CITATION: Northbridge General Insurance Corp. v. Jevco Insurance Co. 2024 ONSC 1520
COURT FILE NO.: CV-22-00691390-0000
DATE: 20240314

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ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8 s.268, and *Ont. Reg*. 283/95 thereunder**;**

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

AND IN THE MATTER of an Arbitration;

BETWEEN:	
NORTHBRIDGE GENERAL INSURANCE CORPORATION Appellant	*Linda Kiley*, for the Appellant
- and–	
JEVCO INSURANCE COMPANY and THE MOTOR VEHICLE ACCIDENT CLAIMS FUND Respondents	*Andrea R. Lim*, for the Respondent Jevco Insurance Company
	HEARD: February 15, 2024

PERELL, J.

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REASONS FOR DECISION

> To the uninitiated, it might seem that defining the word "automobile" in Part VI of the *Insurance Act* dealing with automobile insurance should be a relatively simple matter. Those familiar with the byzantine nature of insurance legislation know better. [*Copley v. Kerr Farms Ltd.* (2002), 59 O.R. (3d) 346 (C.A.) *per* Justice Doherty]

A. Introduction

[1] In mathematics, to get the correct answer to a problem, the order of operations always matters; [1] however, in legal problems to get the correct answer, the order of operations only sometimes matters. For instance, the order of operations matters when a subsequent proceeding is barred as *res judicata,* an abuse of process, or a collateral attack on the decision of a court or tribunal.

[2] The immediate case is an example of a legal problem where the order of operations seems at first blush to have very much mattered. The case at bar is an untypical, indeed a rare example, where in the operation of the statutory accident benefits (SABs) regime of the *Insurance Act*,[2] the order of operations of the legal determinations has created a great deal of confusion. The sequencing of two hearings has yielded inconsistent outcomes, and it has yielded an allegation of an abuse of process in an Arbitrator's determination of whether a person devastatingly injured in a car "incident" was injured in a car "accident".

[3] In the immediate case, the order of operations matters a great deal because the quality of life of a paraplegic depends upon whether a first decision governs the outcome of a second proceeding.

[4] This is a dispute between Northbridge General Insurance Corporation and Jevco Insurance about which insurer, if either, had and has the responsibility to pay the SABs of Kalob Robinson. He suffered catastrophic injuries in a tragic "incident". I say "incident" and not "accident" because whether the incident was an accident was the critical issue of the dispute between the insurance companies.

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[1] Visualize 3 + 2 x 2 = 3 + (2 x 2) = 3 + 4 = 7, which is not equivalent to 3 + 2 x 2 = (3+2) x 2 = 5 x 2 = 10. The correct answer is 7.

[2] R.S.O. 1990, c. I.8.

[5] In this dispute between Northbridge and Jevco, there was an apparently dysfunctional order of operations.

[6] First, there was a determination (legal calculation) about Mr. Robinson's entitlement to SABs by an Adjudicator of the "LAT," the License Appeal Tribunal (for the Automobile Accident Benefits Service ("AABS")). The LAT Adjudicator, however, did not finish the job of determining whether Mr. Robinson was entitled to SABS and only determined that Northbridge was not liable to pay SABs.

[7] Second, there was a determination (legal calculation) of a priority dispute about whom, as between Northbridge and Jevco, should pay Mr. Robinson's SABs. The Arbitrator, who considered himself not bound or fettered by the LAT Adjudicator's decision, concluded that Northbridge was the primary insurer and was obliged to pay Mr. Robinson's SABs. The Arbitrator concluded that if his decision imposing liability on Northbridge was incorrect, then Mr. Robinson was entitled to SABs from Jevco, which would be the primary insurer.

[8] Because of this order of operations, the outcomes of the LAT hearing and of the arbitration were inconsistent and contradictory. Without determining whether Jevco was obliged to pay SABs, the LAT Adjudicator determined that Northbridge was not obliged to pay Mr. Robinson's SABs. In contrast, the Arbitrator determined that Northbridge was obliged to pay Mr. Robinson's SABs, and the Arbitrator determined that if this determination was incorrect, then Jevco was obliged to pay the SABs, a matter about which the Adjudicator had not expressed a comprehensive conclusion.

[9] The LAT Adjudicator's decision was not appealed. The appeal would have been to the Divisional Court, limited to questions of law.[3]

[10] This is an appeal to the Superior Court of Justice of the Arbitrator's decision with an appellate standard of review. For the reasons that follow, I dismiss the appeal.

[11] The Arbitrator was correct. Northbridge is the priority insurer for Mr. Robinson's SABs claim. Mr. Robinson's injuries were caused by the use and operation of the automobile insured by Northbridge. The Arbitrator was correct in concluding in the alternative that Mr. Robinson's injuries were caused by the use and operation of the automobile insured by Jevco. There was no abuse of process in the Arbitrator differing from the LAT Adjudicator.

[12] Thus, Northbridge is the priority insurer and liable to pay Mr. Robinson's SABs in the future, and Jevco is not liable to reimburse Northbridge for the SABs it paid to Mr. Robinson.

[13] As Oliver Wendell Holmes, Jr., famously noted in his treatise *The Common Law*,[4] "The life of the law has not been logic; it has been experience." In the immediate case, the logic of the law seemingly failed because of the sequencing of an incomplete LAT decision coming before a comprehensive arbitral decision; however, in the end, while there is the appearance of aberrant results, that appearance should not disguise that albeit awkwardly, the administration of the SAB regime arrived at the correct determination (legal calculation).

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[3] *Licence Appeal Tribunal Act*, 1999, S.O. 1999, c. 12, Sch. G, s. 6. *Madore v. Intact Insurance Company*, 2023 ONSC 11 (Div. Ct.).
[4] (Boston: Little, Brown and Company, 1881).

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B. Introduction Redux

[14] Because the factual and legal circumstances are paradoxical, I shall repeat the Introduction with some additional detail.

[15] This is an appeal of Arbitrator Fred Sampler's decision pursuant to the *Arbitration Act, 1991*[5] in a dispute between Northbridge and Jevco. The arbitration was to determine a priority dispute under s. 268 (2) of the *Insurance Act*, and *Ont. Reg*. 283/95 (*Disputes Between Insurers*).

[16] The dispute was about which automobile insurer has the responsibility to pay the statutory accident benefits (SABs) of Kalob Robinson. Mr. Robinson suffered catastrophic injuries in a tragic "incident". I say "incident" and not "accident" because whether the incident was an accident was the critical issue of the arbitration.

[17] The tragic incident happened while Mr. Robinson was assisting Greg Smith Jr. and Aaron Kerr to load an inoperative GMC Truck, which was owned by Greg Smith Jr.'s father (Mr. Smith Sr.), onto a trailer, which had been attached to Mr. Kerr's Dodge Truck. The GMC Truck was insured by Northbridge. The Dodge Truck was insured by Jevco.

[18] After the incident, Northbridge paid Mr. Robinson's SABS; however, it made: (a) an application to the LAT for a determination of whether Northbridge was obliged to pay the SABs; and (b) a submission to arbitration, submitting that Jevco had primary responsibility for the SABs.

[19] In both the LAT proceeding and also in the arbitration, Northbridge submitted that Mr. Robinson's catastrophic incident did not qualify as an "automobile accident" under *Ont. Reg* 34/10 (*Statutory Accident Benefits Schedule*).

[20] Jevco was not a party to the LAT proceedings between Northbridge and Mr. Robinson. Mr. Robinson was not a party to the arbitration between Northbridge and Jevco.

[21] In the LAT proceeding, Avril A. Farlam the LAT Adjudicator, determined that Northbridge was <u>not</u> obliged to pay Mr. Robinson SABs. She held that the incident was not an automobile accident because the inoperative GMC Truck no longer qualified as an automobile. She did not rule on whether Jevco or the Motor Vehicle Accident Claims Fund was an insurer. There was no appeal of the LAT decision.

[22] Then, in the arbitration, the Arbitrator determined that the incident was a car accident. He determined that Northbridge was the priority insurer and responsible for Mr. Robinson's SABs.

[23] Northbridge appeals the Arbitrator's decision to this court.

[24] Northbridge submits that the Arbitrator wrongly decided that the inoperative GMC Truck insured by Northbridge was involved in an "automobile accident". Northbridge submits that the Arbitrator's decision, which was inconsistent with the decision of the LAT Adjudicator, has brought the administration of justice into disrepute.

[25] For the reasons that follow, Northbridge's appeal is allowed. I grant the appeal. There was no abuse of process.

[26] Within their respective jurisdictions, both the LAT Adjudicator and the Arbitrator

[5] S.O. 1991, c. 17.

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had to determine whether: (a) the GMC Truck, which at the time of the accident was inoperable, was still an automobile; (b) if so, whether the use or operation of the GMC Truck caused Mr. Robinson's injuries (purpose test); and, (b) if so, whether the use and operation of the GMC Truck was the direct cause of Mr. Robinson's injuries (direct cause test).

[27] The Arbitrator made no error in determining these issues; hence, the appeal should be dismissed.

C. Housekeeping

[28] There are three housekeeping matters.

[29] First, as noted above and as detailed below, this case involves a LAT decision about an injured person's entitlement, if any, to SABS and also an arbitrator's decision about which insurer, if any, has the primary responsibility to pay the SABs (a priority dispute). Originally, the priority dispute involved three insurance companies, Northbridge, Jevco, and Economical Mutual Insurance Co. The parties agreed that Economical need not be involved, and, therefore, in what follows, I shall not mention its possible involvement.

[30] Second, Northbridge joined the Motor Vehicle Accident Claims Fund as a party to the appeal. This joinder is a misnomer. The correct name of the fund is "His Majesty the King in Right of Ontario as represented by the Minister of Public and Business Service Delivery".

[31] Third, a few days before the hearing of the appeal, Northbridge discontinued the appeal as against the Fund on consent. Therefore, in what follows I shall not mention the Funds' possible involvement save as necessary for the narrative.

D. Facts

[32] In **December 2018**, Greg Smith Jr., had been the principal driver of a vehicle, owned by his father Greg Smith Sr. The vehicle was a GMC Truck. The truck was insured by Northbridge. The vehicle was Mr. Smith Jr.'s sole means of personal transportation.

[33] The vehicle, however, was not road worthy. Although Mr. Smith Jr. had removed the rear drivetrain, the vehicle had been drivable using the front wheel drive until the left front axle broke. The vehicle had not been drivable for at least one month before December 20, 2018. However, the vehicle was repairable, and Mr. Smith Jr. intended to repair it.

[34] On **December 20, 2018**, Mr. Smith Jr. wished to move the vehicle from where it was located back to his home so that he could "work on it" i.e., repair it, and make it drivable.

[35] Mr. Smith Jr. enlisted Kalob Robinson and Aaron Kerr to move the GMC Truck. Mr. Smith Jr. owned a trailer. He attached the trailer to a Dodge truck owned by Mr. Kerr. The insurer of the Dodge Truck was Jevco.

[36] Mr. Robinson did not have a driver's license or a vehicle, and he did not have his own car insurance policy.

[37] Messrs. Smith, Jr., Keer, and Robinson went to the location of the GMC Truck. They parked the Dodge Truck with its affixed trailer on the street. Mr. Smith Jr. owned a

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hand-operated winch known as a “come-along”. The young men used the come-along to move the GMC Truck onto the trailer.

[38] Once the GMC Truck was on the trailer, Mr. Robinson went to secure the truck. Tragically, the truck rolled back onto Mr. Robinson. He suffered a catastrophic injury.

[39] Since the GMC Truck was on the trailer, the come-along was not the cause of the incident.

[40] On **January 3, 2019**, Mr. Robinson applied to Northbridge for statutory accident benefits (SABs). Northbridge began paying SABs to Mr. Robinson.

[41] Meanwhile, if this story is not sad enough, Mr. Smith Jr. severed communications with his family. He became homeless. Mr. Smith Sr. scraped the GMC Truck and it was never repaired.

[42] On **January 29, 2019**, Northbridge put Jevco on notice that Jevco had prior responsibility for Mr. Robinson’s SABs. Jevco, however, denied liability. It stated that its policy on the Dodge had been cancelled on December 19, 2018, the day before the incident.

[43] With Jevco denying responsibility, Northbridge also put the Motor Vehicle Claims Fund on notice that it would be responsible for the SABs. However, the Fund also was not prepared to accept priority.

[44] On **April 17, 2019**, Northbridge initiated a priority dispute arbitration.

[45] On **August 19, 2019**, the parties agreed to appoint Fred Sampliner to arbitrate the priority dispute, but it was only years later that the parties formalized the Arbitration Agreement.[6]

[46] On **September 3, 2019**, before the arbitration had been formalized, Northbridge initiated an Application before the LAT. The purpose of the application was to obtain a as to whether the incident was an “accident” as defined by s. 3 (1) of the *Statutory Accidents Benefits Schedule.*

[47] On **February 24, 2020**, there was a LAT case management conference. The Motor Vehicle Claims Fund sought to intervene but was not permitted to participate. Over Mr. Robinson’s objection, Adjudicator Farlam narrowed the issue to be determined to be only whether the GMC Truck insured by Northbridge was involved in an “accident”. Mr. Robinson had sought a determination as to whether any of the vehicles were involved in an accident.

[48] On **June 28-29, 2021**, the LAT hearing took place to determine whether the vehicle insured by Northbridge was involved in an “accident” as defined by s. 3 (1) of the *Statutory Accident Benefits Schedule*. The parties to the hearing were Northbridge and Mr. Robinson. The witnesses at the hearing were Mr. Robinson, Mr. Smith Sr., and Police Constable McLean.

[49] On **July 14, 2021,** Vice-Chair Farlam determined that the Northbridge insured vehicle was not involved in an accident because for over a month the vehicle was

[6] Arbitrator Sampliner is an experienced arbitrator about SAB disputes. Before becoming a private sector arbitrator, he was a Senior Arbitrator at the Dispute Resolution division of the Financial Services Commission of Ontario (FSCO), the predecessor to the LAT.

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inoperable and incapable of motoring.[7]

[50] Mr. Robinson requested a reconsideration. The LAT Adjudicator dismissed the Request for Reconsideration on **January 4, 2022**. She held that she had made no error in confining her decision to the Northbridge insured vehicle. She noted that because Jevco had not been a party to the LAT application, she could not determine whether there was an accident involving the vehicle insured by Jevco.

[51] There was no appeal of the LAT decisions.

[52] The parties entered into an Arbitration Agreement dated **July 7, 2022**. The agreement provided that an appeal of the Arbitrator's decision could be made to the Superior Court of Justice on a point of law or mixed fact and law, without leave.

[53] On **August 19, 2022**, the priority dispute arbitration was heard.

[54] On **November 11, 2022**, Arbitrator Sampliner released his arbitral decision.

[55] Arbitrator Sampliner concluded that Jevco had not effectively cancelled the insurance policy on the Dodge Truck, because it had violated the statutory condition in its termination notice. The violation was that Jevco had failed to offer the mandatory "cash option" for the re-payment of premiums as required by s. 11(1.3) of *Ont. Reg.* 777/93.

[56] Arbitrator Sampliner determined that the inoperable GMC Truck was an automobile. There was no issue that the Dodge Truck was an automobile. Arbitrator Sampliner concluded that the GMC Truck and the Dodge Truck had been involved in an "automobile accident". He held that loading an inoperable automobile onto a trailer attached to another operable automobile for the purpose of transporting the inoperable automobile for repairs is an ordinary and well-known activity to which automobiles are put; it was a common occurrence and natural consequence of maintaining a motor vehicle in good repair. He concluded that the incident with the GMT Truck satisfied the "purpose test" and the "direct cause" test for what counts in law as an "automobile accident".

[57] Thus, on November 11, 2022, the Arbitrator determined that Northbridge was the priority insurer and shall continue to adjust and pay Mr. Robinson's SABs. He dismissed Northbridge's claim for reimbursement of the SABs.

[58] On **December 8, 2022**, Northbridge filed a Notice of Appeal.

E. Ontario's Automobile Insurance Accident Benefits Scheme.

1. Insurance Policy Benefits and Statutory Accident Benefits (SABs)

[59] Before analyzing the Arbitrator's decision in the immediate case, it is necessary to describe the byzantine legal background governing insurance companies issuing automobile insurance policies.

[60] When there is an automobile accident, there is a very complex statutory regime that governs insurance policy benefits and statutory benefits. This complex regime also influences an injured insured person's entitlements to compensation in tort for his or her personal injuries. The statutory regime regulates the terms of insurance contract benefits and imposes a no-fault regime for statutory accident benefits (SABs) and restricts the

[7] *Northbridge Personal Insurance Corporation v. Robinson*, 2021 ONLAT 19-009743/AABS.

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nature of compensation for automobile accidents. The statutory regime involves numerous statutes, including the *Compulsory Automobile Insurance Act*,[8] the *Highway Traffic Act,*[9] the *Insurance Act,* the *Motor Vehicle Accident Claims Act*,[10] the *Motorized Snow Vehicles Act,*[11] and the *Off-Road Vehicles Act*.[12]

[61] Since 1990, the nature of compensation for motor vehicle accidents has been premised on an "exchange of rights" principle. The rights of a person injured in motor vehicle accident ("MVA") to sue in tort has been diminished in exchange for a no-fault SABs scheme in which an insurer becomes liable to pay the prescribed benefits.[13] Motor vehicle owners are required to insure their vehicles, and the *Insurance Act* prescribes the terms of the insurance policies, including coverage for SABs.

[62] The no-fault automobile insurance scheme under the *Insurance Act* is consumer protection legislation, and the scheme is designed to provide to persons injured in automobile accidents statutory benefits (SABs) for their medical, rehabilitative, and financial needs regardless of fault.[14]

[63] *Ont. Reg.* 34/10 (*Statutory Accident Benefits Schedule*) reflects a government policy decision to limit the insurance industry's liability to pay no-fault benefits by holding it responsible only for injuries "directly" caused by the use or operation of an automobile.[15]

[64] This policy change was a change in government policy because prior SAB schedules made insurers liable for injuries "directly or indirectly" caused by the use or operation of an automobile. The schedule introduced in 1996 eliminated the word "indirectly" in the definition, which means that there is now a narrower or more stringent causation requirement for the entitlement to SABs.[16]

2. Insurance and the Availability of Statutory Accident Benefits (SABs)

[65] The *Compulsory Automobile Insurance Act,* the *Motorized Snow Vehicles Act*, and the *Off-Road Vehicles Act* require with certain exemptions that motorized vehicles be insured.

[66] The legislative purpose of encouraging that motorized vehicles be insured is to protect innocent victims of automobile accidents and to provide SABs to persons injured in automobile accidents.[17]

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[8] R.S.O. 1990, c. C. 25.
[9] R.S.O. 1990, c. H.8.
[10] R.S.O. 1990, c. M.41.
[11] R.S.O. 1990, c. M.44.
[12] R.S.O. 1990, c. O.4.
[13] *Madore v. Intact,* 2023 ONSC 11 (Div. Ct.); *Beaudin v. Travelers Insurance Co. of Canada* 2022 ONCA 806; *Tomac v. Economical Mutual Insurance Co.*, 2019 ONCA 882; *North Waterloo Farmers Mutual Insurance Co. v. Samad* 2018 ONSC 2143 (Div. Ct.); *Matheson v. Lewis*, 2014 ONCA 542; *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.); *Sullivan Estate v. Bond* (2001), 55 O.R. (3d) 97 (C.A.); *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.).
[14] *Madore v. Intact,* 2023 ONSC 11 (Div. Ct.); *Tomac v. Economical Mutual Insurance Co.*, 2019 ONCA 882.
[15] *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.).
[16] *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.); *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (1999), 46 O.R. (3d) 154 (S.C.J.).
[17] *Beaudin v. Travelers Insurance Co. of Canada* 2022 ONCA 806; *Matheson v. Lewis*, 2014 ONCA 542.

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[67] If there is an incident with an automobile, an automobile insurer may be liable to pay the person injured by the incident SABs: (a) if the injured person was injured in an "automobile accident" as defined by the *Insurance Act* and its regulations; and (b) insurance policy benefits, if the injured person is an insured under the policy and if there is coverage for the incident.

[68] Section 268 of the *Insurance Act* mandates that all motor vehicle insurance policies provide Statutory Accident Benefits (SABs). Since more than one insured motor vehicle may be involved in an automobile accident, subsection 268 (2) establishes a ranking to determine which insurer is liable to the SABs. The Motor Vehicle Accident Claims Fund under the *Motor Vehicle Accident Claims Act* is involved in this scheme as payor of last resort.

[69] Pursuant to the *Insurance Act* and its regulations, a person injured in an automobile accident is entitled to SABs. In the first instance, the SABs are paid by the first insurer or primary insurer. Pursuant to a loss transfer scheme, the first insurer may be entitled to be reimbursed by the second insurer.[18] Subsection 268 (2) of the *Insurance Act* specifies a ranking of which insurer is liable to pay the SABs accident benefits.

[70] The ranking scheme differentiates the ranking for occupants and for non-occupants. (The immediate case involving Mr. Robinson involves a non-occupant.)

[71] *Ont. Reg.* 283/95 (*Disputes Between Insurers*), s. 2.1(6) requires the first insurer that receives a completed application for SABs to be responsible for paying benefits pending the resolution of any dispute as to which insurer is required to pay benefits. Thus, the first insurer is obliged to pay SABs until another insurer is found to be in priority.

[72] Insurers cannot avoid their obligation to pay statutory accident benefits by claiming that another insurer should pay. If there is some connection between the insurer receiving an application for benefits and the insured, the insurer must pay pending the determination of its obligation to do so.[19]

3. Statutory Accident Benefit (SABs) Disputes

[73] Under the no faults scheme, broadly speaking, there are three types of disputes about the payment of SABs.

a. One type of dispute concerns a person's entitlement to SABs.

b. The second type of dispute concerns which insurance company or the Motor Vehicle Accident Claims Fund is responsible for paying for the SABs. Pursuant to a loss transfer scheme, the first insurer may be entitled to be reimbursed by the "second insurer."[20]

c. The third type of dispute is a derivative of the second type of dispute. The first insurer's right to indemnity under the loss transfer scheme is not absolute and

[18] *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218.
[19] *Unifund Assurance Company v Security National Insurance Company,* 2016 ONSC 6798; *Zurich Insurance Company v. Chubb Insurance Co.* 2015 SCC 19, rev'g 2014 ONCA 400; *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co*. (2008), 94 O.R. (3d) 62 (S.C.J.); *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* 2007 ONCA 62; *Allstate Insurance Co. of Canada v. Brown* (1998), 40 O.R. (3d) 610 (Div. Ct.).
[20] *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218.

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> so there is a third kind of SABs dispute. The first party insurer remains obligated to adjust its claim in a reasonable manner, and where the second party insurer demonstrates that a first party insurer acted in bad faith or grossly mishandled the insured's claim such that the amounts paid are grossly unreasonable, a second party insurer may be relieved of its obligation to indemnify in whole or in part.[21]

[74] The immediate case involves the first and second type of SABs dispute.

[75] With respect to the first type of dispute, s. 280 of the *Insurance Act* specifies that the License Appeal Tribunal ("LAT") has exclusive jurisdiction in respect to all disputes about a person's entitlement to SABs.[22] However, the LAT does not determine which insurer pays the SABs. The LAT is the successor of the Financial Services Commission of Ontario ("FSCO"). (The prior statutory scheme provided for mandatory mediation followed by arbitration by FSCO or court proceedings.)

[76] With respect to the second type of dispute, pursuant to s. 7 (1) of *Ont. Reg*. 283/95 (*Disputes Between Insurers*), when insurers cannot agree on which of them is required to pay SABs, the dispute shall be resolved through a private arbitration, pursuant to the *Arbitration Act*, *1991*. The arbitration is initiated by the insurer paying SABs.

[77] The *Arbitration Act 1991*, empowers the arbitrator with a broad power to make all findings necessary to decide any question relating to determine priority under s. 268 of the *Insurance Act,* including the jurisdiction to determine whether an "automobile accident" occurred.[23]

[78] The SABs claimant is entitled to participate in the arbitration between the insurers.[24]

[79] Thus, the LAT Adjudicator has exclusive jurisdiction to decide insured-versus-insurer disputes about the insured's entitlement to SABs, and the Arbitrator has exclusive jurisdiction to resolve disputes to determine priority and coverage disputes between insurers.[25]

4. The Threshold Issue: Is an "Automobile" involved in the Incident?"

[80] As noted above, the *Compulsory Automobile Insurance Act* stipulates that a motor vehicle cannot operate on a public highway unless it is insured under a contract of automobile insurance.

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[21] *Certas Home and Auto Insurance Company v. Intact Insurance Company*, 2024 ONSC 1122*Jevco Ins. Co. v. Gore Mutual Ins. Co*., 2014 ONSC 3741.

[22] *Yang* v. *Co-Operators General Insurance Company*, 2022 ONCA 178; *Yaromich and Botbyl* v. *Heartland* 2021 ONSC 3759; *Dorman v. Economical Mutual Insurance Company,* 2020 ONSC 4004; *Stegenga* v. *Economical Mutual Insurance Company*, 2019 ONCA 615; *Campisi v. Ontario*, 2017 ONSC 2884, aff'd 2018 ONCA 869, leave to appeal ref'd [2019] S.C.C.A. No. 52; *Cankaya v. Unifund Assurance Company*, 2016 ONFSCDRS 255; *Josefina Vieira v. Royal & Sunalliance Insurance Company of Canada*, 2005 ONFSCDRS 17. In *Botbyl v Heartland Farm Mutual Inc*., 2023 CanLII 72662 (LAT), the Adjudicator held that the LAT had the jurisdiction to grant equitable relief with respect to the forfeiture of SABs cause by applying to the wrong insurer.,

[23] *Primmum Insurance Co. v. ING Insurance Co. of Canada*, [2007] O.J. No. 413 (S.C.J.).,

[24] *Ont. Reg*. 283/95 (*Disputes Between Insurers*), s. 5

[25] *Yang v. Co-operators General Insurance Company*, 2022 ONCA 178; *Yaromich and Botbyl v. Heartland,* 2021 ONSC 3759; *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615

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[81] SABs are payable with respect to vehicles that are "automobiles" involved in "accidents". In other words, there is a threshold statutory requirement that a claim for SABs involve the use or operation of a vehicle as an "automobile."[26]

[82] Section 1(1) of the *Compulsory Automobile Insurance Act* defines "motor vehicle" as having the same meaning as the *Highway Traffic Act*. Section 1 of the *Highway Traffic Act*,[27] defines "motor vehicle" as follows:

> *Interpretation, general*
>
> *Definitions*
>
> 1 (1) In this Act,
>
> […]
>
> "motor vehicle" includes an automobile, a motorcycle, a motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine;

[83] Section 268 of the *Insurance Act* states:

> *Statutory Accident Benefits*
>
> 268 (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.
>
> […]
>
> *Liability to pay.*
>
> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
>   […]
>
> 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,
>
>   iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

[26] *Unifund Assurance Company v Security National Insurance Company,* 2016 ONSC 6798; *Adams v. Pineland Amusements Ltd.*, 2007 ONCA 844; *Copley v. Kerr Farms Ltd.,* [2002] O.J. No. 1644 (C.A.),
[27] R.S.O. 1990, c. H.8.

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> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> *Liability*
>
> (3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.
>
> *Choice of insurer*
>
> (4) If, under […] 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.
>
> […]
>
> *Payments pending dispute resolution*
>
> (8) Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.

[84] SABs are payable with respect to motor vehicles that are "automobiles". There is a similar, sometimes overlapping, threshold issue with respect to insurance policy benefits as a matter of contract law. The terms of the insurance policy coverage and the coverage for SABs may differ. This is an important point to keep in mind and a source of confusion in the caselaw. For instance, an insured person with an automobile insurance policy may have insurance coverage if injured in an incident with an automobile but not have coverage if injured in a go-cart incident unless there is additional coverage under the insurance policy.

[85] In the immediate case, the threshold issue of whether the inoperative GMC Truck was an automobile was a critical issue before the LAT Adjudicator and before the Arbitrator.

[86] Section 224 of the *Insurance Act,* defines "automobile" as follows:

> 224 (1) In this Part,
>
> "automobile" includes,
>
> > (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
> >
> > (b) a vehicle prescribed by regulation to be an automobile;

[87] It should be noted that the language of s. 224(1)(a) "a motor vehicle required under any Act to be insured" connects the *Insurance Act* with the *Compulsory Automobile Insurance Act*, which in turn is connected to the *Highway Traffic Act*.

[88] The test of whether a vehicle is an automobile is whether: (a) it is an automobile in ordinary parlance; (b) it is defined as an automobile in the wording of the insurance policy; or (c) it is within a definition of automobile in any relevant statute.[28]

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[28] *Beaudin v. Travelers Insurance Co. of Canada* 2022 ONCA 806 (dirt bike an automobile); *Benson v. Belair Insurance Company Inc*., 2019 ONCA 840, leave to appeal ref'd [2019] S.C.C.A. No. 510 and No. 529 (dirt

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[89] The application of this test is illustrated by *Unifund Assurance Co. v. Security National Insurance Co.*.[29] In this case, CL was an insured driver under a standard automobile insurance policy with Unifund Assurance. CL was injured while driving an all-terrain vehicle (an "ATV") owned by her boyfriend. The ATV was insured pursuant to an insurance policy issued by Security National that contained a standard form endorsement for recreational vehicles.

[90] There was a priority dispute between Unifund, which had been paying CL's SABs, and Security National. Unifund sought to transfer responsibility for the SABs to Security National. On an appeal of a preliminary issue decided by an Arbitrator, Justice Matheson ruled that the Arbitrator had ruled correctly that the ATV was not an automobile in ordinary parlance but that an ATV is an automobile prescribed by regulation. The issue on the appeal, then was whether the ATV was an automobile in the wording of the respective insurance policies of Unifund and Security National.

[91] Justice Matheson ruled that the Arbitrator had correctly ruled that the ATV was an automobile under Security National's policy but not an automobile under Unifund's policy, which did not have a recreational vehicle endorsement. Further, Justice Matheson ruled that the Arbitrator had erred in concluding that since the ATV was an automobile under Security National's insurance policy for the purposes of a priority dispute, it was also an automobile under Unifund's automobile insurance policy. Justice Matheson ruled that it was necessary to consider each policy separately. The result was that only Security National's policy provided recourse to SABs.

5. The Car Incident versus Car Accident Issue

[92] For the purpose of establishing an entitlement to SABS, there is a two-part test to determine whether an incident is an accident. The party seeking benefits must show that: (a) the use or operation of an automobile caused the injuries (purpose test); and (b) the use and operation of the automobile was the direct cause of the injuries (direct cause test).[30]

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bike and all-terrain vehicle automobiles); *Matheson v. Lewis*, 2014 ONCA 542 (all-terrain vehicle an automobile); *Bouchard v. Motors Insurance Corp*., 2013 ONSC 2205 (Div. Ct.) (pocket bike not automobile); *Rougoor v. Co-operators Insurance Co.* 2010 ONCA 54 (dirt bike an automobile); *Adams v. Pineland Amusements Ltd.*, 2007 ONCA 844 (go-cart not an automobile at time of accident); *Copley v. Kerr Farms Ltd.* (2002), 59 O.R. (3d) 346 (C.A.) (trailer if connected to motor vehicle operating on the highway); *Fortin v. Laplante* (2000), 47 O.R. (3d) 443 (C.A.) (snowmobile not automobile); *Grummett v. Federation Insurance Co. of Canada* (1999), 46 O.R. (3d) 340 (S.C.J.)(race car not automobile); *Morton v. Rabito*, (1998), 42 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 50 (backhoe, not automobile); *McFarland v. Storm* (1998), 28 C.C.L.I. 128 (Ont. Gen. Div.) (dune buggy not an automobile), *Regele v. Slusarczyk* (1997), 33 O.R. (3d) 556 (C.A.) (farm tractor not automobile); *Bergsma v. Canada (Attorney General)*, [1994] O.J. No. 2572 (Gen. Div.), aff'd [1996] O.J. No. 3082 (C.A.) (military vehicles owned by federal Department of Defence automobiles); *Hovinga v. Erbsville Enterprises Ltd.* (1977), 20 O.R. (2d) 123 (Div. Ct.) (go-cart an automobile).

[29] 2016 ONSC 6798.

[30] *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226; *Martin v. 2064324 Ontario Inc. (c.o.b. Freeze Night Club)*, 2013 ONCA 19, leave to appeal to S.C.C. ref'd [2013] S.C.C.A. No. 207; *Downer v. Personal Insurance Co.,* 2012 ONCA 302; *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46 rev'g *Vytlingam v. Farmer*, (2005), 76 OR (3d) 1 (C.A.); *Greenhalgh v. ING Halifax Insurance Company* (2004), 72 OR (3d) 338 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 461; *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.); *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405..

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[93] That the automobile is being used for its normal purposes of carriage and transportation is sufficient to satisfy the purpose test, but the purpose test can be satisfied without active use if the incident resulted from the ordinary and well-known activities to which automobiles are used.[31]

[94] The direct cause test has three components: (1) that the incident would have occurred "but for" the use or operation of the automobile; (2) that there was no separate intervening event, and (3) that the use or operation of the automobile was the dominant feature of the incident.[32]

[95] The direct cause test begins with the "but for" analysis, which serves as an exclusionary analysis to eliminate or screen out from consideration factually irrelevant causes or factors that made no difference to the outcome. The "but for" analysis identifies causes, but the analysis must continue to determine whether a cause is a "direct cause." Road accidents may occur where there is more than one direct cause of a victim's injuries and one of the direct causes is the use or operation of an automobile.[33]

[96] A cause will not be the direct cause if it is interrupted by an external force that becomes the active force or agency of the incident. In *Chisholm v. Liberty Mutual Group*[34] the Court of Appeal and in *North Waterloo Farmers Mutual Insurance Co. v. Samad*,[35] the Divisional Court stated that a direct cause is a cause or an act that sets in motion an uninterrupted chain or train of events or the first in a row of blocks after which the rest fall down without the assistance of any other act or intervention of any other force. An act is not an intervening act if the act is an incident or aspect of the risk created by the use or operation of the vehicle in the ordinary course of things.[36]

[97] The seminal case on the definition of a "car accident" is the Supreme Court of Canada's decision in *Amos v. Insurance Corp. of British Columbia* (1995)[37] In that case, while driving his automobile Amos was attacked and shot by a gang attempting to enter his vehicle. The Supreme Court of Canada held that Amos was eligible for SABs under the British Columbia regulation, which provided benefits "in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle". In deciding *Amos v. Insurance Corp. of British Columbia*, the Supreme Court of Canada developed the purpose and cause test for what constitutes an automobile accident.

[98] Although *Amos v. Insurance Corp. of British Columbia* is the seminal case, it morphed into a more stringent test of what counts as a car accident under the SABs regime in Ontario. This stringency is demonstrated by the Ontario Court of Appeal's decision in *Chisholm v. Liberty Mutual Group* (2002),[38] where the insured was catastrophically injured when while he was driving his wife's insured vehicle, he was shot in a random drive-way shooting and the court held that his injuries were not directly caused by "the use

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[31] *Davis v. Aviva Canada Inc.*, 2017 ONSC 6173*; Economical Mutual Insurance Co. v. Caughy*, 2016 ONCA 226
[32] *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.).
[33] *Downer v. Personal Insurance Co.,* 2012 ONCA 302; *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.).
[34] [2002] O.J. No. 3135 (C.A.)
[35] 2018 ONSC 2143 (Div. Ct.).
[36] *Madore v. Intact Insurance Company*, 2023 ONSC 11 (Div. Ct.); *Sajid v. Certas Home and Auto Insurance Co,* 2022 ONSC 2071 (Div. Ct.); *Chisholm v. Liberty Mutual Insurance Group*, [2002] O.J. No. 3135 (C.A.).
[37] [1995] 3 S.C.R. 405.
[38] (2002) 60 O.R. (3d) 776 (C.A.)

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or operation of an automobile". It is not enough that the vehicle was the place or a part of the incident, it is necessary that the automobile be a direct cause of the injury.[39]

[99] Thus, in Ontario in order to obtain insurance benefits and SABs under the *Insurance Act*, an insured person must meet a more stringent causation test than prescribed by *Amos v. Insurance Corp. of British Columbia*.[40] In contrast to the purpose test, under the direct causation test, the use to which a vehicle is being put is an important component of the analysis.[41]

[100] Whether an incident amounts to a car accident is very fact specific and each case must be determined on its own facts.[42]

[101] In the jurisprudence (by the LAT, its predecessor the FSCO, and by courts on appeals from tribunal or arbitral decisions or in cases about automobile insurance coverage), the following incidents have been found to have been automobile accidents satisfying the purpose test and the direct cause test. Some of the cases involved claims for insurance benefits and some of the case involved claims for SABs.

- In *Saad v. Federation Insurance Co. of Canada*,[43] the injured person slipped and fell on ice while walking back to his car after inflating the car's tires.
- In *Seale v. Belair Insurance Co.*,[44] the injured person fell while running towards an automobile that was sliding down a hill.
- In *Axa Insurance v. Dominion of Canada General Insurance Co*.,[45] the injured person was struck in the eye by a bungee cord used to secure a friend's boat to a trailer.
- In *Pinarreta v. ING Insurance Co. of Canada*,[46] the injured person slipped and fell on a snowbank while getting off a bus.
- In *Citadel General Assurance Co. v. Vytlingam*,[47] discussed further below, the injured persons recovered SABs - but not insurance policy benefits - when they were injured when on a road trip in the United States their automobile was struck by a large boulder dropped from an overpass by two local thrill seekers, who subsequently were sent to prison.

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[39] *Downer v. Personal Insurance Co.,* 2012 ONCA 302; *Greenhalgh v. ING Halifax Insurance Company* (2004), 72 OR (3d) 338 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 461; *Chisholm v. Liberty Mutual Group,* (2002) 60 O.R. (3d) 776 (C.A.).

[40] *Chisholm v. Liberty Mutual Group,* (2002) 60 O.R. (3d) 776 (C.A.); *TTC Insurance Company Limited v. Correia* (2001), F.S.C.O. Appeal P00-00061; *Karshe v. Non-Marine Underwriters, Mbrs of Lloyd's* (2000), F.S.C.O. A99-000855; *Saharkhiz v. Underwriters, Members of Lloyd's, London, England* (1999), 46 O.R. (3d) 154 (S.C.J.); *Warwick v. Gore Mutual Insurance Co*. (1997), 32 O.R. (3d) 76 (C.A.); *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 22 M.V.R. (3d) 41 (Ont. C.A.); *Petrosoniak v. Security National Insurance Company* (1998), F.S.C.O. A98-000198.

[41] *Economical Mutual Insurance Co. v. Caughy*, 2016 ONCA 226 at para. 22.

[42] *Sajid v. Certas Home and Auto Insurance Co.*, 2022 ONSC 2071 (Div. Ct.) at para. 32; *Davis v. Aviva Canada Inc.*, 2017 ONSC 6173; *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405

[43] 2003 ONFSCDRS 66.

[44] 2003 CarswellOnt 5452. See also: *Souchuk v. State Farm Mutual Automobile Insurance Co.*, 2002 ONFSCDRS 188; *Shantz v. Dominion of Canada General Insurance Co.*, 2002 ONFSCDRS 66.

[45] (2004), 73 O.R. (3d) 391 (C.A.).

[46] 2005 CarswellOnt 6926. See also *Mariano v. TTC Insurance Co.*, 2006 CarswellOnt 5837.

[47] 2007 SCC 46 rev'g *Vytlingam v. Farmer*, (2005), 76 OR (3d) 1 (C.A.).

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- In *430937 Ontario Ltd. (c.o.b. Nicholson Service Station Maintenance) v. Zurich Insurance Co.*,[48] the persons injured suffered their injuries when a trailer detached from a truck, crossed the centre line and struck their vehicle.
- In *Economical Mutual Insurance Co. v. Caughy*,[49] the injured person was seriously injured when walking in the dark returning to his camper vehicle, he tripped over a motorcycle that had been parked in a laneway at the camp site.
- In *Dittmann v. Aviva Insurance Co. of Canada*,[50] the injured person was seriously burned when a cup of hot coffee spilled as she attempted to transfer the cup from the drive-through window at the fast food restaurant to the cup holder in her car.
- In *16-003163 v. Intact Insurance Company*,[51] the injured person fell while "car suffering". He was skating behind the vehicle holding onto the rear bumper.
- In *Davis v. Aviva Canada Inc.*,[52] while the car was parked in her driveway, the injured person had opened the hood of her vehicle to change the window washer fluid and was injured when the hood of the car dropped on her.
- In *North Waterloo Farmers Mutual Insurance Co. v. Samad*,[53] the injured person was a taxi-driver who will was injured when he slipped on ice in closing the vehicles door. That the taxi-driver's fall was in part caused by an altercation with a customer did not break the chain of causation.
- In *Charbonneau v. Intact Insurance Co.,*[54] the injured person fell while "car surfing," a commonplace enough activity that the legislature had thought fit to criminalize it as an offence under the *Highway Traffic Act*.
- In *G.R. v. Economical Mutual Insurance Co.*,[55] the injured person slipped and fell while removing snow from his automobile.
- In *VB v Economical Insurance Company*,[56] the injured person slipped on ice after exiting his automobile.
- In *CKD v. Wawanesa Mutual Insurance,*[57] the injured person slipped and fell on ice while in the process of getting into his car.
- In *Madore v. Intact,*[58] the injured person fell off the roof of a trailer that was hitched to a pickup truck. He was on the roof of the trailer for inspection and cleaning, which the court held to be an ordinary use of an automobile causing the incident without intervening event.

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[48] 2012 ONSC 3093.
[49] 2016 ONCA 226.
[50] 2017 ONCA 617, leave to appeal ref'd [2017] S.CC.A. No. 362.
[51] 2017 CanLII 69443 (LAT).
[52] 2017 ONSC 6173.
[53] 2018 ONSC 2143 (Div. Ct.).
[54] 2018 ONSC 5660 (Div. Ct.).
[55] 2019 ONLAT 18-110779/AABS.
[56] 2020 CanLII 87992 (LAT).
[57] 2020 ONLAT 18-006988/AABS.
[58] 2023 ONSC 11 (Div. Ct.). See also *Fehr v Intact Ins. Co.,* 2022 CanLII 14951 (LAT).

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- In *Jiang v. The Co-operators General Insurance Co.*,[59] the injured person was assaulted and injured by her husband while she was driving causing her to lose control of the vehicle leading the car to hit the curb with resultant further injuries.

[102] In the jurisprudence (by the LAT, its predecessor the FSCO, and by courts on appeals from tribunal or arbitral decisions or in cases about automobile insurance coverage), the following incidents have been found **not** to have been automobile accidents satisfying the purpose test and/or the direct cause test. Some of the cases involved claims for insurance benefits and some of the cases involved claims for SABs.

- In *Chisholm v. Liberty Mutual Group*, *supra*, while Mr. Chisholm was driving his wife's automobile, the drive-by shooting from another vehicle was the intervening act independent from the automobile's use or operation.

- In *Greenhalgh v. ING Halifax Insurance Company*,[60] in freezing cold weather, the injured person left her vehicle after it became stuck on a rock in a rural area and she got lost walking home, suffering frost bite after a ten hour misadventure.

- In *Citadel General Assurance Co. v. Vytlingam*,[61] discussed further below, the injured persons recovered SABs - but not insurance policy benefits - when they were injured when on a road trip in the United States their automobile was struck by a large boulder dropped from an overpass by two local thrill seekers, who subsequently were sent to prison.

- In *Russo v. John Doe,*[62] while sitting in a restaurant, the injured person was shot in a drive-by-shooting. The incident satisfied the purpose test, in as much as the shooter's car was been driven for its normal purpose of driving, but the incident did not satisfy the direct cause test; the direct cause was the shooting, which was an intervening act in the drive-by.

- In *Downer v. Personal Insurance Co.*,[63] while sitting in his running car at a gas station, the injured person was attacked by assailants in an attempted carjacking.

- In *Martin v. 2064324 Ontario Inc. (c.o.b. Freeze Night Club)*,[64] a man who was assaulted by two people robbing him and trying to steal his vehicle was held to not be involved in an automobile accident.

- In *Kwong v. Ostrom*,[65] a taxi driver was stabbed by a passenger during a fare and the court held that the use or operation of the vehicle was not the cause of the taxi driver's injuries.

- In *Porter v. Aviva Insurance Co. of Canada*,[66] the person broke her leg when she slipped and fell on an icy driveway when during an ice and snow storm, she walked

[59] 2024 ONSC 1225 (Div. Ct.).
[60] (2004), 72 OR (3d) 338 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 461.
[61] 2007 SCC 46 rev'g *Vytlingam v. Farmer*, (2005), 76 OR (3d) 1 (C.A.).
[62] 2009 ONCA 1481
[63] 2012 ONCA 302.
[64] 2013 ONCA 19, leave to appeal to S.C.C. ref'd [2013] S.C.C.A. No. 207
[65] 2013 ONSC 2811. See also: *Sajid v. Certas Home and Auto Insurance Co.*, 2022 ONSC 2071 (Div. Ct.); *Kamel v. TD General Insurance Company*, [2007] O.F.S.C.D. No. 245 (FSCO); *Khorasani v. Zurich Insurance Company (Commercial Business)*, [2007] O.F.S.C.D. No. 246 (FSCO)
[66] 2011 ONSC 3107 (Div. Ct.).

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to a rideshare Lyft car that had parked in her driveway for her ride.

- In *Francia v. Licence Appeal Tribunal*,[67] there was a fatal collision between a transport truck and a tractor-trailer causing an explosion, fire, and spill of toxic chemicals. The injured person came to the scene of the accident to clean up the environmental spill and suffered personal injuries from the toxic chemicals. The injured person was held not to be entitled to SABs because he was not involved in a car accident.

[103] It may be noted from this case law that a person may be injured by a car accident without coming into direct contact with the vehicle as demonstrated by the numerous cases where a person is injured in the act of approaching a vehicle, leaving a vehicle, or chasing after a runaway vehicle. It may also be noted that car accidents may occur with cars that are moving, temporarily not moving, idling, and parked without a running engine.

[104] As noted above, an injury occasioned while repairing or maintaining or cleaning an automobile may satisfy the purpose test and the direct cause test and constitute an automobile accident. However, as Justice Hackland noted in *Davis v. Aviva Canada Inc.*,[68] each case depends on its own particular facts and depending on the setting and the particular circumstances, repairing and maintaining a vehicle may not be an ordinary and well-known activity to which automobiles are put. Thus, the jurisprudence about car incidents and car accidents has a line of cases where a person is injured while making repairs to a vehicle, but the incident is not ruled to be a car accident. Thus, the following incidents have been found not to be automobile accidents.

- In *Mohamed Khan v. Certas Direct Insurance Co.*,[69] the person injured was removing the gas tank in repairing his wife's van.

- In *John Earl Olesiuk v. Kingsway General Insurance Co.*,[70] the person injured fell off his truck while repairing a truck that had not been operational for at least three weeks.

- In *Savard v. Royal & Sunalliance Insurance Co. of Canada*,[71] the person injured was dismantling an automobile to strip it of reusable parts before sending it to a scrap yard be crushed as scrap metal when after about an hour's work the vehicle fell of its hoist onto him. The activity of dismantling a vehicle for parts prior to its destruction was held not to be an ordinary and well-known activity to which automobiles are put and did not satisfy the purpose test.

- In *Dominion of Canada General Insurance Company v. Prest*,[72] the injured person tripped over a concrete curb after washing his vehicle in his garage parking spot.

- In *18-003343 v. Intact Insurance Company*,[73] the persons injured in an explosion and fire were two repairmen replacing a fuel pump on a vehicle placed on hydraulic

[67] 2021 ONSC 7847 (Div. Ct.), aff'g 2019 CanLII 119747 (LAT) and on reconsideration 2020 CanLII 19569 (LAT).
[68] 2017 ONSC 6173 at paras. 13-14.
[69] 2008 ONFSCDRS 123 (FSCO).
[70] 2011 ONFSCDRS 76 (FSCO).
[71] 2012 ONSC 714.
[72] 2013 ONSC 92.
[73] 2019 CanLII 72197 (LAT), and reconsidered *R.C. v. Economical Insurance Company*, 2019 CanLII 119750 (LAT).

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jacks being repaired in an automobile repair shop.

- In *M.R. v. Wawanesa Insurance*,[74] the injured person injured his back while changing his winter tires to summer tires on his vehicle, in his driveway.

6. *Citadel General Assurance Co. v. Vytlingam*: Contractual Benefits - SABs

[105] The Supreme Court of Canada's decision in *Citadel General Assurance Co. v. Vytlingam*,[75] is a very influential case about the no-fault and SABs regime in Ontario, the case requires an extremely close reading to appreciate what is its influence, if any, as a precedent.

[106] The facts were that Michael Vytingham, his wife Suzana, and her mother were Ontario residents on a road trip to the United States. They were seriously injured when their vehicle, which was insured by Citadel General Assurance, was struck by large boulders dropped by Todd Farmer and his friend from an overpass. Citadel paid the Vytinghams SABs exceeding $1.0 million. There was no doubt that the Vytlingams were entitled to no-fault benefits since they were using their car for an "ordinary and well-known" motoring activity and the injuries they suffered were related to such use and operation.

[107] The Vytinghams sued Farmer in tort and recovered judgments far in excess of a million dollars. But Farmer, who was convicted and sent to penitentiary for his boulder throwing, only had $25,000 in insurance on the vehicle that he had used to go to the overpass. So, the Vytinghams sued Citadel under the inadequately insured motorist coverage in the Citadel automobile insurance policy. The issue before the Supreme Court of Canada was whether the use and operation of Farmer's car – not the Vytingham's car – supported a tort claim committed by a "motorist."

[108] The essential matter to keep in mind is that Citadel's liability for the Vytinghams' SABs claim was based on the operation and use of the Vytingham's vehicle, which entitlement did not expressly require a "motorist" being involved in the automobile accident. However, the Vytinghams' claim was based on the inadequately insured motorist rider and that provision in the policy depended on a "motorist" causing the injuries.

[109] The Ontario Court of Appeal had held Citadel to be liable for the underinsured motorist coverage citing *Amos v. Insurance Corp. of British Columbia*.[76] Justice Binnie writing the decision for the Supreme Court of Canada, however, concluded that the inadequately insured motorist coverage could not stretched so far as to cover the facts of Farmer's driving to the overpass and perpetrating this criminal activity of throwing boulders from the overpass.

[110] In *Citadel General Assurance Co. v. Vytingham*, the insurance policy provision for inadequately insured motorist coverage had some similarities but also some dissimilar language to the SABs coverage. The inadequately insured motorist coverage stated:

> […] the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect

[74] 2020 CanLII 69922 (LAT).
[75] 2007 SCC 46 rev'g *Vytlingam v. Farmer*, (2005), 76 OR (3d) 1 (C.A.).
[76] [1995] 3 S.C.R. 405.

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> of bodily injury to or death of an insured person arising directly or indirectly from the use or operation of an automobile.

[111] Justice Binnie concluded that Farmer's nefarious acts were not committed by a motorist[77] For Citadel to be liable, the Vytinghams' claim would have had to have arisen from an unbroken chain of causation directly or indirectly from Farmer's use or occupation of a motor vehicle as a motorist. This was, however, not the situation, and, therefore, although Citadel was liable for the SABs, it was not otherwise liable to pay under its insurance policy.

[112] Justice Binnie noted that some of what was said in *Amos v. Insurance Corp. of British Columbia* was helpful to relate the Vytinghams' injuries to the "use or operation of a motor vehicle", but *Amos* did not resolve whether there was coverage for an at-fault "motorist." Justice Binnie noted that *Amos* involved a relaxed causation test [because the BC statute would be satisfied by both direct and indirect causation] and he said that nothing in his decision about the inadequately insured motorist coverage should be construed to limit SABs benefits.

[113] Despite Justice Binnie meaning to limit his comments about SABs, nevertheless, the following passages from Justice Binnie's judgment has been very influential in SABs jurisprudence, with particular influence about the purpose and causation tests of what counts for an automobile accident. Justice Binnie stated:

> *The Use of the Motor Vehicle*
>
> While no-fault insurance and indemnity insurance rest on different statutory provisions, both fall to be interpreted in the context of a motor vehicle policy. When Major J. said in *Amos* that it was a condition of no-fault coverage that the claim relate to "the ordinary and well-known activities to which automobiles are put" (para. 17), he was simply signalling that someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance. If, for example, a claimant got drunk and used her car as a diving platform from which to spring head first into shallow water, and broke her neck, she could not reasonably expect coverage from her motor vehicle insurer, even though, in a sense, she "used" her motor vehicle. The same conclusion is compelled under s. 239(1)(a) because an injury resulting from such an off-beat use could not sensibly be said to arise "directly or indirectly from the use or operation" of the motor vehicle as a motor vehicle.
>
> […]
>
> […] the […] insurer's argument overstates the scope of the *Amos* purpose test. The "ordinary and well-known activities to which automobiles are put" limits coverage to motor vehicles being used as motor vehicles, and would exclude use of a car as a diving platform (as above) or retiring a disabled truck to a barn to store dynamite (which explodes), or negligently using the truck as a permanent prop to shore up a drive shed (which collapses, injuring someone). In none of these cases could it be said that the tortfeasor was at fault as a motorist. In none of these cases could it be said that the motor vehicle was being used as a motor vehicle. That is the sort of aberrant situation that the *Amos* purpose test excludes, and nothing more. Here, as in *Amos*, it is the causation test that did the work, not the purpose test.
>
> […]
>
> However, to take another bizarre example for illustrative purposes. If instead of throwing rocks from the overpass Farmer had tried to jump his car at high speed over

[77] Justice Binnie noted that the "motorist" issue had its own line of authority:

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> the interstate highway, Evel Knievel style, and crashed down on the Vytlingam vehicle, the insurer might want to argue that Farmer was not making an "ordinary and well- known" use of his vehicle. However, there is no doubt that Farmer would have been driving the vehicle and driving meets the Amos purpose test. Further, in the language of the OPCF 44R, the Vytlingam's claim in such a case would have arisen "directly or indirectly from the use or operation" of the tortfeasor's vehicle being used as a motor vehicle. The OPCF 44R is a big tent and not much will be excluded as aberrant to the use of a motor vehicle as a motor vehicle.
>
> […]
>
> […] Juriansz, J.A. observed in his dissent in the instant case:
>
> > We live in a car culture. People use cars to get to the places where they cause or suffer damage. "But for" the use of cars, they would not be at those places and would not cause or suffer the damage.
>
> I agree. His colleagues on the Ontario Court of Appeal in effect applied a "but for" test on the coverage issue, but that is not the correct test. For coverage to exist, there must be an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made.
>
> […]
>
> These cases are very fact specific. However, if the vehicle's involvement is held to be no more than incidental or fortuitous or "but for" and is ruled severable from the real cause of the loss, then the necessary causal link is not established.
>
> While the use of Farmer's car "in some manner" contributed to Farmer's ability to commit the tort that caused the Vytlingams' injuries, such contribution does not mean the tort was committed in his capacity as an at-fault "motorist" […] In the present case rock throwing was an activity entirely severable from the use or operation of the Farmer vehicle.

[114] The jurisprudential takeaways from *Citadel General Assurance Co. v. Vytlingam* are both explicit and implicit. The jurisprudence about insurance benefits, be they SABs or other coverage benefits, are very fact specific and require close attention to the particular contractual context and the circumstances of the incident. Where more than one vehicle is involved, it is necessary to analyze the circumstances from each user's perspective, which may be different than the others. Care must be taken to not conflate the purpose test with the direct cause test, because the tests themselves have different measures. The purpose test is designed to exclude a person from receiving accident benefits where a vehicle is being used for abnormal and aberrant purposes disassociated from the normal purposes of a vehicle, which are to transport people and things. However, normal purposes are not limited to just transporting people and things. Care must be taken not to add or conversely not to subtract factors that may or may not be factors in determining when insurance benefits are available. Care must be taken to appreciate that the "but for" test for causation, which is used to determine liability for injuries is applied liberally in some contexts and is applied strictly in other contexts in determining the availability of insurance benefits. Apparently similar facts may have different outcomes because of the differing perspectives of analysis.

F. Standard of Appellate Review

[115] This is an appeal pursuant to s. 45 of the *Arbitration Act.*

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[116] For appeals of an arbitrator's decision in a dispute between insurers about the no-fault accident benefits scheme of Ontario's *Insurance Act*, the arbitrator's decision is reviewed in accordance with appellate review standards. [78]

[117] Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.[79]

[118] Where the ground of appeal raises a question of fact, an appellate court must pay substantial deference to it. The appellate court cannot set the decision aside simply because it views the evidence as showing a different probability from that found below. Before it may properly interfere, the appellate court must conclude that the submitted error amounts to a "palpable and overriding error". The word "palpable" means "clear to the mind or plain to see"[80], and "overriding" means "determinative"[81] in the sense that the error "affected the result".[82] The Supreme Court of Canada has held that other formulations capture the same meaning as "palpable error": "clearly wrong", "unreasonable" or "unsupported by the evidence".[83]

[119] Examples of palpable error include: (a) findings made in the complete absence of evidence (this could also amount to an error in law); (b) findings made in conflict with accepted evidence; (c) findings based on a misapprehension of the evidence; (d) findings of fact, drawn from primary facts, that are a result of speculation rather than inference; and (e) findings of fact based on evidence that has no evidentiary value because it has been rejected by the trier of fact.[84]

[120] Matters of mixed fact and law lie along a spectrum; where the error of the decision-maker can be traced to a clear error in principle, it may be characterized as an error of law and subjected to a standard of correctness; where the legal principle is not readily extricable, then the matter is subject to the deferential standard of palpable and overriding error.[85]

[121] In *Intact Insurance Company v. Allstate Insurance Company of Canada*,[86] the Court of Appeal held that even if the appeal involves an extricable question of law regarding *SABs*, a reasonableness standard of review will generally be applied.[87]

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[78] *Unifund Assurance Co. v. Certas Home & Auto Insurance Co*., 2023 ONSC 1377; *Manitoba Public Insurance v. ICBC*, 2023 ONSC 3658; *Intact v. Dominion and Wawanesa*, 2020 ONSC 7982; *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830; *Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Housen* v. *Nikolaisen*, 2002 SCC 33.

[79] *Canada (Director of Investigations and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[80] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 5.

[81] *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

[82] *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at para. 55.

[83] *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at paras. 55, 56.

[84] *Waxman v. Waxman*, [2004] O.J. No. 1765 at paras. 296, 306, 335, and 349 (C.A.).

[85] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842 at paras. 1-41, leave to appeal refused [2016] S.C.C.A. No. 39; *Housen v. Nikolaisen*, 2002 SCC 33.

[86] 2016 ONCA 609, at para. 53.

[87] See also *Unifund Assurance Co. v. Certas Home & Auto Insurance Co*., 2023 ONSC 1377.

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G. Discussion and Analysis: Did the Arbitrator Make a Reviewable Error?

[122] With this legal and factual background, it is now possible to analyze whether there is merit to Northbridge's appeal of the Arbitrator's decision. I shall do this by first analyzing the immediate case as if it was the arbitration that came first in the sequence of hearings and legal determinations. This methodology ignores the outcome of the LAT proceeding and focuses on whether apart from Northbridge's abuse of process argument, the Arbitrator made any reviewable error in accordance with the appellate standard of review.

[123] In this regard, I can immediately say that the Arbitrator's decision was not only reasonable, it was the correct legal decision based on his findings of fact which were made without any palpable or overriding error. Notwithstanding Northbridge's arguments, there are no errors of law or errors of mixed fact and law that can be identified. The Arbitrator's award on the priority dispute was in accordance with the jurisprudence described in detail above, which recognizes that the results depend upon the particular circumstances of each case.

[124] The Arbitrator determined that the GMC Truck was an automobile. As noted above, the test for whether a motor vehicle is an automobile is whether: (a) it is an automobile in ordinary parlance; (b) it is defined as an automobile in the wording of the insurance policy; or (c) it is within a definition of automobile in any relevant statute. In the immediate case, the GMC Truck was an automobile in ordinary parlance, and the GMC Truck was the subject of Northbridge's automobile insurance policy issued to Mr. Smith Sr.

[125] In argument, Northbridge's conceded that if the GMC Truck had been operational and capable of being driven on the highway before the incident then it would be an automobile. In other words, Northbridge's argument was that the GMC Truck was no longer an automobile because it was not operational at the time of the incident.

[126] This argument, however, falls away by the Arbitrator's findings of fact that Mr. Smith Jr. had not decided to scrap the GMC Truck to transform it from an automobile to junk. There was no transformation in the characterization of the GMC Truck. There is nothing in the characterization of a motor vehicle as an automobile for the purposes of the SABs schedule that requires that the automobile be operational at the time of the incident. The case law about automobile accidents reveals incidents involving motor vehicles that are not in operation or not immediately capable of operation because they are being repaired.

[127] Northbridge relies heavily on the Court of Appeal's decision in *Copley v. Kerr Farms Ltd.*,[88] but the case is of no assistance to it.

[128] In *Copley*, a SABs claimant was injured while working at a tomato farm when an accident occurred while he was in the field attaching a tomato wagon to a truck. The tomato wagon was used to ship harvested tomatoes to market. A tomato wagon, as such, is not in ordinary parlance an automobile, and the issue to be determined by the Court of Appeal was whether the tomato wagon was a trailer that qualified as an automobile. That, however, would only be the case, if the tomato wagon were required to be insured as a trailer when it was in the tomato farmer's field.

[88] (2002), 59 O.R. (3d) 346 (C.A.).

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[129] In other words, there was no doubt that the tomato wagon was a trailer that was required to be insured if it were being used on the highway, in which case the trailer would qualify as an "automobile" under the SABs scheme. The Court of Appeal decided that the circumstance that the tomato wagon in the future would qualify as an automobile did not answer the issue of whether it was an automobile at the time of the incident in the field. It was in that context that Justice Doherty stated that the question to be answered was whether the tomato wagon required insurance at the time and place where the accident occurred.

[130] The immediate case, however, does not involve trailers. It involves a GMC Truck that in ordinary parlance is an automobile. Based on the Arbitrator's factual findings that the GMC Truck had not been transformed into junk, it was an automobile, and whether it required insurance was a non-issue in the test of whether it was an automobile. And, in any event, the GMC Truck had insurance that was not cancelled at the time of the incident.

[131] Moreover, Northbridge's argument is a *non sequitur* and the logical fallacy of interpreting *Copley* backwards to establish a principle that if automobile insurance is not required, then an automobile is no longer an automobile.

[132] Similarly, Northbridge's arguments based on the circumstance that there could not be a motorist without an operational vehicle is a *non sequitur* in the context of determining whether the GMC Truck was an automobile. A motorist is not an element in the SABs test for what counts for an automobile. A GMC Truck is an automobile whether or not it is insured or whether or not there is a motorist involved in the incident.

[133] Thus, in the immediate case, the Arbitrator made no error in deciding that the GMC Truck was an automobile. The next issue he had to decide was whether there was an "automobile accident."

[134] As noted above, for the purpose of establishing an entitlement to SABs, there is a two-part test to determine whether an incident is an automobile accident. For the incident to be an accident: (a) the use or operation of an automobile must have caused the injuries (purpose test); and (b) the use and operation of the automobile must be the direct cause of the injuries (direct cause test).

[135] In the immediate case, the Arbitrator made no error in determining that the use or operation of the GMC Truck satisfied the purpose test and was the direct cause of the injuries suffered by Mr. Robinson, the direct cause test.

[136] With respect to the purpose test, an automobile does not have to be operational; there is no active component to the purpose test and having an automobile repaired is within the ordinary and well-known activities to which automobiles are used. The purpose test was satisfied based on the Arbitrator's findings of fact.

[137] With respect to the direct cause test in the immediate case: (1) the incident would not have occurred but for the use being made of the GMC Truck, which use was to have it taken to be repaired; (2) there was no separate intervening event; and (3) the use being made of the GMC Truck was the dominate feature of the unfortunate tragedy that befell Mr. Robinson.

[138] Contrary to Northbridge's submission the Supreme Court of Canada's decision in Citadel *General Assurance Co. v. Vytlingam* supports the Arbitrator's decision in the immediate case. In this regard, it should be recalled that in that Citadel did not dispute that the Vytingham's vehicle qualified for SABs. It is only with respect to Farmer's vehicle

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that Citadel was not an insurer because Farmer was not a motorist with respect to the injuries he caused by throwing boulders off an overpass.

[139] In the immediate case, Northbridge relies on the lines of cases where making repairs has been found not to be the ordinary and well-known activities to which automobiles are used, but, as noted above in the discussion of the case law, the cases are very fact specific and each case depends on its own particular facts.

[140] In the immediate case, to its credit Northbridge conceded that taking an operable vehicle to be repaired could be an ordinary and well-known activity to which automobiles are used. Thus, its case for not being obliged to pay SABs depended on the circumstance that the GMC Truck had not been operative for over a month. In the immediate case, this circumstance, however, does not overcome the Arbitrator's reasonable conclusion that this GMC Truck was going to be repaired and therefore the events of moving the GMC Truck to the place of repair was an ordinary and well-known activity to which automobiles are used.

[141] With the matters of whether the GMC Truck was an automobile at the time of the incident and whether it satisfied the purpose test and the direct cause test, having been resolved, the remaining issues for the Arbitrator were whether Jevco had cancelled its insurance policy and how to apply the priority rule for the circumstances where the SABs claimant was a non-occupant. There is no appeal of the Arbitrator's decision on these issues.

[142] Thus, in my opinion, there is no merit to Northbridge's appeal, apart for the issue of the circumstance that the Arbitrator's decision was inconsistent with the decision of the LAT Adjudicator, to which matter, I now turn.

H. Discussion and Analysis: Inconsistent Decisions and Abuse of Process

[143] The case at bar is apparently the first occasion that it has been argued that the decision of an arbitrator on a priority dispute is an abuse of process and puts the administration into disrepute because of inconsistencies between the decision of the LAT Adjudicator and the Arbitrator.

[144] In the immediate case, it is true that there are inconsistencies between the LAT decision and the arbitral award, but that circumstance does not entail an abuse of process nor is it an embarrassment to the administration of justice.

[145] The explanation of why there is no abuse of process may begin by observing that typically an abuse of process involves some form of re-litigation or collateral attack on a prior decision of a court or tribunal. However, re-litigation is an inevitable possibility of the no-fault automobile insurance regime because (a) LAT Adjudicators have the exclusive jurisdiction to determine entitlements to SABs; (b) the court has exclusive jurisdiction to determine tort compensation and insurance coverage disputes apart from SABs; and (c) Arbitrators have the exclusive jurisdiction to determine priority disputes about which insurer is obliged to pay SABs.

[146] As noted in the discussion of the no-fault benefits regime, an arbitrator has a large and unrestricted jurisdiction to decide any issues of fact, law, or mixed fact and law regarding a priority dispute, which would include the arbitrator deciding the fundamental question of whether there was an "automobile accident," which, of course, is the same

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fundamental question decided by the LAT Adjudicator. Since both the LAT adjudicator and the arbitrator have exclusive jurisdictions to determine the same issue, it seems incorrect and inappropriate to suggest that if either carries out his or her statutorily prescribed assignment that there is an abuse of process.

[147] In the circumstances of the statutory non-fault insurance scheme, and most particularly in the circumstances of the immediate case, it is also impossible to apply the conventional or technical elements of an allegation of *res judicata,* issue estoppel, an abuse of process, or a collateral attack on a tribunal's decision.

[148] The technical elements are: (a) the parties or their privities are the same in the initial and the subsequent litigation; (b) the same issue is involved in the initial and subsequent litigation; (c) the issue must have been actually litigated and determined in the first litigation and its determination must have been necessary to the result in the litigation; and (d) the decision on the issue in question must have been final.

[149] In the immediate case, as noted in the description of the facts, the parties to the initial LAT proceeding are not the same as in the arbitration and the LAT determination was not comprehensive and did not determine whether there was an "automobile accident" other than from the perspective of Northbridge. Thus, in the immediate case, Northbridge cannot demonstrate that the conventional or technical elements of an abuse of process occurred.

[150] The next point to note is that even when the conventional or technical requirements of a *res judicata* cannot be satisfied, the court has the jurisdiction to apply the abuse of process doctrine. The court has an inherent and broad jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute.[89] The doctrine of abuse of process is a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice, and its application will depend on the circumstances, facts and context of a given case.[90]

[151] *Danyluk v. Ainsworth Technologies Inc.*[91] is a leading case on issue estoppel. In this case, the Supreme Court of Canada held that where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The court should stand back and, taking into account the entirety of the circumstances, consider whether the application of issue estoppel in the particular case would work an injustice.[92]

[152] In the immediate case, the Arbitrator was not bound to apply the decision of the LAT Adjudicator, and given the technical problems of different parties, it is doubtful that there were issue estoppels or a collateral attack on the LAT Adjudicator's less than

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[89] *Davies v. Clarington (Municipality)* 2023 ONCA 376; *Behn v. Moulton Contracting Ltd*., 2013 SCC 26; *Waterloo (City) v. Wolfraim,* 2007 ONCA 732; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Currie v. Halton (Region) Police Services Board,* [2003] O.J. No. 4516 (C.A.); *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at paras. 55–56 *per* Justice Goudge dissenting (C.A.), approved [2002] 3 S.C.R. 307.

[90] *Plate v. Atlas Copco Canada Inc.*, 2019 ONCA 196; *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 (C.A.).

[91] [2001] 2 S.C.R. 460.

[92] *Apotex Inc. v. Schering Corp.*, 2018 ONCA 890; *Amtim Capital Inc. v. Appliance Recycling Centres of America*, 2014 ONCA 62; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

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comprehensive decision.

[153] More to the point, there was nothing frivolous or vexatious in the Arbitrator coming to a decision within his jurisdiction and there was no miscarriage of justice in the circumstances.

[154] To be clear, it is not necessarily wrong for an Arbitrator on a priority dispute to accept and follow a prior decision of a LAT Adjudicator about whether there was an "automobile accident," and that is what may typically occur. But it does not necessarily occur in every case and just as a court must stand back and take into account the entirety of the circumstance before applying an issue estoppel, the Arbitrator must do so.

[155] That is what, in effect, occurred in the circumstances of the immediate case, and it would have been incorrect for the Arbitrator to feel himself bound by the determination of the LAT Adjudicator. Thus, once again there is no reviewable error in the immediate case.

I. Conclusion

[156] For the above reasons, Northbridge's appeal is dismissed.

[157] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Jevco's submissions within twenty days after the release of these Reasons for Decision followed by Northbridge's submissions within a further twenty days.

Perell, J.

Released: March 14, 2024

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CITATION: Northbridge General Insurance Corp. v. Jevco Insurance Co. 2024 ONSC 1520
COURT FILE NO.: CV-22-00691390-0000
DATE: 20240314

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ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8 s.268, and *Ont. Reg*. 283/95 thereunder**;**

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

AND IN THE MATTER of an Arbitration;

BETWEEN:

NORTHBRIDGE GENERAL INSURANCE CORPORATION

Appellant

- and–

JEVCO INSURANCE COMPANY and THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

REASONS FOR DECISION

PERELL J.

Released: March 14, 2024