

**IN THE MATTER OF THE INSURANCE ACT,
R.S.O. 1990, c. I-8 AS AMENDED AND
REGULATION 283/95 MADE UNDER
THE INSURANCE ACT**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

AXA INSURANCE COMPANY

Applicant

- and -

**GORE MUTUAL INSURANCE COMPANY and
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

Respondents

A W A R D

COUNSEL

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The ultimate issue in this Arbitration is to determine which of the three insurers is the insurer liable to pay Statutory Accident Benefits to Terrence Michael Perry (hereinafter referred to as "Perry") by reason of injuries sustained by Perry in a motor vehicle accident which occurred on August 23, 1998.

AGREED STATEMENT OF FACTS

Attached hereto as Schedule "A" is an Agreed Statement of Facts. Those facts may be summarized as follows:

- (a) At the time of the subject accident, Perry was an occupant of a motor vehicle operated by Teresa Amaral.
- (b) The Amaral vehicle was insured by AXA Insurance Company at the time of the subject accident. Perry was not a named insured or a listed driver under the AXA policy.
- (c) At the time of the accident T & S Towing Service and Storage Inc. (hereinafter referred to as "T & S") a corporation, owned two tow-trucks. The trucks may be referred to as #7 and #5. Both were insured under a standard fleet policy issued by Gore Mutual Insurance Company. The named insured under that policy was T & S.

WAS PERRY A LISTED DRIVER ON THE STATE FARM POLICY AT THE DATE OF LOSS?

The first issue for determination is whether Perry was a listed driver on the State Farm policy covering the vehicle owned by Deborah Van Beek, as at the date of loss.

A transcript of a recorded statement of Deborah Van Beek set out that Perry and Van Beek lived together from approximately August of 1996 to May of 1997. In the statement, Ms. Van Beek set out that when she received her renewal from State Farm in approximately July or August of 1997 and saw that Perry was still listed as a driver, she contacted State Farm and asked that he be removed as a listed driver.

In his statement dated November 3, 1998, Perry stated that he lived with Deborah Van Beek for approximately 6 months in 1995 extending into the spring of 1996 when he moved out.

Pauline Alton, a Claims Specialist with AXA Insurance Company, gave evidence at the Hearing. Ms. Alton advised that she contacted State Farm to determine whether Perry was insured under an automobile policy with State Farm on the date of loss. She was orally advised that Perry was a listed driver on the State Farm policy insuring Deborah Van Beek. She

received that advice on September 25, 1998 and again on October 2, 1998. She was then contacted on October 5, 1998 when she first received information that Perry was not a listed driver under the State Farm policy.

By memorandum dated October 13, 1998, Ms. Alton was advised that Perry had been removed as a listed driver under the State Farm policy as of August 14, 1997. The Master Record of State Farm shows that Perry was added as a listed driver effective September 17, 1996 and that he was removed as a listed driver effective August 14, 1997.

A copy of a printout called "Household Clients and Violations" shows the removal of Perry as a listed driver as at August 14, 1997. Under a section called "Rate Ind." the listing shows an "X".

Anthony Damico, a State Farm agent, gave evidence that the change on August 14, 1997 was made on that date and was submitted from the Agency to State Farm by computer system.

Penny Gibb, employed in the underwriting department of State Farm, gave evidence that when a listed driver is deleted, "X" is noted in the rating column as an indicator meaning **deleted**. She explained that there would be a transmission overnight through the computer system from the agent to underwriting. Her evidence was that there was no backdating of the entry.

I conclude that Perry was not a listed driver on the State Farm policy insuring the vehicle owned by Deborah Van Beek on the date of loss. The recorded statement of Deborah Van Beek and the statement of Perry dated November 3, 1998 reveal that the common-law relationship between Perry and Van Beek ended in 1996. Van Beek, in her statement, states that she contacted State Farm when receiving her renewal in July or August 1997, in order to delete Perry as a listed driver under her policy with State Farm. The records of State Farm and the evidence of those called at the Hearing on behalf of State Farm support the information provided by Van Beek.

Pauline Alton was initially provided with information by State Farm employees, that Perry was still a listed driver on the State Farm policy at the date of loss. One can understand why Ms. Alton then had difficulty believing coverage had been deleted for Perry in August 1997, notwithstanding the production of documents by State Farm.

I conclude that State Farm is not responsible to pay benefits to Perry under the SABS, arising out of the subject accident. The claim of AXA Insurance Company against State Farm is therefore dismissed. The Respondent Gore Mutual was prepared to consent to the release of State Farm from this Arbitration, prior to the Hearing. State Farm is to recover costs of the Hearing from the Applicant AXA Insurance Company. Those costs are fixed at the sum of \$750.00.

DID PERRY STILL HAVE AN ON-GOING RELATIONSHIP WITH T & S AS AT THE DATE OF LOSS?

Section 66(1) of the Bill 59 SABS deals with Company Automobiles. If a corporation makes a vehicle available for an individual's regular use, s. 66(1) deems that individual to be the "named insured" under the policy insuring the vehicle at the time of an accident.

There is an issue in this case as to whether Perry still had an on-going relationship with T & S as at the date of loss. There is also an issue as to whether he had the regular use of T & S vehicle #7 as at the date of loss.

Finally, if those questions are both answered in the affirmative, there is an issue as to whether the deeming of Perry as a "named insured" should be applied when considering priority under s. 268 of the *Insurance Act*.

Perry gave evidence at the subject Hearing. His evidence was that he had sustained serious multiple injuries in the subject accident. One aspect of those injuries was memory loss. He stated that his memory loss was such that he was missing memory and was not sure about certain things, as a result.

Perry stated that he had started work at T & S in October or November, 1997. He was hired to drive a tow-truck. He stated that his duties were such that although his general hours were between 7:00 a.m. and 7:00 p.m., he was always on duty. He stated that he had his truck with him all of the time. The truck assigned to him was #7. He described unit #7 as "my motor vehicle". He employed the vehicle to get to and from work. He claimed that there were no restrictions on his use of the unit, by his employer. He explained the nature of the business was that T & S would provide towing services for various customers. When a call was

received, there was a response time of 20 minutes. That was why he had the vehicle with him at all times. He had his own set of keys to the vehicle.

For the first six or seven months of his employment, he operated only unit #7. Perry described that T & S also had another unit. unit #5.

In a statement from Perry, contained at Tab 3 of the Arbitration Brief, marked as Exhibit "2", Perry described his use of a larger truck, unit #5. He stated that when he used unit #5, he would drive unit #7 to the yard and then work with unit #5, then take unit #7 in order to get back home at the end of the day.

Perry underwent some minor surgery on Thursday, August 20 or Friday, August 21, 1998. On his last day at work prior to the surgery, Perry worked a normal full day. He was taking the week-end off by reason of the surgery. He drove unit #7 to the Hospital and it was arranged that the truck would be picked up by an employee of T & S from the Hospital parking lot. The last recollection of Perry prior to the subject accident of August 23, 1998 was being picked up from the Hospital following his surgery. He recalls the drive home. His next recollection is approximately 9 days after the accident of August 23, 1998, when he woke up in Hospital.

As will be set out below, there is an issue as to whether Perry quit his employment with T & S or was fired prior to the subject accident.

The evidence of Perry at the Hearing was that he did not quit his job at T & S and was not fired prior to the subject accident.

Perry recalls that his boss and owner of T & S, Tony Souza, was in Portugal at all material times. Sherri Jones, was the supervisor in charge, while Tony was away.

Perry did not recall any argument with Sherri Jones prior to the subject accident.

It was the evidence of Perry at the Hearing that he had never received a job-related warning and that he had not been fired.

In Perry's statement at Tab 3 of the Arbitration Brief, Perry described an incident which occurred approximately two weeks prior to the subject accident. While towing a transport truck owned by Robert Transport, he damaged an oil pan on the vehicle. In the statement, Perry stated that T & S made him pay for it. He stated that there had been a deduction from his cheques for the cost of the damage.

In his statement, Perry denied that he quit T & S prior to the subject accident. He set out that he still had his pager and his uniform with him when he went in for surgery. Furthermore, Perry stated, in his statement, that his friend, Teresa picked up his last pay-cheque on Friday, August 21, 1998.

Under cross-examination, Perry continued to deny that he was fired or that he had quit prior to the subject accident. He claimed to recall the disagreement with T & S about the damage caused to the Robert Transport vehicle. He recalled discussing the issue with Sherri Jones and others. He claimed that he was told by a representative of Robert Transport that he would not be charged for the damage. He stated that he would have been upset if he was charged for the damage since he had somehow saved Robert Transport exposure to various fines. If he had been charged for the damage, he would have lost approximately \$1,000.00 from his pay-cheque. He could not recall if there was a deduction from his last cheque.

Perry denied advising Diane Souza that he had quit prior to the accident. He still denied that he had quit his position at T & S prior to the subject accident.

Under cross-examination, Perry was confronted with the aforesaid statement. He reiterated the fact that he was on call 24 hours per day. He stated that he was always on call with unit #7. He had no explanation for a reference in the statement to his being on call every other week-end.

Diane Souza gave evidence at the hearing. She is the daughter of Tony Souza, the effective owner of T & S. She stated that Tony Souza had suffered a stroke and now has difficulty with memory and communication. Diane now manages and is the effective owner of T & S.

Ms. Souza advised that she first became actively involved in the business in or about September 1998. She did some book-keeping, accounting, accounts payable, some dispatching and some driving.

Ms. Souza advised that her father went to Europe in or about August 1998. He left Sherri Jones in charge.

At some point following the subject accident, when Tony Souza was still in Europe, Ms. Souza telephoned T & S and spoke with Sherri Jones. She was told that Perry had had an accident. She was not acquainted with Perry. She advised Sherri Jones to send flowers

to Perry and Ms. Jones declined. Ms. Souza actually took flowers personally to Perry in early September 1998. Thereafter, notwithstanding that she had no prior relationship with Perry or his family, she somehow became involved in providing care to Perry during the course of his recuperation. She actually resided at the Perry residence for a period of six to seven weeks.

Ms. Souza claimed that Perry told her about a disagreement that he had had with Sherri Jones over a deduction from his cheque for damage to the Robert Transport vehicle. Ms. Souza claimed that Perry advised her that he had quit T & S as a result.

Ms. Souza identified a cheque number 0481 of T & S Towing payable to Ashley Services, in the sum of \$500.00. Ashley Services was a company operated by Perry. It was agreed at the outset of the Hearing that Ashley Services would be equated with Terrence Perry, for the purpose of the Hearing.

The aforesaid cheque in the sum of \$500.00 was apparently the cheque that was picked up by Teresa for Perry on or about August 21, 1998. The cheque is marked "Payment Stopped".

Of course, Ms. Souza was not the owner or manager of T & S prior to the accident of August 23, 1998.

Ms. Souza was not present for any argument between Sherri Jones and Perry.

Subsequent to the subject accident, there was an investigation by an Occupational Therapist on behalf of AXA Insurance. The investigation included a Job Site Analysis. The report of the Occupational Therapist dated March 26, 1999 sets out that Diane Souza was interviewed on February 23, 1999. Perry was in attendance. The report sets out that Perry was employed on a full-time basis by T & S at the time of his accident. The author of the report sets out that Ms. Souza "indicated that ... Perry is a valued driver, as his job performance had always been satisfactory with respect to reliability, dependability, punctuality, safety, quality of work, quantity of work.". The report goes on to state that Perry "could resume employment".

Ms. Souza could not recall advising the Occupational Therapist that Perry was employed full-time at the time of the accident. She confirmed advising the Therapist that Perry could resume his duties, if capable. The Occupational Therapist, Lynne Kozina, gave evidence at the Hearing. She confirmed that Diane Souza advised her that Perry was employed by T & S at the time of the subject accident.

Ms. Souza also produced run sheet summaries of T & S. She was unable to produce any summaries for any period after August 7, 1998. The summary leading to the cheque dated August 21, 1998 was not produced.

Ms. Souza produced payment stubs re cheques issued to Perry dated July 10, July 31 and August 7, 1998.

The run sheet summary for the period ended July 9, 1998 was stamped as paid July 10, 1998. A cheque in the sum of \$989.78 was shown in the "pay cheque total". Yet, the cheque stub dated July 10, 1998 was in the sum of \$900.00.

The run sheet summary for the period ended August 7, 1998 called for a payment of \$1,510.65. The cheque stub dated August 7, 1998 showed a payment of \$410.50. There was also a pay stub dated July 31, 1998 showing a payment of \$100.00.

Gore Mutual sought to admit into evidence statements taken from Sherri Jones and Kenneth Worsley. I was advised that Sherri Jones could not be located in order to give oral evidence at the Hearing. I was advised that Kenneth Worsley was now deceased.

All parties involved in this Arbitration attempted to make use of various statements and business records. State Farm was permitted to introduce into evidence an affidavit of Veronica Westwater, without objection. A transcript of a recording of questions asked of Deborah Van Beek was also admitted into evidence, without objection.

Diane Souza was called to give evidence and tendered in evidence, various records, although she was not the person with custody of the records at the time that they were made.

The records of T & S, submitted into evidence, were incomplete.

Perry gave evidence notwithstanding memory problems stemming from the subject accident.

I heard submissions as to the issue as to whether or not statements of Sherri Jones and Kenneth Worsley should be admitted into evidence. In all of the circumstances of the Hearing, I have decided to accept the statements into evidence. I will determine what weight, if any is to be given to the alleged facts set out in those statements.

In the statement of Sherri Jones, she described how she was left in charge of the business when Tony Souza departed for Europe. She set out that Perry operated unit #5 and that

in an emergency situation, he operated a one ton truck, presumably unit #7. She confirmed that Perry was permitted to use a truck to get to the Hospital on August 20, 1998. She confirmed that she issued a cheque to Perry, in the sum of \$500.00, after making a deduction for damage to the oil pan of a customer. She set out that she and Perry had a "big disagreement" about the deduction for damage to the transport truck. She stated that once Perry received his cheque of August 21, 1998, he called and ultimately hung up on her. She stated that "he did not say he actually quit". She thought that he implied that he quit. By reason of the conversation, she put a stop payment on the cheque.

Ms. Jones set out in her statement that unit #7 was provided to Perry when he was on call every second week. She claimed that unit #7 was unfit for the road.

Kenneth Worsley set out in his statement that Perry "had a one ton for on-call purposes 24 hours a day, seven days a week". He also stated "Terry would be allowed to keep the one ton tow truck even if he was not supposed to be on call, as T & S Towing had only a few drivers working for them and they would be called constantly". It was Worsley who turned over the cheque dated August 21, 1998 to Teresa. Worsley stated in his statement that "Terry did not quit T & S Towing".

DID PERRY QUIT OR WAS HE FIRED PRIOR TO THE SUBJECT ACCIDENT?

Based on all of the evidence, I conclude that Perry had not quit and was not fired prior to the subject accident.

The best evidence supporting a theory that Perry had quit or was fired, is contained in the statement of Sherri Jones. However, at the very best Jones stated that Perry "did not say he actually quit". Jones thought that he implied that he quit.

Sherri Jones, in her statement, made reference to a prior deduction from a cheque due to Perry, prior to the cheque dated August 21, 1998. It appears that there was definitely an issue between Perry and T & S as to a deduction for damage caused to the Robert Transport vehicle. It is not suggested that Perry quit by reason of the prior deduction.

Perry was allowed to take unit #7 to the Hospital on August 20 or August 21, 1998. He still had the company pager and the company clothing. The cheque was still prepared for him, dated August 21, 1998.

In his statement, Kenneth Worsley stated that Perry did not quit T & S Towing. He stated that there was "talk that Terry was going to be fired". He did not state that Perry was fired or that Perry quit.

Notwithstanding the memory problems which Perry suffered by reason of injuries sustained in the subject accident, he maintains that he did not quit and that he was not fired.

The report and oral evidence of the Occupational Therapist makes reference to confirmation from Diane Souza that Perry was employed on a full-time basis at the time of the subject accident. Ms. Souza praised the work done by Perry and advised the Therapist that Perry could resume employment, if he was able to do it.

There is no reliable evidence supporting the contention that Perry quit or was fired prior to the subject accident. There is no documentary evidence supporting his termination as an employee, prior to the subject accident.

Accordingly, it is my conclusion that Perry was still employed at the time of the subject accident.

DID PERRY HAVE THE REGULAR USE OF T & S UNIT #7?

I conclude that Perry did have the regular use of T & S unit #7 prior to the subject accident. It was the evidence of Perry that he had the use of unit #7 virtually all of the time. He would park it at the yard and use unit #5. However, he would still take unit #7 in order to return home at night and to have it so that he could be on call 24 hours per day.

Kenneth Worsley, in his statement, confirmed that Perry had use of unit #7, 24 hours a day, seven days a week. In his statement, Worsley sets out that Perry would be allowed to keep the one ton tow truck, even if he was not on call.

The fact that Perry was permitted to take unit #7 to the Hospital, further confirms his regular use of that vehicle.

SECTION 66(1) OF THE BILL 59 SABS AND SECTION 268 OF THE INSURANCE ACT

The issue as to priority as between insurers of company vehicles and insurers of personal vehicles has been addressed in a number of decisions. These include the following:

- (a) Lloyd's London v. State Farm Mutual Automobile Insurance Company (October 13, 1998), Bruce Robinson;
- (b) Dominion of Canada General Insurance Company v. Co-operators General Insurance Company (February 9, 1999), a decision of mine;
- (c) Lombard General Insurance Company of Canada v. Allstate Insurance Company of Canada (Feb. 10/99), a decision of mine;
- (d) CGU Group (Canada) Ltd. v. Lombard Canada Insurance Company (January 7, 2000), Guy Jones;
- (e) Unifund Assurance Company v. Commercial Union Assurance Company of Canada (September 26, 1998), Bruce Robinson, as confirmed on appeal by Ferrier J. (June 30, 1999).

I have again reviewed all of these decisions. Arbitrator Robinson and myself determined that the status granted by s. 66(1) of the SABS can be applied when having regard to the priority rules in s. 268 of *The Insurance Act*. Arbitrator Guy Jones has determined otherwise in the CGU v. Lombard case. I understand that that case is under appeal.

I am still of the view that the status granted by s. 66(1) of the SABS should be applied when having regard to the priority rules in s. 268 of *The Insurance Act*.

CONCLUSION

I conclude that Terrence Perry was still employed by T & S at the date of loss. In addition, he did have the regular use of unit #7 at the date of loss.

I conclude that Perry is deemed to be a "named insured" under the Gore Mutual policy by reason of the application of s. 66(1) of the Bill 59 SABS.

I further conclude that Terrence Perry is a "named insured" under the Gore Mutual policy when one applies s. 268 of *The Insurance Act*.


In the result, it is Gore Mutual that is responsible to pay benefits under the Bill 59 SABS to Terrence Perry.

Gore Mutual is obliged to indemnify AXA Insurance (Canada) for benefits paid under the SABS to Terrence Perry. If there is an issue as to the quantum of the same or as to the payment of the same, I will be pleased to determine those issues.

Gore Mutual is to pay to AXA Insurance (Canada) the costs of this Arbitration fixed at the sum of \$1,500.00.

The fees and disbursement of the Arbitrator are to be paid by Gore Mutual Insurance Company.

Dated this 4th day of May, 2000.



Stephen M. Malach, Q.C.
Arbitrator

Axa v. GORE M
EXHIBIT No 1
Viva Voce Verbatim
Date mon march 2000
Wit [Signature]

Schedule "A"

IN THE MATTER OF AN ARBITRATION PURSUANT
TO THE ARBITRATIONS ACT, 1991

AND IN THE MATTERS OF A DISPUTE BETWEEN
INSURERS PURSUANT TO THE *INSURANCE*
STATUTE LAW AMENDMENT ACT, 1993

IN THE MATTER OF AN ARBITRATION

BETWEEN:

AXA INSURANCE COMPANY

Applicant

- and -

GORE MUTUAL and
STATE FARM

Respondent

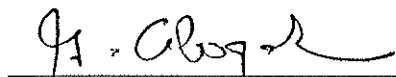
AGREED STATEMENT OF FACTS
~~SUBMISSIONS OF THE APPLICANT~~
~~AXA INSURANCE COMPANY~~

1. On or about August 23, 1998, Terrence Perry was involved in a motor vehicle accident in Ontario, hereinafter referred to as the "accident".
2. At the time of the accident, Terrence Perry was an occupant of a motor vehicle operated by Teresa Amaral within the meaning of s.268(2) of the *Insurance Act*.
3. At all material times, the motor vehicle in which Terrence Perry was an occupant was insured by Axa Insurance, (hereinafter referred to as "Axa") under a standard motor vehicle policy. Teresa Amaral was the named insured.

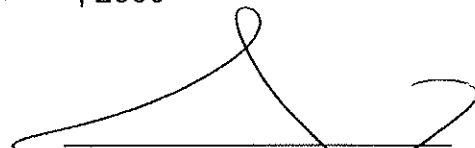
Terrence Perry was not a named insured or driver under the policy.

4. At the time of the accident, Terrence Perry, was an individual living and ordinarily present in Ontario within the meaning of s.66(1) (a) of the **SABS**.
5. At the time of the accident, T&S Towing Service and Storage Inc. (hereinafter referred to as "T&S Towing") was a corporation, unincorporated association, partnership, sole proprietorship or other entity within the meaning of s.66(1) (a) of the **SABS**.
6. At the time of the said accident, T&S Towing owned and insured, among other, two tow-trucks, Ford Unit #7 and Ford Unit #5, both covered under a standard fleet policy issued by Gore Mutual.
7. At the time of the accident, Terrence Perry was not a named insured under the standard fleet policy issued by Gore Mutual.

Dated at Toronto this 13 day of March, 2000



M. Greg Abogado



Michael Huclack

Date: March 13, 2000

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