SUPREME COURT OF YUKON

Citation: *Joe v. The Wawanesa Mutual Insurance Company*, 2020 YKSC 38 and *Bear v. The Wawanesa Mutual Insurance Company*, 2020 YKSC 38

Date: 20200929
S.C. No. 17-A0133
Registry: Whitehorse

BETWEEN:

ARTHUR JOE

PLAINTIFF

AND

THE WAWANESA MUTUAL INSURANCE COMPANY

DEFENDANT

S.C. No.: 17-A0154

BETWEEN:

EMILY BEAR, SPOUSE OF KENNETH RAYMOND BAKER AND BENEFICIARY OF THE ESTATE OF KENNETH RAYMOND BAKER

PLAINTIFF

AND

THE WAWANESA MUTUAL INSURANCE COMPANY

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:

Daniel S. Shier	Counsel for the Plaintiff Arthur Joe
Anna C. Starks-Jacob	Counsel for the Plaintiff Emily Bear, spouse of Kenneth Raymond Baker and Beneficiary of the Estate of Kenneth Raymond Baker
Aron M. Bookman	Counsel for the Defendant, The Wawanesa Mutual Insurance Company

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a stated case to determine whether accident benefits payable to occupants of a vehicle under the unidentified motorist coverage of the owner of the vehicle in a motor vehicle accident are first loss insurance, or whether the unidentified motorist coverage of one of the occupants of the vehicle in the accident can be accessed first.

FACTUAL BACKGROUND

[2] The case arises from a motor vehicle accident that occurred on June 4, 2017. Kenneth Baker was driving Henry Broeren's car (the "Broeren vehicle"). Arthur Joe was his sole passenger. They were travelling along the Alaska Highway past Squanga Lake. A piece of metal, called a porta anchor in the Coroner's report (similar to a portable winch), from a semi-truck and trailer passing in the opposite direction flew through the driver's side of the windshield, instantly killing Kenneth Baker. Mr. Joe sustained physical and psychological injuries.

[3] The semi-truck and trailer were never identified.

[4] Henry Broeren was insured by The Wawanesa Mutual Insurance Company ("Wawanesa"), by the *Yukon Standard Automobile Policy* ("S.P.F. No. 1"). Mr. Broeren also had a Standard Endorsement Form No. 44 ("S.E.F. 44") ("Broeren Policy").

[5] Mr. Joe also had S.P.F. No. 1 and S.E.F. 44 insurance policies on his own vehicle, also with Wawanesa ("Joe Policy").

[6] The S.P.F. No. 1 Policy, Section B is entitled "Accident Benefits", and subsection 3 of Section B provides "Uninsured Motorist Cover" ("UMC"). It contains the following approved wording:

> ***Section B – Accident Benefits***
>
> The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death directly and independently of all other causes by an accident arising out of the use or operation of an automobile.
>
> ….
>
> ***Subsection 3 – Uninsured Motorist Cover***
>
> All sums which every insured person shall be legally entitled to recover as damages for bodily injury, and all sums which any other person shall be legally entitled to recover as damages because of the death of any insured person, from the owner or driver of an uninsured or unidentified automobile as defined herein.

[7] The following definition in Section B is pertinent:

> ***Special Provisions, Definitions, and Exclusions of Section B***
>
> (1) "**Insured Person**" **Defined**
> in this section, the words "insured person" mean
>
> a) any person while an occupant of the described automobile or of a newly acquired or temporary substitute automobile as defined in this policy;
>
> b) the insured and, if residing in the same dwelling premises as the insured, his or her spouse and any dependent relative of either while an occupant of any other automobile; …

[8] Mr. Joe is an Insured Person under the Broeren Policy on the basis of a) of the definition, because he was an occupant of the described automobile, which is the

Broeren vehicle. As well, he is an insured person under the Joe Policy, on the basis of b) of the definition, as an occupant of the Broeren vehicle, which is "any other automobile" under the policy.

[9] Kenneth Baker, the driver, was also an Insured Person under the Broeren Policy on the basis of a) of the definition, because he was an occupant of the Broeren vehicle, the described automobile.

[10] The definition of unidentified automobile in the S.P.F. 1 Policy is relevant:

> **(3) Unidentified automobile defined**
>
> An "unidentified" automobile under this subsection means an automobile which causes bodily injury or death to an insured person arising out of physical contact of such automobile with the automobile of which the insured person is an occupant at the time of the accident, provided
>
> a) the identity of either the owner or driver of such automobile cannot be ascertained...

[11] Automobile as defined in the *Insurance Act*, R.S.Y. 2002, c. 119, includes "trailers, accessories, and equipment of automobiles". The porta anchor that struck the Broeren vehicle was a piece of a trailer, is considered to be an automobile within the *Insurance Act*, and an unidentified automobile in the UMC.

[12] Mr. Joe has commenced a tort action and an insurance action. Kenneth Baker's spouse, Emily Bear, has also commenced a tort action and an insurance action. She and certain of her family members are also entitled to claim under the *Fatal Accidents Act*, R.S.Y. 2002, c. 86.

[13] There is a $200,000 limit under each of the Broeren UMC and the Joe UMC.

POSITIONS OF THE PARTIES

i) Wawanesa

[14] Wawanesa's position is that the Broeren Policy is first loss insurance. It relies on s. 172(1) of the *Insurance Act*, arguing that it applies in this fact situation and requires Mr. Joe, an occupant of the vehicle in the accident, to be reimbursed under the Broeren Policy first. Section 172(1) is attached hereto as Appendix "A". It provides that the liability insurance of the owner of a vehicle in an accident is first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

[15] Wawanesa says that even though UMC falls under the "Limited Accident Insurances" section, which addresses statutory benefits such as medical, funeral, death and disability (see s. 163, s. 164), and s. 172 falls under the "Miscellaneous - Other Insurance" section, this does not preclude the s. 172 priority scheme from applying to circumstances involving UMC. Wawanesa says that the trigger for UMC coverage is the liability of an unidentified driver for the resulting death or injury. Since s. 172 addresses liability insurance generally, it must also include liability by an unidentified motorist. Wawanesa says that UMC's inclusion in Limited Accident Insurances, separate from the third party liability sections in the statute, is an illusory and immaterial distinction. Wawanesa relies on older case law from Ontario in support of its position. Wawanesa notes the plaintiffs have provided no alternative priority analysis, but instead have provided a result-oriented analysis, which is convenient in the circumstances because Mr. Joe has his own UMC.

[16] The implications of Wawanesa's interpretation are that the coverage under the UMC provisions of the Broeren Policy is split between the Bear claimants and Mr. Joe. If Mr. Joe's claim is not satisfied by the proportionate share received under the Broeren Policy, he can access the UMC provisions of his own policy to pay the excess amounts of his claim. The Bear plaintiffs will likely not have their entitlements under the *Fatal Accidents Act* satisfied, given the $200,000 limit that must be shared. Wawanesa says there is no authority to support Mr. Joe's argument that he can choose to be covered by his own policy first, leaving the Broeren Policy to pay for the Bear claimants.

ii) Bear and Joe

[17] The Bear plaintiffs adopt the arguments of Mr. Joe. He relies on the modern approach to statutory interpretation. He notes that the provisions in question are s. 162 (UMC), s. 167 (First Liability), and s. 172(1) - (Miscellaneous, Other Insurance), in the *Insurance Act*, and S.P.F. No. 1, Section B, subsection 3, UMC in the Standard Automobile Policy. All of these are attached hereto as Appendix "B".

[18] The Bear claimants and Mr. Joe argue that UMC is properly characterized as a contractual obligation (between insured and insurer) and not a tort liability provision. The priority provisions in s. 172(1) apply only to tort liability. The tort liability of an unidentified motor vehicle is addressed through the statutory and policy requirements of the insured to pay sums representing damages for recovery from injuries sustained in an accident with an unidentified motor vehicle. The requirements set out in s. 162 mean that UMC is of a different nature than the tort liability referred to in s. 172, making s. 172 inapplicable.

[19] Mr. Joe says the Ontario authorities relied on by Wawanesa are inapplicable because of various distinguishing factors, including the differences in the legislation and the development of the law in each jurisdiction. Specifically, Mr. Joe urges the Court to reject the Ontario Court's decision in *Harrison v. Dumfries Mutual Insurance Co.,* [1996] 29 O.R. (3d) 724 (O.N.G.D.) ("*Harrison*"), which was followed in *Morrison v. Ashley***,** 2012 ONSC 745 ("*Morrison*")**,** and *Oliveira (Litigation Guardian of) v. Mullings*, [2009] 94 O.R. (3d) 751 (O.N.S.C.) ("*Oliveira*"). In *Harrison* a motor vehicle accident occurred between a van being driven by Harrison, who had permission from the van owner to drive, and an unidentified motor vehicle. The van owner had UMC, applicable to Harrison, an occupant. Harrison had his own insurance policy on his own vehicle, a Nova, which also contained a UMC provision. The two insurers were disputing whether or not Harrison could access his own policy on the Nova, or whether the van policy was first loss insurance. The argument in favour of accessing Harrison's own policy on the Nova was that s. 241(1) of the Ontario *Insurance Act*, R.S.O. 1990, c. 218, a section similar to s. 172(1) of the Yukon *Insurance Act*, did not apply because it did not address the responsibility to pay first party benefits such as UMC. Section 241(1) used the words "in respect of liability arising from…". The Court rejected the argument that s. 241(1) did not apply based on the placement of s. 231 (equivalent to the UMC provision in s. 162 of the Yukon *Insurance Act*) in the liability section of the Ontario statute, not in the limited accident insurance/statutory benefits section. The Ontario Court held that s. 241(1) set out the priority in situations arising under s. 231. In other

words, the van owner's UMC was first loss insurance and Harrison's Nova insurance was excess insurance only.

[20] Mr. Joe notes that in the Yukon statute, unlike the Ontario statute in *Harrison*, s. 162 is clearly part of Limited Accident Insurances, and s. 172 is in the following section, under a different heading, Miscellaneous - Other Insurance.

[21] Section 167 is a provision in the Limited Accident Insurances section of the Yukon statute that addresses first loss for benefits under that section. It states that the insurer of the owner of the vehicle involved in the accident provides first loss insurance to an occupant of the vehicle involved in the accident. However, s. 167 refers only to medical and funeral benefits (s. 163) and death and disability benefits (s. 164) in providing that the insurer of the owner of the motor vehicle provides first loss insurance. Section 167 does not address the priority of benefits payable under s. 162, UMC.

[22] Mr. Joe points to the purpose of UMC, described by the Ontario Court of Appeal in *Chambo v. Musseau*, [1993] 15 O.R. (3d) 305 ("*Chambo*"), as:

> …part of a broad statutory scheme which required that all motor vehicles in Ontario be insured and which provided that all automobile insurance policies issued in Ontario had to include, among other things, uninsured motorist coverage. The coverage is statutory in the sense that its basic elements are set out in s. 231 of the Insurance Act. The legislative intent was to internalize costs to the activity (driving a motor vehicle) which created them. Before March 1980 the costs resulting from the negligence of an uninsured driver were externalized, in that they were paid by the taxpayers generally, through the Motor Vehicle Accidents Claim Fund. In my view, the uninsured motorist coverage legislation is remedial and should be given a broad and liberal interpretation.

[23] Mr. Joe says he has paid an increased premium for UMC on his own policy. As a result, he should be able to obtain its benefit. Instead, he is being forced to wait until the determination of Wawanesa's argument that the Broeren Policy is first loss insurance and the Joe Policy excess insurance only for Mr. Joe, before obtaining recovery. This situation is unusual because it is the same insurer for both plaintiffs, causing the delay in payment to Mr. Joe.

ISSUE

[24] The main issue is whether s. 172(1) of the *Insurance Act* applies to recovery under UMC by an occupant of a vehicle in an accident with an unidentified motor vehicle, where that occupant has their own UMC in their policy.

[25] In other words, must Mr. Joe access the Broeren Policy first, based on s. 172 of the *Insurance Act*, sharing on a pro-rata basis with the Bear claimants as one unit? This would leave fewer funds to be shared by the Bear claimants before Mr. Joe could access his own policy, which would provide excess insurance only. Or, can Mr. Joe recover under the UMC in his own policy up to its limit for his injuries as an occupant of the Broeren vehicle, leaving the Broeren Policy UMC to be accessed by the Bear family?

SHORT ANSWER

[26] Certain facts of this case distinguish it from those cases referenced by Wawanesa. The primary one is that there were two occupants in the Broeren vehicle, neither of whom was the owner.

[27] A reasonable interpretation of s. 172(1) is that it does not apply to recovery under UMC in this case, as UMC is statutory, and part of the contractual benefits section for the purpose of the statute and the policy. This accords with the plain reading of the provisions at issue, the structure and object of the legislation, the intent of the legislature. As a result, Mr. Joe is not bound to use the Broeren Policy as a first loss policy, but may access his own policy, for which he has paid a premium, for recovery under the UMC provisions. The Bear claimants will have their recovery from the Broeren Policy UMC provisions.

ANALYSIS

[28] This case requires statutory interpretation and application to the facts of this case. The modern approach to statutory interpretation was adopted by the Supreme Court of Canada in the case of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and reinforced in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 and *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58:

> 29 ...The modern rule of statutory interpretation requires us to read "the words of an Act…in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p 7…

[29] The importance of context in the modern approach to statutory interpretation was discussed specifically as it applies in automobile insurance cases in the decision of *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* [2005] 199 O.A.C. 266, ("*Polowin*"), application for leave to appeal to the Supreme Court of Canada dismissed with costs, January 26, 2006. In that case, the Court was examining

the question of the interpretation of statutory conditions in a standard automobile insurance policy. Although a different issue than the case at bar, the principles of interpretation are still applicable here, especially since the factual context is similar. The Court held at paras. 62-63:

> [62] The context for interpreting a statutory condition 6(7) includes its basic purpose, its mandatory inclusion in the standard Ontario automobile policy, the wording of the policy…
>
> [63] …the court should adopt an interpretation that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and sensible meaning. …

[30] And at paras. 79 and 80:

> [79] Statutory condition 6(7) is not just a legislative provision; because of s. 234(1) of the Act, it is also part of the Ontario automobile insurance policy. In this context, its meaning should be considered in the light of the principles for interpreting insurance policies. One such principle is interpreting the scope of coverage to give effect to the reasonable expectations of the parties. …
>
> [80] …it is always desirable when a court's interpretation accords with the parties' reasonable expectations. …

[31] In this case, the statutory provisions in question are:

1. *Insurance Act*: Section 162 - Uninsured Motorist Cover; Section 167- First Liability; and
2. Section 172(1) - Miscellaneous - Other Insurance.

[32] The policy at issue is S.P.F. No. 1: Section B, Subsection 3, Uninsured Motorist Cover.

[33] There will be some repetition in this analysis of the statutory and policy provisions set out in detail above in the section describing the positions of the parties.

[34] Section 162 is found under the heading Limited Accident Insurances in the *Insurance Act*. It sets out the statutory requirements if UMC is included in an insured's contract of insurance. Section 162 provides that UMC applies to an injured or killed occupant of a vehicle involved in an accident with an unidentified or uninsured person. The vehicle can be either the automobile for which insurance is provided under the contract, or any other automobile, as set out in the contract for the purpose of that insurance.

[35] In this case, as noted above, the Joe Policy defines Insured Person for the purpose of Section B, Subsection 3, Uninsured Motorist Cover, of the policy as the person while an occupant of the automobile described in the policy (that is, Mr. Joe's vehicle), or the insured (that is, Mr. Joe) while he is an occupant of any other vehicle (that is, the Broeren vehicle).

[36] Also included under the heading Limited Accident Insurances is s. 167 - First liability. It provides that if any occupant of a vehicle involved in an accident is entitled to medical and funeral insurance benefits (s. 163) or death and disability insurance benefits (s. 164), then the insurer of the owner of the motor vehicle shall in the first instance be liable for the payments of the benefits.

[37] Section 167 does not apply to s. 162.

[38] Section 172 appears in the *Insurance Act* under the next heading - Miscellaneous - Other Insurance. It provides that insurance under a contract evidenced

by a valid owner's policy in respect of liability occurring in connection with the ownership, use or operation of an automobile owned by the insured named in the contract is a first loss insurance, and insurance under any other valid motor vehicle liability policy is excess insurance only.

[39] While in the broad sense, UMC protects occupants of vehicles from unidentifiable or uninsured drivers who cause injury or death, it has statutory limitations set out in s. 162. The following facts show that it was intended to be treated differently from the general tort liability provisions:

i) UMC is found under the Limited Accident Insurances section;

ii) UMC is not subject to the priority provisions in s. 167 and there is no other provision about first loss insurance in that section applicable to UMC;

iii) UMC, along with the benefits set out in s. 163 and s. 164, is not subject to the statutory conditions to be included in the policy (see s. 138); and

iv) Section 172 does not make specific reference to UMC.

[40] The silence in the statute about priority of multiple policies that may apply to claimants seeking UMC recovery creates ambiguity.

[41] Where there is ambiguity, the principles set out in *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37, (and other cases) apply. The policy and statute should be interpreted in line with the expectations of the parties. This is also one of the principles for interpretation of insurance policies described in para. 79 of *Polowin,* noted above. The Supreme Court of Canada in *Ledcor* wrote:

> [50] Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to

> resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. See *Progressive Homes*, at para. 23, citing *Scalera*, at para. 71; *Gibbens*, [2009] 3 S.C.R. 605 at paras. 26-27; and *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 900-902.
>
> [51] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer: *Progressive Homes*, at para. 24, citing *Scalera*, at para. 70; *Gibbens*, at para. 25; and *Consolidated-Bathurst*, at pp. 899-901. *Progressive Homes* provides that a corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[42] While Wawanesa states that their expectation was that the Broeren Policy is first loss insurance, they provide few details about the mischief that their interpretation is designed to avoid. In other words, what is the harm to Wawanesa of the interpretation proposed by Mr. Joe and the Bear claimants? Clearly, there is additional cost to Wawanesa, as well as a different outcome than expected, based on their interpretation of the Ontario case law, if the interpretation of the Bear claimants and Mr. Joe is adopted, but other than this no hardship was identified.

[43] On the other hand, there is hardship to the Bear claimants if the Broeren Policy is first loss insurance only. Through no fault of their own, their relative, Kenneth Baker, was killed. They clearly are covered by the Broeren Policy, for which premiums were duly paid. Why should they not have the benefit of full coverage under that policy, in the

unique circumstances of this case, where Mr. Joe has full coverage under his own policy, also after paying full premiums, including for UMC? To adopt the interpretation of Wawanesa is to prejudice the Bear family.

[44] The interpretation of the Bear claimants and Mr. Joe is consistent with the expectations of the plaintiffs. As noted by the Court in *Poulin v. Wawanesa Mutual Insurance Co.*, 2016 ABQB 547 at para. 19, "[t]he insurer should not be allowed to collect a premium and deny compensation for a loss." Likewise, the insured should not be able to collect for a loss not intended to be covered by the contract. Here, both insureds paid premiums for UMC in their own policies. It is uncontested that the Joe Policy covers Mr. Joe in this situation. There is no windfall for any of the parties.

[45] Much of the Yukon automobile insurance scheme is modelled after other provinces, and in particular, the Yukon scheme is similar (but not identical) to the Ontario scheme, at least as it was at a certain time period. There is no reason why the Ontario authorities should not provide some guidance to this Court, especially since the wording of the Ontario *Insurance Act* at the time those cases were decided was similar to the wording in the Yukon *Insurance Act*.

[46] However, all the cases referred to by Wawanesa can be distinguished from the facts of this case in several areas. There was only one occupant in the vehicles involved in the accidents in all of those cases. There was no discussion in any of the cases about the inadequacy of the owner's policy coverage to cover the damages of the injured party. Instead, the arguments were directed to whether the sole injured or deceased occupant of the vehicle in the accident was covered by their own policy, or by

the vehicle owner's policy. These arguments related to who should pay as between two different insurers, not between insured and insurer as in this case. There was no injustice to the insured as a result of the arguments between insurers (see *Harrison*; *Morrison*; *Maddalena v. Crouse*, [1996] 30 O.R. (3d) 578 (C.A.) ("*Maddalena*"); *Oliveira*).

[47] As noted above, UMC is distinguishable from the third party liability sections. As part of the insurance contract, it is an assumption of risk or liability by the owner in a specific factual circumstance where the ability to commence a tort action and assess degree of culpability is restricted because of the unidentified tortfeasor. That assumption of risk by the injured party's insurer is paid for through increased premiums under the contract. The interpretation of UMC should be broad and liberal, given that it is a remedial statutory provision, to address a circumstance in which the usual principles of tort liability cannot be applied.

[48] Further distinguishing factors include:

i. In *Harrison*, the Court held that the priority provision in the Ontario statute, equivalent to s. 172 of the Yukon *Insurance Act*, applied to UMC coverage on the basis that the distinction between third party liability and first party benefits, such as UMC, was flawed because UMC was not included in the Accident Benefits section in the Ontario statute, although it was part of the Accident Benefits section in the standard Ontario policy. This is distinguishable from the case at bar, in which UMC is included in the part of the Yukon statute that sets out the other contractual accident benefits

(Limited Accident Insurances). That part of the statute is silent on the priorities applicable to more than one policy including UMC, while it does include priority provisions for the other accident benefits.

ii. In *Morrison*, the Court accepted the conclusion in *Harrison*, without further analysis, and held that in a situation where multiple policies including UMC are available, the priorities set out in s. 277(1) (equivalent to s. 172) apply. The focus in *Morrison* was whether a specific statutory provision applicable to rented vehicles (s. 277(1.1)) applied to UMC, meaning that the insurance provided to rental companies for third party claims would be the last to respond, rather than providing first loss insurance as was required by s. 277(1). The Court held that because there was nothing in s. 277(1.1) to suggest that it applied to UMC claims, the priorities in s. 277(1) applied. This was a different issue and focus than the case at bar. It is noteworthy though that the failure of s. 277(1.1) to refer specifically to UMC claims was a decisive factor.

iii. In *Maddalena*, the focus of the case was whether the vehicle owner's policy was broad enough to include the driver of the vehicle, who was an employee of the owner, or whether he would have to access his own policy for coverage. The employer's insurer argued that the employee occupant should be considered an occupant of an uninsured automobile and thus required to access his own automobile insurance policy. The Court held that the intent of the applicable statutory provision,

s. 265(2)(c)(iii), was to broaden the owner's coverage to include its employees so they would not have to resort to their own coverage if injured in their employer's automobile. This result is in line with the expectations of the employee driver. The focus was on the potential injustice to the employee if the employer's insurance did not cover him. There was no issue of inadequacy of coverage as there was only one occupant. The issue was which insurer should pay.

iv. In *Oliveira*, the Court followed *Maddalena*, as the facts were similar. The issue was whether an employee injured in his employer's vehicle by an uninsured motorist was entitled to claim under his employer's policy. The Court noted that in order to hold that the employee had to access his own coverage, it would have to find that he was the occupant of an uninsured vehicle, an absurd result. In the case at bar, it is not necessary to make such a finding, as it is uncontested that Mr. Joe is covered by his own policy.

[49] Thus, on a plain reading of the statute, UMC appears under Limited Accident Insurances and that section has no specific provision that addresses priorities in the case of multiple UMC policies, unlike the other accident benefits listed. Section 172(1) does **not** explicitly refer to UMC, but only to third party liability. The Ontario authorities do note a distinction between third party liability and contractual benefits: see *Morrison*, *Harrison*.

[50] I accept that there is a distinction, not only because of where the contractual benefits appear in the statute, but also because of their different nature. UMC is not the same as third party liability as the owner or occupant pays a premium for coverage without any expectation of recovery from another insurer. While it must be established that the injuries were likely caused by the unidentified motorist; and attempts to find the unidentified motorist must be made, UMC is statutory and intended to be remedial. To deny the Bear family the benefit of full coverage under the UMC in the Broeren Policy, in this circumstance, would be an injustice and contrary to their expectations.

[51] As noted by Barbara Billingsley in her text *General Principles of Canadian Insurance Law*, (LexisNexis Canada Inc. 2014: March 2014). Canadian law closely regulates the insurance industry in two main ways, both of which have a strong element of consumer protection. First, legislation controls insurance companies to ensure they remain solvent and able to meet their financial obligations. Second, (and relevant for this case), through legislation and common law, insurance law regulates the content and enforceability of insurance contracts. This includes regulation of the substance of the contract; the parties' obligations under the contract; and the qualifications and responsibilities of intermediaries involved in contract formation. Automobile insurance is one of the most heavily regulated areas of insurance law, linked to the government's responsibility for road safety. One of the purposes is to provide public protection against loss and injury suffered by people involved in automobile accidents (pp. 2-3 of Billingsley).

[52] I observe that the statutory and contractual provision of coverage for people injured or killed by uninsured or unidentified motorists is consistent with this general purpose of public and consumer protection.

[53] Wawanesa raised the concern that there is no precedent for an insured to choose which policy may apply to him when there are multiple applicable UMC provisions. This analysis, they say, is result-oriented and convenient on the facts of this case.

[54] Although it may superficially appear that this is the case, in the absence of a specific statutory or policy provision for priorities for UMC, and with the existence of available coverage under both policies for both occupants, interpretation should be consistent with the general expectations of the parties, as well as in keeping with the general intent of the legislature. Consumer and public protection and ensuring enforceability of contracts of insurance, are acknowledged purposes of insurance law. Viewing this situation from a remedial perspective, those purposes are best fulfilled by ensuring that each of the claimants entitled to recovery after this unfortunate and tragic accident can be satisfied by the contract to which they agreed, or were covered by.

CONCLUSION

[55] The Bear claimants are entitled to recovery under the Broeren Policy. Mr. Joe is entitled to UMC recovery under the Joe Policy.

_____
DUNCAN J.

APPENDIX "A"

Insurance Act, R.S.Y. 2002, c. 119

172(1) Subject to section 154, insurance under a contract evidenced by a valid owner's policy is in respect of liability arising from or occurring in connection with the ownership, use, or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

(2) Subject to sections 154, 163, and 164 and to subsection (1) of this section, if the insured named in a contract has or places any other valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, or their interest in the subject matter of the contract or any part thereof, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage.

(3) "Rateable proportion" as used in subsection (2) means,

(a) if there are two insurers liable and each has the same policy limits, each of the insurers shall share equally in any liability, expense, loss, or damage;

(b) if there are two insurers liable with different policy limits, the insurers shall share equally up to the limit of the smaller policy limit; and

(c) if there are more than two insurers liable, paragraphs (a) and (b) apply *mutatis mutandis*.

APPENDIX "B"

Insurance Act, R.S.Y. 2002, c. 119

Uninsured motorist cover

162(1) If an insurer provides in a contract insurance against loss resulting from bodily injury to or the death of a person insured arising out of an accident involving an automobile when,

(a) there is legal liability of another person for the injury or death; and

(b) the other person has no insurance against their liability therefor or that person cannot be identified,

that insurance applies only in respect of

(c) any person who sustains bodily injury or death while driving, being carried in or on, or entering or getting onto or alighting from the described automobile in respect of which automobile liability insurance is provided under the contract; and

(d) the insured named in the contract and the insured's spouse and any dependent relative residing in the same dwelling premises as the insured named in the contract who sustains bodily injury or death while driving, being carried in or on, or entering or getting onto or alighting from, or as a result of being struck by any other automobile that is defined in the contract for the purposes of that insurance.

(2) The insurance mentioned in subsection (1) does not apply in respect of a person specified therein who has a right of recovery under an unsatisfied judgment fund or a similar fund in any province or of any state or the District of Columbia of the United States of America. S.Y. 2002, c.119, s.162.

…

First liability

167(1) If a person entitled to benefits provided by insurance under sections 163 and 164 or either of them,

(a) is an occupant of a motor vehicle involved in an accident, the insurer of the owner of the motor vehicle shall, in the first instance, be liable for payment of the benefits provided by the insurance; or

(b) is a pedestrian and is struck by a motor vehicle, the insurer of the owner of the motor vehicle shall, in the first instance, be liable for the payment of the benefits provided by the insurance.

(2) Nothing in this section affects the operation of subsections 163(2) to (5) and subsection 164(2). S.Y. 2002, c.119, s.167.

…

Other insurance

172(1) Subject to section 154, insurance under a contract evidenced by a valid owner's policy is in respect of liability arising from or occurring in connection with the ownership, use, or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

Yukon Standard Automobile Policy (S.P.F. No. 1)

Section B – Accident Benefits

…

Subsection 3 – Uninsured Motorist Cover

All sums which every insured person shall be legally entitled to recover as damages for bodily injury, and all sums which any other person shall be legally

entitled to recover as damages because of the death of any insured person, from the owner or driver of an uninsured or unidentified automobile as defined herein.

(1) **The Insurer shall not be liable under this subsection,**

a) to any person who has a right of recovery under an unsatisfied judgment or similar fund or plan in effect in any jurisdiction of Canada or the United States of America;

b) to any person who, without the written consent of the Insurer, makes directly or through his representative any settlement with or prosecutes to judgement any action against any person or organization which may be legally liable therefore;

c) for any amount in excess of the minimum limit(s) for automobile bodily injury liability insurance applicable in the jurisdiction in which the accident occurs regardless of the number of persons so injured or killed, but in no event shall such limit(s) exceed the minimum limit(s) applicable in the jurisdiction stated in Item 1 of the application.

(2) **Uninsured automobile defined**

An “uninsured automobile” under this section means an automobile with respect to which neither the owner nor driver there-of has applicable and collectible bodily injury liability insurance for its ownership, use or operation, but shall not include an automobile owned or registered in the name of

a) the named insured or by any person residing the same dwelling premises therewith; or

b) the governments of Canada or the United States of America or any political sub-division thereof or any agency or corporation owned or controlled by any of them; or

c) any person who is an authorized self-insurer within the meaning of a financial or safety responsibility law; or

d) any person who has filed a bond or otherwise given proof of financial responsibility with respect to his liability for the ownership, use or operation of automobiles.

(3) **Unidentified automobile defined**

An "unidentified" automobile under this subsection means an automobile which causes bodily injury or death to an insured person arising out of physical contact of such automobile with the automobile of which the insured person is an occupant at the time of the accident, provided

a) the identity of either the owner or driver of such automobile cannot be ascertained, and
b) the insured person or someone on his behalf has reported the accident within 24 hours to a police, peace or judicial officer or to an administrator of motor vehicle laws and shall have filed with the Insurer within 30 days thereafter a statement under oath that the insured person or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons who identity cannot be ascertained and setting forth the facts in support thereof; and

c) at the request of the Insurer, the insured person or his legal representative makes available for inspection the automobile of which the insured person was an occupant at the time of the accident.

(4) **Limitation of liability**

a) if claim is made under this subsection and claim is also made against any person who is an insured under section A – Third Party Liability of this policy, any payment under this subsection shall be applied in reduction of any amount which the insured person may be entitled to recover from any person who is insured under section A;
b) any payment made under Section A or under subsections 1 or 2 of section B of this policy to an insured person hereunder shall be applied in reduction of any amount which such person may be entitled to recover under this subsection.

(5) **Determination of legal liability and amount of damages**

The determination as to whether the insured person shall be legally entitled to recover damages and if so entitled, the amount thereof, shall be made by agreement between the insured person and the Insurer.

If any difference arises between the insured person and the Insurer as to whether the insured person is legally entitled to recover damages and, if so entitled, as to the amount thereof these questions shall be submitted to arbitration of some person to be chosen by both parties, or if they cannot

agree on one person, then by two persons, one to be chosen by the insured person and the other by the Insurer, and a third person to be appointed by the persons so chosen. The submission shall be subject to the provisions of the **Arbitration Act** and the award shall be binding upon the parties.

(6) **Notice of legal action**

If, before the Insurer makes payment of loss hereunder, the insured person or his representative shall institute any legal action for bodily injury or death against any other person owning or operating an automobile involved in the accident, a copy of the writ of summons or other process served in connection with such legal action shall be forwarded immediately to the Insurer.

…