IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, and REGULATION 664, s. 9

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Ryan Naimark for the Applicant

Michael Duda for the Respondent

ISSUE:

Do any of fault determination rules 6,11 or 19 contained in *Regulation 668* of the *Insurance Act* apply to the accident that took place on December 10, 2003 in the northbound lanes of Highway 416, in which Ms. Huon Chai was injured?

RESULT:

Fault determination rule 11 applies to the accident, and results in a 50/50 % liability split between Mr. Ash, the driver of the Kingsway insured truck, and Mr. Ong, the driver of the minivan. Consequently, pursuant to section 275 of the *Insurance Act*, Kingsway is required to indemnify the Personal for 50% of the benefits paid out to Ms. Chai to date, and for 50% of any future amounts owing.

HEARING:

The arbitration hearing was held on June 24, 2008, in the City of Toronto, in the province of Ontario before me, Shari L. Novick, Arbitrator.

BACKGROUND:

This loss transfer dispute arises out of a motor vehicle accident that took place on December 10, 2003, just outside of Ottawa. Ms. Huon Chai was injured when a transport truck operated by Richard Ash and insured by Kingsway Insurance ("Kingsway") collided with the Ford Winstar minivan in which she was a rear seat passenger. Ms. Chai was ejected from the vehicle and sustained serious injuries. She has been deemed to have sustained a catastrophic impairment within the meaning of the *Statutory Accident Benefits Schedule*.

The Personal Insurance Company ("the Personal") is Ms. Chai's automobile insurer, and has been paying her accident benefits to date. It seeks indemnification from Kingsway, the insurer of Mr. Ash's truck, pursuant to section 275 of the *Insurance Act*. Kingsway concedes that the truck in question is a "heavy commercial vehicle" within the meaning of section 9(1) of *Regulation 664* of the Act, and that it is properly the subject of "loss transfer" if the fault determination rules dictate that its insured, Mr. Ash, is liable for the accident.

The Personal takes the position that Rule 6 of the fault determination rules applies, while Kingsway asserts that Rule 11(2) is applicable to the situation. Kingsway argues that in the

alternative, Rule 19 applies. The parties agree that if I find that none of the fault determination rules apply and that liability for the accident must be determined by the ordinary rules of law, the hearing will be adjourned to permit witnesses to be called to provide *viva voce* testimony.

It was agreed that in the event that The Personal is found to be entitled to indemnification from Kingsway, the parties will attempt to determine the quantum owing on their own; if they are not able to do so, the hearing will be reconvened for that purpose.

RELEVANT STATUTORY and REGULATORY 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.

Subsection 9(3) of *Regulation 664* under the *Insurance Act* provides a first party insurer with the 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.

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 travelling 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.

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.

19. The driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for an incident that occurs,

(a) when automobile "A" is backing up;

(b) when automobile "A" is making a U-turn; or

(c) when the driver of, or a passenger in, automobile "A" opens the automobile door or leaves the door open.

The practical effect of the above rules is that if I find that Rule 6(2) applies, the Personal is entitled to be indemnified by Kingsway for 100% of any amounts properly owing under the loss transfer provisions. If I find that Rule 19 applies, the opposite result would apply and Personal would be 100% liable for any amounts incurred. Finally, if Rule 11 applies, there would be a 50/50 liability split between the two insurers.

FACTS:

Agreed Facts

The parties agreed on most of the relevant facts, save for three, which will be outlined in detail below. Prior to the arbitration hearing but during the course of this proceeding, counsel examined seven witnesses under oath – Ms. Chai (the injured party), Huy Ong (Ms. Chai's husband, and the driver of the minivan that she was a passenger in), both of Mr. Ong's parents (also passengers in the minivan), Richard Ash (driver of the transport truck that collided with the van), and Daniel Fleury and Jean Paul Leblanc, the drivers of two other vehicles who witnessed the accident and whose vehicles were involved in related collisions.

The transcripts of these examinations were filed at the hearing and relied on by counsel. As well, counsel filed a copy of the transcript of Mr. Ong's examination for discovery in the tort action brought by Ms. Chai, which has now been settled. No *viva voce* evidence was called by either party at the hearing.

The undisputed facts are as follows – Ms. Chai was travelling back to Ottawa after spending the weekend in Toronto with her husband, in-laws and two children. The accident occurred at

approximately 10 p.m, as their rented minivan was driving in the northbound lanes of Highway 416. The roads were slippery, and the Rideau River bridge was iced over as a result of freezing rain and a flash freeze.

There are two lanes on the northbound side of the highway at that point. The minivan initially travelled across the bridge portion of the highway in the right lane, but changed into the left or passing lane when Mr. Ong, the driver, noticed some lights ahead of him in the right lane. After the car in front of him applied its brakes, he did the same and the van began to skid, causing him to lose control of the vehicle. The van slid off the road and hit the guardrail on the left shoulder of the northbound lanes of the highway, and came to a stop. At that point, the vehicle was positioned perpendicular to the highway, with the front of the van against the guardrail and the rear of the van obstructing part of the left or passing lane.

Richard Ash was also proceeding northbound on Highway 416 at that time, driving an eighteen-wheel Freightliner truck owned by Clark Leasing and insured by Kingsway. He was driving in the right lane as he approached the bridge, and testified that when he reached the top of the crest leading to the bridge, he saw a group of cars clustered on the right side of the road partially blocking the right lane, and the minivan obstructing part of the left lane. He stated that he attempted to steer the truck through the middle of these vehicles in order to avoid a collision, but that as his truck was straddling both lanes, it collided with the rear left side of the minivan and caused it to spin around.

The parties agree that Ms. Chai was ejected from the van as a result of this collision, and that the injuries she sustained resulted from the van's collision with the truck, as opposed to the impact between the van and the guardrail.

The parties also agree that Mr. Ash's truck struck a Ford pick-up truck that was partially obstructing the right lane of the highway, just south of the Ong minivan. That vehicle was owned by Daniel Fleury. Mr. Fleury's evidence was that as he was standing on the side of the road, he saw the truck's trailer start to jackknife as it approached the scene. He testified that the rear of the trailer hit the driver's side of his vehicle and dragged it approximately twenty feet down the

highway, before the front of the truck struck the Ong van. While Mr. Ash denied this at his examination under oath conducted in June 2006, stating that he was able to straighten the truck out after it had started to jackknife and that it did not contact any other vehicles other than the van, I note that he gave contrasting evidence in a statement to the police on December 11, 2003, one day after the accident. In that statement, after describing his truck's impact with the van, he said "I also hit the car".

The bulk of the evidence filed is consistent with that view. Both the police report relating to the truck's collision with the Ong van, and the OPP's Technical Traffic Report find that the truck also collided with the Fleury vehicle, the latter finding that the Ash truck slid into the van and its trailer sideswiped the Ford pickup (Fleury's vehicle). Finally, the evidence of Jean Paul Leblanc, whose role in the events will be explained below, also testified that he saw Mr. Ash's truck strike the van as well as other vehicles. In view of the above, and the fact that Mr. Ash's memory of the events would be clearer when he provided his statement to the police on the day following the accident, as opposed to some two and one-half years later at an examination under oath, I accept that the tractor trailer insured by Kingsway also struck the Fleury vehicle.

Before setting out the three disputed facts and detailing the relevant evidence on each, I will describe the sequence of events that preceded the collision between the truck and the Ong van that is the focus of this proceeding, to provide further background.

The first vehicle that had difficulty crossing the bridge that evening was a Nissan Pathfinder, driven by Jean Paul Leblanc. The evidence indicates that Mr. Leblanc skidded on the ice, lost control of his vehicle and hit the guardrail just north of the bridge on the right side of the highway. His vehicle came to a stop in the right lane. Shortly afterwards, Daniel Fleury was proceeding along the highway in his black pickup, and narrowly missed hitting Mr. Leblanc's vehicle. Once he realised that the icy bridge created a situation of danger, he decided to stop his car and assist. Mr. Fleury reversed his vehicle back to the foot of the bridge, past Mr. Leblanc's disabled vehicle, and stopped on the right shoulder of the road. He put on his four-way flashers to warn oncoming traffic of the hazard. His vehicle was partly obstructing the right lane of the

highway, as the shoulder of the road on the bridge segment of the highway was not wide enough to contain his pickup truck.

The evidence indicates that both Mr. Leblanc and Mr. Fleury then got out of their vehicles, walked back to the foot of the bridge, and stood behind the guardrail where it was safe. They called the police on their cell phones to report the incident, and to summons help. As they were standing there, either two or three other vehicles proceeded down the highway, applied their brakes and skidded into both parked cars. One of those vehicles was an OPP cruiser, who coincidentally happened to be passing by. The police vehicle also struck Mr. Leblanc's Pathfinder, possibly Mr. Fleury's pickup truck and perhaps another vehicle, and skidded off the road onto the west (left) shoulder. The police officer was able to reverse the cruiser, park on the right shoulder of the road, and activate its emergency lights.

The evidence further indicates that the police officer retrieved flares from the trunk of the cruiser, and with the assistance of the crowd that had gathered at the scene, attempted to light flares and place them on the road to warn oncoming traffic of the hazard. This task was thwarted by the heavy rain that was falling at the time. It is unclear whether other vehicles subsequently came along and collided with the cars that were stopped on the road, but the evidence suggests that multiple collisions had occurred by then among a few different vehicles, and that each of the two northbound lanes of the highway were partially obstructed.

A short time after that, the Ong minivan appeared on the scene, collided with the guardrail on the left side and was then struck by the transport truck. The evidence of all witnesses was that only a few seconds transpired between the van hitting the guardrail and the truck colliding with it. Mr. Fleury estimated that between fifteen and twenty minutes elapsed between the time he first arrived on the accident scene, and the collision between the Ong van and Mr. Ash's truck.

In all, the investigating police officer prepared five separate motor vehicle accident reports, involving a total of seven different vehicles, describing the collisions on the bridge. Many of the vehicles are noted to have been involved in more than one accident. The five reports were all given a common case reference number by the investigating officers.

Disputed Facts

Counsel articulated the three disputed facts relevant to the question of whether fault determination rules 6, 11, or 19 apply as follows:

1. Was the Ong minivan stationary when it was struck by Mr. Ash's tractor trailer, or was it reversing?

2. Was the Fleury vehicle "parked" or "stopped" on the right side of the road at the point that it was struck by the tractor trailer?

3. Did the transport truck strike any other vehicles other than the Ong van and Mr. Fleury's pickup truck?

The answer to the first question will determine whether or not Rule 19 applies, and the second and third question are arguably relevant to the applicability of Rule 11 of the fault determination rules.

Was the Ong van backing up when it was struck by the truck?

The preponderance of evidence on this point suggests that the van was stationary when it was struck by the transport truck. The OPP's Technical Traffic Report determined that it was stationary against the left side guardrail at the time of the collision. Mr. Ash, the driver of the truck, and Messrs. Leblanc and Fleury recalled the van being stopped prior to impact, as did both of Mr. Ong's parents, who were passengers in the van.

Mr. Ong, the driver of the van, gave contradictory evidence on this point. At his examination under oath held in June 2006, he stated that after the van slid into the guardrail and came to a stop, he realised that the engine was still running and that he could reverse the van and park it on the shoulder of the road, where it would be safer. He testified that he shifted into reverse, but that before he had a chance to back up, he saw two headlights coming towards his van and it was then hit from behind by the truck. When further questioned about whether the vehicle might have moved backwards at all after he put the van into reverse, Mr. Ong said he could not recall, but

thought that he had taken his foot off the brake and placed it on the gas pedal, and so if it moved "I wouldn't have moved much, probably a couple of inches".

However, at his examination for discovery in the tort action held in November 2007, Mr. Ong gave a different answer. When asked whether he had reversed the vehicle at all, his response was that he had engaged the gear shift and put the van in reverse, but that the truck collided with them at that point and that he had not had a chance to put his foot on the gas pedal and actually move the vehicle.

Mr. Ong was interviewed about the circumstances surrounding the accident by an insurance adjuster in February of 2004, and made no mention of the van reversing.

On the evidence before me, I find that Mr. Ong was not "backing up" the minivan when it was struck by the tractor trailer. Consequently, Rule 19 does not apply. I find that the rule requires a vehicle to have actually moved backwards, and that the mere shifting into the reverse gear is not sufficient.

The evidence provided by Mr. Ong on the date closest to the events in question is likely the most reliable, and I note that he made no mention of the van reversing then. His evidence some two and a half years later is equivocal, at best, on this point. My review of the transcript reveals that after stating that he had thought about reversing the van so that it would be in a safer place on the roadway, he initially testified that the vehicle was struck before he was able to carry out that intention. It was only after being specifically questioned about the possibility that the van may have moved backwards, that he allowed that it might have reversed a "couple of inches". While I did not have the opportunity to observe Mr. Ong testifying before me, I find that the more persuasive evidence is his initial statement that the van did not actually move backwards before being struck by the truck.

Was Daniel Fleury's vehicle "parked" or "stopped"?

Counsel submitted that this distinction is relevant to the Rule 11 analysis, as that rule only applies if three or more vehicles are "travelling in the same direction". Counsel for the Personal

argues that Mr. Fleury's vehicle was parked on the right shoulder of the road at the relevant time, and despite the fact that it did not entirely fit within the designated shoulder area, could not be said to be travelling. He argued that as a consequence, Rule 11 does not apply.

Kingsway argues that Mr. Fleury's vehicle is more appropriately described as being "stopped" at the time it was struck by the tractor trailer. Counsel submitted that the case law provides that vehicles that are stopped can nevertheless be considered to be "travelling" for the purpose of Rule 6, and contended that the same analysis should be followed with regard to Rule 11.

The parties' submissions on this point call for a legal interpretation as opposed to a factual determination, and I will therefore address these arguments below.

Did the truck strike any vehicles other than the Ong minivan and Fleury pickup truck?

This is a difficult factual determination to make, as many contradictory statements were provided by various witnesses. It would not be overstating things to say that the evidence on this issue is "all over the map".

The relevant police report refers only to the truck colliding with the Ong van and the Fleury pickup truck. The OPP Technical Traffic Report also concludes that the truck slid into the Ong and Fleury vehicles. I note, however, that its "field scene sketch" indicates the position of all vehicles in the area after the collision, and that it corresponds with a diagram prepared by Mr. Fleury at the time he provided his statement. That diagram clearly shows the position of two other vehicles having changed after the collision, which strongly suggests that the truck collided with them as well.

As set out above, Mr. Ash advised the investigating police officer on the day following the accident that aside from striking the van, his truck "also hit the car". While counsel seemed to agree in their written factums filed in advance of the hearing that this reference is to Mr. Fleury's pickup truck, counsel for Kingsway took a different view in oral argument at the hearing. Mr. Ong also testified that the truck hit his van and "another vehicle", without specifying whether he

was referring to Mr. Fleury's truck. Mr. Leblanc said various things on this point in the course of his examination, but conceded in the end that he was not sure.

Finally, Mr. Fleury provided in his statement that the truck hit his vehicle first, then collided with the van, and subsequently impacted three other vehicles. He also stated at his examination that the truck struck his vehicle and several others, but when questioned further on this point he said that he was only certain that the truck had hit a grey car. Given this inconsistency, I do not find Mr. Fleury's evidence to be helpful on this point.

In the final analysis, I find that it is not necessary for me to determine exactly which vehicles struck each other and in what sequence. While I appreciate that an arbitrator's usual first task in a loss transfer analysis is to determine which vehicles were involved in the incident and how it occurred, I find that in this case, given the inconsistent evidence on various points, and the number of vehicles involved, that is not required. The parties do agree that the truck hit at least one other vehicle aside from the Ong van. Having determined above that Rule 19 does not apply to this scenario, the dispute between the parties centres around whether Rule 6, applicable to collisions between two vehicles, or Rule 11, which requires three or more vehicles to be involved in an incident, applies. If Rule 11 does apply, the fact that there were three, four or five vehicles involved in the incident is immaterial, as Rule 11(2) mandates that liability for each collision between two vehicles be determined, without reference to the "bigger picture".

PARTIES' ARGUMENTS:

Both counsel made very thorough arguments and relied extensively on the relevant case law. I will summarise their main submissions below.

Applicants' submissions

The main thrust of the Personal's argument is that section 3 of the fault determination rules, as well as recent case law, mandates that only the vehicles directly involved in the loss transfer proceeding should be considered when applying the rules. Accordingly, the applicant submitted that Rule 6 best describes the collision between the truck insured by Kingsway and the Ong van, and the application of Rule 6(2) results in the truck being 100% at fault for the accident. Counsel

relied heavily on Justice Perell's reasoning in his appeal decision of Arbitrator Jones' award in the case of *ING Insurance Co. of Canada v. Farmer's Mutual Insurance Co.* (unreported, October 2005, upheld on appeal at [2007] I.L.R. I-4604 (Sup. Ct.)) in this regard. He contended that this decision stands for the proposition that the presence of additional vehicles is irrelevant to the analysis unless they are parties to the loss transfer dispute, and that I therefore need not consider any vehicles other than the transport truck and the Ong minivan in my analysis. He submitted that I was bound by this appeal decision from the court.

Counsel also relied on both the arbitration and appeal decisions in *Co-operators General Insurance Company v. Canadian General Insurance Company* (Arbitrator Hudson, October 6, 1997, upheld on appeal [1998] O.J. No. 2578 (Gen Div.); leave to appeal dismissed*)*, in which it was determined that Rule 6(2) applied. He asserted that the facts in that case are virtually indistinguishable from those in the instant case, and that the same reasoning should be applied here.

Counsel for the Personal asserted that Rule 11 was not applicable to this case in any event, for a few reasons. He noted that Rule 11 applies to an incident "involving three or more vehicles that are travelling in the same direction" and contended that there were only two vehicles involved in this case, given that the Fleury vehicle was parked at the time of its collision with the truck, and therefore not "travelling". Counsel also submitted that Rule 11 contemplates a "pileup", which he contended does not accurately describe the five separate collisions that occurred in this case. He argued that the "pileup" scenario implies contemporaneous collisions between a few vehicles, whereas the undisputed evidence in this case is that approximately fifteen minutes elapsed between the first event on the icy bridge, and the collision between the transport truck and the van.

Finally, the Personal argued that policy reasons favour the application of Rule 6(2) over Rule 11 in these circumstances. He explained that a finding that Rule 11 applies would lead to a determination that the truck was only 50% liable for a situation in which it struck the minivan and other vehicles, whereas it would be 100% liable in accordance with Rule 6, if it was found to have only struck the van. Counsel contended that "at fault" drivers should not effectively be

rewarded for striking additional vehicles, and suggested that if drivers subject to the loss transfer regime were aware of the manner in which the rules were applied, they may be motivated to collide with another vehicle once they have already struck one in order to reduce their liability.

Counsel also made detailed submissions on why Rule 19 was inapplicable, but given my findings above, I need not outline them.

Respondents' submissions

Kingsway contended that the focus of the inquiry should not be limited to the collision between the vehicles insured by the two parties involved in the arbitration, but rather on the incident as a whole, which he submitted in this case involved several vehicles. Counsel contended that the fault determination rule that best describes an incident must be applied, and that in this case, Rule 11 describes the full incident that led to Ms. Chai's injuries, whereas Rule 6 only captures part of it.

Kingsway argued that the role of the other vehicles that obstructed the right lane of the highway cannot be ignored, as it was their presence on the roadway that caused Mr. Ash to shift the truck into the middle of the road as he crested the hill, and ultimately caused him to collide with the Ong van. He submitted that consequently, the sequence of events that preceded this collision, as well as the collision itself, constituted the incident that is the focus of our inquiry. He argued that this leads to a finding that there were several vehicles involved in the incident - Mr. Leblanc's Pathfinder, which was the first vehicle to skid on the ice and became disabled in the right lane, Mr. Fleury's pickup truck, which was placed on the right shoulder of the road while he attempted to assist Mr. Leblanc, and the three other vehicles that subsequently proceeded along the highway and in an effort to avoid the other two cars slid on the ice, and came to a stop at a point where they were also obstructing the right lane.

Counsel also noted that at least one of the above vehicles, and possibly all of them, depending on which witness' version of events is accepted, were also struck by the truck as it moved towards and then away from the van.

Kingsway takes the position that in light of the above, Rule 11 applies to this incident. Counsel noted that if three or more vehicles that are travelling in the same direction and in adjacent lanes are involved in an incident, that is the rule that must be applied. Counsel disagreed with the Personal's contention that Rule 11 requires that the collisions be contemporaneous, or that all vehicles involved in the incident must have collided with each other, noting that the rule is silent on those points. He also disputed the notion that the rule does not apply if one of the vehicles involved is "parked"; and referred to Justice Lax's findings in *Co-operators' v. CGI, supra,* that the term "travelling" should be interpreted to refer to the direction of travel of the vehicle as opposed to whether or not it is in motion.

Finally, counsel disputed the Personal's interpretation of Justice Perrell's decision in the *ING v. Farmers'* case, to the effect that only the vehicles that are the subject of a loss transfer claim should be considered when deciding which rule should be applied. He contended that if the role of vehicles that are not the subject of loss transfer are not taken into account, many sections of the fault determination rules would be rendered meaningless.

DECISION and ANALYSIS:

I approach the analysis with two things in mind – the general instruction from the Court of Appeal in *Jevco Insurance v. York Fire & Casualty (1996)* 27 O.R. (3d) 483 that the loss transfer regulation contemplates the spreading of loss among insurers in a manner that favours "expedition over finite exactitude", and the court's description of the fault determination rules in *Jevco Insurance v. Halifax Insurance Co*. [1994] O.J. No. 3024 (Gen. Div.) as setting out a "series of general types of accidents… that allocate fault according to the type of a particular accident in a manner that, in most cases, would probably but not necessarily correspond with actual fault".

I am also mindful of Justice Perell's comments in the *ING v. Farmers Mutual, supra,* case, to the effect that an arbitrator's first task is to determine what "the incident" is, to then determine if it is described in any of the rules, and if so, whether that rule can be applied with respect to the insured.

The parties have differing views of what constitutes "the incident" in this case. The Personal asserts that it is the simple fact of the Kingsway truck having collided with the Ong minivan, and argues that that situation is captured by Rule 6. On the other hand, Kingsway contends that the incident must be viewed in broader terms, and includes not only the collision between the truck and the van, but also the prior actions of the other vehicles that led to them obstructing the right lane of the highway and in turn causing the truck to shift partly into the passing lane and collide with the Ong van.

This dispute is not merely a semantic or technical one. It raises the fundamental question of whether the focus in applying the fault determination rules should be narrow, looking only to the central vehicles involved and their moment of impact, or whether a broader approach is called for, in which the role of other involved vehicles is considered. In my view, the regulation dictates that the latter approach be followed. While section 3 of the rules provides that weather and road conditions should be ignored when determining liability, suggesting that complicating factors be set aside, the rules that follow set out detailed scenarios describing different types of accidents, either involving two vehicles or multiple vehicle scenarios. The drafters of the regulation have clearly attempted to categorise several of the most common types of accidents, and have determined how liability should be apportioned for each category. Section 5 signals that they also appreciated that there will be unanticipated situations that are difficult to categorise, and so if an incident does not fit within one of the described categories, liability is to be dealt with in accordance with the "ordinary rules of law".

I conclude that when the "expedition over finite exactitude" approach is combined with the carefully constructed categories provided for in the Rules, the overall message is somewhat mixed. Ultimately, the parties must carefully determine what, if any, description fits the incident, and then mechanically apply the liability rule assigned. When the question of what caused Ms. Chai's injuries in this case is posed, the answer is that she was injured as a result of a tractor trailer striking the van that she was travelling in. I find, however, that as the scheme is designed to determine liability, the question of how that happened must be pursued. The answer to that is that the truck had to shift from its position in the right lane of the highway to the middle of the

road in order to avoid some cars that were obstructing its passage, which caused it to collide with the van and some other vehicles.

I find that the above incident as described is best captured by Rule 11, the rule that applies to incidents involving at least three vehicles that are travelling in the same direction in adjacent lanes. I agree with Kingsway's submission that Rule 6, which applies when one vehicle is struck from the rear by another, while both automobiles are travelling in the same direction and the same lane, only captures part of the incident that transpired and should therefore not be applied in this case.

I also find that the case law supports this view. The decision I find to be the most useful in assisting to define the scope of involvement of a vehicle in an incident is that of Arbitrator Samis in *Dominion of Canada General Insurance Co. v. Kingsway Insurance Company* (unreported, August 23, 1999, upheld on appeal by Sachs, J., unreported January 11, 2000, court file No. 99-CV-176780). Arbitrator Samis determined in the *Dominion* case that a truck was "involved in the incident" despite the fact that there was no contact between it and the applicant's vehicle. In that case, the truck crossed the path of the applicant's vehicle and caused the driver of that vehicle to take evasive action to avoid a collision, which resulted in an impact with a third vehicle parked on the side of the road. The arbitrator noted that the term "involved in the incident" appearing in section 275 of the *Insurance Act* (the source of the obligation to indemnify under loss transfer) is broader than "in collision with" or other language requiring contact between vehicles

He also listed the following criteria as being useful in determining whether a vehicle was "involved in an incident":

(a) whether there was contact between the vehicles;

(b) the physical proximity of the vehicles;

(c) the time interval between the relevant actions of the two vehicles;

(d) the possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and

(e) whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

On appeal, Justice Sachs upheld the arbitrator's decision, stating specifically on this point that he "was correct in both his finding and in his analysis". (at p. 4)

Applying these criteria to the facts of this case, I find that in addition to the truck driven by Mr. Ash and the Ong van that it collided with, at least the Fleury and Leblanc vehicles, and possibly the other cars that ended up obstructing the right lane of the highway, were all "involved in the incident". Whereas the lack of contact between these latter vehicles and the Ong van, and the time interval between the actions of the different vehicles may suggest that only the first two vehicles mentioned be considered, I find that the physical proximity of the vehicles, as well as the last two criteria outlined lead to a different result. There was a clear causal relationship between the actions of the vehicles that skid on the ice before the truck arrived on the scene and obstructed the right lane of the highway and the subsequent actions of the truck. It was also foreseeable in my view that the actions of those vehicles would cause injury to the occupants of another vehicle.

With respect to the time interval between the actions of the different vehicles, I note that the third vehicle that came along and collided with the stopped vehicle causing the injuries that triggered the loss transfer application in the *Co-operators v. CGI* case relied on by the Personal followed *seven to ten minutes after the initial collision* that left the first two vehicles stopped in the passing lane. This time interval was not commented on either by the arbitrator or Justice Lax in her appeal decision, and presumably did not concern them or affect their analysis. While the evidence in this case was that fifteen minutes transpired between the first vehicle skidding on ice and the collision between the Ash truck and the Ong van, I do not find this to be determinative of whether or not other vehicles were involved in the accident.

Counsel for the Personal contended that a vehicle that is not the subject of a loss transfer application should be excluded from the analysis of what constitutes an incident. He relied heavily on Justice Perell's reasoning in the appeal decision in the *ING Insurance v. Farmers'*

Mutual case, cited above, in this regard. I do not read Justice Perell's comments as going that far. Mr. Naimark cited a passage in the judgement in which the judge explained why he agreed with the arbitrator's conclusion that Rule 17 applied to the case at bar, but did not agree with the manner in which he had reached his decision. Justice Perell stated that the arbitrator had asked the wrong question when he queried whether the third vehicle in that scenario was "involved in the incident", as no loss transfer claim was being made against the insurer of that vehicle. Justice Perell went on to state that Arbitrator Jones' approach in the *Primmum Insurance v. Allstate Insurance* case offended Rule 3, commenting that he had focused on which rules were applicable to parties "not before the tribunal" rather than on what rules applied to "the insured".

I agree with the thrust of Justice Perell's comments that the purpose of the loss transfer exercise is to determine what rule applies to "the insured", which in this case is the truck driven by Mr. Ash and insured by Kingsway. While the focus of my analysis must be on what Rule applies to the actions of Mr. Ash, I do not take that to mean, however, that no other vehicles that played a role in the incident that led to Ms. Chai's injuries can be considered in the determination of which fault determination rule should be applied.

Mr. Naimark further submits that the case law supports the proposition that section 3 of the regulation requires that only the vehicles involved in the loss transfer dispute should be considered. I do not agree with this submission, and find that the jurisprudence supports a different view of the meaning of section 3. Justice Newbold's comments in *Lombard Canada Co. v. AXA Insurance Inc.* [2007] O.J. No. 601 are worth noting in this regard. That case involved a collision between a truck insured by Lombard and a truck insured by Axa, while the Lombard truck was making a lane change. That impact caused the Axa insured truck to cross the centre line of the road and collide with an oncoming vehicle, which caused injuries to the driver of that vehicle. The arbitrator found that all three vehicles were involved in the accident, and that the actions of the driver of the Lombard truck could not be separated from the collision between the other two vehicles "with which they are so closely involved and related in time and effect/cause". He determined that none of the fault determination rules applied to the situation, and that under the ordinary rules of law, pursuant to section 5 of the regulation, the Lombard vehicle was 100% liable for the accident.

Lombard appealed that finding, and Justice Newbold dismissed the appeal, after determining that the grounds of appeal were not strictly based on a question of law, as required by section 45 of the *Arbitration Act, 1991*. He also stated, albeit in obiter, that the arbitrator's conclusion was not contrary to section 3 of the regulation, and made the following comments:

> The incident in question involved three vehicles. Section 3 does not, however, direct that only a part of the incident (collision between truck driver and injured motorist) is to be taken into account and the other part of the incident involving the collision between the vehicles driven by (two truck drivers) is not to be taken into account.
>
> Mr. Brown contends that the situation must be looked at only at the "moment of impact", which he asserts is only the impact between ..(the Axa insured vehicle ..and the injured motorist). I do not see any language in the statute or the fault determination rules that discusses the "moment of impact". Section 3 does not speak in those terms but rather speaks in terms of the "incident". In short, section 3 does not direct the arbitrator to ignore that portion of the incident involving the actions of Mr. Rizzuto.

Further support for the above proposition can also be found in Arbitrator Samis' decision in the *Dominion of Canada* case cited above. He states "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 Tremblay vehicle was the one that crossed the path of the vehicle that ultimately struck a car parked on the side of the road, but did not collide with any vehicle. And, while Arbitrator Samis was considering the application of a different rule than I am in this case, his comments in that regard are instructive. He states –

> In my view it is not appropriate to characterise this accident as a 2 vehicle accident, 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 find similar considerations apply in this case. While the Personal urged me to apply Rule 6, I note that it applies to a two vehicle collision, and I find that it does not accurately describe the incident that transpired.

Finally, I also note Justice Mesbur's comments in a recent appeal decision of Arbitrator Jones' arbitration award in *Aviva Insurance v. Royal and SunAlliance Insurance Company* (unreported, December 2007, upheld on appeal, unreported decision, August 25, 2008, court file # 08-CV-346482 PD3). In that case, an employee working the overnight shift at a Cango gas station was injured when he was struck by two vehicles as he was standing on the roadway. At the request of a driver of a truck who had just delivered fuel to the station, the employee was assisting the driver in reversing the truck back out onto the road. Despite the fact that it was dark outside, there was no overhead lighting nearby and the employee was dressed in dark clothing with only a small penlight flashlight in his hand, he was directed by the driver to go out onto the highway and direct the truck. He was apparently not visible to oncoming traffic, and was struck by one vehicle, fell to the ground and was then struck by a subsequent vehicle, as he lay on the road.

The arbitrator determined under the ordinary rules of law that the employee was 50% at fault for the accident, the driver of the fuel truck was 30% at fault, and that Cango Inc., the owner of the station and the employer, bore the balance of the remaining responsibility at 20%. He found that neither of the drivers who struck the employee were liable at all. Both Royal, the insurer of the truck, and Aviva, the insurer of the gas station, appealed the decision.

While the facts of that case are somewhat unusual, I find the judge's comments touching on the issues discussed above to be relevant to the analysis in the instant case. One of the questions on appeal was whether the fuel truck was "involved in the accident", as it had not struck the employee and the findings of negligence against the driver were not related to his operation of the vehicle. Justice Mesbur cited the list of five criteria applied by Arbitrator Samis in the *Dominion of Canada, supra,* case excerpted above. She agreed with the arbitrator's finding that by requesting the employee's assistance in reversing the tractor trailer onto the road and failing to suggest that he wear a reflective vest, the driver of the truck was "an integral part of the entire incident" and was therefore "involved" in the incident. She stated that "but for the Cango truck and the negligent actions of its driver, there would have been no accident".

Again, while the facts are very different than in this case, I find that the basic reasoning can be imported to this case. But for the fact of the vehicles sliding on the ice and coming to a stop in

the right lane of the highway, the truck would not have had to shift out of that lane and would likely not have then struck the Ong van.

Having determined that many vehicles were involved in the incident leading to Ms. Chai's injuries, I must ensure that all of the criteria in Rule 11 are met before applying it. The rule dictates two other requirements, namely that all vehicles were travelling in the same direction, and were in adjacent lanes. I find that all of the vehicles involved – namely the Ash truck, the Ong van, the Fleury pickup truck, and any of the other vehicles that were obstructing the right lane of the highway were travelling northbound on Highway #416. As stated by Justice Lax in *Co-operators' v. Canadian General Insurance*, the use of the term "travelling" in this context refers to the direction of travel, as opposed to the fact of motion, and so a vehicle that is either disabled after sliding on ice and hitting the guardrail (as was Mr. Leblanc's car) or is pulled over to assist (as was Mr. Fleury's truck) or somehow otherwise stopped on the roadway can still be said to be travelling. Finally, I find that the last requirement of being in adjacent lanes is also met in this case, as the stopped vehicles were in the right lane, the Ong minivan was partially in the left lane lane when it was struck, and the truck was straddling both.

Consequently, Rule 11(2) dictates that the result of this finding is that Mr. Ash, the driver of the Kingsway insured truck, is 50% at fault for the accident with the Ong minivan that led to Ms. Chai's injuries.

I remain seised of this matter in the event that the parties are unable to agree on the correct amounts owing from Kingsway to the Personal.

Dated at Toronto, this _____ day November 2008.

_____

Shari L. Novick
Arbitrator