a car and others who got struck. It would not make a great deal of sense to only allow those who were actually struck to recover for any injuries even though psychological injuries could have been sustained. Therefore it was concluded that the word “struck” should be taken to mean any immediate sensory invasion. Justice Fleury felt that the word “struck” could not be interpreted in a restrictive sense. He was satisfied that where the offending vehicle came within inches of striking an individual and caused a situation of danger that the word “struck” should be given a broad and generous interpretation. He therefore concluded that the bicyclist had the right to recover from the unidentified driver. Similar results and interpretations in the cases of *Tucci et al v. Pugliese et al.*, 2009 CanLII 38984 (ON SC) and *Lewis v. Economical Insurance Group*, 2010 ONCA 528 (CanLII). I am satisfied on the case law provided to me and in particular the decision of the Court of Appeal in *Lewis v. Economical* that the word “struck” is to be given a broad interpretation and does not require that there must be direct physical contact between the automobile and the person of the claimant in order for them to have a right to make a claim on the policy.

I therefore conclude that the daughter was also “struck” by the Unifund vehicle and accordingly Unifund is the insurer who is responsible under Section 268 of the *Insurance Act* to pay Statutory Accident Benefits to her.

**Order:**

Unifund Assurance Company is the priority insurer under Section 268 of the *Insurance Act* and is responsible for providing Statutory Accident Benefits to both claimants.

**Costs:**

According to the Arbitration Agreement at paragraph 10 the costs of the Arbitration including the Arbitrator’s fees, expenses and disbursements, and the costs of any Examinations Under Oath shall be borne by the unsuccessful party. In accordance with paragraph 10, I therefore find that the costs of the Arbitration including my fees, any expenses and disbursements, and the costs of any Examinations Under Oath including the costs of the Court Reporter (see paragraph 12) will be paid by Unifund Assurance Company.

With respect to legal costs, paragraph 10 provides that the successful party shall be awarded the costs of the Arbitration. Those costs are to be either agreed upon or to be fixed at the discretion of the Arbitrator.

As Traders General Insurance Company was entirely successful in this matter and as Allstate Insurance Company of Canada was required to participate in the Arbitration process and ultimately join in Traders success, I find that Unifund Assurance Company is responsible to cover the legal costs of both Allstate and Traders. I hope counsel can reach agreement with respect to those costs but if not they can notify me and we will schedule a further pre-hearing.

I do note that this decision does not deal with any issues relating to quantum or reimbursement and if there are any issues flowing from that, again, counsel should contact me so that we can set up a further pre-hearing.

DATED THIS 24<sup>th</sup> day of February, 2022 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written over a horizontal line.

Arbitrator Philippa G. Samworth

**DUTTON BROCK LLP**