CITATION: Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance v. Gore Mutual Insurance, 2022 ONSC 3188
COURT FILE NO.: CV-18-601117
DATE: 20220530

ONTARIO SUPERIOR COURT OF JUSTICE

RE: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE, Appellant

-and-

GORE MUTUAL INSURANCE, Respondent

BEFORE: FL Myers J

COUNSEL: *John Friendly and Drew T. Higginbotham*, for the Appellant

Arthur R. Camporese, for the Respondent

HEARD: May 24, 2022

ENDORSEMENT

The Appeal

[1] On consent, the title of proceeding is amended to substitute the Minister of Government and Consumer Services for the Minister of Finance as Her Majesty's representative on this appeal.

[2] The Minister appeals from the decision of Arbitrator Kenneth Bialkowski, dated June 6, 2018, holding the Motor Vehicle Accident Claims Fund liable to pay statutory accident benefits under subsection 268 (2) of the *Insurance Act*, RSO 1990, c I.8. The benefits are payable to or on behalf of the claimants Christopher Ugulini (deceased) and Lindsay Lance with respect to personal injuries they sustained in a snowmobile accident that occurred on December 26, 2013.

[3] This appeal involves a narrow question of law. The issue is whether the snowmobile insured by Gore Mutual was "involved in the incident from which the entitlement to statutory accident benefits arose" under s. 268 (2)(1)(iii) of the statute.

[4] The issue is one of law become it involves the assessment of scope or content the legal test that applies to the facts as found. The facts are clear and uncontested. Rather, the issue is what does it mean to be "involved in the incident".

The Standard of Review and Outcome

[5] The court will review the decision of the arbitrator on a standard of correctness on the issue of law in this appeal. The regular appeal standard applies to appeals from arbitrations under

Regulation 283/95. I do not need to go further to consider if the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), impacts the standard of review applicable on appeals from consensual arbitrations generally for the reasons discussed in paras. 9 to 14 of *Her Majesty the Queen in Right of Ontario (Minister of Government and Consumer Services) v Royal & Sun Alliance Insurance Company of Canada*, 2021 ONSC 3922 (CanLII), (referring to the decisions of Davies J., in *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 (CanLII) and Hainey J. in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 (CanLII)).

[6] For the reasons that follow, I find that the arbitrator erred in his interpretation of the meaning of the statutory standard or test set out in s. 268 (2)(1)(iii) of the *Insurance Act*. The arbitrator concluded that where two vehicles do not make contact in an accident, the test of whether an insured vehicle was "involved in the incident" requires that the insured vehicle caused or contributed to the injuries sustained by the claimant of statutory accident benefits. In my view, properly construed, s. 268 (2)(1)(iii) does not impose a causation requirement to determine the priority insurer.

The Facts

[7] On December 26, 2013, two adult brothers, Christopher Ugulini and Casey Ugulini, went for a ride on their snowmobiles together with Ms. Lance. They trespassed on a path that was off limits to snowmobilers. They were travelling faster than would have been allowed had they been on a lawful path.

[8] Christopher Ugulini's snowmobile was in the lead. Casey Ugulini was driving his snowmobile directly behind his brother.

[9] Christopher Ugulini was not insured. Casey Ugulini was insured by the respondent Gore Mutual.

[10] The claimant Lindsay Lance was a passenger on the uninsured, front snowmobile being driven by Christopher Ugulini.

[11] Unbeknownst to the brothers, a tree had fallen across their path. Christopher Ugulini's snowmobile collided with it first. Casey Ugulini's snowmobile collided with the tree about 0.6 seconds later.

[12] Sadly, both brothers were killed in the incident.

[13] Although the two snowmobiles were travelling directly in line, with Casey Ugulini driving right behind Christopher Ugulini, the arborator found that there was insufficient evidence to conclude that Casey's snowmobile ran into the back of, or collided at all with, Christopher Ugulini's snowmobile. Each ran into the tree directly.

[14] Ms. Lance survived but was injured in the crash. She applies for statutory accident benefits.

The Statutory Accident Benefits Payment Priority Ladder

[15] Statutory accident benefits are also referred to as "no-fault benefits". They are benefits that the law requires insurers to offer. They are designed to ensure that people injured in an accident obtain some payment for their immediate needs while issues of fault and tort liability play out over time.

[16] As the "no-fault" designation indicates, statutory accident benefits are payable without consideration of who is at fault for the injuries suffered by the claimant. Instead, they are to be paid by an insurer who can then try to recover the amount paid from others if appropriate.

[17] Since fault is not the payment criterion, the statute sets out a priority scheme to identify the insurer required to pay statutory accident benefits. The statute anticipates that there can be more than one insurer liable to pay statutory accident benefits to a claimant. When that occurs, subsection 268 (4) of the statute provides that the claimant is entitled to choose the insurer from whom she will receive her benefits.

[18] The order of priority among insurers is what is in issue in this case. Subsection 268 (2)(1) provides the following priority ladder for claims by occupants of an automobile. For these purposes, the word "automobile" includes snowmobiles:

Liability to pay

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of ***any other automobile involved in the incident from which the entitlement to statutory accident benefits arose***,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

[19] To determine who is liable to pay Ms. Lance benefits, the first question under subparagraph (i) is whether *she was insured* by the insurer of the vehicle on which she was riding. There was no insurer of Christopher Ugulini's snowmobile. So Ms. Lance could not have been an insured person in that vehicle.

[20] The next rung of the priority ladder under subparagraph (ii) allows an uninsured passenger to obtain benefits from the *insurer of the vehicle* in which she was riding. If Christopher Ugulini had insurance for his snowmobile, Ms. Lance would have been entitled to obtain statutory accident benefits from his insurer. But Christopher Ugulini did not insure his snowmobile.

[21] The third rung of the priority ladder under subparagraph (iii) allows Ms. Lance to obtain her statutory accident benefits from the insurer of "**any other [snow]mobile involved in the incident from which the entitlement to statutory accident benefits arose".**

[22] The arbitrator held that Casey Ugulini's snowmobile, the second in line, that was insured by Gore Mutual, was not *"involved in the incident"* that gave rise to Ms. Lance's entitlement of statutory accident benefits. The arbitrator held that Casey Ugulini was not involved in the incident because he did not cause Christopher Ugulini to crash into the tree ahead of him.

[23] As a result, the Motor Vehicle Accident Fund, represented by the Minister, was held to be the default payor of statutory accident benefits under the fourth and final rung of the payment priority ladder under s. 268 (2)(1)(iv) of the statute.

[24] The Minister submits that the arbitrator erred in deciding that Casey Ugulini's snowmobile was not "involved in the incident".

Statutory Interpretation of Statutory Accident Benefits

[25] The determination of the meaning of the words "involved in the incident" used in s. 268 (2)(1)(iii) of the *Insurance Act* is an exercise in statutory interpretation. Precedents instruct the court on how it should approach such an exercise.

[26] Generally, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament. See: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

[27] More specifically, the Court of Appeal has discussed the principles applicable to interpretation of the statutory accident benefits scheme when insurers have a dispute. In *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.*, 2002 CanLII 14202 (ON CA) Sharpe JA wrote:

> [10] The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this

> context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.

[28] In *Kingsway*, the court was not dealing with s. 268 specifically. However, as I understand the statutory scheme governing statutory accident benefits, as interpreted by the Court of Appeal, we are not dealing with grand issues of principle and equity. The goal of the scheme is to get some much-needed money into the hands of injured parties quickly. No fault is involved in the assessment of who is liable to pay the benefits. That can come later when the paying insurer seeks reimbursement if any is available.

[29] Each insurer understands that it will be liable to pay statutory accident benefits in the cases set out in the priority ladder in s. 268 without assessment of whether the claimant or someone else was at fault for the causing the accident that resulted in the claimant's injuries. Each insurer knows it needs to set its premiums and establish reserves to ensure it remains properly capitalized and profitable despite the no-fault payment obligations. Fairness among thousands or tens of thousands of claimants comes from payment and not the identify of the payor. The statute establishes the public policy as to the fair allocation of the initial payment responsibilities. Fairness to insurers comes from providing them clarity, certainty, and predictability so that they can assess their cash flow needs and set their pricing, regulatory capital, and cash management processes appropriately.

[30] Perell J. put it this way in *Seetal v. Quiroz*, 2009 CanLII 92114 (ON SC):

> [29] …I make three preliminary points about the interpretation of the Insurance Act. The first point is that the Act is part of a group of related statutes and regulations that together forms a sophisticated and integrated scheme to provide compensation for property damages and personal injuries arising from motor vehicle accidents. The second point is that an important component of the overall scheme is no-fault benefits, which is to say that liability to pay compensation may be imposed on an insurer without a finding of negligence against the insured. ***The third point, which is the flip side of the second is that the scheme may employ criteria to allocate responsibility to pay benefits or compensation that might appear pragmatic or approximate.*** (The loss-transfer provisions of the scheme, which allocate responsibilities between insurers, are an example of this approach.) [Emphasis added.]

[31] The Minister asks the court to interpret the statute to try to minimize access to the public purse through the Motor Vehicle Accident Claims Fund. While this may be a factor in assessing other aspects of the motor vehicle insurance system in Ontario, under the four-step priority ladder in s. 268 (2)(1) of the *Insurance Act*, the Legislature has decided to treat the Fund as an insurer and has given it payment obligations when there is no other insurer standing in priority to it. See: *Allstate Insurance Co. of Canada v. Motor Vehicle Accident Claims Fund et al.*, 2007 ONCA 61 (CanLII). I see no basis to strain to avoid claims against the Fund where dictated by the statutory scheme interpreted in accordance with appropriate statutory interpretation principles.

[32] The statute and applicable regulations prescribe a two-step process for determining which insurer bears ultimate liability for statutory accident benefits. First there is a determination of the priority insurer under s. 268 (2). This can be subject to dispute and an arbitration as in this case. But that is not required.

[33] Under the second step, the priority insurer under s. 268 can then look to others for indemnification. For example, in prescribed circumstances, a priority insurer under s. 268 can apply for indemnification from another insurer under the "loss transfer" provisions of s. 275 of the *Insurance Act.*

[34] Under s. 275 (2), loss transfers are specifically based on the relative degrees of fault of the insured parties. So too is tort liability.

[35] A dispute under s. 268 (2) is an inter-insurer determination but it precedes the ultimate determination of fault whether by loss transfer under s. 275 or otherwise. The dispute under s. 268 (2) determines which insurer is the priority insurer that is required to pay statutory accident benefits.

[36] In this case, in fact, a third insurer, Allstate, was originally thought to be the priority insurer under policies of insurance in the names of the brothers' parents. During the arbitration process, Gore Mutual and the Fund agreed that the Allstate policies were not applicable. That left the determination under s. 268 (2) as between them. However what remained was a dispute under the no-fault priority ladder to determine which of Gore Mutual and the Fund was the priority insurer required to pay statutory accident benefits. Other fault-based provisions to determine ultimate liability as between the priority insurer under s. 268 and another insurer remain for later if applicable.

[37] In all, in my view, I am to try to discern the meaning of the words of the statute in light of the purposes of the scheme of statutory accident benefits in particular. I recognize that s. 268 provides a first payment allocation system among sophisticated insurers that can be pragmatic in its approach and design. It is not based on fault or equity among the injured claimants. There can be cases where two or more insurers can all be liable at the same time on the same rung. The tie-breaker falls to the unfettered and arbitrary discretion of the claimants and not to some overriding equitable principle.

[38] There can only be one interpretation of the meaning of s. 268 regardless of when the section is accessed. If an insurer is looking to pass on liability to another based in whole or in part on fault, perhaps an arbitration under s. 268 is not the correct vehicle.

[39] Fairness among the sophisticated insurers is provided by certainty and clarity. The steps in the ladder are not to be interpreted with imaginative approaches to strain to do some form of equity among insurers in particular cases. Rather, the words should be given their plain meaning to promote predictability. This allows insurers to readily understand and model their obligations so as to plan for the businesses accordingly.

The Arbitrator's Decision

[40] The arbitrator reviewed case law interpreting the phrase “involved in the incident” in different contexts. At para. 24 of his decision, he discussed the criteria set out in:

> *Dominion of Canada General Insurance Company. Kingsway Insurance Company* (unreported decision of Arbitrator Lee Samis, released August 23, 1999, affirmed in an unreported decision of H. Sachs, J. of the Ontario Superior Court of Justice, released January 11, 2000), namely:
>
> (a) Whether there is contact between the vehicles;
>
> (b) The physical proximity of the vehicles;
>
> (c) The time interval between the relevant actions of the two vehicles; The possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and .
>
> (e) Whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

[41] That case involved a loss transfer claim.

[42] The arbitrator below took note of the decision by arbitrator Samis that while contact between the vehicles is a criterion of involvement, it is not always necessary to have contact for two vehicles to both be involved.

[43] The arbitrator then discussed the decision in *Janousek v. Halifax Insurance Company*, *et al*, (Arbitrator Shemin Manji, January 19, 1998, [1998] O.I.C.D. No. 8). Arbitrator Manji in that case held:

> I am unable to accept that the insured automobiles were drawn into the "accident" **as associates or participants or shared the experience or effect of the "accident", or became embroiled in the "accident" or became implicated or wrapped or enveloped in the "accident"** ... merely because some debris from the fence which was subsequently struck by the uninsured vehicle, fell on them. In my view, the nexus or link between the insured automobiles and the accident is remote in this case. [Emphasis added.]

[44] Arbitrator Manji also found:

> A person may be involved in an accident "involving" an insured automobile even though the insured automobile may not have caused the accident directly or indirectly. Based on the ordinary meaning of "involve," I also accept that contact between the injured person or the automobile that caused the injury and the insured automobile may not be necessary, in order for the insured automobile to be involved in the accident.

[45] In *Seetal*, discussed above, Justice Perell agreed with the outcome and reasoning in *Janousek.*

[46] In *Seetal*, a pedestrian was hit by an uninsured car. She was carried on its hood until the car struck a nearby taxi. The issue was whether the pedestrian could claim against the taxi's uninsured motorist coverage. The technical issue was whether the pedestrian was "a person involved in an accident with an insured automobile". This is a similar phrase to the one in issue here. But, as discussed below, there are important differences.

[47] In *Seetal*, while the two cars came into contact, the taxi had nothing to do with the injuries that were inflicted on the pedestrian when she was hit by the uninsured car.

[48] Despite accepting the reasoning in *Janousek* that says that causation is not necessary for a party to be found to have been involved in an accident, in *Seetal*, Perell J. held that:

> … Without providing a comprehensive definition, I think that "a person who is involved in an accident involving the insured. vehicle". includes: (a) a person who caused or contributed to the accident, and (b) a person who - to borrow from S.7 (3) of the Motor Vehicle Accident Claims Act - is a person against whom the injured person might reasonably be considered as having a cause of action.

[49] Justice Perell noted that under the regulation that sets out the statutory accident benefit schedule, an "accident" is defined as "**an incident in which the use or operation of an automobile directly causes an impairment…**".

[50] That is, an "accident" is a subset or a particular type of "incident" in which injuries are caused. An incident then is broader than just events where injuries are caused.

[51] The word "incident" is also not defined in the statute. I accept the dictionary definition of the ordinary meaning of the word as discussed by the Licence Appeal Tribunal in *[MN] v. Aviva General Insurance*, 2021 ONLAT 19-001788/AABS:

> [23] At first impression, the term "incident" is broad enough to encompass events that may be usual or commonplace. The Merriam-Webster Dictionary defines "incident" as "an occurrence of an action or situation that is a separate unit of experience." The word is synonymous with "event", "occurrence", "episode" or "happening."

[52] The word "involved" is not defined in the statutory scheme either. Perell J. found that "involvement" is,

> …somewhat vague and very dependent of the particular facts of the particular case. Intuitively, one senses that involvement depends upon some proximity in place and time and participation between a person and an event or activity.

[53] Perell J. was considering involvement in an "accident" which is a particular type of "incident" that causes an injury or impairment. Where the statute uses the word "accident"

someone has caused injury to a claimant. Perell J. found that people involved in an accident include those who caused the injuring event or a person against whom the claimant may have a cause of action. (I am not sure that these two types of involvement really differ much as the causes of action that may apply typically include a causation requirement. But that question is not before me today.)

[54] In these precedents arbitrators and judges recognize that before someone can claim under the insurance of a vehicle that was not part of the actual accident i.e. that did not make contact with another vehicle, there has to be a sufficient nexus to amount to “involvement”. Perell J. found that the taxi was “involved” in the accident because the claimant asserted that the taxi created a situation of danger. Arbitrator Manji held that parked vehicles behind a fence were not involved just because debris from the accident landed on the parked cars.

[55] In this case, the arbitrator reasoned at para. 38,

> [38] With respect to the Fund's second approach, I agree that on the established jurisprudence there does not have to be contact to be considered "involved", in the incident. I also accept that when determining an individual's access to statutory accident benefits, a liberal interpretation should be given to the words of the legislation. However, it should be kept in mind that the case before me is not a case of whether an individual is entitled to statutory accident benefits, but rather a determination of which of two insurers is responsible. for payment of benefits. In my view, for there to be "involvement" in a priority dispute context not only must there be proximity of time and space, but there must still be some link or nexus between the actions of the operator of the alleged "involved" vehicle to the injuries sustained by the claimants. In the case before me, there was clearly proximity of time and space, but the facts cannot support the participatory component. I am satisfied that the injuries sustained by the occupants of the lead snowmobile would have occurred whether the vehicle insured by Gore was following or not. The involvement of the snowmobile insured by Gore must be considered simply "too remote" with regard to the injuries sustained by the claimants. ***Simply stated, I am of the view that in a priority dispute where there is an absence of contact between the vehicles, there must be some action on the part of the driver of the alleged "involved" vehicle that caused or contributed to the collision giving rise to the injuries sustained by the claimants. There was no causal connection on the facts before me, just as there was no causal connection between the parked cars and the injuries sustained by the claimant in the priority dispute in Janousek. As I have indicated, this is not the case of the claimant not having access to accident benefits, but a priority dispute as to which insurer is obligated to pay such benefits. The test to be applied ought be the same whether it is two private insurers which are involved or whether one of the insurers is the Fund.*** [Emphasis added.]

[56] He continued at para. 42:

> [42] I am of the view that the element of "participation" is a required component in any "involved vehicle" analysis in the context of a priority dispute to determine which of two or more . insurers is responsible for payment of statutory benefits to

> a claimant. ***To hold otherwise could conceivable result in a situation where the insurer of a parked car could be held to be in priority to the insurer of a vehicle that caused an accident, which in my view would be an unfair balancing of responsibilities among insurers…***I cannot help but believe that third rung of the priority ladder was meant to be. for vehicles meaningfully involved, ***that is a vehicle whose action caused or contributed to the injuries sustained by the claimant and connected in most circumstances by proximity of time and space.*** In the priority dispute context, the interpretation of the words "involved in the incident" as contained in s, 268(2), is not to expand coverage to make benefits available to an insured as the insured already has access to such benefits, but to fairly distribute responsibility for payment of benefits among those insurers involved in the priority dispute [Emphasis added.]

Analysis

[57] In my respectful view, the arbitrator ran afoul of the Court of Appeal's admonition to avoid creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases.

[58] It was not the arbitrator's role to apply his sense of the fair allocation of the priority payment obligation on insurers. The statute has set the priority ladder which Perell J. noted may well be pragmatic rather than focused on high-minded principles steeped in equitable concepts of justice. The statutory accident benefits schedule is largely just an administrative payment scheme.

[59] The case before the arbitrator did not involve parked cars and it was an error to adopt an interpretation designed to ensure that insurers of parked cars are protected from later being found to be involved in an incident. What about a parked car left in the middle of a pitch black country road late at night? Each case is decided on its own facts and merits.

[60] The arbitrator was required to interpret the plain and ordinary meaning of the words used by the Legislature in its assessment of the fair allocation of priority responsibility for payment of statutory accident benefits.

[61] The arbitrator engrafted a requirement for causation or fault for claimants' injuries into the no-fault payment priority ladder. He focused on injuries caused or contributed to by the accidents rather than mere involvement in the broader incident as directed by the statutory language.

[62] To highlight the problematic nature of the decision, the arbitrator recognized that had the two snowmobiles switched positions, so that Ms. Lance was riding on the second vehicle, under his approach, the first vehicle insured by Gore Mutual would likely have been involved because it can be argued that the lead vehicle was travelling too fast for the conditions or failed to keep a proper lookout and that may have caused or contributed to the injuries sustained by those on the trailing vehicle.

[63] The arbitrator engrafted a fault criterion into the priority ladder because he could not help but think that the Legislature meant to limit insurer's payment obligations to those whose insured

vehicles caused or contributed to the claimant's injuries. Why? The statute does not mention fault or causation in s. 268 (2)(1) at all. This is neither a loss transfer nor a tort law determination of ultimate responsibility for the accident(s). Subparagraph 268 (2)(1)(iii) uses the word "incident" rather than accident. The insured vehicle does not need to be involved in an accident at all. Recall that an accident is an incident in which injuries are caused. So, for the purpose of (iii), there needs only be an incident i.e. some event, occurrence, or happening. Moreover, involvement is a vague term that involves proximity or nexus in time or place.

[64] In my view the arbitrator made an error of law superimposing a causation requirement into the statutory definition before him. The two brothers and Ms. Lance went snowmobiling together. They drove on a path together where they were not allowed to be. They both drive too fast. They were sadly killed together - within a second of each other - by the same cause. There certainly were two different impacts. It is conceivable that there were two different accidents. But there was only one incident.

[65] The two brothers were killed and Ms. Lance was injured in a horrible snowmobile mishap or incident. One of the two vehicles being operated together, with a common purpose, at a common place, and at the same time, was insured. To borrow from arbitrator Manji, the three riders engaged as associates or participants or shared the experience or effect or became embroiled or became implicated or wrapped or enveloped in the event.

[66] By engrafting causation into the priority scheme, the arbitrator creates uncertainty. His own example, that would make the snowmobiles' relative places in line matter when two vehicles were illegally operated on a path together and each hit the same tree six-tenths of a second apart, deprives the priority rung of certainty and clarity.

[67] It undermines predictability for insurers to have to undertake an analysis of fault of the insured vehicle in assessing the priority payment obligation for no-fault benefits. The ultimate fault is determined later. So what degree of fault is required to be "meaningfully involved" at the first stage under s. 268? Must a claimant show that there is a *prima facie* case, an arguable case, a strong *prima facie* case, a serious issue to be tried? Or must a claimant present proof on a balance of probabilities that the insured vehicle caused or contributed to the injuries sustained in the accident?

[68] In my view the plain and ordinary meaning of the words used in s. 268 (2)(1)(iii) of the *Insurance Act* do not require any showing that the insured vehicle caused or contributed to the injuries sustained by the claimant. I say that while agreeing with Perell J. and arbitrator Manji that there are certainly cases where the factual nexus or link between the insured vehicle and the claimant may be too remote to conclude that the insured vehicle was involved. I agree with Perell J. when he wrote in *Seetal*:

> [56] I also agree with the fact-based approach of the *Hannam* line of authorities, where courts without providing a comprehensive definition simply recognize involvement when they see it. The common law sometimes develops that way before a clear rule emerges and, in my opinion, the circumstances of the case at bar bring Mr. Bali and his vehicle within the temporal, spatial and participatory factors sufficient to conclude that there was involvement in Ms. Seetal's accident,

> notwithstanding that Mr. Bali was not a cause or a contributing cause to the accident.

[69] I do not need to go further to deal with the rest of *Seetal* dealing with involvement in an "accident" rather than an "incident".

[70] Mr. Camporese's principal argument was that the question of whether the facts in the case amount to "involvement in an incident" is one of mixed fact and law. But that is not the point being argued. Where the legal test is known, then the question of whether the facts meet the test is indeed one of mixed fact and law. The error made by the arbitrator here, however, is in the interpretation of the legal test as written in the statute to decide whether a vehicle is "involved in the incident". The test does not include a mandatory requirement for the applicant or the Fund to prove that the insured vehicle caused or contributed to the claimant's injuries. By requiring that showing, the arbitrator set the wrong test or asked the wrong question. That is a pure or extricable error of law.

[71] I also do not need to deal with the issue of whether leave to appeal is required in this appeal. Mr. Camporese concedes that if leave is required, as he asserts, the requirements for leave to appeal are met in this appeal. I agree.

[72] Counsel also helpfully agreed that costs fixed in the amount of $6,000 ought to be payable to the successful party.

[73] The award of the arbitrator is set aside. Gore Mutual shall pay costs to the Minister of $6,000 all-inclusive.

FL Myers J

Date: May 30, 2022