

Case Name:
**Doday v. Alberta (Motor Vehicle Accident Claims Act,
Administrator)**

Between
**Ranjit Singh Doday and Kuldish Kaur Doday, Plaintiffs, and
The Administrator of the Motor Vehicle Accident Claims Act,
and ING Insurance Company of Canada, Defendants**

[2011] A.J. No. 286

2011 ABQB 161

11 M.V.R. (6th) 204

95 C.C.L.I. (4th) 325

200 A.C.W.S. (3d) 522

2011 CarswellAlta 369

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Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

M.T. Moreau J.

Heard: February 4-7, 2011.

Judgment: March 10, 2011.

Released: March 11, 2011.

(66 paras.)

Tort law -- Negligence -- Motor vehicles -- Liability of driver -- Action by plaintiff to determine liability for motor vehicle accident allowed -- Plaintiff lost control of tractor-trailer unit in icy road conditions, colliding with light standard and barrier -- Plaintiff contended he was cut off by

unknown driver -- Defendant insurer and claims administrator denied involvement of unknown driver -- Path of travel and tire marks on roadway were consistent with plaintiff's account -- Reliability of other drivers' accounts was questioned due to division of attention in heavy traffic and poor road conditions -- No contributory negligence attributable to plaintiff.

Transportation law -- Motor vehicles and highway traffic -- Rules of the road -- Road conditions -- Ice and snow -- Trucks -- Liability -- Negligence -- Contributory negligence -- Accidents involving uninsured drivers and claim programs -- Action by plaintiff to determine liability for motor vehicle accident allowed -- Plaintiff lost control of tractor-trailer unit in icy road conditions, colliding with light standard and barrier -- Plaintiff contended he was cut off by unknown driver -- Defendant insurer and claims administrator denied involvement of unknown driver -- Path of travel and tire marks on roadway were consistent with plaintiff's account -- Reliability of other drivers' accounts was questioned due to division of attention in heavy traffic and poor road conditions -- No contributory negligence attributable to plaintiff.

Action by the plaintiff, Doday, to determine liability for a motor vehicle accident. The plaintiff alleged that his tractor-trailer was cut off by an unknown driver. He was forced to take evasive action in icy road conditions resulting in a loss of control and collision with a light standard and barrier. The plaintiff sued the Administrator of the Motor Vehicle Accident Claims Act as a nominal defendant and his insurer based on the inadequately insured motorist provisions. The defendant denied the involvement of an unknown vehicle as the cause of the accident. Three civilian witnesses to the accident stated that they did not see the plaintiff's truck cut off by another vehicle prior to its loss of control. Another truck driver attributed the accident to driver inexperience. The plaintiff denied the creation of a phantom vehicle to avoid losing his job and damaging his reputation as a truck driver. He denied that he lost control while slowing down in heavy traffic. Each party presented expert accident reconstruction evidence in support of their respective positions. The plaintiff's expert stated that the plaintiff's unit had to have been steered in a manner consistent with response to an object in the roadway in order to reach its rest location. The defendants' expert opined that the accident occurred from changing lanes too quickly, downshifting or mis-shifting, or braking unevenly on uneven or icy road conditions.

HELD: Action allowed. The plaintiff established on a balance of probabilities that the accident was caused by the driver of an unknown vehicle that cut off his path of travel and caused him to lose control. He was familiar with the roadway and had experience with winter driving. His unit was in good condition. His account of the accident was consistent with the tire marks observed on the roadway. An unknown driver was consistent with the path taken by the plaintiff's vehicle. The defendants' witnesses did not suggest that the plaintiff drove in an unusual manner or at excessive speed for the conditions. There was concern regarding the reliability of the witnesses' testimony given that they were all focused on driving in heavy traffic in poor conditions. No contributory negligence was attributable to the plaintiff.

Statutes, Regulations and Rules Cited:

Motor Vehicle Accident Claims Act, RSA 2000, c. M-22, s. 7(1)

Counsel:

Brij Mohan, for the Plaintiffs - Ranjit Singh Doday and Kuldish Kaur Doday.

James M. Kalyta, for the Defendant - The Administrator of the Motor Vehicle Claims Act.

Connor B. Glynn, for the Defendant - ING Insurance Company.

Memorandum of Decision

M.T. MOREAU J.:--

I. Introduction

1 The Plaintiffs Ranjit Singh Doday ("Doday") and his wife Kuldish Kaur Doday brought this action pursuant to s. 7(1) of the *Motor Vehicle Accident Claims Act* ("the MVACA") against the Administrator of the MVACA ("the Administrator") as a nominal defendant arising from an accident on January 22, 2005 in Edmonton, Alberta in which Doday suffered injuries. The Plaintiff also sued ING Insurance Company of Canada ("ING"), the Plaintiff's SEF 44 insurer based on the inadequately insured motorist provisions of his insurance policy. Liability and damages issues having earlier been severed, these reasons deal only with liability.

2 Doday alleges that a vehicle whose owner and driver are unknown cut off the 1993 Peterbilt tractor-trailer unit (the "Unit") he was operating, requiring him to take evasive action in icy road conditions resulting in the Unit jacknifing and striking a light standard and barrier. The Defendants deny that an unknown vehicle caused or was involved in any way in the accident.

II. The Issues

3 The issues to be decided are:

1. Has Doday established on a balance of probabilities that the accident was caused by the driver of an unknown vehicle that cut off his path of travel and caused him to lose control of his Unit?
2. If so, did Doday negligently cause or contribute to his injuries?

4 The Administrator took no issue at trial with the extent of the efforts made by the Plaintiffs to

ascertain the identity of the unknown driver.

III. The Evidence

5 Doday is 40 years of age. He arrived in Canada from India in September 2002 and obtained his Class 5 then Class 1 driver's licences in October 2002. He also took a driver's safety course to reduce his insurance premiums. On April 1, 2003, he started driving a three-axle tractor-trailer similar to the Unit he was driving on the date of the accident. He worked for the same employer travelling to various locations within northern and central Alberta until October 31, 2003. His next trucking position started in late April 2004 and again he worked steadily in northern and central Alberta driving a similar tractor-trailer until the accident on January 22, 2005. He testified and I accept that he drove during these periods on all types of roads in a variety of road conditions, including freezing rain and, in the winter months of 2004 and January 2005, in icy road conditions. He had no accidents prior to January 2005 and described himself as a safe driver who watched his speed and took care of his Unit.

6 On January 22, 2005 Doday reported for work in Edmonton at about 6:00 a.m., warmed up his Unit, checked the tire pressure and set off to haul sand from a site north of Morinville to Edmonton. The temperature was between -10 degrees and -15 degreesC and the road conditions were icy and slippery. It was a Saturday morning and he described the traffic as "average" on his return into Edmonton southbound on St. Albert Trail hauling a full 30-ton load of sand. His intention was to continue southbound through the intersection of St. Albert Trail and 137 Avenue ("the Intersection") and eventually turn right onto the Yellowhead freeway. He was very familiar with the Intersection from his trucking experience and was driving in the right curb (west) lane. The posted speed limit for southbound traffic was 70 km/h. While he could not precisely recall his speed, he estimated it to be 50 to 60 km/h, given the icy road conditions. Traffic around him was proceeding slowly but cars were passing on the left of his Unit as it approached the Intersection.

7 St. Albert Trail north of the Intersection consists of three southbound lanes, and opens to additional left and right turning lanes north of the Intersection. Doday recalled passing a car dealership on his right. He testified that "a little bit" before the opening of the right turning lane a car suddenly came in front of his Unit, not like a normal lane change, and suddenly slowed down. He did not have a chance to gear down so he turned the steering wheel to the left and hit the brakes. This caused his Unit to jackknife, cross three lanes of traffic and collide with a traffic warning light standard on the median between southbound and northbound traffic north of the Intersection. He could not recall anything further after this point. He could not say which manoeuvre he performed first, steering to the left or braking, as the accident happened so fast, within a second, and he did not have the chance to look left before steering in that direction. He described the car ahead of him as being so close to his Unit that he could only see its rear windshield. He described the vehicle that cut him off as a dirty white or soft cream "regular" car. He stated that he had to steer to the left and did not have time just to apply his brakes to avoid colliding with the car ahead.

8 While in his February 16, 2005 statement Doday described the car as having "overtaken" his Unit, he testified at trial that he did not see the other vehicle pass him. He believed the car cut in front of his Unit to make a right turn onto 137 Avenue. There was an open field on the right of the curb lane and no ditch but a big curb prevented him from steering to the right.

9 Under cross-examination, Doday acknowledged that he had not worked as a truck driver before coming to Canada and he had limited education and limited knowledge of English. He denied that trucking job opportunities were limited and that he created a "phantom vehicle" to avoid losing his job and damaging his reputation as a truck driver.

10 Doday stated that there were cars beside and in front of his Unit "quite a ways ahead" almost at the Intersection. He did not notice a large truck just behind his Unit in the center southbound lane just before the accident. He recalled that traffic ahead of him was proceeding through the green light at the Intersection. The overhead light, which warned of impending traffic light changes, was located on a pole north of the intersection and was not flashing.

11 Doday denied that he saw vehicles stopped at the Intersection and that he lost control of his Unit while slowing down. While acknowledging that it took less brake pressure to lock up the wheels of his Unit on icy roads, Doday denied having previously locked the wheels on slippery roads and denied that he skipped a gear while slowing down for the Intersection ahead or was attempting to make a lane change just before losing control of his Unit.

12 Doday was taken to hospital by ambulance and a specialized traffic unit was dispatched to the accident scene. Constable Tran drew a field sketch of the accident scene that was not to scale. It showed the tire marks from the Unit starting in the right curb lane at a point roughly where the road opened for the left turning lane and north of the opening of the right turning lane. The sketch recorded the continuation of the tire marks across the southbound lanes of traffic to the Unit's final resting place on the center median.

13 Constable Tran acknowledged that the computer screen in his police vehicle noted the following information at 10:55 on January 22nd: "Semi Truck and car. Male about 35-36 concious (sic) breathing maybe a broken leg." However, he did not see any other vehicle when he arrived on the scene nor did he find skid marks for another vehicle. He described the road conditions on January 22, 2005 as extremely icy and slippery.

14 Constable Zerbin arrived at 11:05 a.m. on January 22nd and took photos of the accident scene and of the computer screen in his police vehicle that contained the information noted by Constable Tran. He stated that the information about another vehicle being involved in the accident could have come from any one of a variety of sources, such as ambulance or fire department personnel, witnesses or another patrol unit. He assumed that the information came from a police member who had spoken to the driver of the Unit. He observed that the information on the computer screens is often inaccurate. He described the northbound and southbound traffic on St. Albert Trail that morning as moderate. The road conditions were extremely slippery in the travelled portions of each

lane with dirty slushy snow on the edges of the roadway, between lanes and in the middle of the lanes between the travel portions. He found it difficult to maintain his footing while walking on the roadway which he described as probably the most slippery road he had seen in his long career as a police officer.

15 The Defendants called three civilian witnesses who observed the accident from different vantage points.

16 Merle Carde has 38 years of experience as a trucker. He testified that he was proceeding northbound on St. Albert Trail in a Mack truck hauling two tankers of fuel close to noon on January 22, 2005. The road conditions were very icy with unsanded glare ice. He was slowing down his unit to avoid having to stop for the red light at the Intersection. Before the light turned green there were quite a few vehicles in the Intersection and more of them in the southbound lanes. All lanes of traffic were full, about five to six cars deep stopped at the Intersection. When the light changed to green he was about 200 feet south of the Intersection. He proceeded through the Intersection. He was in the Intersection or just through it, proceeding at 20 to 30 km/h when he noticed another truck to his left headed southbound on the shoulder or the start of the right turning lane of St. Albert Trail. He stated that another truck gets the interest of a truck driver and he kept his eye on the truck as it was the only other truck around. The truck appeared to be moving slowly. Both north and south lanes of traffic were moving. There were no cars in front or beside the truck from the time he first saw it until he noticed it start to slide and come across into the next lane. Its wheels locked up. He thought it might be changing lanes but it was at too sharp an angle. He could not understand why the truck did not correct itself as it was empty. He saw the tractor of the truck hit its trailer and the unit slid along the curb then struck a light pole.

17 Under cross-examination, Carde stated that he had not previously driven a truck on St. Albert Trail and acknowledged that he had to pay extra attention to the road that morning given the icy road conditions. While he stated he had a clear view of the southbound truck as he could see it over other traffic, he acknowledged he would have been occupied with traffic ahead of him and turning traffic before this point and that he would be observing the truck from a distance of about 1,000 feet over traffic. He acknowledged that the Intersection is "huge". He provided two statements regarding the accident, the first on October 11, 2006 and the second on June 26, 2008. He acknowledged that his statements conflicted, since in his first statement he stated: "I had just crossed the [137 Avenue] lights heading north" whereas almost two years later he stated "... I was northbound approaching the intersection of 137 Ave..." He explained that his two earlier statements referred to two different times as in his second statement he described the truck travelling in the curb or far right lane. It was not slowing down and he assumed it was going to make a right turn.

18 Carde could not recall at trial which northbound lane he was driving in when approaching the Intersection, but was positive it was either the far left lane or center lane. He acknowledged that in his first statement he stated he was "... on the inside curb right beside the median" then later in the same statement he said: "I remember now I was in the middle lane travelling north. I know that

because I switched to the inside lane and stopped after the accident." In his second statement he said: "I was travelling in the center lane of three northbound lanes..." When it was suggested to him that it was possible he did not see the truck being cut off by an unknown vehicle, he stated that there was no such vehicle; he did not see the truck get cut off by anyone.

19 Carde acknowledged that in his first statement he said: "I have no idea if (sic) the 137 Avenue traffic light colour. I did not notice it. It was green when I went through it", and that in his second statement he did not mention the light was red. He acknowledged that the colour of the traffic light being red was an important fact that was missing from his two statements. However, I observe that one could infer the traffic light was red from his second statement: "I recall that when I was some distance back I could see that all traffic southbound was stopped. I also recall seeing a tractor-trailer gravel truck approaching from the north travelling south toward the stopped southbound vehicles."

20 Carde stated that he did not observe any other trucks behind the truck he saw slide and there were no trucks between his truck and the southbound truck. He acknowledged that in his first statement he said "I noticed him when he started to slide." He went on to state: "I did not see what caused the gravel truck to lose control of the truck. It is obvious he hit the brakes for some reason." At trial, he denied that the first time he noticed the truck was when it started to slide to the left; he stated that the truck was not sliding when he first observed it.

21 Carde acknowledged he would have been surprised if told the truck was carrying 30 tons of sand but that this would not change his view of how the accident occurred, which he attributed to driver inexperience.

22 John Thordason drives trucks part-time and has been driving tractor-trailers since 1981. On January 22, 2005 he was proceeding southbound in a tractor-trailer on St. Albert Trail. He was driving under the speed limit and was in the process of slowing down in preparation for the Intersection. He described the roads that morning as extremely slippery and rated St. Albert Trail as an "8 out of 10", 10 being almost impossible to drive on. His senses were heightened and he was keeping an eye on the road conditions, the traffic around him and the approach to the Intersection. He could see the Intersection but could not recall the colour of the traffic light. He was proceeding in the middle southbound lane at about the same speed as a tractor-trailer about 200 feet ahead of him in the right lane when he saw the tractor-trailer lose control, jackknife and slide across three southbound lanes, striking a light pole. Thordason had to make a lane change into the right lane to avoid the pole that had fallen onto the road. He stated that he did not lose control of his truck. He recalled that when the tractor-trailer started to slide, it was in the area just before St. Albert Trail opened for the right turning lane north of the Intersection.

23 When asked if he had seen anything in his lane of traffic in front of the truck in the 10 seconds before the accident, Thordason stated that he did not see any vehicles around their general vicinity front or beside; there may have been cars at the intersection "but that was still a ways off". He stated that to a degree he could see ahead of the trailer-tractor in the right lane and did not see a vehicle in

front of it. He stated that when the tractor-trailer lost control, the lane in front of his own truck was open; he checked to his right to make sure that lane was clear before steering to the right to avoid the light pole. He stated that if there had been a vehicle beside or behind the truck, it probably would have ended up in the collision. However, he denied that he was using the fact that the collision did not involve other vehicles as a basis for concluding that there were no other vehicles ahead of his own.

24 When Carde's description of the southbound traffic being heavier than northbound traffic that morning was put to Thordason, he disagreed, stating it was a "light traffic day". He stated that although there may have been vehicles behind his and up where traffic slowed for the Intersection, his driving space was clear of traffic. He agreed that the tractor-trailer ahead of his did not appear to be speeding nor was it weaving in its lane when it suddenly started to slide; he described the movement as a loss of control, not a lane change manoeuvre.

25 Thordason acknowledged that from his position about 200 feet behind the tractor-trailer his vision of what was in front of the truck would have been obstructed to a certain extent; if there had been something right in front of the tractor-trailer's hood he would not have been able to see it. When asked if it was possible he might have missed the vehicle that cut off the tractor-trailer, he stated he did not believe this would have been the case; he saw it slide and did not see any other vehicle make a lane change or beside him. He acknowledged that in the icy road conditions he would be keeping track of his own vehicle as he was approaching the intersection and involved in multiple tasks while slowing down. When it was suggested that he might not have had the opportunity to have seen a vehicle cut in front of the truck he said anything is possible but it was not probable in this case; his attention was focused ahead at what he and other vehicles were doing and he would have noticed a vehicle making a right turn. However, he acknowledged it was possible that a vehicle may have been there but he didn't see it.

26 At trial he did not recall his own truck sliding when he changed lanes to avoid the light standard, nor did he mention this in his brief statement, however, he acknowledged that when he veered to the right to avoid the pole his unit might have slid a bit but he was able to keep it in control.

27 Lars Haenel was proceeding southbound on St. Albert Trail on the morning of January 22, 2005. He saw a semi-trailer ahead of his vehicle in his lane of travel, which he believed to be the middle lane, and another semi-trailer in the far right lane about a truck length ahead of the semi-trailer in his lane of travel. Vehicles on the roadway were travelling at about the same speed, no more than 50 km/h. He was on the phone and looking ahead when he saw the semi-trailer in the right lane "manoeuvering across" to the left for what he assumed to be a lane change. As it did so, the tractor-trailer skidded and jackknifed, coming to rest on the central median traffic light. He acknowledged in his statement of July 26, 2006 that his "partial attention" was on his phone conversation. He saw the semi-trailer in front of his vehicle move into the right lane to avoid the other truck, begin to lose control then regain control and pull over. He pulled his vehicle off to the

right and exited it; the road was extremely icy and he had difficulties with his footing. He first became aware of the semi-trailer in the right lane when it started to manoeuvre into the left lane and lost control.

28 Haemel recalled there being a set of lights at the Intersection but could not recall their colour.

29 Under cross examination, Haenel stated he was about 100 metres behind the semi-trailer in his lane of travel. He could not recall if he could see anything in front of the two semi-trailers or if there were vehicles in the left lane. He did not recall the traffic being busy although he acknowledged he described the traffic as moderate in his July 26, 2006 statement. When it was suggested to him that the semi-trailer in the right lane lost control because it was cut off by an unknown vehicle he stated he had no reason to agree or disagree. He did acknowledge, however, that he stated in his July 2006 statement that it was a single vehicle accident: "I did not see any vehicles that had cut this unit off causing him to lose control. If in fact this happened I did not see it."

30 Expert accident reconstruction evidence in relation to the speed of the Unit was tendered by Doday and by the Defendants to present different theories as to the potential causes of the pattern of tire marks observed on the roadway and sketched by Constable Tran.

31 Andrew Happer, a senior forensic engineer retained by Doday, holds a Masters degree in mechanical engineering (obtained in 2008) and has 14 years of experience in accident reconstruction, having investigated over 1,400 accidents. He has been previously qualified as an expert witness in this Court, the British Columbia Supreme Court and the Provincial Court of Alberta.

32 Happer based the conclusions in his first expert report of March 16, 2007 on the police photos of the tractor-trailer's tire marks and the road surface and police observations of the condition of the roadway. He concluded that for the Unit to have come to its rest location in a manner consistent with the tire marks on the roadway, it had to have been steered to the left and the brakes applied, an action consistent with a driver responding to an object on the roadway.

33 He noted from the police photos that the travel portions of the southbound lanes of St. Albert Trail were clear and looked wet and that there was snow mixed with sand overtop the dash lines between the lanes and on the shoulders of the roadway. From his own measurements, he determined that a left turning lane opened up about 220 metres north of the Intersection. A right turning lane opened up about 170 metres north of the Intersection and was separated at the Intersection from the other lanes of southbound traffic by a triangular median for traffic merging westbound onto 137 Avenue. His estimate of the distance between where the tire marks were first observed by Constable Tran to the Intersection of 185 to 190 metres was not challenged at trial by the Defendants' accident reconstructionist, James Graham. Happer used a utility pole on the west side of the roadway with signage indicating 60 km/hr ahead as a reference point for his distance calculation. The utility pole was shown in the police photos to be near the start of the tire marks.

34 Happer noted that the right turning lane opened up about 20 metres south of the estimated point where the tire marks became visible in the right curb lane of the roadway. The overhead light change warning pole struck by the Unit was located about 105 metres north of the Intersection. Accordingly, he placed the start of the tire marks at approximately 80 to 90 metres north of the warning light pole. Using these measurements and applying a friction value of 0.15 to 0.25 to account for the presence of snow and sand on the highway, Happer opined that the Unit's speed prior to losing control was 48 to 62 km/h, which I note is consistent with the estimates of speed provided by Doday and the civilian witnesses who were proceeding southbound behind the Unit.

35 Happer used the PC Crash computer simulation program to buttress his explanation for the trajectory produced by the Unit's tire marks. Happer inputted a number of pieces of data into the computer program, including his measurements of the roadway geometry and slope, his estimates of the initial speed of the Unit, the degree of tire rotation, and the co-efficient of friction. He modified the inputs until the tire marks trajectory represented in the simulation was consistent with the tire tracks recorded in the police photos. He concluded that to reproduce the path of the tire marks observed in the police photos, the driver would have had to steer the Unit to the left and apply the brakes. He stated that this result was consistent with Doday's testimony that he steered to the left and braked to avoid the vehicle that cut him off. Happer ruled out the scenario of Doday braking first then steering to the left as the Unit would not then have followed the trajectory recorded in the police photos of the tire marks.

36 Happer maintained that the PC Crash simulation also ruled out jacknifing caused by an abrupt lane change, which would have involved steering to the left, then to the right. The tire track path was only consistent with sustained left steering.

37 To support his causation theory, Happer created three PC Crash simulations, the first simulating the steering-left-then-braking scenario which approximated the trajectory of the tire marks shown on the police photos and was consistent with Doday's version of the events. In his second simulation of an abrupt lane change, the tire marks produced did not track those shown in the police photos. His third simulation, consisting of hard braking without steering input, resulted in the Unit listing into the right lane which he noted was inconsistent with the tire mark trajectory shown in the police photos.

38 However, under cross-examination, Happer acknowledged that as each of his three simulations involved a number of timed sequences in which steering and braking actions were inputted, changing some of the inputs would create different simulated outcomes. He was presented with three simulations created by James Graham, the Defendants' expert. Graham's first simulation (brake-steer-brake) consisted of braking (*ie.* slowing down for the Intersection) leading to loss of control due to locking of brakes followed by corrective steering without braking, then braking. Happer noted, however, that this simulation reproduced the tire mark trajectory starting at 60 metres from the final resting place, not 90 metres as indicated in the police photos.

39 As for Graham's second simulation, a "lane-change-too-quickly" scenario, Happer was of the view that inputs resulting in the Unit being at approximately 15 degrees to the roadway were more consistent with an evasive steer than a lane change.

40 Finally, as for Graham's third simulation, a "braking-without-steering" scenario with braking being 10% higher on the left wheels than on the right wheels, Happer noted that the point where the tire marks are seen to cross each other in this scenario is much closer to the Unit's final rest position than as shown in the police photos. However, he acknowledged that the presence of slush or ice under the left wheel could cause the trailer-tractor to pull to the left.

41 James Graham, the Defendants' rebuttal expert witness, received his Bachelor's degree in mechanical engineering in 1984 and has investigated about 4,000 accidents in the last 25 years. He has been qualified to give expert evidence on over 30 occasions in the Court of Queen's Bench of Alberta and in other Canadian courts. He has also gained experience driving on ice as he has raced cars on ice for 20 years.

42 Graham did not take issue with the mid-point of the friction value of 0.2 proposed by Happer. He amended the calculations contained in his report (originally placing the speed of the tractor-trailer at between 55 and 78 km/h) down to 60 km/h if the distance of 185 to 190 metres from the speed reduction sign to the Intersection is used (and not the distance of 120 metres he used without the benefit of measurements in his first rebuttal report). However, Graham did take issue with the friction value being uniform at 0.2 as the presence of snow or slush under one set of tires could generate uneven braking force and jacknifing.

43 Graham also referred to inputs other than friction value that will affect vehicle trajectory in the PC Crash simulations produced by Happer such as brake force and duration, steering angle and duration, and speed. Modifying these inputs would result in a modification of the vehicle trajectory.

44 Graham also disagreed with Happer's conclusion that it was necessary for there to have been a left steering manoeuvre prior to braking for jacknifing to have occurred. Brakes being applied first followed by a corrective steer could also cause jacknifing. While Happer criticized Graham's brake-steer-brake simulation as the point of loss of control where the tire marks were noted to depart from the right lane were closer to the truck's final resting place than as shown in the police photos, Graham stated that by simply changing the time-line of the simulation sequences and adding non-uniform friction, his first simulation would more closely match the tire marks shown on the police photos.

45 Graham also criticized Happer's second simulation of an abrupt lane change as it inputted a degree of tire pivoting (0.5 degrees) which in his opinion was too slight for an abrupt lane change. By simply increasing tire pivoting to 1.0 degree, jacknifing would result in Happer's own simulation.

46 Accordingly, Graham disagreed with Happer's conclusion that there could be only one cause

for the jacknifing and the tire marks pattern shown in the police photos; they could have been caused by a simple loss of control from braking in anticipation of the Intersection, a too-abrupt steering adjustment, or other causes. His report referred to seven potential causes for the loss of control of the Unit, one of them being Doday's account of how the accident occurred. At trial Graham grouped two of the causes together as both stemmed from driver inexperience and overreaction. He also acknowledged that significant differences in tire pressure would not likely have generated a full jackknife. The potential causes (reduced to five) were as follows:

1. Braking on a non-uniform roadway: Graham noted from the police photos that there was sand and slush on the roadway that could have created a difference in friction between the left and right wheels. If the roadway surface was "grippier" on the left wheel, a counterclockwise rotation could, if maintained, result in jacknifing on the icy road surface.
2. Missed downshift (slipping into too low a gear): Graham stated that doing so can cause the engine to "over-rev" and the wheels to lock temporarily which can produce jacknifing on an icy road surface.
3. Driver overreaction through sudden steering and braking and driver inexperience on low friction surfaces: Graham stated that in his experience racing cars on ice, inexperienced drivers tend to overreact and do things too quickly.
4. Improperly adjusted brakes: These can result in one side catching more than the other with consequences similar to braking on a non-uniform surface.
5. Driver actions to avoid impact with a stationary or moving object: The moving object scenario is consistent with Doday's account of the accident. Police did not observe any stationary objects on the roadway that would have impeded Doday's route.

47 Graham testified that Doday's description of the accident having occurred very suddenly was contrary to the laws of physics. However, he acknowledged that his report incorrectly indicated that 6.5 to 9.3 seconds was needed for a vehicle overtaking and changing lanes in front of Doday's truck, as this was based on changing two lanes, not one. He computed the time to make one lane-change at 4.0 to 5.2 seconds and took no issue with Happer's estimate of 4.0 to 5.7 seconds. He noted that Doday described in his statement being "overtaken" by the unknown vehicle. After the unknown vehicle's lane change there would be a gap between it and the Unit. Assuming the unknown vehicle was proceeding 10 km/h faster than the Unit (based on "overtaking"), then braked suddenly, an estimated total of about nine seconds would be required for the lane change then the closing of the gap between the vehicles to the point of collision between them.

48 In response, Happer noted that the time available for a lane change is not synonymous with reaction time because while making the change the vehicle ahead would be encroaching on the Unit's lane of travel. The vehicle would be partly in front of the Doday vehicle for about one-half of

the time needed for a lane change. Also, it is necessary to know the speeds of both vehicles and their distance from each other when the unknown vehicle started the lane change in order to calculate the amount of time available for Doday to react. Happer also pointed out that Graham overestimated the available time because he assumed a smooth (as opposed to an abrupt) steering movement in the course of the lane change. Happer estimated that even if the relative speeds of the two vehicles were as hypothesized by Graham, once Doday observed the hazard ahead he would have needed a second to decide what to do and 3 to 4 seconds for his Unit to physically clear its own lane. He also noted that the intruding vehicle could have been braking while making the lane change which would then have reduced the time to collision.

49 As to Graham's causation theories relating to the mechanical condition of the Unit, Happer noted that according to the Trans-West truck appraisal, the Unit was in good condition and appeared to be well-maintained. Graham, however, pointed out that to determine if the brakes were properly adjusted, it would be necessary to remove the wheels and there was no evidence that this had been done. However, Graham acknowledged that generally wear on brakes is approximately equal right/left.

50 While Happer agreed in general with Graham's observation that drivers tend to steer away from a hazard (in this case to the right to avoid the unknown vehicle coming from Doday's left), there was an obstruction on Doday's right in the form of a curb along with snow accumulation on the westerly edge of the roadway. While the curb would have kept the Unit on the roadway, the snow build-up could potentially have upset it.

IV. The positions of the parties

51 Counsel for Doday pointed out that Doday had experience with all types of roadways and road conditions and some experience with winter driving conditions before the accident. The roadway on the date of the accident was extremely slippery and Doday was driving under the posted speed limit. The tire marks started at a point on the roadway very near to the opening of the right turning lane and support Doday's testimony that an unknown vehicle suddenly moved into his lane of travel in order to make a right turn onto 137 Avenue. The tire marks were consistent with an evasive left steering and braking movement based on Happer's expert evidence, and inconsistent with any other explanation for the accident. In particular, according to the PC Crash simulations performed by Happer, an abrupt lane change or unsafe braking in icy road conditions would not have produced the jacknifing and the tire marks observed from the police photos. Other accident scenarios based on the condition of the brakes and/or tires were contradicted by the Trans-West appraisal that reported the tractor-trailer to be in good mechanical condition and well-maintained. Accordingly, counsel for Doday maintained that Doday's version of the accident had been established on the requisite balance of probabilities standard.

52 Counsel for Doday also made submissions regarding the Defendants' theory that Doday had considerable time to respond to the moving vehicle hazard ahead. This theory would shed

considerable doubt on the credibility of his testimony that the accident happened so fast, within a second. Counsel for Doday responded that the initial distance between and the closing speed of the two vehicles were not known and were crucial to the calculation of response time and evasive measures.

53 While counsel for Doday acknowledged that the independent witnesses were attempting to be truthful and had no motive to lie in describing the events that occurred over six years ago, the Court must be mindful of the frailties of eye-witness evidence; evidence of this type can be given honestly but still be mistaken, particularly with the passage of time. He pointed out the inconsistencies between the two statements provided by Carde as to the location of his tractor-trailer when he saw the Unit lose control and between his first statement and trial testimony as to the colour of the traffic lights at the Intersection. He noted Thordason's admission that his view of vehicles ahead of the Unit would have been partially obstructed. Thordason could not recall the colour of the traffic light and acknowledged there was plenty of time to slow down and the movement of the Unit was not consistent with a lane change manoeuvre. Counsel pointed out that Haenel could not recall what vehicles were in the vicinity of his vehicle and his view of the Unit would have been obstructed by Thordason's tractor-trailer.

54 As to there being any negligence on the part of Doday in his reaction to being cut off, his counsel submitted that he was relieved of any responsibility given the urgent situation he was facing. Counsel referred to case authorities discussing the reduced expectations of the law in relation to a driver facing "the agony of collision" despite hindsight revealing the availability of other more prudent courses of action.

55 Counsel for the Administrator pointed out that to establish liability, Doday was required to satisfy the Court on a balance of probabilities that negligent conduct on the part of the unknown driver contributed to his injuries. He submitted that Doday failed to discharge this onus.

56 Counsel pointed out that there were several other reasonable explanations for the accident that are supported by the evidence, including over braking, or over steering and over braking by an inexperienced driver in extremely icy road conditions, or non-uniform braking caused by the presence of slush and sand on the roadway or by improperly adjusted brakes.

57 Counsel suggested that Doday was motivated to misrepresent the circumstances of the accident to protect his reputation and maintain his employment. Counsel maintained that on the basis of Doday's statement in February 2005 that his Unit was overtaken and cut off, his evidence that it all happened so quickly, within a second, was not credible given the time required for a phantom vehicle to have changed lanes, and for the gap between the two vehicles to close. Counsel also pointed out that there was sufficient time before the Intersection for a vehicle moving into Doday's lane of travel to effect a proper lane change to the right-turning lane without crowding Doday's tractor-trailer as illustrated in the aerial photo of the Intersection. There was no need for a phantom vehicle to have braked suddenly such as described by Doday.

58 Counsel noted that changing inputs to the PC Crash simulation program even slightly resulted in different outcomes and that there are reasonable alternative explanations for the accident.

59 Counsel also emphasized that three independent witnesses contradicted Doday's version of the accident, each of whom observed the accident from a different vantage point. Carde, whose view of the Unit from his own tractor-trailer was unobstructed, observed no vehicles in front or to the left of the Unit before or at the time it lost control. He did not see the Thordason tractor-trailer as it was 200 feet behind Doday's Unit. Counsel referred to Thordason's testimony that his senses were heightened as a result of the icy road conditions; he described slowing down in preparation for the Intersection and did not observe any vehicles ahead in his lane or move into Doday's lane of travel. He submitted that Thordason's truck-driving experience allowed him to maintain control of his vehicle (as observed by Haenel) while Doday's lack of experience on icy road surfaces was a factor in this accident. Finally, counsel pointed out the dangers of Courts making findings relating to the presence of "phantom vehicles" that might result in a multiplicity of attempts to recover from government-sponsored accident claims funds in similar situations.

60 Counsel for the SEF 44 insurer adopted the submissions of the Administrator and noted that while Carde, an ordinary witness, expressed the opinion that the accident was caused by driver inexperience, he observed nothing at the time that would otherwise explain why the accident occurred. Counsel added that although the PC Crash program does not exclude Doday's version of the accident, the testimony of the independent witnesses do so. Finally, he pointed out that the onus is on Doday to establish his version of the events on a balance of probabilities, not on the Defendants to exclude it.

V. Findings

1. Doday had received air-brake training and had operated trailer-tractors for seven months for one employer and nine months for another employer on all types of highways and roads throughout northern and central Alberta prior to the accident. His experience driving a tractor-trailer in winter conditions was largely acquired between October 1, 2004 and January 21, 2005. He was very familiar with the Intersection.
2. The accident occurred close to 11:00 a.m. on January 22, 2005. The road conditions on St. Albert Trail north of the Intersection were extremely icy with glare or black ice in the travel portions of the roadway for southbound traffic.
3. The roadway for southbound traffic on St. Albert Trail north of the Intersection was uneven given the presence of snow and sand between lanes, on the shoulders and between the travel portions of the lanes, affecting the friction value which I find to have been between 0.15 and 0.25 based on Happer's evidence not contradicted by Graham.
4. The Unit was travelling southbound at approximately 55 to 60 km/h in the

- right southbound through-lane of St. Albert Trail approaching the Intersection. This finding as to speed is based on Doday's own recollection, the testimony of Thordason and Haenel, neither of whom suggested that the tractor-trailer was driving at an excessive speed having regard to the posted speed or the road conditions, and the testimony of Happer, who calculated the distance between the location where tire marks first appeared in the right curb lane (as recorded by police photos using as a reference point a post alerting southbound drivers to a reduction of the speed limit) and the Unit's resting place, using a co-efficient of friction of 0.2.
5. The information on the police computer screen that a semi-trailer and car were involved in the accident does not materially advance Doday's case given the testimony of Constable Zerbin that the information could have come from any number of sources and develops over the period of an investigation and can be incorrect. However, had the Defendants suggested that Doday had the opportunity over the three week period before he gave his statement to the police to confabulate what occurred, it would have been met by the inference that Doday was the likely source of the information that appeared on the computer screen immediately after the accident as suggested by Constable Zerbin, since no other witness had come forward with this causation theory.
 6. I do not accept Graham's opinion that Doday's description of the accident happening suddenly and within a second is contrary to the laws of physics. I accept Happer's estimate of the minimum time for a vehicle to complete a lane change in front of the Unit at 4.0 to 5.7 seconds. Graham acknowledged that the time available for Doday to respond to the hazard would depend on the initial separation distance between the two vehicles and their closing speeds once the unknown vehicle ahead of the Unit was perceived by Doday as a hazard. Graham also acknowledged that the time required for the Unit to complete an evasive manoeuvre by way of lane change to avoid colliding with an unknown vehicle must also be taken into account. Graham's opinion that the Unit had approximately nine seconds to avoid the accident was based on assumptions as to the speed of the unknown vehicle and the distance between the vehicles in regards to which there was no supportive evidence save Doday's comment in his statement that the other vehicle "overtook" his vehicle. This is an inference that Doday could have drawn (as he testified that he did not see the unknown vehicle pass his) from the fact that he did not notice anything unusual in his lane of travel before the unknown vehicle appeared in front of his Unit. I prefer the opinion of Happer in relation to the time that would have been available to Doday to respond to the unknown vehicle noted in his January

12, 2011 surrebuttal report at p. 16:

Once this lane change was initiated, it would have taken a short amount of time for Mr. Doday to have detected the vehicle, identified it as a hazard, and then decided how to respond. After this, Mr. Doday would have started his left steer manouevre.

Depending on the initial distance between the two vehicles and their relative speeds, there could have been little time and distance for Doday to have effectively avoided the vehicle ahead.

7. I do not accept Happer's evidence that based on his three PC Crash simulations, the tire marks pattern on the police photos excluded all other potential causes of the jacknifing advanced by Graham. The PC Crash simulation program is highly sensitive to input data as to time, distance, friction values, braking and steering and their sequencing. A particular vehicle trajectory can be achieved by manipulating these various inputs. I find that Doday's account of the accident is consistent with the tire marks observed on the roadway. However, the PC Crash program does not exclude other potential causes of the accident suggested by Graham.
8. I do not accept that the jacknifing of the Unit was caused or contributed to by improperly adjusted brakes on the Unit. I accept Doday's uncontradicted testimony that the Unit was in good condition and well maintained, as supported by the Trans-West appraisal, albeit without a full mechanical check having been performed of the brakes. There was no evidence suggesting any prior issues with the braking ability of the tractor-trailer. Moreover, as noted by Graham wear on brakes tends to occur with equal impact on left and right brakes.
9. I do not accept that the jacknifing was caused by a missed downshift. It is noted that the Unit was in excess of 185 metres north of the Intersection when it started to slide and was already proceeding at a speed of approximately 60 km/h or less before coming in proximity to the "reduce to 60 km/h" sign on the west side of roadway. The traffic light at the Intersection would not have been a matter of immediate concern to Doday. He testified that the light was green and the traffic warning light (80 to 90 metres ahead of him when his vehicle started to slide according to Happer's measurements) was not flashing. Carde testified six years after the events that he clearly remembered the light being red at the intersection yet in his 2006 statement he stated he had no idea what colour the light was and that

he did not notice it. Neither Thordason nor Haenel could recall the colour of the traffic light although their vehicles were some distance north of Doday's tractor-trailer. Their lack of recollection is consistent with the traffic light not being a matter of immediate urgency or concern given the distances of their respective vehicles from it. Finally, Doday stated there was no time to gear down. I have already noted the weaknesses of Graham's opinion that Doday's account of the suddenness of the accident was contrary to the laws of physics.

10. There was no suggestion in the testimony of the three independent witnesses of the Unit exhibiting any unusual driving pattern, proceeding too quickly for the road conditions or that Doday was having difficulty maintaining control of the Unit before it started to slide. Indeed Carde stated that he was "surprised" that the tractor-trailer lost control. I find that Doday did not apply his brakes in preparation for the Intersection with ensuing loss of control on the slippery road surface. As I noted, Doday was already proceeding at or around the speed limit prescribed by the "reduce speed to 60 km/h" and the traffic light warning sign was well ahead of his Unit. Thordason, about 200 feet behind him, stated that he was slowing down in preparation for the intersection but did not say that he applied his brakes.
11. Carde testified that the Unit appeared to be moving slowly. This is not consistent with the testimony of Haenel that the vehicles on the roadway were proceeding at about 50 km/h and the testimony of Thordason that he did not see any trucks driving as slowly as 20 to 30 km/h. He was driving slightly under the speed limit of 60 km/h as was the tractor-trailer ahead of him in the right lane. Carde's testimony as to the speed of the Unit is also inconsistent with Happer's estimate of speed at 48 to 62 km/h based on the tire marks and friction value. While Carde was of the opinion that Doday's tractor-trailer may have braked for the approaching traffic lights, he stated in his 2006 statement that he had "no idea" what colour the traffic lights were. The reliability of his assertion some four years later at trial that the light was red is undermined by his earlier statement made much closer in time to the events.
12. I have other concerns about the reliability of Carde's testimony. He stated that he saw no vehicle cut off the tractor-trailer. However, he was making this observation while in or emerging from the Intersection in heavy traffic. Of concern is his apparent ability to keep his eye on traffic around him in heavy traffic conditions on an extremely slippery roadway and observe the Unit five lanes of traffic and a distance of about 1,000 feet away and rule out a vehicle crossing the Unit's path at any point in order to access the right turning lane. He was not able to definitively recall what

- lane of traffic he was in, which would in turn clarify how many lanes of traffic he was actually looking over to observe the Unit.
13. It is also noted that Carde's description of the flow of traffic as being heavy differed from Thordason's recollection that it was a light traffic day. He had a tendency to make conclusory statements, such as stating that the truck was empty when it was carrying a 30 ton load, and that the accident was due to driver inexperience when he had no knowledge of Doday or his driving experience.
14. Thordason's contemporaneous statement to the police was very brief and lacked detail. At trial, he was recalling details of the events of over six years ago, many of which were not noted in his statement. His statement contained no particulars whatsoever of the flow of traffic and location of vehicles ahead, beside or in front his truck or the Unit just prior to the accident. He acknowledged at trial that from his truck's position 200 feet behind the Unit in the adjoining lane he would not have been able to see something right in front of the hood of the Unit. He also acknowledged being involved in multiple tasks while slowing down for the Intersection. While not probable, he acknowledged it was possible that a vehicle may have cut off the Unit and he did not see it.
15. I note that Thordason could not recall at trial some details of what would have been in his field of vision looking ahead such as the colour of the traffic lights at the Intersection or whether or not the traffic warning light (105 metres north of the Intersection) was flashing. The flow of traffic and particular location of vehicles in his lane and the lane of the Unit, like the state of the traffic lights ahead, would have been uneventful until he noticed the sudden slide of the tractor-trailer ahead, given he made no mention of these matters in his brief statement. He did not specifically recall his own truck sliding when making the lane change to avoid the traffic warning post but acknowledged it may have slid a touch but not much; however, he couldn't recall. Haenel, who was following Thordason's truck in the same lane, clearly observed it slide slightly then come back in control. This was a rather significant fact that he did not recall. Together with the brevity of his initial statement, it raises some concerns as to the reliability of his memory after six years.
16. Haenel had considerable difficulty recalling the events of the accident. He acknowledged he had a partially obstructed view of the area in front of Doday's tractor-trailer. Proceeding about 100 metres behind the Thordason truck and speaking on the telephone, I find that he could have missed a vehicle overtaking the Unit. All he could really say is that he did not see the Unit being cut off, not that it could not have happened. Accordingly, his testimony does not materially advance the position of the Defendants

- that there was no phantom vehicle that cut off the Unit.
17. Having considered all of the evidence including the testimony of the three independent witnesses, I accept the testimony of Doday and find it more probable than not that an unknown car proceeding southbound on St. Albert Trail moved into Doday's lane of travel and braked suddenly at a point very shortly before the right hand southbound lane opens up to a right turning lane 170 metres north of the Intersection, as confirmed by a police drawing of the tire tracks of the tractor-trailer that appeared in the right through lane approximately 185 metres north of the Intersection.
 18. The action of the unknown driver is consistent with moving across the path of the Doday tractor to access the right turning lane to 137 Avenue. While the right hand turning lane continued southbound to a point north of the intersection where it was interrupted by a triangular median, it is noteworthy that the point the tire marks became visible is in the vicinity of the first point of access by southbound vehicles to the right-hand turning lane.
 19. In response to being cut off by the unknown car, Doday steered his Unit abruptly to the left and braked to avoid a collision with the rear of the unknown vehicle, causing the Unit to jackknife and move across the southbound middle and left lanes before colliding with a barrier and overhead traffic control warning standard located on the median between the southbound and northbound lanes of St. Albert Trail 105 metres north of the Intersection. This collision sequence is consistent with the pattern of tire marks leading from the right curb southbound lane toward the left curb southbound lane and to the Unit's place of rest.
 20. The icy road conditions reduced traction and heightened the tendency of the Unit to jackknife.
 21. I find that what was described by Graham as the "usual" driver reaction to swerve away from the location a hazard is coming from was not readily apparent or available to Doday given that there was a curb to the right of the Unit's lane of travel with a build-up of snow. I accept Happer's testimony that the build-up of snow could have caused the Unit to upset if it had veered to the right instead of left.

61 Having found that Doday has established on a balance of probabilities that the accident was caused by the driver of an unknown vehicle that cut off his path of travel and caused him to lose control of the Unit, did Doday negligently contribute to his own injuries?

62 I agree with counsel for Doday that the test is not whether a better course of action was in fact open to Doday but whether what was done by way of evasive action was what an ordinarily prudent man might reasonably have been expected to do in such an emergency: *Down v. Schmitz*, [1952] B.C.J. No. 28, at para. 5. MacFarlane J. cited at para. 10 the comments in *English v. North Star Oil*

Limited, [1941] 3 W.W.R. 622 (Sask.C.A.):

... one who suddenly finds himself in a place of danger and is required to consider the best means that may be adopted to evade the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method ...

63 See also *Gill Estate v. Canadian Pacific Ltd.*, [1973] S.C.R. 654, at p. 665, *Elliott v. Hill Bros. Expressways Ltd.*, [1998] A.J. No. 524 (Q.B.) at paras. 45-48.

64 As noted, the road conditions were extremely slippery. Carde, an experienced trucker, acknowledged that if one's truck had been cut off in the icy road conditions prevailing that day and had to make an evasive manoeuvre it could have caused a loss of control of one's truck. I am not of the view that any negligence can be attributed to Doday in all of the circumstances.

VI. Conclusion

65 For the reasons given, Doday's action is allowed. The accident was entirely caused by the negligence of the driver of an unknown vehicle.

66 Costs may be spoken to within 30 days should agreement not be reached as to same.

M.T. MOREAU J.