

IN THE MATTER OF the *Insurance Act* R.S.O. 1990, c. I.8, as amended and section 275 of the *Insurance Act* and Regulation 668

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL & SUN ALLIANCE INSURANCE
COMPANY OF CANADA

Respondent

AWARD

COUNSEL APPEARING

Jessica L. J. Rogers: counsel for the Applicant, Aviva Insurance Company of Canada (hereinafter called Aviva).

Derek Greenside, counsel for the Respondent, Royal & Sun Alliance Insurance Company of Canada (hereinafter called RSA).

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act* 1991 to arbitrate a dispute between two insurers with respect to a claim for loss transfer being made pursuant to s. 275 of the *Insurance Act* and its Regulations.

This claim arises from an incident that occurred on August 20, 2019. At that time, there was an accident between a motorcycle insured by Aviva and a transport truck insured by RSA.

All parties agree that loss transfer is applicable. This dispute is with respect to liability.

While there is not a great deal of disagreement with respect to the facts of this case, there is significant disagreement with respect to what flows from those facts and in particular which sections of the Fault Chart set out in Regulation 668 are applicable, if any.

The parties selected me as their arbitrator on consent and pursuant to an Arbitration Agreement dated October 16, 2023.

PROCEEDINGS

This arbitration proceeded primarily in writing. Each party submitted:

1. A Factum;
2. A Book of Authorities;
3. Document Briefs which included:
 - a. A number of photographs of the area where the accident occurred;
 - b. The transcript of the examination for discovery of the driver of the motorcycle dated November 30, 2021;
 - c. Ottawa Police Service file photographs;
 - d. Ottawa Police Service general occurrence file October 20, 2019 to October 22, 2019;
 - e. Various other photographs of the scene of the accident taken by the Ottawa Police;
 - f. Transcript of the examination for discovery of the driver of the transport truck dated December 1, 2021;
 - g. Motor Vehicle Accident Report;
 - h. Ontario Traffic Manual Book 6 re warning signs;
 - i. Jenish Forensic Engineering Collision Reconstruction Report, January 31, 2023;
 - j. Pario Engineering & Environmental Sciences Engineering Assessment, February 20, 2023;
 - k. Jenish Forensic Engineering, Report to City of Ottawa, April 28, 2023.

In addition, counsel made some oral submissions, to supplement their written material. No witnesses were called.

ISSUE IN DISPUTE

The Arbitration Agreement identified the issue in dispute with respect to this hearing as follows:

To determine a dispute between the parties regarding which, if any, of the Fault Determination Rules apply to the motor vehicle accident on August 20, 2019 and, if necessary, what are the respective degrees of fault between the parties?

FACTUAL BACKGROUND AND SUMMARY OF RELEVANT EVIDENCE

This accident occurred on August 20, 2019 at a somewhat unusual intersection. It has been described as a “Y” intersection and that seems a fair way to describe it.

Aviva insured a motorcycle that was being operated by the claimant when it was involved in an incident with a transport truck hauling a trailer that was insured by RSA.

The two relevant roads at this Y-intersection are Gordon Murdoch Road and Dalmeny Road.

The motorcycle had been travelling southbound on Gordon Murdoch Road and was coming through a curve which would then result in the motorcycle entering onto Dalmeny Road at which time he would be travelling in an easterly direction. According to the evidence of the motorcycle driver, it was his intention to continue travelling eastbound on Dalmeny. There does not appear to be any dispute that in terms of the motorcyclist there was no stop sign or yield sign as it approached eastbound Dalmeny Road through the curve.

At the same time, the RSA truck was proceeding westbound on Dalmeny Road. As the truck approached this Y-intersection in order to continue to reach Gordon Murdoch Road northbound the transport truck would have had to follow the curve to the right. This would then bring the RSA truck into the same curve that the motorcycle was traversing, albeit in the opposite direction.

However, the tractor-trailer driver did not intend to connect with Gordon Murdoch Road in a northbound direction. Rather, the tractor-trailer driver intended to proceed west on Dalmeny and cross over the eastbound lanes of Dalmeny Road at the Y separation. Once the driver had passed through the left side of the Y, he would then proceed to a T-intersection. There was a stop sign at this T-intersection. Here the tractor-trailer driver intended to make a left turn in order to travel southbound on Gordon Murdoch Road. I have attached to this decision some of the photographs from the Ottawa Police file which provide a better understanding as to the appearance of this intersection as a mere description does not do it justice.

While there was no stop sign or yield sign for the Aviva motorcycle while travelling through the curve, there was a sign for vehicles on westbound Dalmeny as they approached the Gordon Murdoch Road curve. That sign is reproduced below.



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Figure 13 - Westbound view showing the area of impact and the motorcycle FRP.

This sign identifies an upcoming right curve in the road. It shows the arrow on the portion of the road that curves and becomes Gordon Murdoch Road. It has an advisory speed of 50 km/h. It also shows the left Y where Dalmeny Road continues up to the stop sign in order to make the lefthand turn to get on southbound Gordon Murdoch Road. There is also on westbound Dalmeny a sign that appears to have been placed there by a concerned citizen. The sign appears to be nailed into a telegraph pole and it states:

SLOW DOWN
FORKING CURVE

Ahead you must yield to traffic coming from curve 50 km/h

Now to the collision itself. According to the driver of the motorcycle, as he travelled through the curve from southbound Gordon Murdoch Road to eastbound Dalmeny Road, he did see the RSA truck in the distance. However, he appears to have assumed that the truck would be following the curve to the right.

The RSA truck did not do that and rather crossed the lane of traffic that the motorcycle was travelling in. The motorcycle driver was unable to stop and his motorcycle struck the back wheel of the trailer.

Unfortunately, this was a significant accident and the driver of the motorcycle lost one of his legs.

I now turn to a review of some of the evidence before me. With respect to the intersection itself, the photographs show, and the evidence of the driver of the tractor truck also confirms, that there is a double yellow line on Dalmeny Road westbound as you approach the Y-intersection. However, there is a gap in the double yellow line where Dalmeny and Gordon Murdoch converge. The double yellow line then continues on again on the stretch of Dalmeny that leads up to the stop sign.

A review of the photographs also shows, and the drivers confirm, that in order for the motorcycle to come through the curve and enter into the eastbound lanes of Dalmeny, he would have to cross over the westbound lanes of Dalmeny. Similarly, for the transport truck driver to continue proceeding to get to the T-intersection where the stop sign is, he would have to cross over the eastbound lanes of Dalmeny in order to get through the Y-intersection.

The motorcycle driver on his examination for discovery reported that the speed limit in the curve where he was travelling was 80 km/h. He says he saw the transport truck off in the distance just down the road and continued to keep his eye on it. Only at the last second did he realize the transport truck would not follow the curve. He states, "He was in fact turning left in front of me and in less than a second there was no way to react. There was no evasive manoeuvre I could

take.”

Also, according to the driver of the motorcycle it was his view that he had the right of way. He did not have a stop sign. He did not have a yield sign. He stated, “I am not making a lefthand turn I have the right of way. People coming the opposite direction don’t. They are in fact crossing my lane to continue on a lefthand turn.”

According to the examination for discovery of the driver of the transport truck, he states:

“I was just going straight, and I was going to make a left turn on Gordon Murdoch Road and when I passed my truck and probably my trailer not half of the trailer, like 20% of the trailer then I see that somebody is coming from that road and I look for my window, like passenger side window, and like, not more than two seconds and I see my mirror, like on the passenger side and that I got hit on the rear end tire.”

The tractor-trailer driver therefore confirmed that he did not see the driver of the motorcycle until he had already started crossing over the eastbound lanes of Dalmeny.

He describes his speed as being approximately 50 km as he knew he had to make a turn from the stop sign further ahead.

He acknowledged that he saw the yellow sign that I described above showing the arrow through the curve and the 50 km speed recommendation. However, he did not remember seeing the good Samaritan’s sign.

Also on his discoveries the transport truck driver confirmed that in order to proceed to the stop sign at Dalmeny and Gordon Murdoch, that at the Y-intersection he “had to turn his wheel to the left”. He also acknowledged that he had turned his wheel to the left just prior to the collision.

The Motor Vehicle Collision Report that was generated by the Ottawa Police describes how the incident occurred as follows:

“Vehicle 1 westbound on Dalmeny
Vehicle 2 eastbound on Dalmeny Road
Vehicle 1 (tractor-trailer) turned left at the Y in the road and Vehicle 2 made contact with the rear end of Vehicle 1”

I also found helpful the extensive file produced from the Ottawa Police Service. In a narrative described as a Prosecution Summary, the following is indicated:

“Motorcycle driver was riding his motorcycle within the curve that connected Roger Murdoch Road southbound to Dalmeny Road eastbound. Tractor-trailer driver proceeded to go slightly to the left at the intersection travelling into motorcycle's path of travel to reach the offset continuation of Dalmeny Road past Roger Murdoch Road. Motorcycle collided with the first axle at the rear of the trailer.”

There was also reference in the Ottawa Police Service file to a statement having been given by Driver 1/tractor-trailer driver. He stated that he had been travelling westbound on Dalmeny Road at about 40 km/h. He approached the Y-intersection, turned left and crossed oncoming traffic for eastbound Dalmeny Road. He further stated he had just about cleared the intersection when he felt a bump on the rear passenger-side tires.

A witness was interviewed who indicated that he was intending to go the same direction as the truck intended to. He observed the hand-painted sign a few yards prior to the area of impact. He could hear the motorcycle coming before he saw it. He noted the truck kept going straight and it did not slow down or yield. Both were going about the speed limit: 80. He also commented that whoever put the hand painted sign on the telephone pole was a “genius”.

The Police Report indicates that based on the evidence gathered as well as the witness statements that the motorcycle had the right of way and the tractor-trailer drove into the motorcycle's path of travel. The tractor-trailer should have waited to proceed through the motorcycle's lane of travel. One of the police officers who attended the scene made the following comments:

“It would appear that the transport truck driver essentially turned left to head to Gordon Murdoch Road and failed to yield the right of way to m/c and m/c clipped the right rear side of the trailer.”

With respect to the warning sign (yellow sign) that directed traffic for vehicles westbound on Dalmeny, included in the evidence before me was the Ontario Traffic Manual July 20, 2001 with respect to warning signs. This particular sign is found at page 41 of the traffic manual. It is under the heading “Intersection Warning Signs”. This sign is described at page 41 as to be appropriate for a Y-intersection. While not exactly the same format as the sign in this case, it clearly indicates a Y-intersection sign very similar to the one on Dalmeny Road. At page 42 of the manual, it is stated:

“The Y-intersection sign (controlled) indicates a Y-shaped intersection where through traffic approaches from the stem of the Y and continues along the branch

of the Y with the arrowhead. The road representing the other branch of the Y is under a stop or yield control at the point of the intersection with the through road.”

In the case before me, the branch of the Y with the arrowhead branches to the right and the non-arrowhead portion of the Y to the left would govern the tractor-trailer as it proceeded westbound on Dalmeny Road.

I also reviewed the collision reconstruction reports. The report prepared by Jenish Forensic Engineering indicated the following with respect to the vehicle movements leading up to the impact:

“The location of the motorcycle at the time of impact indicated that this vehicle entered the intersection within the eastbound lane of the curve, where it transitioned into the eastbound lane of Dalmeny Road. This required the motorcycle to cross the path of a westbound vehicle, turning left onto the westbound extension of Dalmeny Road, to continue west on that roadway. Whereas the tractor-trailer was required to yield to oncoming traffic within the curve, before entering the intersection, the motorcycle was just entering the intersection when it collided with the rear portion of the trailer.”

This report made frequent references to the requirement that the tractor-trailer turn left at the Y-intersection.

The report from Pario Engineering took issue with the description of the tractor-trailer being required to turn left. They state:

“The Jenish description of the tractor-trailer making a left turn at the Y-intersection was inaccurate.”

Pario takes the position that the tractor-trailer was continuing straight through and was not required to turn left and it was only further west at the T-intersection of Dalmeny Road and Gordon Murdoch Road where the tractor-trailer was to make a left turn.

In its conclusions, Pario states:

“Given that westbound traffic can continue straight through the intersection with no stop or yield sign, or any type of warning that the intersecting curve traffic has the right of way, it would not be reasonable to expect a westbound driver to perform emergency braking in response to traffic within the curve.”

And two:

“We disagree that westbound Dalmeny Road traffic was required to ‘turn left’ to continue through the Y-intersection with Gordon Murdoch Road. The westbound lane alignment allowed for vehicles to continue straight through the intersection requiring no steering correction.”

Both engineering firms relied on the appearance of the road and topography to reach their conclusions.

In response to the Pario report, Jenish points out to a number of photographs which show the yellow centre line curving slightly to the right near the intersection and that the centre line no longer aligns with that on the west side of the intersection. They describe this as a visual cue to drivers that the path of travel follows the curve to the right and that to access the westerly extent of Dalmeny Road, westbound drivers are required to “turn left” across the oncoming lane, albeit by steering only a small amount to the left.

It is also to be noted that the Pario report concludes that this intersection is poorly designed and confusing to drivers who are not familiar with the configuration of the intersection. They also note that the City of Ottawa failed to adequately design the intersection to minimize the number and severity of potential conflicts at the intersection. In fact currently, they point out, this intersection has been reconfigured and the eastbound lane through the sweeping curve is now blocked. Pario suggests that deficiencies included not only the configuration of the Y-intersection, but the speed control and the signage.

RELEVANT LEGISLATION

Insurance Act, s. 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 RELEVANT FAULT DETERMINATION RULES

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.

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.

12.(1) This section applies when automobile "A" collides with automobile "B", and the automobiles are travelling in opposite directions and in adjacent lanes.

(4) If automobile "B" is over the centre line of the road when the incident occurs, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

(5) If automobile "B" turns left into the path of automobile "A", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

13.(1) This section applies with respect to an incident that occurs at an intersection that does not have traffic signals or traffic signs.

(2) If automobile "A" enters the intersection before automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

PARTIES' ARGUMENTS

Submissions of Aviva

Aviva submits that the scheme of loss transfer is meant to provide an expedient and summary method of reimbursement. Fault is to be determined strictly in accordance with the Fault Determination Rules.

Aviva relies on a line of cases which suggests that the Fault Determination Rules set out just a series of general types of incidents and allocate fault in a manner that may, but not necessarily, correspond with actual fault. The rules are to be interpreted liberally and as long as the facts of the incident fit reasonably within a rule the rule should be applied.

Aviva also submits that the case law is clear that the Fault Determination Rules dispense a rough justice in order to facilitate this quick and inexpensive way of determining fault. The purpose of the legislation is to spread the load amongst insurers in a gross and somewhat arbitrary fashion with expediency being favoured over to finite exactitude (*Jevco Insurance Company v. York Fire & Casualty Company* [1996] O.J. No. 646, Court of Appeal). Aviva relies on Rule 12 in support of their position that fault should be found 100% with RSA's insured.

Aviva submits that the two vehicles were travelling in opposite direction in adjacent lanes. Aviva submits that all those requirements have been met with the motorcycle travelling eastbound on Dalmeny and the RSA truck travelling westbound on Dalmeny.

Aviva then relies on Rule 12(5) and takes the position that the RSA truck made a left turn into the path of the motorcycle resulting in 100% liability. While Aviva acknowledges that the left turn is not a significant left turn, Aviva submits that what constitutes a left turn should be looked at on a common sense approach, and it is not relevant what degree of turn is necessary in order for rule 12(5) to apply. Aviva relies on the photographs, the Police Report and the sign on the road that showed the arrowhead indicating a through road to the right and a slight shift to the left in the Y intersection.

Aviva submits that the RSA truck did not have the right of way and was required to yield to the motorcycle, which again is consistent with the rationale behind rule 12(5).

Aviva submits while it acknowledges that the Y separation was not a 90 degree left turn, that that was only because of the layout of the through road. The effect of the manoeuvre by the tractor-trailer driver was no different than a 90 degree left turn even though he did not make a 90 degree left turn and therefore again Rule 12(5) is applicable. Aviva says this is consistent with the "rough and ready" approach to the application of the Fault Determination Rules.

If 12(5) is not applicable then Aviva relies on 12(4) where Aviva submits that the tractor-trailer was over the centre of the line when the accident occurred and therefore is 100% at fault. The FDR defines “centre line” of a roadway as a single or double unbroken or broken line marked in the middle of the roadway. If no line is marked, then it is the middle of the roadway.

Aviva submits that if I do not find that the tractor-trailer made a left turn, that its movement still brought it over the centre line of the roadway and therefore they are still 100% liable.

Aviva also made submissions on Rule 5 which RSA states is applicable.

Aviva submits that if I find rules 12(4) or 12(5) are not applicable and I am looking at Rule 5, then I must first look to see if any other rules are analogous and as a result would then dictate how I would determine fault under Rule 5. Aviva submits that takes us back to Rules 12(4) and 12(5) and that they are the most analogous to the situation before me and therefore the result would still be 100% as against a tractor-trailer if I looked at Rule 5.

Case law suggests under Rule 5 where I consider the ordinary rules of law not only can I look at analogous rules but also I can look at the *Highway Traffic Act*. Aviva submits s. 141(5) of the *Highway Traffic Act* is applicable. Section 141(5) requires that a driver shall not turn left across the path of a vehicle approaching from the opposite direction unless a reasonable opportunity to avoid a collision has been afforded to the approaching vehicle. Aviva submits that if I apply ordinary law as reflected by the *Highway Traffic Act* s. 141(5), that I should conclude that the RSA vehicle turned left across the path of the motorcycle without affording them a reasonable opportunity to avoid a collision and therefore should be found 100% liable.

On this point, Aviva acknowledges that there was no stop sign or yield sign that would be applicable to the RSA truck. However, Aviva submits that that does not mean that the driver can just proceed through the Y intersection without making sure he can do so in safety. Particularly as he was crossing the eastbound lanes of Dalmeny in order to proceed westbound.

Aviva also suggested that if I decide to consider Rule 5, that I cannot consider the road design and any possible negligence on the part of the municipality stemming from the road design. Aviva submits that Rule 3, while it does not explicitly refer to road designs, makes reference to an obligation to exclude in my determination of fault “the circumstances in which the incident occurs including road conditions”. Aviva submits that this would include road design. Even if I determine that I can take road design into consideration Aviva submits that the case law does not support an apportionment of liability to a non-auto third party such as a municipality (see *Co-operators Belair v. Zurich*: Arbitrator Novick, June 22, 2023).

Submissions of RSA

RSA submits that this was an uncontrolled intersection and that the Aviva motorcycle was required to give way to the RSA vehicle that was lawfully occupying the westbound lane of Dalmeny Road.

RSA vehemently denies that the driver of their insured vehicle was making a left turn and also denies that the driver while proceeding westbound crossed over any eastbound lanes of traffic.

RSA submits that while the police materials suggest that westbound traffic must “yield the right of way before continuing straight through before the curve to reach the intersection of Gordon Murdoch Road”, that there is in fact no signage posted which indicates that westbound traffic must yield the right of way.

With respect to the applicability of Rule 12, RSA submits that the two vehicles were not travelling in opposite directions and therefore the rule is not applicable. While they may have been travelling in different directions they were not opposite.

RSA submits that for Rule 12(4) to apply, that the RSA vehicle must have been over the centre line of the road. RSA says its vehicle never crossed the centreline of Dalmeny Road, it simply proceeded on its intended and continuing course of travel in a westbound direction.

With respect to Rule 12(5) RSA submits that this rule is inapplicable because the tractor-trailer did not turn left or in any way turn into the path of the Aviva motorcycle. RSA submits that a lefthand turn contemplates a change in direction from one thoroughfare to another. That did not occur here says RSA. The tractor-trailer simply continued straight in its westbound direction on Dalmeny Road.

If any of the rules in the fault chart apply, it is Rule 13 as this was an uncontrolled intersection. The RSA vehicle entered the intersection first. The intersection occurs where the sweeping bypass connects with Dalmeny Road. The tractor-trailer driver was there before the Aviva vehicle and therefore the Aviva vehicle is completely at fault.

RSA submits that the only left turn contemplated by their insured was when it got to the T-intersection at Dalmeny Road and Gordon Murdoch with a plan to turn left onto Gordon Murdoch Road southbound.

If I find that Fault Determination Rules 12 and 13 are not applicable then RSA also relies on Rule 5. However, RSA submits that applying the ordinary rules of law would result in a 100% liability as against the motorcycle. To a large extent, RSA relies on the Jenish Engineering Report in

support of their position. RSA submits that the motorcycle was going 60 to 70 km/h at the time of the collision. If it had been going slower, the accident would not have occurred. It was an uncontrolled intersection with a duty on the motorcycle driver to yield to obvious traffic. He could see the tractor-trailer and took no appropriate action.

RSA also submits that I should consider under any determination I may make under Rule 5 the role of the municipality. RSA submits that the materials provided to me support that there was a negligent design of this area and in particular what they describe as a sweeping bypass and its connection to Dalmeny Road. This was designed by the City of Ottawa. The design of this intersection should be taken into account when determining fault for this accident. Aviva points out to a letter they submitted from an Ottawa counsellor who proposed a closure of the bypass curve prior to the accident. After the accident, the Municipality of Ottawa closed off the curve which is evidence of recognition that the design was improper.

RSA also points to the Jenish report which stated that the "City of Ottawa failed to adequately design the intersection to minimize the number and severity of potential conflicts at the intersection. The current (present day) reconfiguration of the Dalmeny Road and Gordon Murdoch Road intersection (eastbound lane through the sweeping curve is now blocked) accords with TAC geometric design guide for Canadian Roads which dictate that a realignment or a correction to the intersection layout is required if the intersection has deficiencies, speed control, signage or design, which cannot be corrected to reduce and/or eliminate conflicts and which cannot be corrected to ensure the safety of road users".

RSA submits that Rule 3(a) specifically does not make reference to road design. RSA submits that road conditions are not the same as a road design. RSA relies on a decision from Arbitrator Guy Jones in *Royal & Sun Alliance Company v. Aviva Insurance Company of Canada*, 2007 Carswell ON 11772 from December of 2007 which was upheld on appeal (2008 Carswell ON 4894) August 25, 2008 by Justice Mesbur. In that case, Arbitrator Jones was required to determine in a loss transfer matter the degree of fault between an injured pedestrian who was a gas bar attendant, the owner of the gas bar, the driver of the fuel truck and two other vehicles who struck the pedestrian. Arbitrator Jones concluded that the gas bar attendant was 50% at fault, the fuel truck driver 30% at fault and the owner of the gas bar 20% at fault. In terms of loss transfer, that meant that only 30% recovery was permitted from the fuel truck driver. Justice Mesbur agreed in the appeal that other persons or entities could be considered when determining fault for the accident and if there are others at fault, then the party seeking loss transfer can only recover in accordance with the degree of fault assigned to the vehicles covered by s. 275 of the loss transfer provisions.

RSA submits that the term "road conditions" is intended to apply to matters such as whether the roads are dry or wet or whether they have been properly maintained in terms of having cracks or potholes. This was not intended to include road design.

In any of the circumstances set out by RSA the motorcycle driver is found to be 100% at fault subject to an apportionment of liability due to the involvement of the municipality.

Aviva Reply

On the issue of the uncontrolled intersection, Aviva's position is that the Y separation was a controlled intersection. This was demonstrated by the road sign which was westbound on Dalmeny Road which had the arrowhead at the end of the curve to the right and then by the stop sign for eastbound traffic that turned right from northbound Gordon Murdoch Road.

Aviva relies on Ontario Traffic Manual Book 6 and in reviewing the intersection warning signs notes that the warning sign on Dalmeny Road for westbound traffic meets the criteria of a road sign dealing with a controlled intersection. Therefore, the Aviva motorcycle had the right of way.

Aviva submits that RSA reliance on Rule 13 is misplaced as it applies to incidents that occur at an intersection that does not have traffic signals or traffic signs and this Y-intersection did have a traffic sign showing the right of way through the curve and the obligation to yield if you were proceeding through the left of the Y-intersection.

With respect to RSA's submissions that it would be appropriate to allocate some contributory negligence or some degree of fault to the municipality, Aviva takes the position that the Arbitrator Jones decision is no longer good law. Aviva relies on the decision in *State Farm Mutual Automobile Insurance Company v. Aviva Canada Inc.*, 2015 ONCA 920 wherein the Court of Appeal held that Rule 3 must be applied to all determinations of fault made under the regulation including those made under Rule 5.

Aviva points to the decision of Arbitrator Novick in *Co-operators and Belair (supra)* where she concludes that given the Court of Appeal's decision in *State Farm v. Aviva (supra)*, that Arbitrator Jones's earlier decisions no longer constitute good law.

Aviva submits that Rule 3 precludes the consideration of fault of non-involved third parties.

AWARD

I conclude that the RSA transport truck was making a left turn at a controlled intersection and that Rule 12(5) of the fault chart is applicable. Therefore, RSA is 100% responsible and pursuant to s. 275 of the *Insurance Act* must indemnify Aviva for 100% of the accident benefits paid. I make no decision with respect to what constitutes appropriate indemnification in terms of quantum as that was not before me.

DECISION AND ANALYSIS

ANALYSIS

Section 275 of the *Insurance Act* creates a scheme for reimbursement between certain motor vehicles such as a heavy commercial vehicle and a motorcycle. This legislation came into existence in June of 1990 and has been the subject matter of a number of decisions, both at the arbitral and judicial level.

In this case there is no dispute that loss transfer is applicable as the RSA vehicle involved was a heavy commercial vehicle. In addition, the Aviva vehicle was a motorcycle. The issue here is purely one of fault and which provisions of the fault chart are applicable.

As Arbitrator Novick pointed out in her decision in *Co-operators v. Belair (supra)*, the statutory framework for claims for loss transfer is brief and almost perfunctory. There is little help under s. 275 for an arbitrator in determining how to apply the terms and provisions of the fault chart when liability is in dispute.

On the other hand, there have been a number of judicial comments on how fault is to be determined in loss transfer cases. Justice Gotlib in the case *Jevco Insurance Company v. York Fire Casualty* [1995] O.J. No. 1352 noted that the scheme of this legislation is to “provide for an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by Regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.

Similarly, Justice Matlow in *Jevco Insurance v. Halifax (supra)* commented at paragraph 8 that the rules contained in Regulation 668 under the *Insurance Act* merely set out a series of general types of accidents in order to facilitate indemnification without the necessity of allocating actual fault. He stated that the rules allocate fault according to a particular type of accident in a manner that in most cases would probably but not necessarily correspond with actual fault.

We then have the leading case from the Court of Appeal in *State Farm Mutual Insurance Company v. Aviva Canada Inc.*, 2015 ONCA 920. In that case, the court was considering the meaning of Rule 3 of the Fault Determination Rules in conjunction with Rule 5. The court was looking at what the meaning of “ordinary rules of law meant in the context of a loss transfer claim”. First, the court concluded that Rule 3 applies to all determinations of fault made under the Fault Determination Rules including those made under Rule 5. They also concluded that pure tort law was not applicable to determine liability in loss transfer matters. They stated

“By precluding a pure tort law approach to fault determination, Rule 3 acts in harmony with the purpose of the legislative scheme because it promotes an expedient, more summary approach for determining fault.”

The court endorsed the decision in *Jevco v. York Fire* that this legislative scheme is designed to provide an expedient and summary method for determining fault for purposes of indemnification. It is done in a gross and somewhat arbitrary fashion favouring expediency and economy over finite exactitude.

In concluding that Rule 12(5) of the Fault Determination Rules is applicable here, I have taken into consideration the direction and comments of the courts and arbitrators noted above.

I have carefully reviewed the Police Report, the reconstruction reports and particularly the discoveries of the two drivers and the photographs of the scene as it was on the day of the accident.

I conclude that the RSA vehicle executed a left turn at the Y-intersection in order to continue proceeding in a westerly direction on Dalmeny Road. While I agree that this was technically not a change in direction for the RSA vehicle in that it was continuing to proceed in a westerly direction, but the fact is in order to do so it had to jig to the left of the Y-intersection in order to get up to the stop sign at Gordon Murdoch. If the tractor-trailer had continued through the righthand side of the curve, it would have ended up on Gordon Murdoch. This was clearly an intersection between Gordon Murdoch northbound and Dalmeny Road.

Keeping in mind that the fault chart is designed to provide a rough-and-ready and expedient way of determining liability, I conclude that Rule 12(5) does not require that a vehicle make a 90 degree turn to the left in order to be brought within that rule. Again, this was an intersection where you either had to curve right or curve left in order to navigate through the intersection if you were proceeding in a westerly direction on Dalmeny as the RSA truck was. In looking at the photographs of the road, clearly the westerly direction of Dalmeny Road jigs over to the left and I do not find that it is a straight-through road. The driver himself admitted that he had to turn his steering wheel to the left in order to continue on to westbound Dalmeny. I find that this left-turn movement was sufficient to bring in the left-turning provisions of Rule 12(5).

I also conclude that these vehicles were travelling in opposite directions in adjacent lanes. The motorcycle was entering the intersection to proceed in an easterly direction on Dalmeny and the RSA truck was proceeding in a westerly direction on Dalmeny. Rule 3 directs me not to look at the location on the insured's automobile at the point of contact with any other automobile involved in the incident and therefore it is not relevant for me to consider where the motorcycle

struck the tractor-trailer at the time of impact. I am satisfied that these vehicles were travelling in opposite directions at the time of the accident.

I am also satisfied that they were travelling in adjacent lanes. Clearly this is not a typical adjacent lane case but I do not find any direction in the Fault Determination Rules with respect to the meaning of “adjacent”. I did review the decision from State Farm Mutual Automobile Insurance Company and Allstate Insurance Company of Canada (Arbitrator Novick, January 28, 2025) wherein she made some helpful comments about the meaning of the word adjacent under Rule 12(5).

In the case before her, counsel argued that the term “adjacent” is not defined in the Regulation but put before her the definition from Black's Law Dictionary as follows

“lying near or close to; sometimes, contiguous neighbouring. Adjacent implies that two objects are not widely separated, though they may not actually touch .. while ‘adjoining’ imports that they are so joined or united to each other that no third object intervenes.”

Counsel for State Farm in that case argued that the term adjacent should be broadly interpreted which is consistent with the legislative intent underlying the loss transfer provisions in order to spread the loss amongst insurers in that gross and somewhat arbitrary fashion as has been referred to in *Jevco v. York*.

Arbitrator Novick concluded that the term “adjacent lanes” in Rule 2(1) is capable of supporting more than one reasonable meaning and is therefore ambiguous. Therefore, the question for her was which of the interpretations (narrow or broad interpretation) fits in more harmoniously with the scheme of the Fault Determination Rules. She concluded that the broader interpretation should apply and she held that “adjacent lanes” means lying near or close to but is not restricted to lanes that are adjoining or immediately next to each other.

I agree with Arbitrator Novick and I conclude that this accident occurred when the tractor-trailer and the motorcycle were in adjacent lanes.

Clearly the intersection in this case and the circumstances of this loss do not fit neatly into one particular rule. However, I find that the facts of this case on a broad interpretation consistent with the purpose of the loss transfer scheme sufficient to bring this accident squarely within Rule 12(5). Based on the fact that I conclude that the RSA vehicle turned left into the path of the motorcycle while it passed through the Y-intersection, RSA's driver is 100% at fault.

However, I do want to deal with the submissions of RSA with respect to Rule 13 and whether I should make some finding against the municipality for negligent design. Rule 13 applies to circumstances where an incident occurs at an intersection that does not have traffic signals or traffic signs. I conclude that this is an intersection that has a traffic sign. It clearly does not have any traffic signals but there is a sign that governs westbound drivers on Dalmeny Road. I have looked carefully at the appearance of this sign and also carefully reviewed the Ontario Traffic Manual Book 6, with respect to warning signs.

In this case, the yellow sign shows a road curving to the right with an arrowhead at the end of that road. This in my view clearly indicates that that is the “main road”. The Ontario Traffic Manual Book confirms that where an arrowhead is at the end of the line, that that symbolizes the right of way. I also agree with Aviva that the arrowhead on the road sign confirms that the Y-intersection was in fact a controlled intersection.

The second branch of the Y in the sign shows a slight deviation to the left (westbound Dalmeny continuing up to the T-intersection) and there is no arrowhead. This, the Ontario Traffic Manual, confirms means that vehicles proceeding through the non-arrowhead left side of the Y-intersection are under a stop or yield at that point in the intersection where it connects with the other half of the Y.

That is the only reasonable assumption that one could make based on the topography, the nature of these two roads, the intersection and the signage. I acknowledge that there is no stop sign. However, in my view an intersection can be governed by a traffic sign that is not a stop sign. In intersections where there are no actual stop signs the signage, as we see in this case, is clearly designed to provide directions with respect to the drivers approaching the Y-intersection.

Therefore I conclude that Rule 13 is not applicable as this accident did not occur at an intersection that did not have a traffic signal or traffic sign.

RSA also argued that if I concluded that neither Rules 12 or 13 were applicable, that if I applied Rules 3 and 5 that I should find that the Aviva vehicle was responsible. While I have concluded that Rule 12(5) is applicable, I also find that if I had looked at Rule 5 “the ordinary rules of law”, that I would have concluded that the RSA truck is 100% responsible. I would have found that an analogous rule to assist me in determining liability under Rule 5 would have been Rule 12(5) and I also agree with Aviva that s. 141(5) of the *Highway Traffic Act* would be relevant. Section 141(5) provides that a driver shall not turn left across the path of a vehicle approaching from the opposite direction unless a reasonable opportunity to avoid the collision has been afforded to the approaching vehicle. In this case, I find that the RSA driver turned left across the path of the motorcycle without affording it a reasonable opportunity to avoid a collision. The driver failed to follow the clear direction set out in the yellow sign showing the right of way through the curve

which should have alerted the driver to slow down and yield to the motorcycle which was there to be seen.

This then brings me to whether or not in a loss transfer matter one can allocate fault to third parties other than the drivers of the insured vehicles that fall within the definition of s. 275 of the *Insurance Act*. I find that I do not have that authority and that the loss transfer is limited to assigning fault between either a first party or second party insurer as defined under s. 275 of the *Insurance Act*. I did review the case law provided by RSA and in particular the decisions from Arbitrator Jones and I do not agree with Arbitrator Jones's conclusions. I agree with Arbitrator Novick to the extent that arbitrator Jones's decision was upheld by Justice Mesbur (*Royal & Son Alliance v. Aviva Insurance, 2008, supra*) that that approach has been overturned by the Court of Appeal in *State Farm v. Aviva, supra*. Arbitrator Novick in her decision states "I will simply state that I do not agree with Arbitrator Jones' findings of fault allocation in these cases. In my view, the clear words of s. 275(2) that indemnification can only be made "according to the respective degree of fault of each insurer's insureds" also means that the "fault pie", as applicant's counsel put it, can also only be divided between these parties that are directly involved in the incident. To find otherwise creates a complicated and dissonant situation that in my view is inconsistent with the simple and expedient system envisioned by the legislature". I wholeheartedly agree with Arbitrator Novick's statement. I also agree with the following:

"In face of the Court of Appeal's clear statement to the contrary in *State Farm and Aviva, supra*, this statement cannot stand and his detailed analysis and findings that follow, as well as the appeal decision of Justice Mesbur upholding this finding, in my view, no longer constitutes good law".

This was based on Arbitrator Jones's conclusion in his case to support his position about expanding the liability analysis that Rule 3 does not apply to Rule 5 and that has clearly been overturned by the Court of Appeal in *State Farm and Aviva*.

I therefore conclude that s. 275 does not permit me to look at the actions of the Municipality of Ottawa in the design of this road. I also conclude that Rule 3 would prevent me from looking at the road design in any event. In my view, where Rule 3 directs me not to consider "road conditions" that it would equally apply to road design and therefore it is not a proper consideration for this rough and ready and expedient process in determining liability as between two sophisticated auto insurers in a loss transfer claim.

AWARD

I find that Rule 12.5 of the Fault Determination Rules is applicable to the loss of August 20, 2019 and in accordance with Rule 12(5) and s. 275(1) and (2) of the *Insurance Act*, I conclude that the RSA vehicle is 100% liable in this accident and indemnification should proceed forward on that basis.

COSTS

Paragraph 11 of the Arbitration Agreement provides that the costs relating to the arbitration are to be awarded based on the discretion of the arbitrator. I did not receive any submissions with respect to costs or any advice that there was an offer to settle.

As Aviva was 100% successful in this arbitration, I conclude that the costs of the arbitrator are to be paid by RSA. Similarly, RSA is to pay Aviva's legal costs. This would include any disbursements. If the parties cannot agree on costs within the next 30 days, I would ask that they let me know and we can schedule a costs hearing.

If there were any issues with respect to the quantum of indemnification that flow in this matter, counsel should contact me so we can schedule a pre-hearing on that issue.

DATED THIS 2nd day of May, 2024 at Toronto.



Arbitrator Philippa G. Samworth
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