

IN THE MATTER OF AN ARBITRATION
PURSUANT TO s. 148.2(1) OF THE REVISED REGULATIONS
TO THE *INSURANCE (VEHICLE) ACT* (BC REG. 447/83) AND
THE *ARBITRATION ACT*, R.S.B.C. 1995, c.55

BETWEEN:

S.D.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION
Re: Preliminary Issue

COUNSEL FOR THE CLAIMANT

Jaspreet Malik, Nina Chohan and
G. Cheema (articled student)
Triton Law LLP
205 – 12565 – 88 Avenue
Surrey, BC V3W 3J9

COUNSEL FOR THE RESPONDENT

Avon Mersey, Q.C. and
Ernest Soares
Singleton Urquhart LLP
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Dates of Hearing

February 4 and 5, 2019

Place of Hearing

Vancouver, British Columbia

Date of Award

February 28, 2019

INTRODUCTION

1. In this arbitration the Claimant, S.D., (the “Claimant”) seeks compensation from the Respondent, Insurance Corporation of British Columbia (“ICBC”) under the Underinsured Motorist Protection (“UMP”) provisions of section 148.2 of the Regulations to the *Insurance (Vehicle) Act*, RSBC 1996, c.231. The claim arises out of a motor vehicle accident that occurred on January 28, 2015 at or near the intersection of State Route 530 and Exit 208 from Interstate 5, in Arlington, Washington State. The parties have agreed to a preliminary determination of the “entitlement” issue. Depending upon the outcome of this issue, a further hearing may be held. In brief, the Claimant settled his claim for tort compensation with the Washington State motorist who struck him, accepting the other motorist’s liability insurance limits and releasing the other motorist and her insurer, all without the knowledge or consent of the Respondent. The issue for determination is whether this conduct results in the loss of the Claimant’s entitlement to UMP compensation from ICBC.

THE MOTOR VEHICLE ACCIDENT

2. The accident occurred on State Route 530 at its intersection with Exit 208 from Interstate 5. State Route 530 runs in an east – west direction. The Claimant was operating his tractor trailer truck and came off Exit 208 in a northbound direction. As he got to the intersection the truck ran out of gas. He stopped the vehicle and activated his four-way flashers. Precisely where the truck stopped is disputed. The Claimant put on his reflective jacket and walked over to speak with another truck driver (“R”). R’s truck was stopped at the intersection in the eastbound lane of State Route 530 nearest the center line. The intersection was controlled by traffic lights. The light was “red” for R. R. was intending to turn left at the intersection to proceed north towards Interstate 5. The Claimant stood on the steps at the driver’s door of R’s truck and they had a conversation about the Claimant’s plight. When their conversation was finished, the Claimant stepped down off the truck steps and was immediately struck by an oncoming westbound vehicle

driven by N. The accident occurred at approximately 11:15 pm. The Claimant's precise location on the road is also contentious.

DISPOSITION OF THE TORT CLAIM

3. N was insured by Geico General Insurance Company ("Geico"). A certificate of N's insurance limits was filed as Exhibit 7. The bodily injury limit was \$25,000 per person. By a Release dated February 2, 2016 the Claimant and his wife together released N and Geico from all claims arising out of the accident in exchange for a payment of \$25,000. (Curiously, another Release in identical form but with different witness certification dated April 2, 2016 was also executed. No explanation for the duplicate Release has been provided but nothing turns on it.) No action was ever commenced in Washington State.

COMMUNICATIONS WITH ICBC

4. The accident was reported to ICBC by the Claimant or possibly his employer on his behalf within 40 days. ICBC was advised that there was an ongoing claim with WorkSafe BC ("WCB") and there was also a travel insurer involved. A file for a Part 7 rehabilitation claim was closed in October 2015. There was no communication from the Claimant or anyone on his behalf between November 2015 and January 17, 2017 when counsel for the Claimant contacted ICBC about the advancement of an UMP claim. ICBC took the position that any UMP claim was barred.

THE UMP ARBITRATION

5. The Claimant commenced this arbitration proceeding. An Amended Statement of Claim was delivered July 24, 2017. The Respondent delivered a Statement of Defence dated August 23, 2017. As noted previously the parties agreed to have a determination of the Claimant's entitlement to UMP compensation prior to any determination of the quantum of compensation. The Amended Statement of Claim alleges in paragraph 11 personal

injuries including a traumatic brain injury, optic atrophy and permanent traumatic optic neuropathy in the right eye resulting in legal blindness and soft tissue injury to the neck, mid and low back and right knee. There are also claims for loss of earnings past and future, and cost of care past and future.

POSITION OF THE PARTIES

6. In brief, the Claimant submits that N is clearly legally liable for the Claimant's injuries even if the Claimant may have been contributorily negligent to a minor degree. An assets search indicates that N has no assets with which to pay any judgment against her. The Claimant is entitled to settle his claim against N without ICBC's consent so long as ICBC is not prejudiced. ICBC has not been prejudiced by the settlement. It can have any issue of the Claimant's contributory negligence determined in the arbitration. The quantification of damages in a Washington State legal action would be irrelevant because in the determination of damages in an UMP arbitration the law of British Columbia must be applied. It is absurd and technical and contrary to principles of statutory interpretation that the Release would bar a subsequent UMP claim.

7. In brief, the Respondent submits that the Claimant is not entitled to UMP compensation because:
 - a. there is no "underinsured motorist" as defined in the Regulation;
 - b. the claim is barred in law because of the Release;
 - c. damages for the injuries is limited to the damages recovered in the settlement;
 - d. ICBC did not consent to the settlement and has been prejudiced by it.

THE STATUTORY PROVISIONS

8. The applicable provisions of the *Insurance (Vehicle) Regulation*, BC Reg 447/83 are as follows:

"Restrictions on Liability

148.2(1) Subject to subsection (1.1), the determination as to whether an insured provided underinsured motorist protection under section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the *Commercial Arbitration Act*.

Underinsured Motorist Protection

148.1(1) In this section:
“underinsured motorist” means an owner or operator of a vehicle who is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death.

148.1(2) Where death or injury of an insured is caused by an accident that

- (a) arises out of the use or operation of a vehicle by an underinsured motorist, and
- (b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America

the corporation shall, subject to subsections (1), (5) and (6) and section 148.4, compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death.

- 148.1(5) The liability of the corporation under this Division for payment under an owner's certificate or driver's certificate of all claims arising out of the same occurrence, including a claim for
- (a) prejudgment interest under the *Court Order Interest Act* or similar legislation of another jurisdiction;
 - (b) post-judgment interest under the *Interest Act* (Canada) or similar legislation of another jurisdiction, and
 - (c) costs awarded by a court or an arbitrator;
- shall not exceed
- (d) the total amount of damages awarded in respect of the accident to all persons insured under the owner's certificate or driver's certificate;
 - (e) the amount determined under section 148.2(1), or
 - (f) the applicable amount set out in section 13 of Schedule 3.
- whichever is least, minus the sum of the applicable deductible amounts.

- 148.2(4) The corporation is not liable under section 148.1
- (a) in respect of an accident occurring in a jurisdiction of Canada or the United States of America in which the right to sue and recover damages for injury or death caused by a vehicle accident is barred by law, or
 - (b) to an insured who, without the written consent of the corporation and to its prejudice, settles or prosecutes to judgment an action against a person or organization that may be liable to the insured for injury to death."

THE EVIDENCE

9. The evidence consisted of oral evidence from the Claimant, R, an ICBC representative Grant Hill, Dennis Woods a Washington State lawyer, an Affidavit from a Washington

State patrol trooper, and multiple read-ins from the Claimant's Examination for Discovery. Both the Claimant and R gave evidence through an interpreter.

AFFIDAVIT EVIDENCE

10. Stuart Keith Gort swore an Affidavit dated January 30, 2019 annexing a true copy of Police Traffic Report No. E408988. Trooper Gort was an investigating officer. The attached report consists of a two page form providing date, time and location of the accident and identification of the parties involved, together with a two paragraph narrative and a computer generated diagram of the accident intersection. The diagram shows the Claimant's vehicle completely blocking the eastbound lanes of State Route 530 with the cab protruding partly into the westbound lane nearest the center line. The diagram also shows the Claimant wholly in the westbound lane at the time of impact. The narrative description of the accident is reproduced below. "Unit 2" is the Claimant.

"Unit 2 is operating a commercial motor vehicle ("CMV") when it becomes disabled after running out of fuel at the intersection of State Route 530 and the northbound I-5 and off ramps. The CMV completely blocks eastbound SR530. Unit 2 then exits the CMV and walks westbound in the roadway of westbound SR530. A witness states that Unit 2 then stopped and stood on westbound SR530 just inside of the center line while requesting his assistance. Unit 1 then travels westbound through the intersection and past the disabled CMV. Driver 1 stated that her view was obstructed by the disabled CMV and that the lights from the vehicle in the surrounding area made it difficult to see. Unit 1 then strikes Unit 2 as he is standing in the westbound lane of SR530. Witness statements taken."

11. No witness statements are attached to the report. The diagram lacks some markings, such as stop lines which are evident from photographs of the accident scene. There are no measurements of any kind nor is there any accident reconstruction analysis.

EVIDENCE OF R

12. R was the driver of the "B-train" stopped at the intersection in the eastbound lane. He has held a Class 1 driver's license since 2005. He has driven through this intersection approximately once a week since 2005 and was completely familiar with the intersection. He stopped for a red light. He was intending to turn left when the light changed. The right side of his vehicle was close to the white line separating the two eastbound lanes. There was some space between the driver's side of his truck and the center line. He was also stopped quite a bit west of the stop line for eastbound traffic. He observed the Claimant's truck stopped in the intersection. The Claimant then backed his truck up a little bit so that the cab was partially obstructing eastbound traffic in the curb lane of State Route 530. The Claimant activated his four-way signals, put on his safety vest and walked over to R's truck. R activated the four-way flashers on his own truck. The Claimant stood on the steps of R's cab. They talked for a short time. The Claimant was out of gas and asked if R had an extra gallon can. R said he did not and directed the Claimant to a gas station that was a short distance west of the intersection and on the north side of State Route 530. The Claimant indicated he would go to the gas station. The Claimant stepped down from the cab and was almost instantly struck. When he stepped down the Claimant would have been about six inches from the yellow center line in the eastbound lane. At impact the Claimant would have been within one foot either side of the yellow center line. R never saw the westbound vehicle prior to impact. The westbound vehicle was in its own lane. The Claimant was struck by the front bumper of N's car near the left headlight and thrown into the windscreen on the driver's side. He struck the windscreen and not the "A" pillar. N's vehicle travelled some distance west before coming to a stop on the north side of State Route 530.
13. R disagrees with the location of the Claimant's truck shown in the police diagram. In its stopped position after rolling back the cab of the Claimant's truck was partially blocking the curb eastbound lane on State Route 530. Whilst it was stopped in that position and prior to the accident other vehicles in the curb lane eastbound were able to drive around the cab and proceed through the intersection.

14. R stayed with the Claimant at the accident scene and accompanied him in the ambulance to hospital.

EVIDENCE OF THE CLAIMANT

15. The Claimant is a 49 year old truck driver with a grade 10 education who came to Canada in 1997. He is married with two children and lives in Delta, British Columbia. He obtained a Class 1 driver's license in 2014. He had been driving the route between Vancouver, British Columbia and Portland, Oregon for about 1.5 months prior to the accident. The accident occurred between 10:00 and 11:00 p.m. He was driving a Kenworth 660 truck – trailer unit. He took the 208 Exit off Interstate 5. He was intending to buy gas and stay overnight at the 208 truck stop. Prior to approaching the intersection of the 208 Exit and State Route 530 he had noticed that the fuel level needle had started moving back and forth and subsequently a red fuel light appeared. As he proceeded to turn left at the intersection the engine stopped and he could not restart it. He allowed his vehicle to roll backwards and stopped it with the front of the cab partially blocking the curb lane for eastbound traffic on State Route 530. He activated his four way flashers, put on his safety jacket and walked over to R's truck stopped in the eastbound lane nearest the center line of State Route 530. R's flashers were also on. He got up the steps at the driver's door and talked to R for possibly one to 1.5 minutes. He did not recall their discussion. He got down from the steps but has no memory of following events.
16. He sustained multiple injuries in the accident including permanent restricted vision in his right eye. He continues to take pain medication. He was off work for seven to nine months after the accident. He tried unsuccessfully to return to work as a truck driver. He now works part-time as a pizza delivery driver.
17. After the accident repairs were done to the truck's fuel gauge which the Claimant asserts was faulty.

18. On cross-examination the Claimant agreed that because of the injuries he suffered in the accident he now has a problem with his memory. He has forgotten some things about the accident and has only a partial recollection of others.

19. He agreed that the limit of 11 hours per day driving time for a driver is for safety reasons. He agreed that his driver's log showed that he had been driving 10 hours and 45 minutes at the time of the accident. He agreed that his wife filled out his last entry later, and estimated the time of the accident. He thought the accident occurred around 10:00 pm. He denies underestimating his driving hours that day.

20. On the morning of the accident the gas gauge showed half a tank. That should easily have been sufficient for him to reach the Exit 208 gas stop. He was intending to fill up at the Exit 208 gas stop. He also needed to have a rest. The red warning light had been on for two to three kilometers prior to reaching the 208 Exit ramp. The Claimant denied that he "took a chance" that he could reach the gas stop but agreed that he was "hoping to make it". After his truck broke down, his intent was to get enough gas to move the truck off the road. He agreed it was a hazard to other vehicles. From the driver's door of R's cab, the Claimant would have to cross the westbound lanes of State Route 530 in order to get to the gas station. He does not remember looking for westbound traffic before stepping away from R's truck. The Claimant denies being in a hurry to get to the gas station. It was diesel fuel that he required. It is available at truck stops.

21. On discovery the Claimant was shown the police diagram in which his vehicle is entirely blocking the eastbound lanes of State Route 530 and the cab is protruding into the westbound lane nearest the center line. He initially agreed at question 293 that the diagram showed where his truck stopped. However, at question 296 he added that he moved the truck back from its initial position and did not agree, because he could not remember, that his truck was in the position shown on the police diagram at the time of the accident. As noted previously, in his oral testimony at the arbitration hearing the

Claimant was quite sure that the cab of his truck was only partially obstructing the curb lane for eastbound traffic.

EVIDENCE OF DENNIS WOODS

22. Mr. Woods is a duly qualified attorney licensed to practice law in the State of Washington. He provided an expert report dated May 9, 2018 (Exhibit "1" on the arbitration). Mr. Woods was asked to provide an opinion on various aspects of procedural and substantive matters under Washington law. His opinions in Section D of his report maybe summarized as follows:
- a. The plaintiff in a personal injury action could sue in either Federal or State Superior Court. A trial by jury is available as a matter of right.
 - b. Discovery of parties and witnesses is permitted prior to trial.
 - c. Witnesses may be subpoenaed requiring attendance at trial.
 - d. Discovery is not available now because the claim has been settled.
 - e. Because of the settlement the following procedural processes are not available:
 - i. Choice of jurisdiction and venue;
 - ii. Written interrogatories;
 - iii. Requests for production of documents;
 - iv. Requests for admissions;
 - v. Depositions of parties and witnesses;
 - vi. Compulsory process over the parties;
 - vii. Subpoena power over third parties located in Washington State;
 - viii. Discovery of insurance policies;
 - ix. Right of inspection of the vehicles involved;
 - x. Trial by jury if elected;
 - xi. Debtor exam by creditor if a verdict were rendered.
23. Washington is a comparative fault state. A defendant has the burden of proof in allocating any fault to a plaintiff.

24. In the event of a judgment that was not paid, then subject to various exemptions, a judgment creditor has various forms of execution available to satisfy an unpaid judgment. A creditor may examine the debtor under oath concerning available assets.

25. Based upon assumptions that Mr. Woods was asked to make concerning the circumstances of the accident, he provided an opinion that the Claimant would likely be found to be at fault in the range of 25% to 40% if the matter had been litigated in Washington. In his oral evidence Mr. Woods provided the opinion that if the Claimant was struck in the westbound lane but within six inches of the center line his degree of fault would probably be towards the lower end of the range. He also added that the single most important factor on the comparative fault issue was where the Claimant was standing at the time of impact. There were other important factors but the position at impact was the primary one.

26. Mr. Woods also provided an opinion that the Releases have the legal effect of precluding any claims against either N or Geico and preclude any further monetary obligations of either N or Geico arising out of the accident. The Releases are valid and enforceable under Washington State law. Had no Release been signed, a court or jury could award any monetary amount that was proved by the evidence at trial. Recovery would be limited by N's assets and limits of insurance.

EVIDENCE OF GRANT HILL

27. Mr. Hill is an ICBC litigation claims' manager with approximately 7 – 8 years' experience dealing with out of province UMP claims. He provided evidence regarding ICBC's general practice when potential UMP claims are reported to it. With respect to this particular claim the claim was first reported within 40 days after the accident possibly by the Claimant's employer. It was initially reported as a Part 7 only claim with the further advice that the Claimant was proceeding to WorkSafe BC. Nothing was done and the rehabilitation department closed its file in October 2015. No UMP file was opened. There was no communication between November 20, 2015 and January 17,

2017 when the Claimant's counsel contacted ICBC regarding an UMP claim. The claim against N had already been settled. There was never a request for ICBC's consent to the settlement. ICBC was unaware of it.

28. It would be difficult now for ICBC to mount a liability defence including proving contributory negligence on the part of the Claimant. The Defendant has been released and it would be difficult to compel her to give evidence in the arbitration. There is minimal police information. It would be problematic to get an order for production of the full police file, assuming there is more, in order to support the accuracy of the police diagram.
29. If consent had been requested then ICBC would have become fully involved in this potentially serious injury by getting available medical records, independent medical examinations and would have conducted a wage loss investigation.
30. Had consent been requested the Corporation would have certainly required a statutory declaration from N regarding her assets and may also have conducted its own investigation. The "asset report" (Exhibit 8 – letter from Daniel & Associates, Investigations dated March 18, 2016) would have been pursued further because of the reference to the sale of property in February 2015 for \$99,500.
31. A full liability investigation may have involved retaining accident reconstruction engineers, experts in human factors, as well as lighting experts.
32. Given the limited information known even now concerning the circumstances of the accident, the injuries of the Claimant and the assets of N, Mr. Hill would not have consented to the settlement with N and Geico.
33. Mr. Hill also relies upon the various items identified in the report of Mr. Woods as further evidence of prejudice to ICBC.

34. The effect of the settlement is that legal liability of N has not been established, nor has the extent of any contributory negligence on the part of the Claimant been established.
35. On cross-examination Mr. Hill agreed that ICBC would not have any standing in any Washington State action, had one been commenced. ICBC would be dependent upon persuading Geico's appointed defence counsel to take advantage of procedural steps that might assist in the defence of the claim on liability and limit the quantum of damages.
36. Mr. Hill further agreed that in cases where consent to settle is granted, the quantum investigation mostly occurs after settlement although there is always a minimal investigation respecting quantum before settlement is permitted.
37. Mr. Hill agreed that had a Washington State action proceeded to trial ICBC would not have had access to N and would be bound by the outcome on the liability issue which would be decided according to Washington State law. ICBC has not approached N to see if she would be willing to cooperate.
38. There is no ICBC policy requiring obtaining a statutory declaration from a tortfeasor in these circumstances but it is Mr. Hill's practice to do so. The extent of injuries is not so important a factor in determining whether ICBC will consent to a settlement. In this case liability for the accident was unclear and required determination in Washington State. In addition there were insufficient details of N's assets. ICBC has not done any investigation of N's assets. While not agreeing that the police officer's report was "woefully inadequate", Mr. Hill agreed that it is missing witness names, does not have statements attached and does not ascribe information to any particular individual.

DISCOVERY READ-INS

39. Additional evidence was adduced by way of read-ins, without objection, from the Examination for Discovery of the Claimant on November 2, 2017. The additional information included the following:

- a. The Claimant signed a letter prepared by his own lawyers dated February 2, 2016 in which he acknowledged that he was releasing any claims against the other motorist and Geico and that he did not wish to proceed civilly against the other motorist in the United States (question 449 – 451).
- b. The Claimant did not recollect when was the last time before the accident that he put fuel into the truck (question 143).
- c. The red light indicates that the truck is almost out of fuel (question 278).
- d. About 10 minutes before the truck stopped running the Claimant saw the red light and saw the gas needle moving (question 286).
- e. There were lights at the intersection (question 405).
- f. The Claimant did not remember whether the other truck driver was outside his truck or inside his truck when they spoke (question 437).
- g. The Claimant agreed that the police sketch accurately showed where he was hit (question 312).
- h. Q.487: And I suggest to you the reason why you ran out of gas is you are tired and you did not pay attention to the gas gauge

A. I don't recollect. Could be so.

ISSUES FOR DETERMINATION

40. The issues for determination are as follows:

- a. Is there an underinsured motorist?
 - b. Is the claim barred under Regulation section 148.2(4)(a)?
 - c. Is the quantum of the claim restricted by the terms of the Release to the amount paid in exchange for the Release?
 - d. Is the claim barred by section 148.2(4)(b) i.e. settlement without ICBC's consent to the prejudice of ICBC?
41. The onus of establishing on the balance of probabilities the existence of an underinsured motorist is on the Claimant in order to bring himself within the scope of the insuring agreement in section 148.1(2). The onus of proving on a balance of probabilities that the claim is barred under either section 148.2(4)(a) or (b) is on ICBC. The ultimate outcome however does not depend upon the burden of proof.

SUBMISSION OF THE CLAIMANT

42. The definition of "underinsured motorist" requires three elements to be proven. There must be (1) an owner or operator of a vehicle who is (b) legally liable for the injury of the Claimant and (c) who is unable to pay the full amount of the Claimant's damages. It is admitted that N was the operator of the vehicle that struck the Claimant. On the evidence that has been adduced, including Mr. Woods' opinion, it is clear that N is legally liable for the Claimant's damages subject to some possible reduction for the Claimant's contributory negligence. Mr. Woods' opinion on his assumed facts is that N would likely be found 60% to 75% liable. Geico obviously thought N was legally liable as they quickly offered their policy limits. Based on the evidence adduced in the arbitration, N would be legally liable. She struck the Claimant on the highway at a well-lit intersection in the presence of two tractor-trailer units each displaying their four way flashers. The Claimant submitted that liability for the accident should be determined based on the evidence in the arbitration with the consequence that there would be no further hearing on

liability. As I indicated to counsel during this submission, this hearing was to decide a preliminary issue of entitlement only and it was not open to me to make any final determination of liability in this hearing.

43. With respect to N's ability to pay the Claimant's damages, the evidence supports her inability to do so. Based on the Claimant's testimony, his injuries are serious. He suffered a head injury, a permanent right eye injury, suffers some cognitive impairment and likely depression, and has been incapacitated from his occupation as a long haul trucker. This evidence suggests a sizeable assessment of damages.
44. The evidence indicates that N has no assets. That is the conclusion of Daniels and Associates Investigations (Exhibit "8"). There is no contradictory evidence. ICBC has not even attempted to investigate N's assets or lack of them.
45. With respect to the settlement and Release issue, the Claimant submits that ICBC's position is completely technical and not consistent with the proper statutory interpretation of the legislation. An interpretation most favourable to the insured should be preferred (*Somersall v. Friedman*, 2002 SCC 59). In this respect the Claimant is entitled to reach a settlement with N without ICBC's consent so long as ICBC is not prejudiced. With respect to the prejudice issue, the Claimant submits that ICBC is not prejudiced. It can raise and have determined in the arbitration the issue of any contributory negligence on the part of the Claimant. It can fully investigate the quantum of the claim in the arbitration proceeding by way of Examination for Discovery, production of clinical records and obtaining independent medical examinations. It can conduct its own investigation of N's assets. The claim of prejudice is theoretical. ICBC has not attempted any liability investigation nor sought the cooperation of N nor investigated any possible assets of N.
46. The Claimant submits that the analysis in *Beauchamp v. ICBC* should not be followed but a different approach taken. Legal liability should be determined as of the time of the

accident relying on *Somersall*. The prior arbitration decision in *GG* is distinguishable because there was no concession in that case that the injury was significant.

47. Regulation section 148.2(4)(a) should be interpreted to mean an action is barred at law in the first instance.

SUBMISSION OF ICBC

48. ICBC submits that the Claimant has not proven the existence of an underinsured motorist. It relies upon *Beauchamp v. ICBC* (2005 BCCA 507), as well as the prior arbitration decisions in *GG v. ICBC* (BCICAC File Number DCA-1242-UMP, September 23, 2010) and *Undisclosed v. ICBC* (28 August 2009, J.J. Camp Q.C., Arbitrator). These decisions are relied on for the proposition that absent consent from ICBC to proceed to an UMP arbitration, arbitration is not available until there is a determination by judicial decision that a tortfeasor is legally liable for the injury of an insured and is unable to pay the full amount of the insured's damages. In the present case there has been no judicial determination of N's legal liability nor any assessment of the Claimant's damages and no determination of N's inability to pay an undetermined sum.
49. In the alternative, ICBC submits that it is not liable to pay compensation because the Release executed in favour of N and Geico means that the right to sue and recover damages is barred by law. The Corporation relies upon section 148.2(4)(a).
50. In the further alternative, ICBC submits that by the terms of the Release, the Claimant has acknowledged payment for all the damages he sustained as a result of the accident. The insuring agreement in section 148.1(2)(b) requires the Corporation to compensate an insured for any amount he is entitled to recover from the underinsured motorist as damages for the injury. By granting a full release, there is nothing more that the Claimant is entitled to recover from N.
51. In the further alternative and relying on Regulation 148.2(4)(b) the Corporation submits it is not liable to pay UMP compensation because the Claimant without ICBC's written consent and to its prejudice settled his claim against N. It is conceded that ICBC's

consent to the settlement was never sought. ICBC relies upon the evidence of Mr. Woods and Mr. Hill to establish prejudice. While conceding that ICBC would not have had control of the defence of any action commenced in Washington State, ICBC says it has lost the benefit of whatever steps Geico's defence counsel would have taken in defence of the claim; ICBC has lost the judicial determination of fault between N and the Claimant; ICBC has lost the benefit of knowing the evidence that would be put forward in support of the claim for damages, even if the determination of the quantum of damages in the Washington State action would not be the basis for determining the quantum of UMP compensation.

52. ICBC submits that "legally liable" means a judgment, and not just someone's opinion that N would be liable. Even if liability could be determined in the arbitration, ICBC is still prejudiced because of the loss of entitlement to a jury trial and because of the anticipated difficulties in obtaining the evidence of the investigating police officer and N at the arbitration hearing.
53. ICBC also submits that the question of prejudice is not a "balancing" issue; if there is any prejudice, then section 148.2(4)(b) applies.

DISCUSSION AND ANALYSIS

54. This hearing was agreed to by the parties to determine a preliminary issue of entitlement to UMP compensation based upon the Claimant having settled his claim against N without ICBC's consent. Although much of the oral evidence dealt with the circumstances of the accident, it is not the arbitrator's role in this hearing to determine actual liability for the accident. I do not make any findings of fact concerning actual liability for the accident so as not to prejudice any subsequent hearing at which fault for the accident may be a specific issue for determination. Even if I were to conclude that a judgment against N is not a prerequisite for the Claimant pursuing this UMP arbitration I would still not make any findings as to actual fault for the accident. This hearing was not established for that purpose and I am acutely aware that there is no evidence before me from N. She did not give viva voce evidence nor is there any statement that she may

have given to the police or anyone else. What I do conclude from the evidence that has been adduced is that liability for the accident, and probably particularly contributory negligence on the part of the Claimant, is a real issue requiring determination.

IS THERE AN UNDERINSURED MOTORIST?

55. There is considerable judicial history in British Columbia in support of the proposition that in order to be entitled to access UMP compensation an insured claimant must either have the consent of ICBC or a judicial determination against the underinsured motorist.
56. Chronologically the starting point is *Dahl v. Whitehill* (New Westminster Registry No. SO-6905, January 2, 1996). *Dahl* involved an application to have an UMP arbitrator determine whether the claimant was contributorily negligent for accepting transportation with an impaired driver. It was known that the claims of the claimant and another person would exceed the limits of the tortfeasor's liability insurance. The plaintiff and ICBC had agreed that there needed to be a determination of the quantum of the plaintiff's damages. ICBC wished to have the arbitrator determine whether the plaintiff was contributorily negligent and brought the application. In dismissing the application Hogarth, J. concluded that section 148.2 did not apply until there had been a determination that there was an "underinsured motorist". At paragraph 13 and 14 he stated:

"13. In my view subsection 148.2 does not apply until it has already been determined that a person claiming, the "insured", is claiming as a consequence of an accident with an "underinsured motorist", that is someone who is unable to pay the full damages awarded to the insured. This amount can only be claimed in the action and after a trial or an assessment. The third party can defend the action in the stead of the defendant if it so desires and raise the question of contributory negligence, but before any claim can be made

under the provisions of an UMP the final amount in the action is to be determined, as until then there is no “underinsured motorist”.

14. The amount that is to be arbitrated is the amount finally determined in the action as it is affected by the “deductibles” and other sums mentioned in section 148.1.”

57. In *Beauchamp v. ICBC* (2005 BCCA 507) a claimant brought a petition seeking an order that an arbitrator be appointed to determine whether the petitioner was entitled to advance an UMP claim. A master granted the order which was overturned by a chambers judge on appeal. The petitioner appealed to the Court of Appeal. The Court of Appeal concluded that the UMP claim could not proceed. The circumstances of the application were unusual. The plaintiff was a passenger in a vehicle stolen by the driver who lost control of the vehicle and rolled it. The only evidence on the application was an Affidavit from the petitioner’s solicitor repeating the allegations in the Statement of Claim and swearing them to be true without stating the source of knowledge. The appointment of an arbitrator was sought “on the assumption that judgment has been obtained against the tortfeasor and on the assumption the tortfeasor is unable to satisfy the judgment”.

58. In affirming the chambers judge’s decision to dismiss the petition for the appointment of an arbitrator, the Court of Appeal stated as follows:

At paragraph 7:

“The basic idea of the underinsured motorist protection (“UMP”) scheme to provide insurance coverage to persons who are injured or killed in a motor vehicle accident, where the person responsible for the accident is unable to pay the full amount of damages recoverable by the insured person, or by the deceased’s personal representative”. Under section 148.1(2) ICBC’s obligation to compensate does not arise until the person

claiming to be entitled to UMP coverage can show they are an “insured”, and that the injuries, or death, resulted from an accident with an “underinsured motorist”, that is someone who:

- a. was the owner or operator of a vehicle;
- b. is “legally liable” for the injuries of the insured;
- c. is unable to pay the full amount of the claimant’s damages.”

59. Counsel for the petitioner argued that “legally liable” did not mean that there had to be a judicial determination of the motorist’s liability before the definition could be satisfied and the arbitration could be engaged under section 148.2.

60. The court concluded that arbitration could not proceed on a hypothetical basis. At paragraphs 23 and 24 the court said:

“23. Arbitration is not available until it is shown that the person claiming is an “insured”, and is claiming in relation to an accident with an “underinsured motorist.” The definition of “underinsured motorist”, set out above, contains three elements. A person falls within the definition if he or she: (1) is the owner or operator of a vehicle; (2) is legally liable for the injury or death of an insured; and (3) is unable to pay the full amount of the insured’s damages.” (emphasis added)

24. Until those facts are either determined by judicial decision, or by admissions, there is no “underinsured motorist”, and the arbitration provisions of the *Regulations* cannot be engaged.” (emphasis added)

61. Finally, at paragraph 28, the court said:

“I also agree that in order to engage the arbitration provisions in section 148.2 it must first be determined, judicially or by admissions, that there is an “underinsured motorist”. The master’s order was based on assumptions and

purported to engage **Regulation** 148.2 on a hypothetical basis. This is not permissible under the **Regulations.**” (emphasis added)

62. While the circumstance raised by the underlying facts was whether an arbitration could proceed based on hypothetical facts, the court twice at paragraph 24 and at paragraph 28 stated that the arbitration provisions in section 148.2 could not be engaged unless there was a determination, by judicial decision or by admissions that there is an “underinsured motorist”.

63. In *Undisclosed v. ICBC*, an arbitration dated September 17, 2009 by arbitrator Camp, Q.C., the issue was whether the determination of the quantum of damages by a Washington State jury was binding on ICBC in the subsequent UMP arbitration. Arbitrator Camp found that it was not binding relying upon the clear meaning of Regulation 148.2(6)(b). In the course of his decision Arbitrator Camp stated at paragraphs 21 and 22 as follows:

“21. On the facts of this case ICBC concedes the claimants have satisfied all of the prerequisite requirements laid down for UMP coverage. Hence, it is conceded that the Washington jury verdict established liability on the underinsured motorist, resolved issues of contributory negligence and established that the damages attributable to the fault of the underinsured motorist exceeded the insurance limits and assets available to compensate the claimants. Put another way, it is conceded that the Washington jury verdict determined that the claimants are “insureds” and (redacted) is an “underinsured motorist” for the purposes of the UMP scheme.

22. In the majority of cases, in my experience, the parties (ICBC and the claimants) agree that the prerequisites for UMP coverage have been satisfied and the parties arrive at a settlement pertaining to UMP compensation. Where the parties cannot agree, ICBC can follow one of two courses of action. ICBC can either require that the claimant(s)

proceed to a tort trial to determine the prerequisites necessary for UMP arbitration, or they can agree that those prerequisites have been met and proceed to an UMP arbitration by consent.”

64. In that case ICBC required a tort trial to determine the prerequisites necessary for UMP arbitration.
65. In *GG*, the claimant settled with the tortfeasor by accepting his share of the insurer’s limits that had to be shared with three other claimants. The accident involved an intersection collision. GG was the driver of one of the vehicles. In an action commenced in Washington State the defendant (other motorist) had admitted sole liability for the accident and not pled contributory negligence against GG. ICBC permitted the three other claimants to settle their claims against the tortfeasor and paid some UMP compensation to each of them. It refused to consent to a settlement of GG’s claim as it wished to have determined the issue of possible contributory negligence on the part of GG. GG proceeded to settle his claim, executed a release of the tortfeasor and consented to the dismissal of the Washington State action. The tortfeasor executed a statutory declaration evidencing an inability to pay any judgment.
66. Relying on the *Dahl* and *Beauchamp* decisions ICBC argued that there was no “underinsured motorist”; that the settlement and release precluded legal entitlement to any further compensation; and that there was a breach of section 148.2(4)(b).
67. The claimant argued that legal entitlement had been conclusively established under Washington law by the tortfeasor’s admission of sole liability for the accident. By making UMP payments to the other three claimants, ICBC was precluded from denying that the tortfeasor was unable to satisfy any further damages.
68. In *GG* the arbitrator concluded that in order to be entitled to proceed with an UMP claim, there had to be either an unsatisfied judgment in the underlying tort claim or ICBC’s consent. The decision in *Somersall v. Friedman* (2002 SCC 59) was considered but found not to be a “third way” to proceed to UMP arbitration under the BC legislative

scheme. The arbitrator also concluded that ICBC had not been prejudiced by the settlement of the Washington State action because, the tortfeasor having admitted sole liability for the accident in the pleadings, the issue of contributory negligence on the part of GG was not going to be an issue had the Washington action proceeded to trial.

69. In *Lee v. ICBC* (Arbitration decision, June 29, 2016; supplementary decision, July 5, 2016, Mark Tweedy, Arbitrator) Mr. Lee was injured in a parking lot accident in Everett, Washington. The other motorist's liability insurer offered its policy limits of \$100,000 US in settlement. The claimant requested ICBC's consent to settle which was refused in writing. ICBC's reason for refusal was that it was not clear whether a Washington State jury would award damages in excess of \$100,000 US; therefore without a decision there was no proven underinsured motorist. Mr. Lee accepted the limits offer without ICBC's consent.
70. Relying upon *Dahl*, *Beauchamp* and *GG*, ICBC submitted that a party only has two ways in which to establish whether someone is an underinsured motorist: either by a judgment obtained in the underlying tort proceeding or with ICBC's consent. Mr. Lee argued that the *Beauchamp* and *GG* decisions were distinguishable because in those cases there was a liability dispute in the underlying tort action. Mr. Lee further asserted the right to settle without ICBC's consent providing ICBC was not prejudiced, relying on section 148.2(4)(b).
71. The arbitrator determined that the existence or not of a liability issue in the underlying tort proceeding was not material to the result in either *Beauchamp* or *GG*. The authorities required that the determination of an underinsured motorist could only be accomplished where there was a judgment in the underlying proceeding or the consent of ICBC. In dicta, the arbitrator held that the argument that consent to settle was not required if there was no prejudice was "akin to trying to establish that an exception to an exclusion creates coverage and ignores that he has not bought himself within the insuring agreement". In any event the arbitrator concluded that there was "obvious prejudice" to ICBC in that it was deprived of the possibility that a Washington State jury would award damages within

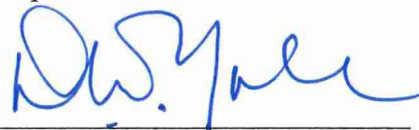
the policy limits of \$100,000 US which would amount to a judicial determination that there was no underinsured motorist.

72. In supplementary reasons the arbitrator held that it was not his function to determine if the tortfeasor was an “underinsured motorist”. “Whether someone is an underinsured motorist can only be determined by there being a judgment in excess of policy limits and an inability of the tortfeasor to pay that judgment, or if ICBC admits these matters.” The arbitrator rejected a submission that any prejudice to ICBC arising from the settlement could be satisfied by award of costs in the arbitration to ICBC if ICBC were successful. The arbitrator repeated at paragraph 6 that “the true prejudice to ICBC is that the Washington State action did not proceed to judgment, which might have resulted in a judgment for less than the tortfeasor’s policy limits, thus eliminating an UMP claim”.
73. In my view *Beauchamp* is authority binding on me. It stands for the proposition that there are only two ways for a claimant to establish the existence of an underinsured motorist so as to be entitled to proceed to an UMP arbitration. Those two ways are an unsatisfied judgment in the underlying tort action or the consent of ICBC. Claimant’s counsel invited me to adopt a different approach from *Beauchamp* but did not articulate a legal basis on which I should not follow *Beauchamp*.
74. *GG* considered whether the *Somersall* case provided a “third way” to advance an underinsured motorist to claim. For the reasons articulated in *GG* based upon the significant differences between the BC legislation providing for UMP compensation and the SEF44 endorsement I concluded that the “third way” option was not available in British Columbia. In the present case there never was an action commenced against N and ICBC’s consent to settlement was never requested. Accordingly I am compelled to conclude that the Claimant has not proven the existence of an “underinsured” motorist and is therefore not entitled to UMP compensation.
75. In the event the above conclusion is found to be incorrect I will address the issue of prejudice. In my view ICBC has suffered prejudice by being deprived of the opportunity to have the issue of legal liability determined in a Washington State action. As noted

previously, based on the evidence adduced in the arbitration hearing I am satisfied that there was a real issue with respect to the allocation of fault for this accident. N's evidence regarding the circumstances of the accident is not available. Mr. Woods' opinion does not have any assumptions based on information from N. If, contrary to all evidence at this hearing, N were to say that the cab of the Claimant's truck was protruding into her westbound lane and the Claimant appeared suddenly in front of her vehicle, an apportionment of fault might be quite different from Mr. Woods' opinion in his report. While what N's evidence might be is speculative, the physical circumstances of the accident raise a serious issue regarding the proper allocation of fault for the accident according to Washington State law. ICBC has been deprived of the opportunity of having that allocation, which would be binding on it, determined in a judicial proceeding in Washington State, according to Washington State law.

76. With respect, it is not a complete answer for the Claimant to say that ICBC is not prejudiced because the issue of allocation of fault can be determined in the arbitration. N has no obligation to cooperate with ICBC in a determination of fault. She has been released from any further claim and has no financial interest in the outcome of the arbitration. Had an action proceeded in Washington State, she would have owed a contractual obligation to cooperate with Geico and her failure to do so could have jeopardized her insurance coverage.
77. If fault for the accident had to be determined in the arbitration, to the extent ICBC alleged contributory negligence against the Claimant, it would have been required to prove Washington State law, necessitating obtaining an expert opinion, which would not have been necessary had the issue be determined in a Washington State action.
78. While it may be possible for ICBC in the arbitration to compel N to attend or give evidence and to compel the Washington State police to produce any further records they may have, neither of these steps are straightforward; they are not assured of success; and they would also not have been necessary had fault for the accident been determined in a Washington State action.

79. ICBC also asserts prejudice by the loss of access to various procedural steps available to the defence in Washington State. ICBC would not have been a party to a Washington State action. It would not have had conduct of the defence. It has not identified any particular procedural right that would have been exercised at its behest that has been lost. It is not proven, for example, that it would have wanted a trial by jury and Geico would have agreed to stipulate for a trial by jury. In the absence of such particular evidence, I view the evidence of the various procedural steps available in the civil lawsuit under Washington State law to be another way of asserting that ICBC was entitled to have a determination of liability and damages in a Washington State action according to Washington State law.
80. This is consistent with the decision in *Beauchamp* and the scheme of UMP compensation that in the absence of ICBC's consent to a settlement, there will be a judicial determination of both legal liability of a tortfeasor and an inability to pay damages assessed in order to establish the presence of an underinsured motorist.
81. I also find that ICBC has been prejudiced in its ability to assess N's ability to pay any damages. I accept Mr. Hill's evidence that he would have required N to swear a statutory declaration as to assets and that he would have required an explanation of the sale of the property she owned in February 2015. N has no obligation or incentive now to provide any information if ICBC requested it. N would have had such an incentive if the release of any claim against her depended upon providing such information.
82. I do not find it necessary to address the application of Regulation section 148.2(4)(a).
83. In conclusion I find that the Claimant has not proven that N is an underinsured motorist. I further find that ICBC has been prejudiced by the without consent settlement of the claim against N.
84. In the result, the Claimant is not entitled to UMP compensation.



Donald W. Yule, Q.C., Arbitrator