

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I.8.as amended, s. 268 and ONTARIO REGULATION 664

AND IN THE MATTER OF THE ARBITRATIONS ACT,
S.O. 1991, c.17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

AMERICAN HOME ASSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Tricia J. McAvoy for the Applicant

J. David Murphy for the Respondent

ISSUE:

Which of the Fault Determination Rules, if any, contained in Regulation 668 of the *Insurance Act* apply to the accident that took place on February 21, 2005 in the eastbound lanes of Highway 401 near London, involving James Stenabaugh?

RESULT:

1. The accident is not described in any of the Fault Determination Rules, and consequently, section 5 of the Rules mandates that the degree of fault of American Home Assurance's insured driver be determined in accordance with the ordinary rules of law.
2. When the rules of negligence are applied, Mr. McMahon is 100% liable for the accident, and therefore Mr. Jacques, American Home Assurance's insured, is not at all liable for the accident.
3. Accordingly, Allstate is not entitled to seek indemnification from American Home Assurance for the amounts it has paid out in accident benefits to James Stenabaugh.

HEARING:

The arbitration hearing took place on December 3 and 4, 2007 in the City of London, Ontario before me, Shari L. Novick, Arbitrator.

THE FACTS:

The accident in question took place on the morning of February 21, 2005, in the eastbound lanes of Highway 401, near mile marker 222. The parties agree that a Ford Taurus insured by Allstate Insurance ("Allstate") and driven by James Stenabaugh, collided with a Freightliner tractor trailer insured by American Home Assurance Company ("American Home") and driven by William Jacques. It is also agreed that the tractor trailer is a "heavy commercial vehicle" as defined in section 9 of Regulation 664, and that therefore the Loss Transfer provisions apply.

Mr. Stenabaugh suffered significant injuries in the accident. Allstate continues to pay him statutory accident benefits, and seeks indemnification from American Home for the amounts paid out to date, as well as for any amounts owing in the future. Counsel agreed that the amount in issue as of the date of the hearing was \$106,295 (net of the \$2,000 deductible).

The parties also agree that a third vehicle, a Pontiac Sunfire driven by Sean McMahon, was also involved in the accident. The evidence establishes that this vehicle first struck Mr. Stenabaugh's vehicle, and that this impact actually caused the subsequent collision between the Stenabaugh vehicle and the tractor trailer driven by Mr. Jacques. Although the sequence of events leading up to the collision between these two vehicles is somewhat complicated, the only material fact in dispute was the location on the road of the Stenabaugh vehicle prior to this collision.

Mr. Stenabaugh was unable to testify at the hearing, due to his injuries. I was advised that in any event, he has no memory of the accident or the circumstances leading up to it.

I heard evidence from four witnesses – William Jacques, the driver of the tractor trailer insured by American Home, Sean McMahon, the driver of the Pontiac that first came into contact with Mr. Stenabaugh's vehicle, Police Constable Narancsik, one of the two officers who initially investigated the collision, and Police Constable McEvoy, the Technical Traffic Collision Investigator who conducted the technical analysis at the accident scene a few hours after the accident had occurred.

Both Mr. Jacques and Mr. McMahon were interviewed immediately after the collision, and provided statements to the police, which were relied on at the hearing. As well, the two police officers generated written reports in the course of their duties, and these were also reviewed in detail at the hearing, and relied on by counsel.

The essence of the oral evidence provided at the hearing was as follows:

Sean McMahon

Mr. McMahon testified that he was driving eastbound on Highway 401 with two passengers in his vehicle on the morning in question. He recalled being in the passing lane, behind a row of cars, when he noticed that the cars in front of him were all changing into the center lane. He then became aware of a thin layer of snow covering the road surface in his lane, and worried that the snow might be concealing some ice. He explained that he also decided to move his vehicle into

the center lane. He recalled there being a long line of cars beside him in the center lane, with no room to shift over, and stated that he decided to accelerate and attempt to pass the front car in the row. He testified that as he began moving his car over it started to “wobble”, and then went into a spin. Once the car was spinning he could not recall exactly how or where the car traveled, but was aware that it cut across three lanes of traffic, finally ending up in the ditch at the side of the road, facing the opposite direction.

Mr. McMahon testified that while he could not be certain, he thought his vehicle had likely struck Mr. Stenabaugh’s Ford Taurus as it was spinning across the lanes. He recalled the Stenabaugh vehicle being the lead vehicle in the center lane, and the one that he was attempting to pass, just prior to his vehicle spinning out. He was less certain about the location of Mr. Jacques’ truck prior to the collision, but thought that it was also in the center lane, behind the Ford Taurus. He was unsure of whether or not there were any vehicles between the truck and the Stenabaugh vehicle. He added that he had a “hazy recollection” of the Taurus swerving out of the center lane to avoid colliding with his car, once his vehicle began to spin.

The statement Mr. McMahon provided to the police officer shortly after the accident is essentially consistent with the evidence he provided at the hearing, outlined above. I also note that the Technical Collision Investigative Report conducted by the police reveals property damage to this vehicle in the area of the right front bumper and fender, which is consistent with the Pontiac coming into contact with the Stenabaugh vehicle as it was spinning in a southerly direction.

William Jacques

Mr. Jacques also provided a statement to the investigating officer, shortly after the accident. He stated that he had been driving his truck in the curb lane, when he saw a grey car “spinning in a 360 degree spin” some distance ahead of him. Given the evidence outlined above, I find that this refers to the McMahon vehicle. Mr. Jacques advised that at the same time, he noticed another grey car passing his truck in the center lane, and then shifting into the curb lane, directly in front of him. Again, given the other evidence, this would clearly refer to the Stenabaugh vehicle. Mr.

Jacques stated that he moved his truck into the center lane to avoid colliding with the Stenabaugh vehicle, but that that car then struck the McMahon vehicle that was spinning, and that “one of the cars shot out into the middle lane directly in front of my truck” and hit the front of his cab. He reported that he tried to steer toward the shoulder of the road, and when he stopped the truck and got out, he saw that the Stenabaugh vehicle was pinned under his truck.

Mr. Jacques also testified at the hearing. Unfortunately, he had suffered a serious stroke that affected his memory earlier in the year, and he explained that anything that had happened in his life prior to the stroke was a “blur”. Consequently, he was unable to recollect the details of the accident. In the circumstances, I take the statement provided by Mr. Jacques to the police officer on the day of the accident to be his best recollection of the events in question.

Robert Scarrow

The investigating officer also obtained a statement from an independent witness, Robert Scarrow.

Mr. Scarrow stated that he was traveling in the center lane of the highway, behind the tractor trailer, just prior to the accident. He recalled seeing the McMahon vehicle pass the Stenabaugh vehicle, which he stated was also in the center lane, in front of the truck. He advised that McMahon’s vehicle then spun out and clipped the Stenabaugh vehicle, continued spinning and eventually ended up in the ditch. He stated that he observed the Stenabaugh vehicle spin back in front of Mr. Jacques’ truck, and that it was then struck by the truck and dragged toward the centre median on the shoulder of the road.

Mr. Scarrow was not called to testify at the hearing.

Mr. McMahon was charged at the scene with careless driving, but was ultimately convicted of “making a lane change not in safety”.

Stephen McEvoy

As noted above, I also heard the testimony of an OPP Technical Collision Investigator, Stephen McEvoy. He described taking various measurements at the accident scene, and analyzing the technical evidence to arrive at a conclusion about the cause and location of the collision. Constable McEvoy testified that he combed the accident scene and discovered two small scrape marks in the middle of the center lane, consisting of grey paint transfers from Mr. Stenabaugh's Ford Taurus onto the roadway. He stated that a "debris field", extending from the scrape marks in the center lane to the retaining wall at the center median where the vehicles ultimately stopped, contained various components from the Taurus and the tractor trailer. The location of these markings led Mr. McEvoy to conclude that the collision between the truck and the Stenabaugh vehicle occurred in the center lane of the highway, and that the Stenabaugh vehicle was traveling ahead of the truck just prior to their collision.

In contrast to the evidence provided by the witnesses who were involved in the accident, Mr. McEvoy testified that he concluded that the Stenabaugh vehicle had been traveling in the curb lane prior to the collision, was struck by the McMahan vehicle as it spun across three lanes of traffic, and that that impact caused the Stenabaugh vehicle to rotate 90 degrees and slide into the center lane, where it was struck by Mr. Jacques' truck. He described those two vehicles as having a "T-bone" collision, with the driver's side of the Stenabaugh vehicle coming into contact with the front left side of the tractor trailer. He added that while the truck would have been wholly in the middle lane at the moment of impact, Mr. Stenabaugh's Taurus would have been straddling the center and curb lanes at the point of impact.

He also stated that his examination of Mr. McMahan's Pontiac revealed some damage to its right front corner, including the right fender and bumper cover, as well as some paint transfer. He testified that he believed this was caused by the Pontiac's contact with Mr. Stenabaugh's Taurus.

Mr. McEvoy characterized the accident as an “avoidable collision”. In his opinion, if the McMahan vehicle had not been traveling in the curb lane where the road surface was wet and slippery, the collision could have been prevented.

Mr. McEvoy was asked under cross-examination whether the evidence gathered during his investigation was inconsistent with the Stenabaugh vehicle being in the center lane prior to the collision, as Mr. McMahan had testified and various witnesses had reported to the investigating officer. He first stated that in order for the Stenabaugh vehicle to end up perpendicular to the truck, as it did, it would have had to come from the south end of the truck (the curb lane side) with enough force to drag the truck across two lanes of traffic into the restraining wall at the median on the opposite (north) side of the eastbound lanes of the highway. When asked whether it was possible that the first impact, between Mr. McMahan’s Pontiac and the Stenabaugh vehicle, could have happened in the center lane, the witness responded that he couldn’t say for sure which lane the Taurus had been traveling in, but “all I know is that the Taurus at one point was south of (meaning to the curb lane side) of the truck, and that it then traveled into the center lane and struck the truck.”

Lisa Naranscik

Police Constable Lisa Naranscik also testified at the hearing. She confirmed that she was one of two officers dispatched to investigate the collision on the day in question. After speaking to the witnesses, she completed the Motor Vehicle Accident Report of the incident, which contains a sketch showing the location of the three vehicles involved after the collision. The report also indicates that Mr. McMahan was charged with careless driving.

Ms. Naranscik explained that based on the witnesses’ statements, she concluded that Mr. McMahan had been driving at an unsafe speed given the poor road conditions, and that his actions had caused the collision between the Stenabaugh vehicle and the tractor trailer. She determined that the Stenabaugh vehicle was driving in the center lane prior to being struck by the spinning McMahan vehicle, and that that vehicle “clipped” the Stenabaugh vehicle as it began to spin across the lanes. However, when advised during cross-examination that Mr. McEvoy had

concluded that the Stenabaugh vehicle was in the curb lane when it was “clipped” by the McMahon vehicle, which caused it to slide toward the center lane and impact the truck, Ms. Naranscik stated that she had no reason to disagree with the technical analysis done of the accident scene, and that she was prepared to defer to his conclusion.

RELEVANT PROVISIONS:

The applicable legislative and regulatory provisions are set out below:

Section 275 of the *Insurance Act* provides:

- (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.
- (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer’s insured as determined under the Fault Determination Rules.
- (3) No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection.
- (4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Subsection 9(3) of Ontario Reg. 664/90 under the *Insurance Act* provides a first party insurer with a right to claim indemnification from a second party insurer under a policy insuring a heavy commercial vehicle. It states:

- 9(3)** A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a

first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

Indemnification is determined in accordance with the Fault Determination Rules, contained in Regulation 668 of the *Insurance Act*. The relevant Rules are set out below:

3. The degree of fault of an insured is determined without reference to,
 - (a) The circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or
 - (b) The location on the insured's automobile of the point of contact with any other automobile involved in the incident.
4.
 - (1) If more than one rule applies with respect to the insured, the rule that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies in the circumstances.
 - (2) Despite subsection (1), if two rules apply with respect to an incident involving two automobiles and if under one rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident.
5.
 - (1) If an incident is not described in any of these rules, the degree of fault of the insured shall be determined in accordance with the ordinary rules of law.
 - (2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.
6.
 - (1) This section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are traveling in the same direction and in the same lane.

- (2) If automobile “A” is stopped or is in forward motion, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.
- 9.
 - (1) This section applies with respect to an incident involving three or more automobiles that are traveling in the same direction and in the same lane (a “chain reaction”).
 - (2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile.
 - (3) If all automobiles involved in the incident are in motion and automobile “A” is the leading vehicle, automobile “B” second and automobile “C” is the third vehicle,
 - (a) in the collision between automobiles “A” and “B”, the driver of automobile “A” is not at fault and the driver of automobile “B” is 50 per cent at fault for the incident;
 - (b) in the collision between automobiles “B” and “C”, the driver of automobile “B” is not at fault and the driver of automobile “C” is 100 per cent at fault for the incident.
 - (4) If only automobile “C” is in motion when the incident occurs,
 - (a) in the collision between automobiles “A” and “B”, neither driver is at fault for the incident; and
 - (b) in the collision between automobiles “B” and “C”, the driver of automobile “B” is not at fault and the driver of automobile “C” is 100 per cent at fault for the incident.
- 10.
 - (1) This section applies when automobile “A” collides with automobile “B”, and both automobiles are traveling in the same direction and in adjacent lanes.
 - (2) If neither automobile “A” nor automobile “B” changes lanes, and both automobiles are on or over the centre line

when the incident (a “sideswipe”) occurs, the driver of each automobile is 50 per cent at fault for the incident.

- (3) If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.
- (4) If the incident occurs when automobile “B” is changing lanes, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 percent at fault for the incident.

- 11. (1) This section applies with respect to an incident involving three or more automobiles that are traveling in the same direction and in adjacent lines (a. ”pile-up”).
 - (2) For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident.

DECISION /ANALYSIS:

General Approach:

The approach to follow in this type of case is to first determine the facts of the incident described, and then determine which of the Fault Determination Rules, if any, applies. If none of the Rules apply, section 5 mandates that the degree of fault of the vehicle that is the target of the loss transfer application must be determined in accordance with the ordinary rules of law.

I note that the Ontario Court of Appeal has stated that the purpose of the legislation is to spread the load among insurers “in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude” (*Jevco Insurance v. York Fire & Casualty*, (1996) 27 O.R. (3d) 483). Many arbitrators and counsel have interpreted these comments to mean that arbitrators hearing these disputes should dispense “rough justice”. It is clear from the case law and section 3

of the Regulation that the analysis of fault under the Fault Determination Rules is often indifferent to factors that apply under the ordinary rules of tort law.

Findings:

As mentioned above, much of the evidence was not disputed by the parties. However, the accident involved three vehicles that moved in various directions, occupying different lanes at different times. There were two separate collisions. As such, it is difficult to state with certainty exactly when each vehicle was located in each lane, especially in view of the fact that both drivers of the vehicles involved in the collision that is the focus of this proceeding were not able to testify at the hearing about the details of the accident.

Based on the evidence before me, I find that Mr. McMahon was driving his Pontiac Sunfire in the passing lane of the eastbound 401, when he attempted to pass Mr. Stenabaugh's vehicle, which was traveling adjacent to him in the center lane. When he began to move into the center lane, his car began to skid and it "clipped" the Stenabaugh vehicle, which then swerved to the right into the curb lane. The property damage on the McMahon vehicle confirms that there was a collision between these two vehicles. The McMahon vehicle then spun across three lanes of traffic, finally ending up in the southbound ditch on the side of the road, next to the curb lane, facing oncoming traffic.

I find that in the moments prior to this first collision, Mr. Jacques was driving his tractor trailer in the curb lane. His statement sets this out, and in my view, that is the strongest evidence on this point given his current inability to recall any details of the accident. I accept this evidence over that of Mr. Scarrow, who was not called to testify at the hearing, and whose statement was therefore not tested under cross-examination. I further find that in an attempt to avoid a collision with the Stenabaugh vehicle that had suddenly appeared in his lane, Mr. Jacques moved the truck into the center lane. While it is unclear exactly why or how the Stenabaugh vehicle then rotated 90 degrees and shifted direction, it is clear from the property damage that that vehicle then collided in a "T-bone" fashion with the tractor trailer.

The impact between these two vehicles had two effects – given the difference in height between the tractor trailer and the Taurus, the Stenabaugh vehicle became “pinned” under the truck, and given the force and angle at which the car struck the tractor trailer, both vehicles then traveled northward across the center and passing lanes onto the northbound shoulder. Both vehicles ultimately came to a stop next to the restraining wall on the median separating the east and westbound lanes of the highway.

I accept Constable McEvoy’s evidence that Mr. Stenabaugh and Mr. Jacques’ vehicles collided in the center lane, with the truck positioned there, and the Stenabaugh vehicle straddling the curb and center lanes. He testified that there were scrape marks and paint transfers in that lane, which clearly indicated the point of impact. What is less clear is where the Stenabaugh vehicle was positioned prior to this collision. Constable McEvoy determined from his technical analysis that he was driving in the curb lane, while all of the other evidence points to him being in the center lane and being pushed into the curb lane by the impact with Mr. McMahon’s Pontiac. I note that when Mr. McEvoy was asked whether this scenario could have occurred, he allowed for that possibility, stating that his analysis revealed that “at one point” the Taurus would have had to have been to the south of the truck in order to have exerted the force that it did, which caused the two vehicles to travel northbound, on impact.

When all is said and done, each of the three vehicles involved in this incident occupied at least two different lanes over the course of the few seconds during which the two impacts took place. Two of the three vehicles ended up pointing or oriented in different directions at the time of impact between the Taurus and the truck, than they had been prior to this event. The McMahon vehicle spun out from the passing lane, crossed three lanes of traffic, and ended up in the ditch across the highway from where it started out, facing in the opposite direction. The Taurus started off in the center lane, was pushed into the curb lane as a result of being clipped by the McMahon vehicle, and then changed direction and shifted partly but not completely into the center lane where it was struck by the truck while at a 90 degree angle, facing north/south. Finally, Mr. Jacques’ truck, started off in the curb lane, moved to the center lane where it contacted Mr.

Stenabaugh's Taurus, and then traveled across the passing lane onto the shoulder of the road clear across from where it had started out.

Neither the investigating officer nor the technical investigators were able to follow the standard practice of drawing a diagram showing the movement of the vehicles involved in the collision either on the police report, or in the materials generated during the investigation that followed. Had they done so, I suspect the sketch would have involved severally swirling lines intersecting at various points, looking more like an abstract drawing than the path of motor vehicles on a highway.

Do any of the Fault Determination Rules apply?

Much of counsels' arguments focused on whether or not Rule 6(2) and/or Rule 10(4) apply to this incident. Allstate takes the position that Rule 6(2) applies, given that at the moment of impact, the Stenabaugh and Jacques vehicles were in the center lane, moving forward in an easterly direction. American Home contends that Rule 10(4) best describes the incident in question, as the collision was caused by Mr. Stenabaugh's vehicle moving from the curb lane into the center lane, into the path of the tractor trailer. Alternative arguments were made citing Rule 9 and Rule 11.

Rule 6 is titled "Rules for Automobiles Traveling in the Same Direction and Lane", and the combined effect of Rule 6(1) and (2) is that if a vehicle is either stopped or in forward motion, and both vehicles involved are traveling in the same direction and in the same lane, the vehicle that strikes the other from the rear is deemed to be 100 per cent at fault for the accident. This Rule was analysed in detail by Justice Lax in her decision in *Co-operators' General Insurance v. Canadian General Insurance* [1998] O.J. No. 2578, and her reasoning was heavily relied on by Allstate in this case.

Justice Lax begins her analysis by referring to the Court of Appeal's comments in the *Jevco Insurance* case set out above, and explains that to facilitate indemnification between insurers without the necessity of allocating actual fault, the Rules allocate fault according to the type of

accident that occurred, that in most cases would probably, but not necessarily, correspond with actual fault. She states that “the rules are to be liberally interpreted and applied”. While the facts in the *Co-operators’* case are distinct from those in the instant case, Justice Lax makes some general comments which counsel for Allstate focused on – namely, that the relevant time for determination of fault under Rule 6 is at the time of the collision, and, citing Rule 3, which mandates that the degree of fault should be determined without reference to the circumstances in which the incident occurs, that the manner in which a vehicle involved in a collision enters the lane in question is irrelevant.

I do not disagree with Justice Lax’s findings, but conclude that Rule 6(2) does not apply to the accident that occurred in this case. I say this for a few reasons. Firstly, Rule 6 contemplates an accident involving two vehicles, and refers to vehicles traveling in the same direction in the same lane. In the instant case, there were three vehicles involved in the accident that resulted in Mr. Stenabaugh’s injuries. While I appreciate that the focus of our inquiry in this proceeding is on the collision between the Jacques and Stenabaugh vehicles, this collision would not have occurred, had Mr. McMahon’s Pontiac not struck the Stenabaugh vehicle first and caused it to veer out of control. And, while at some point the Stenabaugh vehicle and the tractor trailer driven by Mr. Jacques were traveling in the same lane, to describe what occurred here as a rear-end collision would be to arbitrarily focus on a precise moment in time while ignoring all of the other steps that played out in a complicated sequence of events.

This point leads to another issue focused on by counsel at the hearing, arising out of Arbitrator Samis’ decision in *Dominion of Canada v. Kingsway Insurance* (August 23, 1999), upheld by Sachs, J. (unreported decision dated January 11, 2000, court file No. 99-CV-176780), and Arbitrator Jones’ decision in *Primmum Insurance v. Allstate Insurance* (September 15, 2004). The facts in the *Dominion* case are similar to those in the instant case, in that the actions of a third vehicle caused a collision between two other vehicles. One of the questions raised in that case was whether Rule 3 requires that the circumstances of the collision between the two vehicles that came into contact be examined without considering the involvement of the third one. Arbitrator Samis held stated that while section 3 directs him to exclude any reference to ambient

conditions and the action of pedestrians, it (section 3) “does not require me to exclude the actions of the Tremblay vehicle in this case, and to do so would be to ignore one of the main events leading to these injuries”.

The parties in that case also contemplated the application of Rule 17. Arbitrator Samis made the following comments on that point -

In my view it is not appropriate to characterize this accident as a 2 vehicle accident, as contemplated by Rule 17. Having concluded that the Tremblay vehicle is involved, that involvement cannot be ignored by blind application of a Rule that deals with another kind of collision. I noted that the Fault Determination Rules do deal with some multiple vehicle accident cases under Rule 9. However no rule addresses the facts of the case at hand.

I agree with Arbitrator Samis’ comments, and find his approach in *Dominion* to be helpful in this case. While I appreciate that a “rough and ready” approach is required in applying the Fault Determination Rules, my view is that a Rule should not be applied if the only way to do so is to significantly distort the facts in order to fit them within the stated criteria.

Arbitrator Jones addressed the same issue in his decision in *Primum and Allstate*, referenced above, as well as in *ING Insurance v. Farmers’ Mutual Insurance* (October 17, 2005, upheld by Perell, J., unreported decision dated May 31, 2007, court file No.06-CV-323236 PD1). He found that when other considerations are fundamental to the occurrence of an incident such that a Rule no longer properly describes the incident, that Rule should not apply. This latter award was appealed, and while Justice Perell dismissed the appeal and agreed with the conclusion reached by Arbitrator Jones, he made it clear that he did not agree with the analysis undertaken.

Counsel for Allstate reviewed Justice Perell’s reasons in detail in her argument, highlighting the following point -

In my criticism of Arbitrator Jones’ approach although not his conclusion, there is a subtle semantic problem that needs to be noted. To say that the facts of a case do not fall within the interpretation of a Fault Determination Rule is interpretative

decision and not the same thing as saying that the facts ought not to fall within the Rule, which is a normative or legislative decision. I take Arbitrator Jones in describing his approach to the application of the Fault Determination Rules to mean that he was determining what circumstances ought to fall within Rule 17(2).

I think it is incorrect to approach Rule 17 normatively by determining whether or not it should apply. Either the Rule applies or it does not apply, and asking whether the Rule ought to apply is to ask the wrong question.

I am mindful of Justice Perell's comments, and appreciate the 'subtle semantic problem' to be noted. I also note his outline of the approach to follow, set out at paragraph 33 of the decision, where he instructs that an arbitrator's first task is to determine the facts, and secondly, to determine if that incident was described in any of the Fault Determination Rules. He advises that it must then be determined whether the rule applies with respect to "the insured", meaning the target of the loss transfer application, and if so, he states that the Rule must be applied, as arbitrary and expedient as it may be. Finally, he provides that if the incident is not described in any of the rules, the arbitrator's task is to determine the degree of fault of the insured in accordance with the ordinary rules of law.

Having determined the facts as I have found them, I conclude that the incident in question is not described in any of the Fault Determination Rules. My view is that to choose the particular moment among several possible moments at which time Rule 6 may describe the incident in question would be an arbitrary determination, and require me to ignore all of the other surrounding circumstances and events that led to Mr. Stenabaugh's injuries. Similarly, to give effect to American Home's submission that Rule 10(4) applies, given that Mr. Stenabaugh was changing lanes at the point of impact with the truck, would be an equally arbitrarily chosen moment within a larger and more complicated sequence of events. I find that to accept either of the parties' main submissions would be to deny the reality of the complicated dynamic that was created when Mr. McMahon attempted to pass Mr. Stenabaugh's vehicle and began moving his car into the center lane.

I also reject the suggestion that both of the above Rules apply. In my view, the accident cannot accurately be described as resulting from either a rear-end collision or an unsafe lane change, which are the underpinnings of Rule 6(2) and 10(4).

Rule 9 and Rule 11 were also raised by counsel in argument. Rule 9 describes an incident in which three or more vehicles are traveling in the same direction and in the same lane. I find that this rule does not apply to this case, as even though the three vehicles involved were traveling in the same direction and changed lanes at different points during the sequence of events that unfolded, they were actually never in the same lane.

Rule 11 also contemplates an incident involving three or more vehicles, specifically those traveling in the same direction but in adjacent lanes. I also find that this does not apply to the circumstances at hand, as the only point at which the three vehicles involved were driving in adjacent lanes was likely before Mr. McMahon began his lane change, triggering the other events which led to Mr. Stenabaugh's injuries.

Finally, Mr. Murphy sought leave to make a submission in support of his argument that Rule 6(2) does not apply, a day after the hearing was concluded. Ms. McAvoy later submitted that leave should not be granted to make any further submissions, but provided her response in the event that I was inclined to grant such leave. While I usually would not grant leave to one party to make post-hearing submissions over the objection of opposing counsel, other than in unexpected circumstances, my findings above render this issue moot.

Section 5 – fault to be determined in accordance with “ordinary rules of law”

Having rejected the application of the above Rules, section 5 mandates that I determine the degree of Mr. Jacques' “fault” in accordance with the ordinary rules of law.

On this analysis, I find that Mr. McMahon is 100% liable for the collision between the Stenabaugh vehicle and the tractor trailer driven by Mr. Jacques. By deciding to accelerate and pass Mr. Stenabaugh's car and move into the center lane at the speed at which he was traveling,

when the pavement was slippery, Mr. McMahon created a situation of danger from which neither Mr. Stenabaugh nor Mr. Jacques could extricate themselves. Constable Narancsik, the investigating officer who attended the accident scene, testified that she concluded that the cause of the collision was that Mr. McMahon was driving too fast for the conditions. Constable McEvoy, the Technical Collision Investigator, described it as an “avoidable collision”. His report concludes that “...taking into account the weather and road conditions, had the driver of the Pontiac not been traveling in the inside wet and slippery lane the collision may have been prevented”.

I also note that Mr. McMahon was charged with careless driving under the *Highway Traffic Act*, and was ultimately convicted of “making a lane change not in safety”.

Ms. McAvoy suggested that Mr. Jacques had the opportunity to take measures to avoid colliding with Mr. Stenabaugh’s vehicle, and should therefore also bear some liability for the accident. Given Mr. Jacques’ memory loss there is not much evidence on this point, but I note that the statement he provided shortly after the accident states that “the grey car that passed me hit the first car that was spinning... then one of the cars shot out into the middle lane directly in front of my truck.” I find that this describes a situation that happened quickly and unfolded in an unexpected way, and did not provide Mr. Jacques with an opportunity to react or take evasive action to avoid a collision.

Accordingly, I find that American Home Assurance is not liable to indemnify Allstate for any accident benefits paid out to James Stenabaugh as a result of this accident.

COSTS:

The parties have agreed that costs are to be borne by the unsuccessful party. I may be spoken to in the event that the parties are unable to come to an agreement on the amount of costs payable to American Home Assurance from Allstate Insurance.

As a final matter, I order that Allstate Insurance pay the fees and disbursements of the Arbitrator.

DATED THIS _____ day of January, 2008, in the City of Toronto, Province of Ontario.

Shari L. Novick
Arbitrator