

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 275 and ONTARIO REGULATION 668**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

FEDERATED INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Krista M. Groen for the Applicant

Dan Rabinowitz for the Respondent

ISSUE:

1. Which of the Fault Determination Rules in *Regulation 668* apply to this accident, if any, and what is the result of this finding?

RESULT:

1. Rule 6 of the Fault Determination Rules applies to the accident. Consequently, Steven Callebert, the driver of the truck, is deemed to be 100 per cent at fault for the accident.

BACKGROUND:

Soodabeh Ebrahimi was driving home from work on the evening of December 23, 2008 when her Suzuki Swift was struck by a tractor trailer driven by Steven Callebert. Ms. Ebrahimi's vehicle was insured by State Farm Mutual Automobile Insurance Company ("State Farm") at the time. The truck was leased by Petro Canada (now Sun Cor) and insured by Federated Insurance Company of Canada ("Federated").

The parties agree that the truck was a "heavy commercial vehicle" as defined in section 9(1) of *Regulation 664*, and that the Loss Transfer provisions in section 275 of the *Insurance Act* apply.

Ms. Ebrahimi applied to State Farm for payment of accident benefits under the *Statutory Accident Benefits Schedule*. State Farm paid benefits to her, and the claim has now been resolved on a full and final basis. State Farm contends that the driver of the truck is liable for the accident, and seeks indemnification from Federated for the benefits it has paid out pursuant to the Loss Transfer provisions of the *Act*.

The question at the root of this dispute is whether Rule 6 of the *Fault Determination Rules* applies to the circumstances of this accident. That provision applies when one vehicle is struck from the rear by another, and both automobiles are travelling in the same direction and in the same lane. The result of the application of the provision is that the driver of the rear vehicle is deemed to be 100% at fault. State Farm contends that all of the required criteria are met for this rule to apply, while Federated submits that the vehicles were not travelling in the same lane at the time of impact.

RELEVANT PROVISIONS:

Insurance Act – section 275

(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.

Regulation 668 –

2. (1) An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.

(2) The diagrams in this Regulation are merely illustrative of the situations described in these rules.

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. .

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.

FACTS & EVIDENCE:

The parties filed an Agreed Statement of Facts setting out the general details surrounding the accident. It provides that the collision took place in the eastbound lanes of Highway 7, west of Bathurst Street in Vaughan, Ontario. It was snowing at the time of the accident, and four to six inches of snow and slush had accumulated on the highway, resulting in poor driving conditions.

Both Ms. Ebrahimi and Mr. Callebert were examined under oath prior to the hearing. Both drivers were also called as witnesses at the arbitration, as was the police officer who had investigated the accident. The main thrust of the witnesses' evidence is set out below.

Soodabeh Ebrahimi

Ms. Ebrahimi testified that she was following her regular route home from work on the evening in question, traveling eastbound on Highway 7. She recalled that the roads were snow-covered and slushy, but the visibility was "not bad". Ms. Ebrahimi explained that she had moved from Iran to Canada in 1999, and had become accustomed to driving on snowy roads since arriving. She stated that both her husband and her son are auto mechanics, and that her car is always well-maintained.

Ms. Ebrahimi testified that she had spoken to her husband prior to leaving work, and he had cautioned her to drive carefully and stay in the curb lane, given the snowy conditions. She stated that she had heeded his advice, and was driving in the curb lane of Highway 7, at approximately 40 to 50 kilometers per hour. She testified that she first noticed the truck's headlights about two to three minutes before the accident, and recalled that the truck was positioned behind her in the curb lane, perhaps a bit to the left of her vehicle.

Ms. Ebrahimi stated that the truck was travelling at a faster speed than she was, and that it struck her vehicle from behind while both vehicles were in the curb lane. She testified that Mr. Callebert's truck hit her "at the left to middle" of the rear of her car, and that the force of the impact caused her vehicle to spin around and land in the ditch or shoulder of

the highway. She recalled that the truck passed her vehicle after the impact, travelled approximately 20 or 30 meters and then stopped in the curb lane.

Ms. Ebrahimi was adamant in her evidence that she had been travelling in the curb lane prior to the impact. She also insisted that the truck had struck the rear of her vehicle on the left side, from the “back middle to the left”. However, when presented with photos of the damage to her vehicle during her cross-examination, she conceded that the photos indicate that the bulk of the damage was on the right or passenger side corner of the rear of her vehicle.

Ms. Ebrahimi’s evidence about the position of the vehicles after the accident was inconsistent with the sketch drawn by the police officer in the MVA report prepared. The sketch shows her vehicle angled toward the shoulder of the road, partly in the curb lane and partly in the middle lane. It shows the truck stopped completely in the curb lane, just west of her vehicle. When she was cross-examined on this point, Ms. Ebrahimi maintained that the truck had passed her vehicle after the impact, and came to a stop further east along the highway.

Steven Callebert

Mr. Callebert testified that he has been driving a truck for thirty-one years. He stated that he was driving a Kenworth truck hauling diesel tanks on the night in question, and that the truck was in good condition. He recalled the roads being snow-covered, and estimated that he was travelling approximately 50 kilometres (in an 80 kilometre/hour zone) at the relevant time.

Mr. Callebert testified that he entered the eastbound lanes of Highway 7 at Keele Street, and remained in the curb lane at all times. He recalled seeing the Claimant’s vehicle straddling the curb and the middle lanes ahead of his truck, as he approached Bathurst Street. He stated that when Ms. Ebrahimi’s vehicle was between 50 and 100 feet ahead of his truck, she hit the brakes suddenly and stopped her vehicle. He was unable to stop the truck in time, and collided with her vehicle.

When asked to pinpoint the location of the vehicles at the time of the accident, Mr. Callebert stated that when Ms. Ebrahimi started to apply her brakes, one-third of her car was in the middle lane, and two-thirds of her car was in the curb lane. He stated that the front of his truck's grille struck the right rear corner of her vehicle, on the passenger side. He also stated that her vehicle was stopped at the time of impact.

Under cross-examination, Mr. Callebert conceded that he could not actually see the painted lane markers on the highway due to the quantity of snow on the road. He acknowledged that he could therefore not be sure that the Claimant's vehicle was straddling the lanes as he described above. He also acknowledged that given the height of the truck's cab, he was unable to see Ms. Ebrahimi's vehicle at the moment of impact and so could not say with certainty where the truck struck her car.

Mr. Callebert disagreed with counsel for State Farm's suggestion that the front bumper of the truck hit the Claimant's vehicle squarely in the back. When she referred him to the transcript of his evidence provided at the examination under oath at which he stated "the front bumper and the grill hit her car square in the back, I think" he ultimately agreed with counsel's suggestion that he could not state with certainty where his truck had struck Ms. Ebrahimi's car.

Finally, when asked about the position of the vehicles appearing on the sketch on the MVA report prepared by the police officer, he stated that it accurately depicted the placement of the vehicles after the accident. He recalled that his truck had passed the Claimant's vehicle, and came to a stop in the curb lane west of the Claimant's car.

Colin Hunter

Police Constable Hunter is an officer with the York Regional Police, and was dispatched to investigate the accident on the evening in question. He advised that no charges were laid as a result of the accident due to the poor road and weather conditions. When asked why he had recorded on the MVA report that Ms. Ebrahimi had lost control of her

vehicle and that it had “spun out”, he responded that she had either told him that or he had reached that conclusion from observing the skid marks on the snow. When asked whether these skid marks, which suggested that Ms. Ebrahimi’s vehicle had moved in a clockwise direction, could have happened as a result of the impact between the vehicles, he responded that there was no way for him to tell, as he had arrived at the scene after the accident had taken place.

ARGUMENTS & ANALYSIS:

Rule 6 of the Fault Determination Rules applies when one vehicle is struck from the rear by another vehicle, and both are traveling in the same direction and in the same lane. Regardless of whether the vehicle in front is stopped or moving, the result of applying this rule is that the driver of the rear vehicle is deemed to be 100 per cent at fault for the accident. The parties in this case agree that the truck driven by Mr. Callebert struck Ms. Ebrahimi’s vehicle from the rear, and that both were traveling in the same direction, being eastbound on Highway 7.

Counsel part company, however, on the question of whether the vehicles were traveling in the same lane at the time of the accident. State Farm argues that the preponderance of evidence suggests that they were, and that all of the criteria for the application of Rule 6 are therefore met. Counsel for Federated contends that Ms. Ebrahimi’s evidence was not reliable, and that her insistence that she was in the curb lane at the time of the accident should not be accepted. He stated that the photos showing damage to the right (passenger) side of her car suggest that she was in the process of changing from the middle lane into the curb lane when the accident happened, and that Rule 6 is therefore inapplicable.

The general context of the Loss Transfer provisions must be considered when analysing the evidence tendered at the hearing, as well as the court’s directions regarding how the Fault Determination Rules should be applied. The Court of Appeal stated in *Jevco Insurance v. York Fire & Casualty*, (1996) 27 O.R. (3d) 483 that the purpose of the Loss

Transfer Provisions is to spread the load among insurers “in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude”. I also note Justice Matlow’s statement in *Jevco Insurance v. Halifax Insurance* [1994] O.J. No. 3024 that the Fault Determination Rules –

set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, they 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. (at para.8)

Arbitrators have interpreted these comments to mean that a form of “rough justice” should be dispensed when deciding these disputes. 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 would apply in a straight negligence analysis in a tort context.

The accident in this case took place on a snowy night in December. It seems clear that the extreme weather created poor road conditions on the highway, and that that was the underlying cause of the collision between Ms. Ebrahimi’s vehicle and the truck. Section 3 of the regulation, however, instructs me to ignore the circumstances in which the incident occurred, including the weather and road conditions. In effect, the Fault Determination Rules set out “categories” of types of incidents, and an arbitrator must determine whether the incident fits within any of the categories described. If so, that rule must be applied. If the incident is not described in any of the rules, or if there is insufficient information to determine the degree of fault, fault must be allocated in accordance with the ordinary rules of law (section 5).

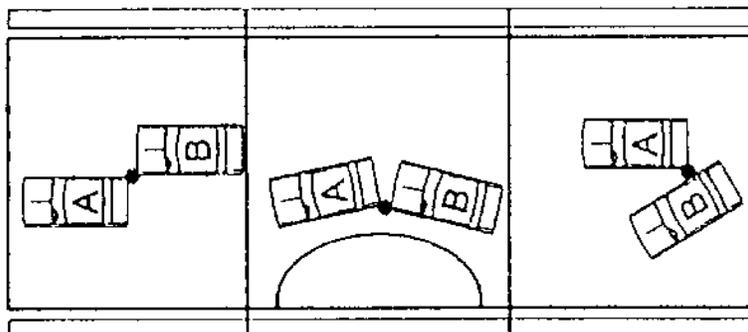
In order to decide whether Rule 6 is applicable in the circumstances of this case, I must decide whether both vehicles were travelling in the same lane. Ms. Ebrahimi was adamant that she had been driving in the curb lane ever since she entered the highway, and remained in that lane until the truck struck her vehicle. Mr. Callebert initially described Ms. Ebrahimi’s vehicle as being positioned “one-third in the middle lane, and

two-thirds in the curb lane”, but then acknowledged that he could not be certain of that, given that the snow that had accumulated on the road obscured the lane markings.

Counsel for Federated argued that the photos of Ms. Ebrahimi’s vehicle taken after the accident tell the real story of how the incident occurred. He noted that they indicate that the bulk of the damage is on the right side of the rear of the Claimant’s vehicle, and that this suggests that she must have been changing from the middle lane into the curb lane at the point of impact. While I can see that that conclusion may be drawn from the photos, section 3(b) of the regulation specifically directs me to determine the degree of fault “without reference to ...the location on the insured’s automobile of the point of contact with any other automobile involved in the incident”. I find that this not only prevents me from relying on the photos as definitive evidence, but also reinforces the idea that I must focus on whether the incident fits within the category of incident described, as opposed to embarking upon a detailed analysis of all of the potential evidence that may be relevant to a liability determination in a tort claim.

Ms. Ebrahimi testified that she was travelling in the curb lane prior to the impact. Mr. Callebert testified that two-thirds of the Claimant’s vehicle was in the curb lane. Given the preference for “expedition and economy over finite exactitude”, I find that both vehicles were traveling in the curb lane when the incident took place, and that the criteria necessary for the application of Rule 6 have been satisfied.

As a final point, I note that the diagrams that accompany Rule 6 in the regulation (reproduced below) show two vehicles colliding in a variety of positions. While section 2(2) states that the diagrams are “merely illustrative of the situations described in the rules”, it is clear that the first diagram on the left illustrates a situation that is comparable to that described by the witnesses at this hearing.



Accordingly, I find that Rule 6 applies to the accident that took place between the parties on December 23, 2008, and that by application of that rule, Mr. Callebert is deemed to be 100 per cent at fault for the incident. Consequently, State Farm's request for Loss Transfer is upheld.

COSTS:

Given the result, I find that Federated is responsible for paying the costs of the arbitration incurred by State Farm, on a partial indemnity basis. Federated is also responsible to pay the arbitrator's fees and disbursements associated with the hearing.

DATED at TORONTO, ONTARIO this _____ DAY OF AUGUST, 2012.

Shari L. Novick
Arbitrator