

Jim's Perspective...

One Elephant, Two Arguments, Three Opinions And A Little Bit Of Law

One Elephant.

It was six men of Indostan
To learning much inclined,
Who went to see the elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind.

The First approached the elephant,
And, happening to fall
Against his broad and sturdy side,
At once began to bawl:
"God bless me! But the elephant
Is nothing but a wall!"

The Second, feeling of the tusk,
Cried: "Ho! What have we here
So very round and smooth and sharp,
To me 'tis mighty clear
This wonder of an elephant
Is very like a spear!"

The Third approached the animal,
And, happening to take
The Squirming trunk within his hands,
Thus boldly up and spake:
"I see," quoth he, "the elephant
Is very like a snake!"

The Fourth reached out his eager hand,
And felt about the knee:
"What most this wondrous beast is like
Is mighty plain," quoth he:
"Tis clear enough the elephant
Is very like a tree."

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The Fifth, who chanced to touch the ear,
Said: "E'en the blindest man
Can tell what this resembles most:
Deny the fact who can,
This marvel of an elephant,
Is very like a fan!"

The Sixth no sooner had begun
About the beast to grope
Then, seizing on the swinging tail
That fell within his scope,
"I see," quoth he, "the elephant
Is very like a rope!"

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!

So, oft in theologic wars
The disputants, I ween,
Rail on in utter ignorance
Of what each other mean,
*And prate about an elephant
Not one of them has seen!*¹

Two Arguments.

Larry Freudenberg and his wife were insureds under a Shelter auto insurance policy with bodily injury liability limits of \$100,000 per person, \$300,000 per occurrence. Freudenberg was traveling in a family car covered by the Shelter policy and was injured in an accident involving this car. No other auto insurance applied to this accident. I assume it was a one vehicle accident in which another Freudenberg family member was driving the car. The Shelter liability Coverage A (bodily injury) and Coverage B (property damage) contained a provision that provided for a "partial exclusion" to these coverages as follows:

Coverage A and Coverage B do not cover any of the types of damage listed below unless no other liability insurance provides coverage for those damages in an amount required by the applicable financial responsibility law. In that event, the minimum dollar amount of coverage required by the applicable financial

¹ John Godfrey Saxe, "The Blind Men and the Elephant," in *The Best Loved Poems of the American People*. (Garden City Publishing Co. 1936)

responsibility law will be provided by this policy. No additional benefits that are not required by that law will be provided.

Listed below as one of the types of damage not covered was, “damages owed to any insured, relative, or resident of an insured’s household.” Consequently, Shelter argued that it only owed the minimum FR limit of \$25,000, and not the BI liability limit of \$100,000.

As you know, Nebraska has a compulsory auto liability insurance law. Section 60-310 of the Nebraska Motor Vehicle Registration Act sets forth the mandatory auto liability coverage requirement as follows:

Automobile liability policy means liability insurance . . . protecting other persons from damages for liability on account of accidents occurring subsequent to the effective date of the insurance arising out of the ownership of a motor vehicle (1) in the amount of twenty five thousand dollars because of bodily injury to or death of one person in any one accident (2) [\$50,000 per occurrence], and (3) [\$25,000 for property damage].

The last sentence of this statute states:

An automobile liability policy shall not exclude, limit, reduce, or otherwise alter liability coverage under the policy solely because the injured person making a claim is the named insured in the policy or residing in the household with the named insured.

Shelter argued that this last sentence only applied to a policy providing the minimum limits of 25/50. Shelter pointed out that the definition of “automobile liability policy” found in Section 60-310 has no modifier such as “all” or “every.” Consequently, this statute applies only to, or exactly to, a policy providing 25/50 auto liability coverage. Since Shelter’s policy had liability limits of 100/300, this law has no application to this policy. Freudenberg argued that the language in Section 60-310 applied to all auto liability policies regardless of limits. It was further argued that “automobile liability policy” as used in the statute should be read as a policy providing “at least” 25/50 liability coverage.

Three Opinions.

1. At some point before suit was filed, this disputed claim was submitted to the Nebraska Department of Insurance. According to a subsequent Nebraska Supreme Court opinion, the Department disagreed with Shelter’s interpretation of this statute and thought Shelter’s \$100,000 policy limit applied.
2. Shelter filed a Declaratory Judgment Action in Lancaster County District Court. The District Court issued an opinion in which it agreed with Shelter’s interpretation of the compulsory insurance law set forth above.

3. Freudenberg appealed and the Nebraska Supreme Court issued an opinion in which it agreed with Freudenberg's position.

The Court said that to interpret Section 60-310 as Shelter suggests, would lead to the absurd result that the state's compulsory insurance law does not regulate all automobile insurance purchased by Nebraska residents, but only insurance for coverage in the minimum amount of 25/50/25. It also said that under Shelter's interpretation of "automobile liability policy," anyone carrying proof of a policy in amounts that are not exactly 25/50/25 is not carrying proof of an effective automobile liability policy. The Court said:

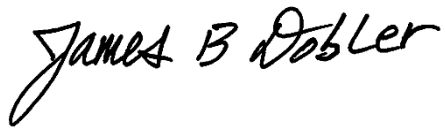
We hold that Section 60-310 applies to policies both with coverage limits at the minimum required by law and with coverage limits above the minimum required by law and that it prohibits both exclusions that seek to completely exclude liability coverage for an injured insured or household member and exclusions that seek to limit, reduce, or alter the liability coverage to the minimum required by law for an injured insured or household member.

In a concurring opinion, Judge Stacy referred to legislative history related to the last sentence of 60-310. She notes that most of this language was added in 1995. In that year, the language only said that an auto policy shall not **exclude** an injured person because the injured person is the named insured or member of the household. This established that in Nebraska, household exclusions were no longer valid and enforceable. In 2013, LB316, introduced by Senator Burke Harr, added the words **limit, reduce or otherwise alter** to 60-310, and these terms applied to automobile liability coverage. I remember working with Senator Harr on this language *and it was intended that this language apply to all auto liability policies* as the Supreme Court has held. My recollection is that Senator Harr had a constituent who had some type of "drop down" coverage problem or "sub-limit" of coverage that was activated due to the injured person being a member of the household. In other words, the Supreme Court got it right.

The English language is not a perfect form of communication. I have always thought how difficult a task it is for the insurance industry to provide a product that functions primarily through the printed word, and that same product must also comply with statutory language usually written by individuals that are not knowledgeable about insurance. However, they do have the assistance of insurance lobbyists! When I see Court opinions involving various disputes about how to interpret insurance policies, or insurance statutes, I often think of the six blind men from Indostan! I do not mean that in a negative way, but instead, I view the poem as an illustration of the fact that human beings can interpret and see things differently – and do so in a legitimate way.

Many insurance contract disagreements are usually resolved without submitting the matter to the courts. The disagreements that get to the courts are almost always the hard ones; the difficult ones in which there are indeed very legitimate arguments going both ways. Resolving these difficult disputes is not easy. But at least each party in this case got their day in court, received due process under the law, and received an objective analysis of the contract language and applicable Nebraska insurance law. The dispute isn't summarily resolved by an oligarch, a dictator, or a theocracy, but instead it is resolved by an independent judiciary.

Nebraska insurance statutes provide that if the insurer has denied insurance benefits and the insured successfully recovers those benefits through a court proceeding, the insurer must pay the insured's attorney fees. With this insurance claim going all the way to the Nebraska Supreme Court, the attorney fee will no doubt be substantial.



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