

***IN THE MATTER OF SECTION 275 OF THE INSURANCE ACT, R.S.O. 1990,
AND ONTARIO REGULATION 664;***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

COACHMAN INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Derek Greenside for the Applicant, Coachman Insurance

Megan Murphy for the Respondent, Intact Insurance

BACKGROUND:

1. Sharon Sharpe was seriously injured when she was struck by a tractor trailer shortly after she exited from her vehicle that had become embedded in a snowbank. The truck also collided with her vehicle, a Dodge SUV insured by Coachman Insurance. The incident happened in the early morning hours of January 17, 2017, in Georgetown, Ontario as Ms. Sharpe was on her way to work. The tractor trailer was owned by Transit Mica Inc., and insured by Intact Insurance,
2. The accident took place on Ewing Street, a two-lane road running in a southwest and northeast direction. There is a downward grade for vehicles traveling northeast, as well as a curve in the road. The roads in the area were icy. Ms. Sharpe lost control of her vehicle as she came down the hill and navigated her way into a snowbank to avoid hitting other vehicles in the area. The tractor trailer followed a short time later and the driver, Alain Chabot, also lost control as he applied the brakes.
3. Ms. Sharpe was sitting in her vehicle when people in the area saw the truck sliding towards her van and yelled out to warn her. She left the vehicle, and attempted to climb up the snowbank nearby. She slipped while doing so, and the truck ran over both of her legs.
4. Ms. Sharpe applied to Coachman Insurance for payment of benefits under the *SABS*. Various payments were made, and her claims were resolved on a full and final basis at a mediation in early 2021. A total of \$550,00 in benefits was paid out. Coachman seeks indemnification for the amounts paid from Intact, pursuant to section 275 of the *Act*, claiming that the driver of the tractor trailer was fully liable for the accident. Intact denies that its driver was liable in the circumstances.
5. There is no dispute that the tractor trailer that struck Ms. Sharpe was a “heavy commercial vehicle” as defined in section 9(1) of *Regulation 664* to the *Act*, and that the Loss Transfer provisions in section 275 of the *Act* apply.

ISSUE IN DISPUTE:

1. Which of the Fault Determination Rules in *Regulation 668* to the *Act* apply in these circumstances, and what is the effect of this finding ?

RESULT:

1. Rule 17(1) of the Fault Determination Rules applies in this case. The driver of the Intact insured vehicle is therefore 100% at fault for the accident.

EVIDENCE:

6. The parties submitted a Statement of Agreed Facts setting out the details of the road and accident scene, as well as the sequence of events leading up to the collision from both drivers' perspectives. It also contains the main findings from a report authored by forensic engineers from the firm -30- Forensic Engineering, retained to do an analysis of how the accident occurred.

7. Counsel also submitted a Joint Document Brief containing the Police MVA Report, transcripts from the Examinations for Discovery of Ms. Sharpe and Mr. Chabot in a tort claim brought by the Claimant, a transcript from an Examination Under Oath conducted of Ms. Sharpe in July 2018 in this proceeding, notes from an "adjusting interview" with Mr. Chabot, pictures of the accident scene and both vehicles, and the accident reconstruction report from -30- Forensic Engineering dated March 1, 2018.

8. No *viva voce* evidence was called, and the hearing took place by way of an exchange of written submissions. Most of the relevant facts are not in dispute. I will summarise the documentary evidence and note the few areas in which inconsistent information has been provided.

9. Sharon Sharpe was on her way to work when the accident occurred just before 6 a.m. on January 17, 2017. She recalled that it was drizzling lightly. She picked up a co-worker who lived on Cherry Street, and had planned to pick up two others before driving to their workplace. There was an incline on Cherry Street and the road was icy. Ms. Sharpe stated that she could not gain any traction to get up the hill, so she turned her vehicle around and instead proceeded along Ewing Street, down a hill that the forensic engineers estimated to be a 7.5% downhill slope.

10. Ms. Sharpe testified that she knew the road surface was slippery, and she tried to slow down as she approached the curve in the road. She applied her brakes, but stated that "there was nothing, I was just on ice". She recalled seeing other vehicles on the road that could not make it up the incline, as well as a telephone pole nearby, and explained that she decided to guide her vehicle into a snowbank located to the left of her vehicle, in order to avoid hitting any of those things. The gentle impact brought her vehicle to a stop. She stated that she felt this was a safe thing to do, as cars coming down the hill would be able to see her vehicle, and it was far enough off the roadway that those traveling up the hill would be able to avoid it.

11. Ms. Sharpe stated that she remained in her SUV after driving into the snowbank. She made two quick phone calls to the people she was supposed to pick up, to let them know that she would not be coming. The passenger apparently left the vehicle when he noticed that another colleague from work had stopped her vehicle, and was also having trouble on the ice. The Claimant recalled that she had just put her phone back in her purse when she heard people yelling at her to get out of her vehicle. She looked to her left, saw the truck coming directly for her and exited the vehicle quickly to get out of the way.

12. Ms. Sharpe recalled that she tried to climb up the snowbank that her car was lodged in, in order to avoid the truck. She was wearing slip-on running shoes, and her foot sunk into the snowbank, slowing her down and causing her to fall. She testified that the tires of the tractor trailer then ran over both of her legs "in the blink of an eye". She stated that the impact of the truck with the snowbank caused the whole snowbank to move, and that the truck also struck her SUV.

13. Ms. Sharpe stated that when her vehicle coasted into the snowbank, its nose was pointed toward the sidewalk. She estimated that she was stopped for approximately five minutes before she was struck by the tractor trailer. The forensic engineer's report determined that the Dodge SUV's engine continued to idle while the car was in the snowbank, and that the vehicle's transmission was in the "park" position.

14. The Motor Vehicle Collision Report from the police file contains a short description of events and a diagram. It identifies "Vehicle 1" as the tractor trailer driven by Mr. Chabot, and "Vehicle 2" as the Claimant's vehicle. It states "V1 slid into V2 which was disabled in snow bank", and that "V1 struck V2 with right front bumper into V2 driver front door". It also notes that the driver of V2 was struck outside of her vehicle prior to the two vehicles colliding.

15. The diagram accompanying the text in the MVA report shows Ms. Sharpe's vehicle on the far left side of the road, partly on the shoulder. The drawing suggests that the truck struck Ms. Sharpe's vehicle and caused it to move, but the arrow and dotted lines are difficult to decipher. The outline of another vehicle is shown in the diagram, but it is not clear whether that is a third vehicle, or one of the two vehicles identified that had shifted position as a result of the impact.

16. Mr. Chabot, the driver of the tractor trailer, stated that he was driving a trailer with a full load to a client in Georgetown on the day in question. He left Napanee in the morning, and drove along Highway 401 until exiting at some point west of Toronto. He recalled that the roads were dry as he proceeded along the highway, but that they looked "shiny" after he exited the highway, and he assumed they were icy.

17. Mr. Chabot recalled approaching the area, and slowing down as he turned left onto Ewing Street. He felt the tires of the cab of his truck slip slightly as he made the turn, but stated that the tractor and trailer straightened out as he entered the street. He noticed that the road started to slope downward, and he applied his brakes. He stated that despite doing so, he was unable to gain any traction because of ice on the road. He recalled trying to activate the Bendix braking system for the trailer by pulling on a lever in the dashboard, but there was no reaction. The steering on the truck was also not responsive, and he lost control of the vehicle and was unable to stop.

18. Mr. Chabot testified that he saw three cars in front of him as the truck was sliding down the hill. He stated that one was to the right, with its lights facing him and its back stuck in the snow; he assumed that it had tried to go uphill but was not able to. He recalled seeing a small black car, parked to the left of him. He testified that there was also a vehicle in the middle of the street,

which he identified as the Dodge SUV that the Claimant had been driving. He stated that the headlights of this vehicle were facing him, and that these three cars were “side by side”.

19. When he was referred to the diagram in the Police MVA Report described above, showing the Claimant’s SUV at the far left, partially off the road, Mr. Chabot insisted that Ms. Sharpe’s vehicle was in the middle of the road and facing uphill when he approached. He stated that “it happened so fast”, and that he was trying to “understand what was going on because it made no sense...” When he was asked how far away he was from these other vehicles when he first saw them, Mr. Chabot responded that he could not say, and that his main focus was on stopping the truck, “while seeing that what I could see downhill was not normal”.

20. Mr. Chabot was shown photographs of both vehicles after the accident, that showed the location of the damage to each. It was suggested to him that as the right side of the truck’s front fender and the left front and side of the van were damaged, those would be the points at which the two vehicles collided. He stated a few times that when he was partway down the incline on Ewing Street, he noticed that the Dodge SUV turned or shifted slightly toward the right. When asked to confirm that he recalled the van moving at the time of the collision, he responded that “they were trying to shift and turn, probably to move away”. However, he also acknowledged that there were no people in the van when it was struck by the truck. Mr. Chabot further stated that Ms. Sharpe must have panicked when she saw the truck coming toward her, and that she moved in the “opposite direction to the others”, and came toward his truck.

21. As noted above, forensic engineers were retained by the insurer and prepared a report titled Engineering Assessment of a Motor Vehicle – Truck Collision in March 2018. Their analysis was based on an inspection of both vehicles, photographs of the damaged truck and the accident scene, and the data stored in the vehicles’ systems. They also reviewed a summary of a statement provided by Mr. Chabot. They did not have access to or review any information from Ms. Sharpe. As noted above, the report concludes that the Dodge SUV was in a stationary position with the engine idling and the transmission in “park” position for at least five seconds prior to the impact with the truck.

22. The report also concludes that Ms. Sharpe's vehicle was likely positioned perpendicular to the direction of travel on Ewing Street and that the front right corner of the truck struck the front door on the left (or driver's) side of the Claimant's van. It states that Ms. Sharpe's vehicle likely rotated clockwise as a result of that impact, and that there was a secondary impact at the rear of the van, on the left side. The report determined that Mr. Chabot had applied his brakes for approximately 40 seconds before the truck came to a final stop, and concluded that the reason he was unable to stop the truck before it collided with the Sharpe vehicle was due to the icy road conditions, rather than his actions or inaction.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act

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 664

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.

Regulation 668 – 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.

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.

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.

17. (1) If automobile "A" is parked when it is struck by 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.

Highway Traffic Act

170. (1) No person shall park, stand or stop a vehicle on a roadway,

(a) when it is practicable to park, stand or stop the vehicle off the roadway; or

(b) when it is not practicable to park, stand or stop the vehicle off the roadway unless a clear view of the vehicle and of the roadway for at least 125 metres beyond the vehicle may be obtained from a distance of at least 125 metres from the vehicle in each direction upon the highway.

(2) Subsection (1) does not apply to that portion of a roadway within a local municipality, other than a local municipality that was a township on December 31, 2002 and, but for the enactment of the Municipal Act, 2001, would have been a township on January 1, 2003.

PARTIES' ARGUMENTS:

23. As noted above, counsel exchanged detailed written submissions on the question of fault and the application of the Fault Determination Rules. I summarise their positions below.

Applicant's submissions - Coachman

24. Counsel for Coachman submitted that it was clear from the evidence that Ms. Sharpe's vehicle was parked and disabled when it was struck by the truck. He noted that the vehicle's transmission was in the "park" position, and that it had mounted the curb and become embedded in a snowbank. He referred to the Claimant's evidence that she had called the two co-workers that she was supposed to pick up to let them know that she would not be coming, and submitted that this makes clear that her vehicle would not be moving for awhile. Counsel contended that these facts confirm that Ms. Sharpe's vehicle was "parked" at the time of the impact, and that Rule 17(1) accordingly applies. He noted that this leads to the conclusion that Mr. Chabot was 100% at fault for the accident, and that Intact must indemnify his client for the amount in issue.

25. Counsel for Coachman submitted alternatively that if I find that Rule 17 does not apply, Rule 6 would apply, with the same result. Rule 6(1) applies if an automobile is struck from the rear by another vehicle, and both are "traveling in the same direction and in the same lane". He noted that Rule 6(2) then provides that if an automobile is stopped, the driver of the stopped vehicle is not at fault and the driver of the other vehicle is 100% at fault. Mr. Greenside cited Justice Lax's comments in *Co-operators General Insurance v. Canadian General Insurance* (1998) CarswellOnt 2560 that the phrase "struck from the rear" in this rule refers to the approach of the vehicle causing the collision in relation to the vehicle with which it collides, rather than the point of contact on the vehicle itself. He noted that Justice Lax also determined that the word "traveling" in Rule 6 refers to the direction of travel of the vehicle, and does not require that both vehicles involved be moving at the time of impact.

26. Finally, Coachman submitted in the further alternative that if Rule 6 does not apply in these circumstances, an analysis of fault must be conducted based on the "ordinary rules of law" as set out in Rule 5. Counsel noted that the Court of Appeal ruling in *State Farm Mutual Insurance v Aviva Canada* (2015) ONCA 920 CanLii makes it clear that this analysis differs from the detailed

process conducted in determining fault in a tort claim. He contended that Ms. Sharpe's vehicle was embedded in the snowbank before the truck turned onto Ewing Street, and that there was nothing that she could have done to change the position of her vehicle without the assistance of a tow truck. He submitted that the fact that Mr. Chabot chose to proceed down the icy hill knowing that there was a chaotic scene below should lead to the conclusion that he was 100% at fault for the accident, and that Intact is accordingly obliged to reimburse Coachman for the benefits sought.

Respondent's submissions – Intact

27. Counsel for Intact submitted that neither Rule 17 nor Rule 6 of the Fault Determination Rules apply in these circumstances, and that Ms. Sharpe should be found to be fully at fault for the accident under Rule 5, in accordance with the "ordinary rules of law".

28. Counsel suggested that there are two reasons why Rule 17(1) should not be found to apply in these circumstances. She noted that Rule 17 addresses a situation where two vehicles collide, one that is moving and one parked. She referred to evidence provided by both Ms. Sharpe and Mr. Chabot that they noticed other vehicles at the bottom of the hill as their vehicles slid down, and that their actions were affected by the location of these other vehicles. Counsel highlighted Ms. Sharpe's statement that she guided her van into the snowbank in order to avoid these other cars, and submitted that this is what caused her to leave her vehicle partly blocking the lane of travel. She contended that these other vehicles that both drivers saw further down Ewing Street before the collision occurred were also "involved in the incident from which the responsibility to pay accident benefits arose" as set out in section 275(1) of the *Act*, and that this fact takes these circumstances out of the scenario described in Rule 17(1).

29. Ms. Murphy noted Arbitrator Samis' finding in *Dominion of Canada v Kingsway Insurance* (1999) CarswellOnt 7019, (upheld on appeal by Sachs, J., August 11, 2000) that when determining which vehicles are "involved in the incident from which the responsibility to pay accident benefits arose", contact between the vehicles is one of the factors to be considered, but is not necessarily required. She noted that Arbitrator Samis stated that once a third vehicle is found to be involved in the incident, its involvement "cannot be ignored by the blind application of a Rule that deals

with another kind of collision". Counsel contended that this instruction applies here, and that given the involvement of these other vehicles, Rule 17 does not apply.

30. Ms. Murphy further submitted that Rule 17 is inapplicable because the Claimant's vehicle was not "parked" at the time of the collision, as the rule requires. She noted that this term is not defined in the Fault Determination Rules, but that other arbitrators have considered the duration of time a vehicle was stopped for, the method of stopping, and the intent of the driver in determining whether a vehicle was "parked". She submitted that Ms. Sharpe's vehicle was not stopped for a long time, noting that the forensic engineering report determined that it was likely stopped "for at least five seconds", and that the headlights remained on. Counsel suggested that the Claimant did not park her vehicle, but rather guided it into the snowbank in order to prevent a collision with another vehicle, and that her intent was to leave it there temporarily as she assessed the situation. She contended that as the requirement for a vehicle to be "parked" is not met, Rule 17 cannot apply.

31. Counsel for Intact submitted that Rule 6 is also inapplicable, as it addresses rear-end collisions, and vehicles that are traveling in the same direction and same lane. She noted that the forensic engineers determined that Ms. Sharpe's vehicle was struck on the left side rather than at the rear, and that it was lodged in a snowbank at the time of impact so cannot be said to have been traveling, in any direction or lane. Counsel cited my comment in *Allstate Insurance v American Home Assurance* (2008) CarswellOnt 11416 that in assessing liability in a Loss Transfer context, a Rule should not be applied if the only way to do so is to significantly distort the facts in order to fit them within the stated criteria. She submitted that applying either Rule 17 or Rule 6 in these circumstances would be doing exactly that.

32. Counsel stated that Rule 5 requires that if an incident is not described in any of the rules, the degree of fault should be determined in accordance with the ordinary rules of law. Applying those rules, she urged me to find that Ms. Sharpe was fully at fault for the accident, as she placed her vehicle either in the middle of the road, or chose to leave it in a snowbank in a position that created a situation of danger for other drivers. She also submitted that in leaving her vehicle in the snowbank, Ms. Sharpe breached section 170 of the *Highway Traffic Act* which prohibits "stopping,

standing or parking a vehicle along a roadway”. She also submitted that the Claimant was negligent because, according to Mr. Chabot, she left her vehicle and moved toward the truck when she saw it approaching, and was not wearing appropriate footwear for the conditions which caused her to slip and fall under the truck.

Reply submissions – Coachman

33. Counsel for Coachman submitted in Reply that the facts in this case do not support Intact’s contention that the Claimant contravened section 170 of the *Highway Traffic Act* when she “parked” on a roadway. He noted that section 170(1)a specifies that it is only forbidden to stop or park on a roadway when it is practicable to park or stop a vehicle off the roadway, and submitted that this was not the case in these circumstances. He also noted that section 170(2) states that the prohibition against parking on a roadway does not apply if the location in question is within a local municipality. He contended that this exception would apply here, noting that (as agreed by the parties in the Agreed Statement of Facts) Georgetown is a community in the town of Halton Hills, and is part of the Regional Municipality of Halton.

ANALYSIS & REASONS:

34. Any analysis of liability in a Loss Transfer dispute must be done with a consideration of the general principles set out by the courts regarding how to approach these type of cases. The Court of Appeal stated in *Jevco Insurance v. Canadian General Insurance Company* (1993) 14 O.R. (3d) 545 that the Loss Transfer provisions are designed to provide for an expedient and summary method of reimbursing the first party insurer for payment of benefits under the SABS from the second party insurer whose insured was fully or partially at fault for the accident. And in *Jevco Insurance v. York Fire & Casualty Co.* (1996) 27 O.R. (3d) 483 (C.A.), Carthy, J.A. stated that the purpose of section 275 of the *Act* is to spread the load among insurers in a “gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude”.

35. I consider the facts in this case with these principles in mind. Ms. Sharpe and her Dodge SUV were both struck by the tractor trailer driven by Mr. Chabot after both vehicles slid down the hill on Ewing Street in Georgetown. The Claimant stated that she applied her brakes when she noticed a curve in the road coming up, but that her vehicle started to skid. In an effort to avoid

other cars and a telephone pole nearby, she guided her vehicle into a small snowbank. She stated that when her vehicle came to a stop, its nose was pointed toward the sidewalk, but she felt it was far enough off the road to not cause a hazard.

36. Ms. Sharpe estimated that she was hit by the truck about five minutes after she had stopped in the snowbank. The forensic engineering report finds that "at least five seconds" passed between those events. I note that the authors did not speak to the Claimant prior to preparing the report, nor read a transcript of her evidence, and relied solely on information obtained from her vehicle's Airbag Control Module and from Mr. Chabot. I find that given Ms. Sharpe's evidence that she made two phone calls before exiting her vehicle, her estimate of five minutes is reasonable. The report also determined that Ms. Sharpe's vehicle was likely perpendicular to the direction of travel on Ewing Street prior to the collision, and that the right front corner of the truck struck the front left side door of the Dodge SUV after it struck Ms. Sharpe and ran over her legs.

37. Mr. Chabot disputed Ms. Sharpe's evidence and the diagram in the Police MVA Report regarding the location of the Claimant's vehicle as he approached the hill and curve on Ewing Street. He recalled noticing three stopped cars "side by side" on the road at the bottom of the hill. He insisted that Ms. Sharpe's vehicle was the middle vehicle, and was facing his truck with its lights on. He stated that he thought this vehicle was trying to move out of the way, and that it twisted and turned before the moment of impact. He stated however at another point that the van was stopped when it was struck by his truck, and that no one was in the vehicle. Mr. Chabot explained that it "all happened so fast" once his truck started to slide on the ice, as he tried to apply the brakes, pull the brake lever on the dashboard to activate the braking system for the trailer and tried to steer the truck to a position of safety.

38. The above summary highlights that the only substantial fact in dispute relates to the position of the Sharpe vehicle on the roadway prior to the point where the truck strikes her and collides with her vehicle. Ms. Sharpe claims that the nose of her vehicle was in the snowbank and was out of the lane of travel, while Mr. Chabot claims that it was in the middle of the road. The police report appears to show the vehicle on the far left side of the road, partly off the roadway. The engineering report that analysed the damage to the vehicles states that the vehicle was "likely

positioned perpendicular to the direction of travel". The truck showed signs of damage on its right front corner, and the Claimant's vehicle was damaged on the left front door and side.

39. Having reviewed the evidence in detail, I prefer Ms. Sharpe's version of events to that of Mr. Chabot. While I did not have the benefit of hearing his testimony, I found parts of his evidence to be confusing and contradictory. He referred on a few occasions to the Dodge SUV moving prior to the collision, but admitted that no one was inside. To be fair, Mr. Chabot came upon a confusing scene in the dark early morning hours, in an area he was not familiar with. He was trying to do many things at once in order to gain control of the tractor trailer, that was sliding down an icy hill with people and cars nearby. It is not surprising that he did not have a clear recollection of the exact position of the Claimant's vehicle, given the few seconds he says transpired between the time the truck started sliding down the hill and the impact with the Claimant, and being in the midst of a situation he described as being "not normal". I conclude that the evidence supports a finding that the Sharpe vehicle was stopped in the snowbank at the side of the road, with its nose pointed toward the west, when it was struck by the tractor trailer.

40. However, the position of the Sharpe vehicle at the time of the collision is ultimately not relevant to the question I must decide. Nor is the point of contact between the two vehicles, or the conclusion reached by the forensic engineers that it was the icy conditions that caused the accident, rather than Mr. Chabot's negligence. Rule 3(a) of the Fault Determination Rules states that the degree of fault of an insured is to be determined without reference to "the circumstances in which the incident occurs, including weather conditions and road conditions". Rule 3(b) provides that "the location on the insured's automobile of the point of contact with any other automobile involved in the accident" is not relevant in a determination of fault. It is clear from the Court of Appeal's decision stated in *State Farm Mutual Insurance v Aviva Canada, supra*, that Rule 3 informs all determinations of fault under the Rules.

41. The question then becomes whether the circumstances described above fit within any of the Fault Determination Rules, or whether fault must be determined in accordance with the "ordinary rules of law" as set out in Rule 5. Coachman contends that Rule 17(1) applies, and results in Intact's insured being 100% at fault for the accident. That rule provides that if a parked vehicle

is struck by another vehicle, the driver of the parked vehicle is not at fault and the driver of the second vehicle is fully at fault.

42. Intact raises two points in support of its argument that Rule 17(1) does not apply in these circumstances. Firstly, it submits that Ms. Sharpe's vehicle was not actually "parked", as it was only temporarily (and it suggests illegally), stopped in the snowbank. Counsel noted that the van's headlights were still on at the moment of impact and that Ms. Sharpe had only intended to stop her vehicle in the snowbank so that she could assess the situation and decide on her next course of action. I note that there is no definition of "parked" or "parked vehicle" in *Regulation 668*, and that factors such as the length of time a vehicle was stopped, the method of stopping and the driver's intent have been considered in determining whether a vehicle is "parked" or not.

43. Considering the above factors, I find that Ms. Sharpe's vehicle was parked at the point that she was struck by the tractor trailer. Although the engine was idling, the evidence is clear that the vehicle's transmission was in "park". Ms. Sharpe stated that her car was in the snowbank for approximately five minutes before it was struck by the truck, which is a not insignificant period of time. While she may have guided her vehicle into the snowbank in order to avoid colliding with other vehicles or objects, it is clear from the fact that she called two co-workers to tell them that she would not be picking them up, that she needed assistance from either a tow truck or other people in order to extricate her vehicle from its position. I find that despite the somewhat unusual location in a snowbank, the fact that Ms. Sharpe's vehicle was stopped for five minutes and did not move while she made a few phone calls leads to the conclusion that it was "parked" at the time that it was struck by the tractor trailer.

44. Intact also argued that Rule 17(1) should only be applied in circumstances involving a simple collision between two vehicles, and not in a scenario such as this where other vehicles are involved in the incident. Counsel referred to Arbitrator Samis' finding in *Dominion of Canada v. Kingsway Insurance, supra*, where he noted that it was not appropriate to characterise an incident as a two-vehicle accident if other vehicles have been determined to be involved. She submitted that the other vehicles on Ewing Street that had also skidded on the ice influenced both drivers' actions in this case and were therefore also "involved in the incident".

45. I agree with Arbitrator Samis' analysis in the above case, which was upheld on appeal. He determined that a truck that essentially cut off the claimant's vehicle by crossing directly into his path of travel as it entered the highway from a private driveway, caused the claimant in that case to take evasive action. In so doing, his vehicle struck a pickup truck stopped on the shoulder of the road. Given this chain of events, and the direct link between the actions of the truck driver and the claimant's instant response, it made sense to characterise the truck as being "involved in the incident from which the responsibility to pay accident benefits arose", and to therefore reject the application of Rule 17(1).

46. I find that the circumstances of this case are different, however, and lead to a different result. While Ms. Sharpe stated that she guided her vehicle into a snowbank in order to avoid hitting other nearby cars and objects, those other vehicles formed part of the scene that she came upon as she drove toward the downward slope and curve on Ewing Street. They played a "passive role" in the situation, in contrast to the truck that cut off the claimant in Arbitrator Samis' case, which played a very "active role" in the chain of events that followed. The mere fact that other vehicles may be nearby when two vehicles collide does not, in my view, make them "involved in the incident".

47. I accordingly find that Rule 17(1) of the Fault Determination Rules applies in these circumstances, and that Mr. Chabot, the driver of the Intact insured tractor trailer, is 100% at fault for the accident. In view of this finding, I need not consider the parties' submissions on the application of Rules 5 or 6.

48. Intact is therefore liable to indemnify Coachman for the benefits it has paid out to Ms. Sharpe pursuant to section 275(1) of the *Act*, subject to any arguments about the reasonableness of such payments.

ORDER:

I hereby Order that Intact reimburse Coachman Insurance for all benefits paid to date, plus any applicable interest.

COSTS & ARBITRATION FEES:

Given the result, Coachman is entitled to payment of its costs, on a partial indemnity basis, from Intact. I invite the parties to contact me if they cannot agree on the amount of costs to be paid, and a teleconference will be convened to discuss the issue.

Intact is also responsible to pay the arbitration fees relating to this matter. I will forward my final account under separate cover.

DATED at TORONTO, ONTARIO this 25TH DAY OF JANUARY, 2022



Shari L. Novick

Arbitrator