



Citation: TD General Insurance Company v. F. Shirin, 2023 ONLAT 21-013408/AABS

Licence Appeal Tribunal File Number: 21-013408/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

TD General Insurance Company

Applicant

and

Farkhad Shirin

Respondent

DECISION

ADJUDICATOR: Kevin Lundy

APPEARANCES:

For the Applicant: TD General Insurance Company
Peggy Moore, ADR Claims Specialist
Lauren Kolarek, Counsel

For the Respondents: Farkhad Shirin and
Sabina Shirin in File: **21-013393/AABS**
Maria Papadopoulos, Paralegal

For the Related Parties: Farid Aliyev, Applicant
File: **20-003357/AABS**
Victoria Polyakevich, Counsel for the Applicant
TD Home and Auto Insurance Company, Respondent
Elisabeth van Rensburg, Counsel for the Respondent

Interpreters:
(Russian Language)

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Heard by Videoconference: February 22, 23 and June 29, 2023

OVERVIEW

- [1] Farkhad Shirin ('F.S.', the respondent) was involved in an automobile collision on June 27, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the '*Schedule*').
- [2] F.S. was a passenger in the front passenger seat of a 2009 Honda Odyssey driven by Farid Aliyev ('F.A.'). F.S.'s wife, Sabina Shirin ('S.S.') was seated in the rear right passenger seat. They were travelling southbound on Weston Road towards Finch Avenue in the City of Toronto when F.A. collided with a 2006 Bentley Continental GT, driven by Mohammed Yaqubi, ('M.Y.'), who was travelling eastbound on Fenmar Drive. F.A. reported that the Bentley turned right turn onto Weston Road and unexpectedly entered his path of travel without providing him with enough time to avoid a collision. As a result of the impact, F.S., S.S. and F.A., all reported injuries.
- [3] TD General Insurance Company (the 'applicant') applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the 'Tribunal') for repayment of medical and rehabilitation benefits paid to F.S. pursuant to section 52.(1) of the *Schedule* on the basis that the incident on June 27, 2018 was not an "accident" within the definition in subsection 3(1) of the *Schedule*.
- [4] Although the parties disagreed whether F.S. received any payments for medical benefits either directly or otherwise, this was not an issue for me to decide.

PRELIMINARY ISSUE

- [5] The preliminary issue in dispute is:
 - 1. Was the respondent, F.S., involved in an "accident" as defined by subsection 3(1) of the *Schedule*?

RESULT

- [6] I find that the respondent was not involved in an "accident" as defined by section 3(1) of the *Schedule*.

PROCEDURAL ISSUES

- i. On May 5, 2022, the Tribunal ordered that this file shall be heard together with two related files, 20-003357/AABS and 21-013393/AABS. Although the three files relate to the same motor

vehicle accident, as the applicants and respondents are not the same in each matter, on October 24, 2022, the Tribunal ordered the matters to remain separate files but to be heard together.

- [7] A videoconference hearing was held on February 22 and February 23, 2023 to address the preliminary issue of whether the incident on June 27, 2018 was an “accident” within the meaning of subsection 3(1) of the *Schedule*, prior to a potential hearing on the substantive issues. The hearing commenced at 9:30 a.m. on both dates. The parties planned to complete the evidence of the three claimants on the first day and finish with the two expert witnesses on the second date, followed by oral submissions.
- [8] On the first day of the hearing, unanticipated issues arose with respect to the Russian interpreters. As she is fluent in Russian, counsel for F.A. noted serious inaccuracies in the interpretation of the opening statements for all four representatives, several of which related facts central to the dispute between the parties. As this problem persisted despite the use of shorter phrasing and more careful enunciation, all parties agreed that the interests of justice precluded continuing with the first interpreter. I confirmed with F.A. that although he can speak some English, he requires the assistance of an interpreter to understand the proceedings. The hearing was held down to obtain the services of a replacement interpreter.
- [9] At 11:15 a.m., a second Russian interpreter joined the videoconference and the hearing proceeded with F.A.’s evidence. However, throughout F.A.’s direct testimony and cross-examination, counsel for both F.A. and the respondent asked the interpreter to correct comparatively minor inaccuracies in her translations. At 1:10 p.m., the interpreter abruptly refused to continue on the basis that she deemed these interruptions unduly aggressive. Despite the offer of a break to reduce her anxiety, she refused to continue and left the call. After conferring with the other representatives until 1:30 p.m., F.A. requested an adjournment to the second scheduled date to proceed with the two expert witnesses, the evidence for whom would not require interpretation. This request was granted on consent of all parties.
- [10] Although the Tribunal secured the services of a third Russian interpreter, who was available at 3:15 p.m., only the two counsel for the insurer were able to re-join the videoconference. In the absence of evidence that the absent parties or the court reporter had received notice that the matter had resumed, it would not have been in the interest of justice to proceed and the matter was again adjourned to the following day for continuation.

- [11] On the second scheduled date of the hearing, F.A. and F.S. were unavailable to testify, both having scheduled only February 22, 2023 to provide their evidence. F.A.'s counsel advised that her client had left for work on the morning of February 23, 2023 and therefore would not be available to testify at all that date. Only S.S. was potentially available on February 23, 2023. The parties requested that the Tribunal adjourn the hearing and schedule a single additional date to complete the evidence of the applicant and present the evidence of the claimants on files 21-013393/AABS and 21-013408/AABS.
- [12] This request was denied and the parties agreed to convert the remainder of the hearing to a written format with court reporting services, tendering a transcript of any testimony upon which they may wish to rely.
- [13] On February 24, 2023, F.A. filed a notice of urgent motion requesting that the Tribunal instead reschedule the hearing for an additional day by videoconference. The motion was filed on the basis that the Tribunal's denial of an adjournment to a third videoconference hearing date and the conversion of the remainder of the hearing to a written format adversely affected the parties' rights of access to justice and is contrary to the principle of procedural fairness. This motion was granted on March 13, 2023 and the hearing was ultimately adjourned to June 29, 2023 for continuation by videoconference.
- [14] Despite further, albeit less severe, issues with interpretation on the final day of the hearing, these inaccuracies were resolved through shorter and more careful phrasing and no further delays were required. F.A.'s counsel occasionally assisted with interpretation to ensure accuracy. The other parties raised no objections to this assistance.

ANALYSIS

The Respondent's Account of the Incident

- [15] F.S. testified that he has known his friend, the driver, F.A., for "a long time" and that F.A. is a DJ who performed at his son's first birthday party. On the day of the collision, he and his wife, S.S. were travelling with F.A. to F.A.'s house to stay there for the night prior to a camping trip planned for the following day "up north." He denied providing F.A. with any directions.
- [16] At the hearing, F.S. denied seeing the other vehicle before it approached the intersection and only braced for the impact as it occurred. He also denied knowing the path that the other driver intended to take but stated that he and the other occupants of the minivan all assumed that the other driver intended to turn

right based on the lane that the other vehicle occupied prior to the collision. He did not recall if he said anything to F.A. to warn him of the impending impact and emphasized how quickly the incident occurred. He denied seeing any turning signals on the other vehicle prior to the collision.

- [17] Despite the dark, after F.S. exited F.A.'s vehicle, he observed that F.A.'s vehicle was badly damaged. At this point, he saw that the other vehicle was a Bentley. Although they were all shaken, F.A. suggested that the Shirin's go home as he would take care of everything. S.S. also wanted to leave to check on their son at home. As a result, F.S. and S.S. did not attend at the collision reporting centre with F.A. Although S.S. testified that her brother in law drove them home, F.S. testified that it was his cousin. He explained that in his family, brothers and cousins are so close that they use the terms interchangeably. Although he opted not to seek medical attention immediately following the collision, he described attending at a walk-in clinic a few days later.
- [18] F.S. agreed that he has given the same description of the collision over the years since it took place. He also agreed that his memory would have been fresher closer to the time of collision compared to later.
- [19] When he applied for accident benefits, he stated in his OCF-1 form, "I was a front seat passenger when a car made a right turn into our lane and we ended up hitting that car." This description is identical to that provided by S.S. on her OCF-1. He agreed that he signed the form on August 16, 2018 and agreed with this description at the hearing. He took the position that this statement and his testimony at the hearing were consistent on the basis that his assumption that the other driver would turn right and an act of actually executing a right turn are one and the same. He noted that at that intersection, visibility is not good since drivers heading southbound on Weston Road would be unable to see an approaching vehicle on Fenmar Drive until it nears the light due to the sharp angle at which the streets intersect.
- [20] F.S. recalled attending at an examination under oath on October 18, 2019 and agreed that he had no issues understanding the questions put to him or in responding to those questions. At this examination, he testified that he had known F.A. for "more than ten years," consistent with his evidence at the present hearing. However, at his own examination under oath on October 28, 2019, F.A. testified that he had known F.S. for no more than one year prior to the collision. F.S. explained that "F.A. is a friend to everybody" as he is a famous DJ and twice reiterated that he was the DJ at the Shirins' son's first birthday party.

[21] At the examination under oath, F.S. provided the following description of the collision:

We were approaching the intersection. We had a green light and the car was making a right on to Weston Road, also going southbound -- to go southbound. It happened so quick that Farrid [sic] had no time to stop because he cut him off when we had the green light. So basically, it happened in the middle of the section and T-boned the other car.

[22] Again, F.S. equated the physical act of turning right with his assumption that the other was about to turn right, in part because he believed that there was no other way for the Bentley to go other than through the red light. When asked whether he agreed that the transcript includes no reference to this assumption, he was evasive in his response.

[23] F.S. repeated his description of a right turn without reference to an assumption during several assessments arranged both by his counsel and the insurer. For instance, on February 17, 2019, F.S. underwent an in-home occupational therapy examination with occupational therapist, Deena Rogozinsky. During that assessment, he offered the following account of the collision:

They were travelling southbound on Weston Road approaching an intersection when a car suddenly made a right-hand turn in front of their vehicle, which resulted in a collision.

[24] He also recalled attending a psychological assessment on January 11, 2019 with psychologist Dr. Erin Langis. During that assessment, roughly six months after the collision, he described the event as follows:

Mr. Shirin reported that he was involved in a motor vehicle accident on June 27, 2018 between approximately 910 and 10 p.m. He stated that he was the front seat passenger of the vehicle, and his friend was the driver. His wife was a passenger in the back seat. Weather conditions were unremarkable. They were traveling in a Honda Odyssey minivan. They were traveling southbound on Weston Road and approaching an intersection when a vehicle "cut in front" of their van, and they subsequently t-boned the vehicle. He was wearing his seatbelt and the airbags deployed. He struck his head but denied any loss of consciousness.

- [25] He also recalled seeing chiropractor, Dr. Marco Curcio on April 22, 2019 for a functional abilities evaluation. At that assessment, he described the collision as follows:

Mr. Shirin was the seat-belted front-seat passenger of a Honda Odyssey minivan involved in a motor vehicle accident on June 27, 2018 at approximately between 9:30 and 10:00 p.m. His friend (the driver), and wife were the only other occupants in the vehicle. The weather and road conditions at the time of the accident were clear and dry. Mr. Shirin reported that they were travelling southbound on Weston Road when another vehicle suddenly cut them off, causing Mr. Shirin's vehicle to T-bone the other vehicle. Upon impact of the collision, the airbags deployed and Mr. Shirin struck his head however denied losing consciousness.

- [26] As with his statement to Dr. Langis, he stated that the collision occurred between approximately 9:30 and 10:00 p.m., that they were travelling southbound on Weston Road and that the other vehicle cut them off.

- [27] He also described the collision to Dr. Nina Belyakova on May 21, 2019 in the course of a driving reintegration assessment. Although this assessment followed the functional abilities evaluation by less than one month, his description of the collision differed with respect to the time of the event:

Mr. Shirin's accident occurred at 11 p.m. on June 27, 2018, when he was the front passenger of his friend's minivan. The vehicle was operated by his friend, and his wife was travelling as a rear right passenger. The weather and road conditions were unremarkable. They were travelling along Weston Rd. in Vaughan, Ontario. Their vehicle was struck in a T-bone fashion while proceeding through an intersection on a green light. The vehicle's airbags deployed. He struck his head against the vehicle's interior. He did not lose consciousness.

- [28] He also recalled being assessed by Dr. Julie Millard, a physiatrist on November 29, 2018, approximately only five months after the collision. At this assessment, his description of the collision dynamics initially appeared to differ significantly:

Mr. Shirin was involved in a motor vehicle accident on June 27, 2018. He was the seat-belted front seat passenger of a Honda Odyssey. There were a total of three occupants in the vehicle at the time. The airbags deployed.

Mr. Shirin was travelling at 60km/h on Weston Road in Toronto, Ontario when he struck a third party vehicle in a head-on collision.

Mr. Shirin reported hitting his head but denied losing consciousness.

The fire department responded the accident scene. Mr. Shirin was not transported to the hospital.

[29] F.S. explained that in his opinion, a head-on collision includes any accident in which at least one of the involved vehicles impacts the other with its front end, regardless of where on the body of the other vehicle the first vehicle strikes. This rather loose definition would therefore include a T-bone collision since the first vehicle strikes the side of the second with its front end. His perspective became apparent during a lengthy exchange with the insurer's counsel in which F.S. insisted that only the front end of the striking vehicle matters for the definition of a head-on collision. Although inaccurate, this perception appears to reconcile his descriptions of the same event elsewhere as a T-bone collision, a term he described as essentially synonymous with a head-on collision.

[30] He also saw psychologist Dr. Terra Seon on November 22, 2018 for a psychological assessment. At this assessment, only five months after the event but one week before meeting with Dr. Millard, he provided a detailed account of the collision:

Mr. Shirin displayed a good memory for events leading up to, during, and post accident. He did not present as being in any undue emotional or psychological distress while describing the details of the accident in question. Mr. Shirin reported on June 27, 2018 he was travelling as a front-seat passenger noting his friend was operating the vehicle and his wife was seated in the back of the vehicle. He recalled they were travelling southbound on Weston Road approaching an intersection when a car suddenly made a right-hand turn, which resulted in a collision. Mr. Shirin reported the vehicle he was travelling in collided with the side of the oncoming vehicle. Mr. Shirin confirmed he was wearing his seatbelt at the time of the subject accident. He reported the airbags deployed. He believes that he struck his head, however did not lose consciousness.

Mr. Shirin reported emergency services were contacted, however were not dispatched to the scene and they were encouraged to attend a nearby collision reporting centre.

[31] At the hearing, F.S. insisted that firetrucks attended at the scene but did not recall stating this to Dr. Seon. This element relates to a recurring contradiction with his evidence at the hearing compared to the other witnesses. He stated that S.S. was “pretty shook up” but he did not contact 911. Although he was gone by the time emergency responders would have attended, he recalled seeing two tow trucks attend and suspected that a fire truck may have attended at the scene. As noted above, F.S. stated to Dr. Millard and at his examination under oath that the fire department attended at the scene. In his testimony, F.A. confirmed that no emergency personnel attended at the scene other than the two tow trucks. I find that F.A.’s evidence on this issue is more likely accurate given that none of the participants in the collision nor the two truck operators called 911 or otherwise alerted the authorities to the incident until the drivers attended at the collision reporting centre.

[32] On April 30, 2019, he saw A family medicine physician, Dr. Ahmed Belfon, for an insurer’s assessment whether medical treatment benefits he sought were reasonable or necessary. At this assessment, he provided another detailed account of the collision with some details not previously mentioned:

Mr. Shirin reports that he was involved in a motor vehicle accident on June 27, 2018 at approximately 9:30 or 10:00 PM. The weather was clear that night. He was the front passenger of a minivan. His wife was with him and his friend was driving. He states that they were driving down Weston Road when a vehicle pulled out in front of them attempting to make a right turn onto Weston Road. This resulted in a T-bone type collision. The impact was to the front bumper of Mr. Shirin’s vehicle and the side of the other vehicle. He was wearing his seatbelt. Driver’s and passenger’s airbags deployed. He states that he struck the right side of his head on the window. There was no loss of consciousness. He states that he was able to get out of the vehicle unassisted. Police, paramedics and firefighters arrived at the scene and assessed him. Transfer to the emergency department was not required. His cousin picked him up and took him home. The vehicle was later written off.

[33] At the hearing, he denied stating that police or an ambulance attended at the scene but could not account for why Dr. Belfon wrote this in his report. He acknowledged that he did receive an opportunity to review this or any other report for possible errors before their issuance. He also noted that the discussion of the mechanics of the collision at each assessment was very brief, usually no more than two minutes.

- [34] He also suggested that either F.A. or the other driver contacted the police. As noted above, F.A. denied this and implied that the tow truck drivers discouraged police involvement. There was no indication that anyone observed the other driver or anyone else contacted the police. As well, at the present hearing, he acknowledged that the passenger side airbag did not deploy and stated that no one ever asked him about the number of airbags that deployed, though he may have referred to this safety device in the plural. He also denied ever stating that paramedics assessed him at the scene. F.S. could not explain why Dr. Belfon chose to include these very specific details in his report if he never stated them.
- [35] When shown photographs of F.A.'s minivan following the collision, he agreed that the images represented the damage caused in the incident and that the damage extends across the entire front end. He denied however that the damage appeared more extensive on the driver's side. The photographic evidence also confirmed that only steering wheel air bag had deployed. He recalled wondering at the time why the passenger side air bag had failed to deploy.

The Account of the Collision from the Driver Farid Aliyev

- [36] F.A. offered a similar account of the collision as F.S. though with more consistency with respect to the circumstances of the incident. Although his perspective on the impact necessarily differed from his passengers as he was operating the vehicle, both S.S. and to a lesser extent, F.S. referenced his account of the incident in their description of the event to others. As a result, F.A.'s descriptions of the incident is relevant to the present matter as he also witnessed the events of June 27, 2018 firsthand and could potentially offer some clarity on the facts of the collision.
- [37] F.A. testified that on the day of the collision, he was driving his two married friends, F.S. and S.S., in his 2009 Honda Odyssey minivan. They had departed from F.S.'s parents' house with a plan to go to F.A.'s apartment. During his examination under oath on October 28, 2019, he described the Shirins as his friends because when he arrived in Canada, the Shirins were one of the families with whom he communicated. He testified that he had known F.S. for more than one year prior to the collision. However, in F.S.'s testimony at his own examination under oath on October 18, 2019, F.S. stated that he had known F.A. for more than ten years. To explain this apparent contradiction, F.A. speculated that they had mutual acquaintances in Azerbaijan and F.S. was likely aware of him through his work as a popular DJ. He denied knowing F.S. personally before coming to Canada.

- [38] The weather and road conditions that day were dry and unremarkable. He testified that it was “approximately 11 in the evening, maybe a bit later” when the collision occurred. He believed that although it was dark, the intersection of Weston Road and Finch Avenue was well lit, sufficient to see another car approaching. He was unfamiliar with the area and relied on a map. He had a green light when the collision occurred.
- [39] Submitted images confirm that southbound Weston Road has four lanes including two through lanes, a left turn lane and a dedicated right turn lane with a channelizing island. Eastbound Fenmar Drive consists of one lane. Fenmar Drive intersects Weston Road southbound at a sharp angle less than 90°.
- [40] Although he agreed that he was speaking with his passengers immediately prior to the collision, he emphasized that he was watching the road and was not distracted. He stated that when he first saw the other vehicle, it was approximately ten to twenty meters away, approaching Weston Road on Fenmar Drive. The other car was decreasing its speed and F.A. believed the driver was going to stop. From his vantage point, he could not see a turn signal to indicate that the other driver intended to turn right but believed that he would have seen the light from a turn signal in the darkness. He stated that the other vehicle was very close when it became apparent that the driver was not going to stop. F.A. was unable to stop his own vehicle in time to avoid the collision. He recalled honking his horn but denied having sufficient time to swerve away from the approaching vehicle. Once the driver’s side airbag deployed upon collision, he could no longer see the road. As a result, he could not say with certainty if the other vehicle was still moving or stopped, but believed that it was still moving and may have accelerated prior to the impact. He did not recall how the impact may have moved his body but remembered pushing his hands against the steering wheel. He did not recall any part of his body striking the interior of the vehicle, just that his head snapped backwards.
- [41] After the collision, he looked at his passengers and exited the vehicle. He then opened the rear door for S.S. He recalled feeling in shock but did not notice any aches or pains. He went to speak to the driver of the other vehicle who was still in his car and asked him what he was doing. He and the other driver spoke in English. Despite his lack of fluency, F.A. was able to understand the essence of the other driver’s statements. He stated that the other driver spoke very quickly but apologized for the collision and appeared to consider himself at fault. He was not aggressive and asked if F.A. and his passengers were okay. The other driver stated that he thought he had enough time to turn right. While F.A.’s vehicle remained in the same location in the road, he did not recall if the other vehicle

remained in the same place following the collision. In other words, he could not describe the relative positions of the vehicles or recall if the front of his vehicle was still touching the other vehicle following the collision.

- [42] As this was the first accident in his life, F.A. asked the other driver what he had to do next under the circumstances. He was concerned as the other vehicle was a Bentley and in his country, if he struck such a luxury car, he would have to pay a huge amount of money. However, the other driver tried to calm him down and assured him that if he had automobile insurance, everything would be covered. When two tow trucks arrived, they were told that there was no need to contact the police and they should simply attend at the collision reporting centre which was close to the scene. Although he testified that he and his passengers were seriously injured in the collision, none of them called 911. The other driver also did not call 911. As a result, no police, ambulance or firetrucks attended at the scene. The two tow truck drivers transported F.A. and the other driver to the reporting centre and the Shirins went home.
- [43] F.A. testified that he believed that the other driver intended to turn right based upon what M.Y. told him at the scene. He did not recall if M.Y. continued to discuss the mechanics of the collision at the reporting centre but doubted this as both drivers were busy providing statements to the police. F.A. did not recall any other indications that the other driver had intended to turn right, apart from the other driver's statement after the collision.
- [44] He recalled observing damage to the Bentley in the area of its driver's side door and possibly the left front fender. Although he had been using Google Maps on his phone, he did not take any photographs of the damage to either vehicle until after he arrived at the collision reporting centre. Despite an opportunity to examine both vehicles more closely at the scene of the accident, he chose not to do so as he was more concerned for his passengers and the other driver.
- [45] Over the five years between the collision and the present hearing, F.A. has provided largely the same description of the collision to numerous people, starting when he attended at the collision reporting centre that night. He also agreed that his memory would have been better that night compared to later examinations, including the hearing.
- [46] At the reporting centre, he was asked to draw a diagram of the scene of the accident. In this image, he depicted his vehicle as travelling straight through the intersection southbound and "the other guy" crossing his path, having turned right from Fenmar Drive onto Weston Road. To the left of the diagram, he provided the following statement:

I was on **weston** [sic] road and the guy came from Fenmar & came to red light & the guy turn right, My light was green so I went straight

- [47] Although F.A. testified at the hearing that he did not know at the time that the other vehicle was about to turn right, his diagram and the above statement imply an executed right turn. Under cross-examination, he explained that he relied upon the other driver's statement to him after the collision and incorporated that statement into his description of the incident.
- [48] After that first statement, F.A.'s description of the mechanics of the collision began to develop subtle variations upon subsequent retellings. He testified at his examination under oath on October 28, 2019 that the other car "stopped at the red sign, but he didn't wait for me and he go, he turned to the right." After stating under direct examination at the hearing that the other driver did not stop, under cross-examination, he altered his evidence to state that the other car only seemed about to stop.
- [49] Although he initially attributed this discrepancy to the absence of a Russian interpreter at the examination under oath, the transcript from that examination indicates that an interpreter was indeed present and that F.A. opted to proceed without his assistance. He then denied any recollection of giving this evidence at the examination but acknowledged that he had no basis to refute that the transcript of the examination represented an official record of that proceeding.
- [50] F.A. also told several other examiners that the Bentley had turned right. On December 5, 2018, during his description of the collision to psychologist, Dr. Debra Mandel, during a psychological assessment, he stated "that he was travelling toward Finch when another vehicle which had a red light stopped and then went without waiting for him and the other vehicle made the right hand turn on the red light."
- [51] Similarly, he stated to psychotherapist, Dr. Felix Yaroshevsky on November 8, 2018 that "he was driving through a green light and somebody on his right was approaching the lane and making a right turn." Again, he maintained at the present hearing that the other vehicle had not yet turned but he was told by the other driver after the collision that he intended to turn right. As with the assessment with Dr. Mandel, there is no reference to the other driver merely stating an intention to turn in Dr. Yaroshevsky's letter dated November 13, 2018, though this qualification would seem comparatively straightforward to mention. F.A. explained that none of the medical professionals asked him *exactly* what happened, a claim I find rather dubious in relation to physicians who apparently sought to diagnose his injuries to the best of their expertise and abilities. Under

the circumstances, I find it would have been more reasonable for F.A. to provide an accurate factual description of the collision rather than portray the unfulfilled intentions of others as facts.

- [52] However, F.A. continued to advise examiners that the other vehicle actually turned right. Occupational therapist, Lee Birbrager attended at F.A.'s residence on April 2, 2019 to conduct an in-home assessment. Describing the collision, F.A. advised that as he and the Shirins were travelling southbound on Weston Road, through a green light at the intersection of Fenmar Drive, "the driver of a vehicle on Fenmar had a red light and turned right onto Weston Road." Again, F.A. stated at the hearing that the driver was not actually turning right and based this assumption on the other driver's later statement. I find that he offered no cogent explanation with respect to why he did not make this distinction, particularly as a Russian interpreter was present at the assessment. F.A. saw Lee Birbrager again on September 11, 2019, assisted by another Russian interpreter and reiterated the same description of the collision.
- [53] At an insurer's examination on July 27, 2019 with physiatrist, Dr. Anna Czok, F.A. stated that "they were travelling at unknown speeds when a second vehicle unexpectedly made a right hand turn in front of them, resulting in a frontal-impact collision." Again, a Russian interpreter was present at the examination to assist him.
- [54] As well, on October 31, 2019, F.A. stated to Dr. Veronica Kekosz, MD at another physiatry assessment that "as he was starting to drive through an intersection, a vehicle from his right attempted to make a right-hand turn and unfortunately there was a front end impact with the driver side of the other vehicle."
- [55] On January 21, 2020, F.A. stated the following to assessment social worker, Dr. Nazila Isgandarova at a biopsychosocial assessment:
- He was travelling on Weston Road towards Finch Avenue when a vehicle tried to make a right hand turn on a red light and he was not able to stop in time. The front of his vehicle struck the other car on the driver's side. There was airbag deployment. He hit his head, but did not lose consciousness.
- [56] Although F.A. emphasized his inclusion of the verb "tried," this would tend to suggest some tangible action beyond the mere stated intention to turn upon which F.A. retroactively claimed to rely for these statements.

[57] Lastly, F.A. agreed that the OCF-1 form that initiated his claim bears his signature and includes the following accident description:

I was driving on Weston Rd. Another vehicle coming out of a drive way [sic] making a right turn failed to stop on a red light and hit my vehicle

[58] He agreed that this was the description of the accident that he gave to his legal counsel so that they could complete the form on his behalf.

The Account of the Incident from the Passenger Sabina Shirin

[59] In addition to the greater inconsistencies in her descriptions of the collision compared to F.S. and F.A., S.S.'s claims at the hearing that she merely assumed that the other driver was turning right conflicted with her fluctuating levels of detail regarding the collision. These issues cast doubt on her evidence in particular and the claimants' narrative as a whole, particularly as she purported to rely upon the observations of the other two occupants of the Honda.

[60] S.S. testified that F.A. is a family friend and that he was driving her and her husband, F.S., to his house when the collision occurred. She was not providing any directions to F.A. She estimated that she knew F.A. for approximately one year before the collision but noted that F.A. had known her husband for many years before that night.

[61] S.S. recalled attending at an examination under oath on October 18, 2019 and agreed that she had no issues understanding the questions put to her or in responding to those questions. Although her command of the English language has improved since the examination under oath, she confirmed that she did not require the assistance of an interpreter during the examination under oath or any of the assessments conducted.

[62] When asked at the examination under oath how long she had known F.A., she provided a response inconsistent with her evidence at the hearing. Specifically, she stated that F.A. is her husband's friend and that she had known him since she came to Canada and that he is a DJ from her country. At the hearing, she agreed that she came to Canada in 2016, two years before the incident.

[63] At the hearing, she testified that he did not see the other vehicle prior to the collision. She agreed that her memory of the collision would have been fresher that night compared to the time of the present hearing. Similarly, at the examination under oath, she stated that she did not know the time of day when

the collision occurred, but recalled that it was dark. At the hearing, she attributed this lack of knowledge to her role as a passenger and being on her phone at the time. As a result, she denied knowing the path the other vehicle took prior to the collision and did not anticipate the collision. She also could not state whether F.A. was driving straight immediately before the collision occurred.

[64] However, when she filled out her OCF-1 form, she implied a more detailed awareness of the event stating, "I was a back seat passenger when a car made a right turn into our lane and we ended up hitting that car." She agreed that she signed the form on August 16, 2018 and although she denied any recollection of writing this description, she did not deny writing it.

[65] In the years since the incident, she has provided a similar description of the collision to various assessors and others. Although many of the other details varied, she consistently maintained that the other car was turning right when the collision occurred. She explained that she based her understanding of the dynamics of the collision from what F.A. and others involved in the incident told her afterwards. She added that because she was on her phone, she did not see the other car coming and did not brace for the impact. She was unaware of the make and model of the other vehicle as she is not familiar with cars.

[66] At the examination under oath, she was able to recall a few more details and conveyed a greater awareness of the circumstances of the collision:

Like, we were going straight and the car was turning to the right and we had the green light. And to be, like -- to be honest, I was on the phone, like -- but I know that the -- our front side, like, hit the other car, because, like, he was turning to the right.

[67] She went on to agree with the examiner that it was a T-bone accident. At the hearing, she initially attempted to distance herself from this level of detail on the grounds that her command of English was not as developed at the time of the examination and she did not then express herself as articulately as she now does, but agreed that she did not require an interpreter at that time. Nonetheless, she confirmed that the details of the collision that she stated at the examination were correct to her "best knowledge" but still simultaneously maintained that it was based upon an assumption.

[68] On February 17, 2019, S.S. underwent an in-home occupational assessment with Deena Rogozinsky, a registered occupational therapist. At this assessment, S.S. provided a description of the collision consistent with her statement at the examination under oath. Specifically, she stated that she was the back seat

passenger of a minivan driven by her husband's friend, travelling on Weston Road, with her husband as the front seat passenger, when suddenly a car turned right in front of their vehicle, causing their vehicle to impact it.

- [69] However, at an earlier psychological assessment with psychologist, Dr. Langis on December 18, 2018, roughly six months after the collision, she provided a description of the incident with some differing details:

Ms. Shirin reported that she was involved in a motor vehicle accident on June 27, 2018 sometime in the evening. Weather conditions were unremarkable. She was a back-seat passenger, her husband was the front seat passenger, and her husband's friend was the driver. They were traveling in a minivan. She noted that she had left her baby in the care of her mother in law and was on her way to visit a friend. Ms. Shirin was using her phone when the accident occurred and is unsure of the details. The accident occurred in Vaughan, Ontario. She heard "something from the side" and raised her hands up defensively. She cannot recall if she was wearing her seatbelt, The airbags deployed. She is unsure if she struck her head. Her husband later advised her that their vehicle was broadsided on the passenger side.

- [70] While she denied any recollection of her husband's description of the collision, she could not dispute providing this statement.

- [71] She also saw Dr. Gilbert Yee on May 16, 2019 for an orthopaedic assessment and described the collision as follows:

Ms. Shirin was involved in a motor vehicle collision on June 27, 2018. She was a shoulder and lap belted restrained second row passenger side occupant in a minivan driven by her husband's friend. They were crossing the intersection with a green light when they were T-boned on the driver side. There was no air bag deployment. She is not sure whether she lost consciousness.

- [72] At the hearing, S.S. acknowledged that the above description of the collision differs from her account to Dr. Langis with respect to the location of the impact. However, she reiterated that this description was based upon "an assumption" as she was not driving. On this basis, she asserted that the descriptions provided were consistent.

[73] S.S. was also examined on May 21, 2019 by psychologist Dr. Nina Belyakova for a driving reintegration evaluation and provided the following description of the collision:

They were travelling along Weston Rd. in Vaughan, Ontario. Their vehicle was struck in a T-bone fashion while proceeding through an intersection on a green light. She was using her cellphone at the time of the collision, and therefore could not provide any exact details of the accident. She remembers hearing something and raising her hands up. The vehicle's airbags deployed. She struck her head against the vehicle's interior. When asked, she expressed being unsure [if] she lost consciousness.

[74] This description was provided only five days after S.S. met with Dr. Yee. S.S. agreed that she able to provide more details later when filling out her accident benefits applicant as well as to Dr. Langis and to Dr. Yee. Again, she stated that she provided the details of the collision to Dr. Belyakova to the best of her knowledge.

[75] When she saw Dr. Vincenzo Santo Basile, MD on July 22, 2019 for a neurological evaluation, she offered a substantially different description of the collision:

Her husband's friend was driving, and she was in the rear seat. She cannot recall the exact details of the intersection. She has patchy recall for the event. She recalls that the circumstances leading up to the accident included driving through a green light at intersection when another vehicle was taking a right hand turn in their lane and their car hit the other vehicle in rear end. There was no secondary collision. She did not anticipate the accident and did not brace herself for impact. The airbags did deploy. She did hit her head and did lose consciousness.

[76] Despite describing her recall as patchy, she provided details not given previously, including the new claim that F.A.'s van had struck the other vehicle in the rear end. She denied any recollection of providing this or any other statement and emphasized that she could not provide any details of the collision at the hearing as she could not remember and could only assume the circumstances of the event.

[77] On November 16, 2018, S.S. saw Dr. Saad Naaman for a physiatry assessment. This assessment occurred approximately five months after the collision but

before the examination under oath and many of the other assessments. At this assessment, S.S. described the collision as follows:

Ms. Shirin reports that she was sitting in the back seat on the passenger side. She reports that they were traveling through an intersection on a green light, they t-boned a car turning right into the intersection.

[78] S.S. believed that she may have told Dr. Naaman that she only assumed the details of the collision but acknowledged that she had no explanation for this alleged omission in his report.

[79] By contrast, on November 7, 2018, only nine days earlier, S.S. saw Dr. Debra Mandel for a psychological assessment when she provided another version of the collision as follows:

She was seated in the back-passenger seat and her husband was seated in the front passenger seat. They were travelling on Weston Road. She was unable to recall whether she was wearing her seatbelt. She detailed that she was looking at her phone when she heard a “crash” and that she was not sure what had happened. At impact her body moved forward, and all of the airbags deployed. She reportedly lost consciousness for a few seconds.

[80] At the hearing, she denied recalling that she told Dr. Mandel that all airbags deployed but did recall stating that she was wearing her seatbelt. She suggested that Dr. Mandel may have made an error in recounting her description of the accident but otherwise could offer no explanation for the substantive differences between this account and that given to Dr. Naaman only nine days later.

[81] On November 23, 2019, S.S. met with Dr. Yuri Marchuk for another psychiatry examination. At that examination, she provided the following description of the collision:

She states her husband’s friend was driving her and her husband to his house. She states the vehicle she was in was traveling straight through an intersection when it was hit by a third-party vehicle turning right.

[82] She agreed that she had no reason to deny that she gave this description at this time.

- [83] On her own evidence, this was a serious accident. Although she was able to exit F.A.'s vehicle without assistance after the collision, she sustained injuries as did her husband and F.A. While she could not recall at the hearing whether the airbag or airbags deployed, she told multiple assessors that she lost consciousness. While she stated at the hearing that she did not recall describing a loss of consciousness, she conceded that since this detail was mentioned in the reports issued by Dr. Basile, Dr. Belyakova and Dr. Mandel, she must have stated it. She ultimately agreed that she lost consciousness but also acknowledged that she did not contact 911 and was unaware if anyone else present did so. She could not recall if she observed any emergency vehicles attend at the scene as she was "shocked." She also chose not to attend at a hospital immediately following the collision, explaining that she simply wanted to return home and see her young son. She testified that her brother in law drove her and F.S. home. As noted above, her husband described his relationship to this person differently.
- [84] She also opted not to examine the damage to either vehicle or attend at the collision reporting centre with F.A. When shown photographs F.A.'s minivan following the collision, she agreed that the images represented the damage caused in the incident and while the damage extends across the front end, it appears more extensive on the driver's side. The photographic evidence also confirmed that only the steering wheel airbag had deployed.

The Forensic Analyses

The Walters Forensic Engineering Inc. Report

- [85] Scott Walters ('S.W.') is a forensic engineer and the president of Walters Forensic Engineering Inc. ('Walters'). He specializes in accident reconstruction and human factors engineering issues. He has thirty years of experience with accident reconstruction and has been involved in approximately 1,500 accident reconstructions. He was qualified as an expert in collision reconstruction.
- [86] Walters was retained to conduct an independent engineering assessment for this matter. In particular, they were hired by F.A. to comment on a report prepared by 30 Forensic Engineering ('30FE') dated January 24, 2020. The company was not retained to determine whether the incident was a staged collision. In preparing his report, S.W. attended the collision scene with F.A. on December 18, 2020 and reviewed the following information:
- a. Police Motor Vehicle Collision Report;

- b. Transcript of the examination under oath of F.A. dated October 28, 2019;
- c. F.A.'s document brief;
- d. Photographs of the Honda and Bentley from the Collision Reporting Centre;
- e. Property damage estimate for the Honda including photographs;
- f. Photographs of the Honda from the collision scene taken by F.A;
- g. Collision Report Supplementary Statements (CRSS) form from F.A. and the other driver, M.Y.; and
- h. The 30FE report

[87] Dr. Saad Niser is another engineer at Walters who assisted S.W. with the report by generating the photographic figures. These figures were created with a software drawing package and programmed on the assumption that F.A. was travelling southbound in the curb lane of Weston Road prior to the incident and the damage patterns seen in the photographic evidence of the vehicles are accurate. The drawings were created for illustrative purposes only and no simulation was conducted.

[88] While S.W. reviewed other documents from the document brief, given their volume, he did not list all of them in his report. As a result, he acknowledged that he may have missed a document in which F.A. repeated his version of the events. He agreed that in all of the reports listed in his report, F.A. either stated that the Bentley failed to stop and made a right turn or stopped and then made a right turn.

[89] S.W. recalled that the site visit on December 18, 2020 lasted at least one hour. During the related interview, S.W. asked F.A. to describe the collision. He agreed that no validity testing was performed during this interview. Although no interpreter attended, two of F.A.'s legal counsel were present should interpretation be required. However, S.W. found F.A.'s command of the English language sufficient to describe the collision and F.A. did not request an interpreter.

[90] S.W. agreed with 30FE that the Honda sustained damage to its front end with the most significant area of intrusion at the left front corner. He also agreed that the Bentley sustained intrusion to its left side starting at the approximate location of the left front wheel and extending rearward to the rear edge of the driver's door.

The most significant area of intrusion was to the rear of the left front wheel in the area of the leading edge of the driver's door and the rocker panel.

- [91] With respect to how the vehicles came together at impact, S.W. agreed with the 30FE forensic report that the Bentley was *not* making a right turn. In his opinion, if the Honda was travelling southbound in the curb lane of Weston Road and its front struck the left side of the Bentley and T-boned it, as F.A. and M.Y. both reported, it is unlikely that the Bentley was making a right turn onto southbound Weston Road.
- [92] In his opinion, the vehicles were oriented at 90° or slightly less at impact. Determination of the vehicles' movements prior to impact would depend on the angles and the steering and speed inputs entered by the drivers. Moving backward in time prior to the impact, it becomes increasingly less possible to determine the orientation of each vehicle.
- [93] Both F.A. and M.Y. both indicated in their collision centre reports that F.A. was travelling south on Weston Road. S.W. stated in his report that F.A. was also generally consistent in his reporting that the front of the Honda impacted the driver's side of the Bentley, including "T-boning" it. S.W. defined a "T-bone collision" as an impact where the first vehicle strikes another with its front end more or less at 90° to the side of the second vehicle. F.A.'s description of the impact between the Honda and the Bentley, in S.W.'s opinion, is consistent with the damage to the vehicles and their orientation at impact. Therefore, if F.A. was travelling southbound, the Bentley would not be making a right hand turn at impact. Assuming F.A.'s information that he was travelling southbound on Weston Road and the front of his vehicle impacting the left side of the Bentley to be correct, the configuration of the vehicles at impact would have been close to 90°. Assuming that F.A. was indeed travelling straight on Weston Road, the vehicles would not have collided had M.Y. not crossed in front of him.
- [94] Diagrams in S.W.'s report indicate that if M.Y. was turning right as F.A. and his passengers reported, the angle of impact would have been much closer to a sideswipe impact, not supported by the physical damage to the vehicles. Such a sideswipe collision would have left more of a smearing impact rather than the stamping impact observed on the side of the Bentley.
- [95] However, in S.W.'s expert opinion, given the reported circumstances of the collision, the 30FE report relied on very narrow interpretations of the physical parameters of the incident, specifically that the Bentley was in the process of making a right turn when the impact occurred. This interpretation does not take into account the possibility that M.Y. had been in the process of making a right

turn, but prior to impact swerved left to end up in the orientation of the vehicles at impact. S.W. also suggested that it was possible that M.Y. intended to make a right turn but did not or he was incorrect in his recollection of intending to make a right turn prior the collision.

- [96] Unfortunately, M.Y. did not testify at the hearing to a firsthand accounting of his actions in the seconds prior to the collision. None of the witnesses observed the driver of the Bentley steering to the left at any point prior to the collision and S.W. candidly acknowledged that there was no evidence to support this theory. This is simply a possible sequence of events that could explain the disparity between the reported events and the damage to the vehicles. He noted that he was not asked to perform an analysis on how the vehicles arrived at their eventual orientation at impact.
- [97] S.W. also acknowledged an absence of physical evidence at the scene such as skid marks or gouge marks on the road surface to indicate the orientation of either vehicle prior to collision. However, he did not inspect the scene of the collision until well over two years after the collision and such physical marks may have long since vanished. He noted that there were some lamp standards at the intersection but clarified that these objects would not have offered significant obstruction to F.A. as he was travelling southbound on Weston Road.
- [98] He also agreed that the damage to the vehicles could have resulted from the T-bone impact described by the claimants if the Bentley was attempting to run the red light at the last minute or had fishtailed. However, it is important to note that this is simply an unsubstantiated theory since none of the witnesses reported either of these scenarios.
- [99] Furthermore, S.W. could not speculate on how the comparative weights of the two vehicles would have affected the Honda upon impact given the resulting collision would have been affected by unknown variables including relative speed and the angle of impact.

The 30 Forensic Engineering Report

- [100] Nishan Perera ('N.P.') is a senior collision reconstructionist and associate in the Collision Reconstruction Group at 30FE. He holds a Bachelor of Applied Science (Mechanical Engineering) with a focus on Automotive Engineering. He has been involved in conducting vehicle examinations and extracting 'black box' data, as well as investigation of numerous collisions involving, automobiles, motorcycles and pedestrians. He was qualified as an expert in collision reconstruction.

- [101] The applicant retained 30FE to assess the likely physical circumstances of the incident. They were specifically asked to comment on the validity of the reported information. To that end, N.P. and Raffi Engeian ('R.E.') prepared a report dated January 24, 2020 and an addendum dated March 15, 2022. N.P. wrote the first report and R.E. peer reviewed it. Prior to writing the report, N.P. reviewed photographs of the damaged vehicles, the Collision Report Supplementary Statement Forms and a damage estimate for the Honda Odyssey dated June 27, 2018. The images of the Bentley were of lower resolution and N.P. did not have an opportunity to inspect the vehicle in person. However, given the dark blue colour of the Bentley and while better resolution images would have helped to show any hidden additional scrapes and scratches, those provided offered sufficient information on how the engagement actually occurred. He recalled no issues with the resolution of the images of the Honda, noting that the photographs had better detail and that vehicle was painted in a lighter shade of silver.
- [102] The provided photographs indicated that the damage to the Honda was biased to its left front area. The front bumper cover was displaced rearward, left of centre near the leading edge of the left headlamp. There were multiple paint chips on the front bumper cover that formed a rectangular imprint or pattern across its front. Similarly, on the left front corner, the bumper cover was dented rearward with chipped paint. The hood was buckled rearward and was dented at its leading left edge. The left headlamp appeared to be displaced rearward and the left fender was deformed rearward at its leading edge. Behind the front bumper cover, the bumper reinforcement bar was buckled to the left of centre and the front reinforcement bar was crushed rearward into the radiator panel. There was less damage to the right front corner of the Honda. There was a slight rearward deformation at the leading edge of the right fender, to a lesser extent to that of the left fender. Inside the vehicle, only the front driver's side airbag was deployed.
- [103] The provided photographs indicated that the Bentley sustained damage to its left side. Specifically, the left door shell was crushed rightward (inward) and the trailing edge of the fender and the A-Pillar sustained maximum rightward deformation. No airbags were deployed.
- [104] N.P. was able to associate the damage to the vehicles to each other and overlap the damaged areas through 3D models in PC Crash software to orient the vehicles according to the damage and confirm where the Honda impacted the Bentley. In their Collision Reports, both drivers reported that F.A. was travelling southbound on Weston Road when M.Y. made a righthand turn in front of him

while travelling eastbound from Fenmar Drive. N.P. compared the damage to the vehicles, aligned the models to that damage and then compared the drivers' statements to the physical evidence. He did not perform any simulations to determine the vehicles' speeds as this was outside the scope of the firm's assignment. While he was unaware if S.W. conducted any speed analysis in his investigation, N.P. stated that such an analysis would provide the necessary basis for S.W.'s opinion that F.A. had insufficient time to stop the Honda to avoid the collision.

- [105] The alignment of both the damage heights and the damage widths of the vehicles were consistent with the front of the Honda striking the left side of the Bentley. The damaged areas of both vehicles were overlapped in a manner consistent with the left front wheel and A-pillar of the Bentley having been struck by the left front corner and bumper reinforcement of the Honda. The damage reflected an orientation consistent with a 'T-bone' impact where the vehicles were generally perpendicular to each other. This damage could not have occurred if the Bentley turned right in front of the Honda at this intersection.
- [106] With respect to the impact engagement, the damage to the front left corner of the Honda, where the majority of the damage was on that vehicle, indicated that the majority of the forces was travelling in that direction, and that can only be inferred if the Bentley was generally perpendicular to the Honda, but slightly angled to the left.
- [107] N.P. compared both southbound traffic and the typical right-turning motions of vehicles through the intersection with the impact engagement based on the damage. Eastbound traffic attempting a right turn from Fenmar Drive onto Weston Road could do so from a relatively wide eastbound single lane which allowed two vehicles to stop side-by-side at the intersection. A review of both the Google Street View imagery for eastbound traffic and the overhead aerial view indicated that roadway deterioration in the area separated the general path of eastbound right-turning vehicles from eastbound through vehicles. If the Bentley was taking a typical right turn, it would have exposed its left side to the approaching Honda. However, the impact surfaces would not have aligned with the observed damage to both vehicles. N.P. disagreed that it was impossible for a vehicle to turn left and northbound onto Weston Road and no evidence was submitted to contradict his evidence on this point. As far as he was aware, it was not prohibited to turn left onto Weston Road from Fenmar Drive. A Google maps image looking east across the intersection from the west side of Fenmar Drive dated September 2018 also showed no notices prohibiting a left turn northbound onto Weston Road. Although it is possible that M.Y. may have attempted this

turn to run the red light as the Shirins suggested, the low speed of the Bentley at impact does not support this theory.

- [108] The expected damage based on the expected vehicle travel paths of a right-turning Bentley and a southbound Honda was compared against the vehicle impact engagements as defined by their actual damage patterns. A right-turning Bentley would have been aligned in a southeasterly direction as it crossed into the path of the approaching Honda. The expected headings of both vehicles would likely have resulted in the right front corner of the Honda striking the left door/A-pillar areas on the Bentley. As a result, it is expected that the Honda would have sustained the greatest damage to components at its right front corner (i.e., right headlamp, leading right edge of the hood, right fender) as opposed to the actual damage being predominantly offset to the left front. Further, the Bentley would likely not have sustained the damage from the bumper reinforcement bar of the Honda. Rather, the engagement would have resulted in longitudinal scratches and scuffs as the right front of the Honda moved past the left side of the Bentley. The orientation would have also resulted in secondary contact between the left side of the Bentley and right side of the Honda, as both vehicles rotated away from each other after impact. Therefore, the vehicle damage patterns created by the impact were inconsistent with those expected from a southbound Honda colliding with an eastbound, right-turning Bentley.
- [109] N.P. also compared the vehicle damage patterns to the vehicle orientations and the likely initial headings required to produce those damage patterns. To do so, he rotated the vehicles while maintaining their relative engagement until it matched the likely orientation of either a right-turning Bentley or a southbound Honda. He determined that if the Honda was initially southbound on Weston Road, the collision would have resulted in the observable damage patterns if the Bentley was proceeding left through the intersection rather than turning right, as was reported. Alternatively, if the Bentley was initially eastbound on Fenmar Drive and turning right, the collision would have resulted in the observable damage patterns only if the Honda was initially proceeding westbound through the intersection rather than southbound, as was reported.
- [110] Therefore, the damage patterns restrict the possibility of both reported vehicle headings being true. In other words, if the Honda was travelling southbound, it is unlikely that the Bentley was turning right. Alternatively, if the Bentley was turning right, it is unlikely that the Honda was southbound. In either case, these orientations produce scenarios which were inconsistent with what F.A. and M.Y. reported.

- [111] Further, the photographs depicted little if any longitudinally running scratches and scuffs on the left side of the Bentley. A vehicle moving with appreciable speed typically sustains some form of longitudinal scratching and scuffing during a T-Bone impact as a result of it translating forward against the front of the striking vehicle. For the subject collision, the lack of these scratches and scuffs indicated that the Bentley was likely stationary or moving relatively slowly compared to the Honda at impact.
- [112] N.P. noted that the failure of the front passenger airbag to deploy is significant as he would have expected both airbags to deploy given that there was reportedly a passenger in the front seat, even with the slight bias from 90°. He also agreed that the airbag deployment generally suggested that the Honda was travelling at a higher speed than the Bentley prior to impact. He explained that the forces involved in a head-on impact such as that experienced by the Honda predominantly occur over the entire front of the vehicle. Even if the damage is focussed towards the driver's side of the vehicle, the airbags are designed to protect both front occupants. Although manufacturers differ, the threshold for deployment is typically around 15 to 17 km/h changes in speed. In other words, the Honda would have had to decelerate by approximately 15 to 17 km/h at the moment of impact to meet this deployment threshold. While the damage suggests that the Honda was decelerating or braking prior to impact, N.P. had not performed a reconstruction to ascertain the actual impact speed. Prior to this deployment, F.A. would have been able to see the Bentley approaching as the airbag deploys in a fraction of a second at impact but not before impact. Preceding impact, his analysis of the sightlines at the intersection revealed no obstructions to F.A.'s ability to perceive the motion of the approaching Bentley.
- [113] N.P. wrote the March 2022 addendum report to address the Walters report and F.A.'s examination under oath, both received after 30FE had issued its initial report. He noted that S.W. generally agreed with his initial findings regarding the vehicle orientations and engagement at impact. However, S.W.'s report indicated that F.A. was "generally consistent in all of his reporting that the front of the Honda impacted the driver's side of the Bentley, including 't-boning' it." The report further concluded that, "Mr. Aliyev's information reported to us and in some of the insurer's reports would be consistent with the Bentley travelling more or less eastbound in front of him..." In this regard, N.P. agreed with S.W. However, S.W.'s report did not consider that F.A.'s statements regarding his vehicle 'T-boning' the Bentley were inconsistent with the reported information, which indicated that the Bentley was making a right-hand turn at the time of impact.

- [114] F.A. also explicitly stated that the Bentley was making a right turn in front of his vehicle during his examination under oath. His description of the Bentley stopping at the intersection for the red signal (“red sign”) before proceeding was also consistent with the typical movements of a vehicle making a right turn when facing red traffic signal.
- [115] With respect to S.W.’s theory that M.Y. may have turned right then steered left, given the information available, he agreed that it is not possible to determine what either vehicle was doing in the seconds preceding the collision. He added however that this would be a very atypical manoeuvre and would require some analysis on the lateral acceleration profile of the vehicle and whether such a profile is even achievable by the Bentley. Although he agreed that the evidence does not preclude this possibility, all of the *reported* circumstances point to a right turn by the Bentley and no subsequent manoeuvre as theorized by S.W.
- [116] N.P. also offered an opinion on the possibility that the damage to the vehicles could have resulted from the T-bone impact described by the claimants if the Bentley was attempting to run the red light at the last second or had fishtailed. While he agreed that this was possible, the damage to the Bentley indicated that it was travelling at a fairly low speed or stopped. If there was some behaviour on the part of M.Y. that restricted the motion of the Bentley to almost a near stop, this would have to occur at the same time as such a rapid intended manoeuvre. As both vehicles were also equipped with an ABS braking system and the parties agreed that the road surface was dry, this explanation is possible but unlikely. He did not devote more investigation in either report to other collision possibilities as the parties had reported that the collision occurred because the Bentley had turned right into the Honda.

Was the Respondent involved in an “accident” as defined by the Schedule?

- [117] I find that the respondent did not meet his evidentiary burden to demonstrate on the balance of probabilities that he was involved in an accident as defined in subsection 3(1) of the *Schedule*.
- [118] The date and location of the collision as well as the participants and vehicles involved were not in dispute. The only issue was whether the description of the event on June 27, 2018 is sufficiently credible for the respondent to demonstrate on the balance of probabilities that it was an accident rather than something else.
- [119] To be eligible for benefits, the respondent must prove that the incident meets the definition of an accident under subsection 3(1) of the *Schedule*. An accident is defined as:

“an incident in which the use or operation of an automobile directly causes an impairment ...”

[120] In *Amos v. Insurance Corporation of British Columbia*, [1995] 3 SCR 405 (*‘Amos’*), the Supreme Court of Canada set out the two part test for determining whether an insured person was involved in an “accident” and thus entitled to statutory no-fault accident benefits:

- a. The Purpose Test: Did the accident result from the ordinary and well-known activities to which automobiles are put?
- b. The Causation Test: Was there some causal relationship between the applicant’s injuries and the ownership, use or operation of the vehicle, or was it merely incidental or fortuitous?

[121] In *Greenhalgh v. ING Halifax Insurance Co.* (2004), 72 OR (3d) 338 (*‘Greenhalgh’*), the Ontario Court of Appeal reviewed the caselaw and determined that in order to satisfy the definition of an “accident” under the *Schedule*, an insured person must meet the purpose test as set out in *Amos* and the causation test as set out in *Chisholm v. Liberty Mutual Group* (2002), 60 OR (3d) 776 (ON CA). This combined test was adopted and amended to meet the *Schedule’s* current and more narrow definition, requiring the applicant to now satisfy the following questions:

- a. Purpose Test:
 - i. Did the accident result from the ordinary and well-known activities to which automobiles are put?
- b. Causation Test:
 - i. Was the use or operation of the vehicle a cause of the injuries?
 - ii. If the use or operation of the vehicle was the cause of the injuries, was there an intervening act or acts that resulted in the injuries that cannot be said to be part of the “ordinary course of things?” In other words was the use or operation of the vehicle a “direct cause” of the applicant’s injuries?

[122] In *Owusu v. TD Home & Auto Insurance Company et al.*, 2010 ONSC 6627 at paragraph 8, the Ontario Superior Court held that “there is no presumption of entitlement created in the legislation, nor should one be implied.” The respondent bears the onus to satisfy both the purpose and causation tests. In

M.D. v. Intact Insurance Company, 2017 CanLII 87155 (ON LAT) ('*M.D.*'), the Tribunal determined that the insured person bears the onus to prove on the balance of probabilities that he or she was involved in an accident. To that end, the adjudicator relied on *Shakur v. Pilot Insurance Co.* (1990) 74 OR (2d) 673 (Ont. C.A.), in which the Court of Appeal confirmed that the onus to prove entitlement to benefits under a policy does not shift from the insured person. The burden only shifts when the respondent seeks to demonstrate that the claimant wilfully misrepresented the circumstances of the incident.

- [123] As the Tribunal held in *Amare v. Economical Insurance Company*, 2021 CanLII 100265 (ON LAT), the claimant retains the evidentiary burden to prove that he or she was involved in an accident even where the insurer alleges a staged accident. A staged accident is an incident where an accident is created for the purpose of profit. In *M.D.*, the Tribunal determined that a staged accident is an intentional act that is contrary to public policy and section 118 of the *Insurance Act*, RSO 1990, c I.8., and therefore excluded from the definition of an accident in subsection 3(1) of the *Schedule*. A staged accident would therefore not pass the purpose test.
- [124] S.S. and F.S. took the position that they have described the incident consistently and to the best of their abilities. F.S. noted that as a passenger, he is not responsible for the operation of the vehicle and bears no duty to warn the driver of an impending threat. He also has limited ability to influence the outcome of a potential hazardous situation.
- [125] Like F.A., S.S. and F.S., had previously stated that the Bentley turned right but also adopted the same revised narrative and emphasized at the hearing that they also only presumed an intention on the part of the Bentley driver. S.S. emphasized the brevity of the portion of the various examinations conducted in which interviewers reviewed the mechanics of the incident. As the purpose of many of those interviews related to their injuries, the examiners only covered the events of June 27, 2018 in the interest of context and did not delve into the minutia of the event to explore the claimants' precise perceptions of the collision as it occurred.
- [126] However, there was never any mention of an assumption or speculation in any of the reports submitted and all of the assessors appeared to indicate that they accepted what the claimants told them, specifically that the Bentley had in fact turned right or was in the process of doing so when the collision occurred. Although none of the assessors or examiners ever questioned whether the turn described had occurred or was merely the product of speculation, I find that they

would have lacked reasonable cause to question this detail unless F.A. and his passengers volunteered that the turn was merely a matter of speculation rather than observation.

- [127] While F.S. suggested that he had in fact stated that he only assumed that the Bentley was turning right, I find it unlikely that all of the assessors and interviewers independently erred in their reports by omitting this distinction between fact and speculation. I find that it is more likely that the assessors duly recorded F.S.'s actual descriptions of the collision, specifically that M.Y. turned right as he had then not yet adopted the narrative that the right turn was only an assumption.
- [128] Both accident reconstruction experts testified that the damage and the reported actions of both drivers were incompatible with the Honda travelling south on Weston Road and the Bentley turning right into its path. In light of the claimants' multiple prior statements that the Bentley was turning right, the claimants largely relied upon a speculative theory advanced by S.W. that it is possible that the ultimate orientation of the vehicles and their corresponding damage may have resulted from a right turn followed by a last instant left steering correction by M.Y. This was the only theory advanced that could potentially reconcile the claimants' reports and the damage to the vehicles. Significantly, S.W. did not include this theory in his report and never asked F.A. any questions during their December 2020 interview with respect to whether M.Y. may have steered left in the last instant before the vehicles collided.
- [129] N.P. acknowledged that it was "plausible" that the Bentley could have executed a right turn followed by a left steer to align the vehicles into the positions that they assumed at impact. However, as the claimants bear the evidentiary burden and no other credible explanation for the collision was advanced, they would have to demonstrate that this was more likely than not the sequence of events. A merely possible scenario without any supporting evidence does not meet this burden. Significantly, none of the claimants suggested this version of events before the experts concurred that the right turn description of the collision was rejected as incompatible with the physical evidence. The claimants never stated to any interviewer that the Bentley steered to the left. As well, both experts discounted the likelihood that F.A.'s field of vision would have been obstructed in the seconds preceding the collision.
- [130] The issue is also not whether it was reasonable for F.S. to believe that the Bentley was about to turn. Rather, the issue was that he repeatedly stated to various examiners that it did in fact turn but later changed this evidence at the

hearing to suggest that the turn was merely speculative. His present qualifications to his prior statements represent an attempt at retroactive continuity to render those statements compatible with the subsequent expert evidence that disproved his original version of events.

- [131] Although F.A. and F.S. offered differing explanations for their assumptions that the other driver was about to turn right, S.S. provided no basis for this theory at all and appeared to suggest that she relied upon what the other two occupants of the Honda told her. This would tend to accord with her wildly shifting accounts of how the collision occurred and fluctuating level of recall depending on the assessment conducted. She variously described the impact as a rear-end collision, a broadside to the passenger side and an impact to the driver's side.
- [132] In general, F.S.'s recollections appeared to improve over time. He also offered a comparatively wide range of times when the collision occurred, many of which conflicted with other evidence. As well, he offered differing accounts of the mechanics of the collision and whether the passenger airbag had deployed.
- [133] Details of the claimants' other evidence exhibited additional credibility problems. For instance, they offered widely differing accounts on how long they knew each other. F.S. also offered a comparatively wide range of times when the collision occurred, many of which conflicted with other evidence. As well, although F.S. disagreed that the damage to the front of the Honda was biased to the left, I find that the clear photographic evidence demonstrates otherwise.
- [134] All three claimants described a very serious collision and the property damage depicted in the photographic evidence supports this severity. S.S. reported a loss of consciousness and F.S. testified that he struck his head. All three claimed that they sustained serious injuries as a result of the collision and F.A. noted that five years later, he has still not fully recovered. Yet rather than wait for an ambulance or attend at a hospital, the Shirins simply called a relative for a ride home and stated that they both attended at a walk-in clinic within a week or two of the collision. Neither submitted any clinical notes and records of any walk-in clinic, any family doctor or any other OHIP funded medical provider to substantiate their alleged injuries. Even their descriptions of their relationship to the relative who drove them home differed.
- [135] Despite the severity of the collision, F.A. testified that he chose not to contact the police and no emergency vehicles attended at the scene. Although F.S. offered a wide array of conflicting evidence on this point, I prefer the evidence of F.A. on this issue and find that no emergency vehicles attended or were even contacted. As an involved driver who ultimately attended at the collision centre, he would be

more likely than a passenger to involve authorities at the scene and his evidence was consistent that he did not do so. His preference to prevent authorities from viewing the scene is also consistent however with an intent to conceal the facts of the event.

[136] The credibility of their narrative was also compromised by the evidence that they chose not to call. Significantly, F.A., S.S. and F.S. chose not to call M.Y. to testify at the hearing. As the only other direct witness to the collision, M.Y. could have potentially corroborated key aspects of F.S.'s and the other claimants' evidence.

[137] In *G.S. v. The Personal*, 2020 Canlii 98734 (ON LAT), the Tribunal drew an adverse inference from the applicant's failure to call material eyewitnesses to the incident, noting that these witnesses would have had valuable firsthand knowledge of the incident that could have been helpful in corroborating the applicant's version of events. Instead, the absence of these witnesses was found to raise suspicion that they did not testify because their evidence would not have been found credible. In *Nguyen v. State Farm Mutual Automobile Insurance Company*, 2016 ONFSCDRS 243, the Financial Services Commission of Ontario ('FSCO') cited the following guidance from *Law of Evidence in Canada*, (2nd ed.) J. Sopinka, S.N. Lederman, A.W. Bryant (Toronto: Butterworths Canada Ltd, 1999) at 297 regarding adverse inferences:

...an unfavourable inference can be drawn when, in the absence of an explanation, a party ... fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party." I draw a negative inference from the Applicant's failure to call any witnesses who would have helped to establish her case.

[138] The Tribunal has repeatedly found that a third party driver's failure to testify on behalf of the insured amounts to an implied admission that the missing evidence would have been contrary to or unsupportive of the claimant's case, resulting in an adverse inference. I similarly draw an adverse inference with respect to M.Y.'s absence in the present case. Although they relied upon the alternate theory of the collision as described by S.W., the Shirins did not call expert evidence to support their account of the collision. While the applicant insurer could have called M.Y. to testify, it is important to reiterate that the applicant does not bear the burden of proof to demonstrate that the respondent was not involved in an accident.

[139] Ultimately, in light of all of the inconsistencies within his own evidence, the lack of corroborating evidence and the persuasive findings in both engineering reports

which directly contradicted all of the claimants' narratives, I do not find that the respondent met his onus to demonstrate on the balance of probabilities that he was involved in an accident as defined in subsection 3(1) of the *Schedule*. He has also failed to demonstrate that the incident occurred as he reported, if at all.

ORDER

- [140] I find that the respondent was not involved in an "accident" as defined by subsection 3(1) of the *Schedule*. He is therefore not entitled to claim accident benefits under the Schedule with respect to the incident on June 27, 2018.

Released: August 1, 2023



Kevin Lundy
Adjudicator