

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.18, Section 275 and Regulation 664/95 made
under the *Insurance Act*

AND IN THE MATTER of the *Arbitration Act*
S.O. 1991, c.17

AND IN THE MATTER of an Arbitration

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant

-and-

THE HARTFORD INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Shawn H. Patey and Suzanne Courtlander for the Applicants

Leilah Edroos for the Respondent

ISSUES:

1. Pursuant to Regulation 668, R.O., 1990, is Hartford Insurance Company liable to pay any accident benefits paid by Liberty Mutual Insurance Company to, or on behalf of,

Ms. Tara Jakobs as a result of a motor vehicle accident which occurred on June 7, 1994?

2. If so, what percentage of the payment made by Liberty Mutual Insurance Company should Hartford Insurance Company be responsible for?

ORDER:

1. Hartford Insurance Company is liable to pay one hundred percent of the payments made by Liberty Mutual Insurance Company to or on behalf of Ms. Tara Jakobs.

FACTS:

The basic facts of this case are not in dispute between the parties and may be summarized as follows:

This Arbitration is as a result of a motor vehicle accident which occurred on June 7, 1994 at the intersection of Steeles Avenue East and Goreway Drive in Brampton, Ontario. At that time, a 1984 Camaro driven by Ms. Tara Jakobs and insured by Liberty Mutual Insurance Company (“Liberty”) was proceeding westbound on Steeles Avenue East, approaching Goreway Drive. At approximately the same time, a red Mack truck, operated by Mr. Michele La Selva, insured by Hartford Insurance Company (“Hartford”) was proceeding eastbound on Steeles Avenue East, approaching the intersection of Goreway Drive.

The Jakob vehicle stopped in the intersection waiting to make a left turn to proceed southbound onto Goreway Drive. Eventually the Jakob vehicle proceeded to complete its left turn when it was struck by the Mack truck. Both vehicles came to a rest at or near the southeast corner of the intersection.

As a result of the accident Ms. Jakobs suffered serious bodily injuries and her passenger Ms. Jasbir Dhaliwal was killed.

Subsequent to the accident, the driver of the truck, Mr. La Selva was charged and convicted of dangerous driving causing death and dangerous driving causing bodily injury, both indictable offences under Sections 249 (3) and (4) of the Criminal Code of Canada.

Liberty paid various “no-fault” accident benefits to, and on behalf of, Ms. Jakobs arising out of the accident. Liberty now claims indemnity from Hartford for those accident benefits pursuant to Section 275 of the *Insurance Act* which reads as follows:

- (1) The insurer responsible under Section 268 (2) for the payment of no-fault benefits to such classes of persons as may be named in the Regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the Regulations involved in the incident from which the responsibility to pay the no-fault benefits arose.
- (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer’s insured as determined under the fault determination rules....
- (4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitration Act*.

The companion regulation to Section 275 is Section 9 of Ontario Regulation 664/90 which provides, in effect, that an insurer paying no-fault benefits of a person struck by a “heavy commercial vehicle” is entitled to claim indemnity from the insurer of the heavy commercial vehicle. The degree to which the first party insurer can claim indemnity is governed by the “fault determination rules” which are set out in Ontario Regulation 668/90 and fix fault in accordance with certain schematic diagrams and the description of the manner in which the accident happened.

At the conclusion of the hearing of evidence in this matter, and prior to submissions being made, the parties agreed that rule 20 (2) of the Fault Determination Rules applied to this case. That section states:

The degree of fault of the insured shall be determined in accordance with the ordinary rules of law, and not in accordance with these rules,

- (a) if the driver of automobile “A” involved in the incidents is charged with an offence; and
- (b) if the driver of automobile “B” is wholly or partly at fault, as otherwise determined under those rules, for the incident.

Accordingly, the degree of fault for the accident and who will pay the cost of the no-fault benefits paid is to be determined in accordance with the ordinary rules of law.

EVIDENCE:

There were numerous witnesses called by the parties who observed different parts of this tragic accident. While the observations of the witnesses varied to some degree, I found that all the witnesses at the scene at the time of the accident testified in an open and honest fashion regarding events that had occurred six years previously.

Former Constable Ann Debrouwer of the Major Collision Bureau of Peel Regional Police testified primarily as to the layout of the accident scene following her arrival, after the accident. She testified that Steeles Avenue eastbound approaching Goreway Drive has three through lanes as well as a left turn and right turn lane. Westbound Steeles Avenue approaching Goreway also has three through lanes as well as a left turn and a right turn lane. Northbound Goreway approaching Steeles has two through lanes and a left turn lane. Southbound Goreway approaching Steeles also has two through lanes and a left turn lane.

Constable Debrouwer testified without her notes, written at the time of her investigation, but with the aid of a Collision Report which she prepared at the conclusion of her investigation. While she testified as an expert in accident reconstruction, her primary value at the hearing was limited to her observations at the accident scene.

Constable Debrouwer testified that she arrived on the accident scene at approximately 5:30 p.m. and found the Camaro and truck in a field to the southeast of the intersection. The speed limit for traffic on Steeles was eighty kilometres per hour and seventy kilometres per hour on Goreway. After performing preliminary work at the scene she observed the damage to the vehicles and concluded that the front of the truck had struck the front right hand side of the Camaro.

Constable Debrouwer also interviewed the truck driver Mr. La Selva, who apparently indicated to her that he didn't think there was anything mechanically wrong with his

truck and indeed, none of the evidence at the hearing suggested that there was anything significantly wrong with the truck.

Constable Debrouwer also gave evidence as to the operation of the signal lights at the location, as it is controlled by traffic lights. The essence of Constable Debrouwer's testimony was that at the time of the accident the traffic lights for east west traffic on Steeles Avenue would be green and then amber for approximately 4.6 seconds. This would be followed by red lights in all directions for 2.0 seconds. This, depending on the traffic volume, would be followed by an advance green of 5 to 11 seconds for northbound traffic on Goreway. This would then be followed by a left advance amber arrow for northbound traffic for three seconds. During this entire sequence the lights for eastbound Steeles would remain red.

As a result of interviewing the witnesses and conducting the rest of the investigation, Constable Debrouwer charged Mr. La Selva with criminal negligence causing death and criminal negligence causing bodily harm, contrary to the Criminal Code of Canada. She further advised that Mr. La Selva was convicted of the lesser and included offences of dangerous driving causing death and dangerous driving causing bodily harm contrary to the Criminal Code of Canada. While it is important, in the sense that it creates a situation where Section 20 (2) of the Fault Determination Rules may apply, it does not, in these circumstances, determine the question of civil liability for the accident.

In addition to the above, Officer Debrouwer stated that as a result of her observations of the lighting sequence and speaking to the witnesses, she concluded that the eastbound traffic light for Mr. La Selva must have been red for a period of seven to thirteen seconds prior to the impact. This opinion was, of course, entirely dependent upon the observations of the witnesses at the scene of the accident and as such, I place no weight on Officer Debrouwer's opinion of the colour of the light or how long it had been red, at the time of the impact.

Prior to considering the evidence of the eye witnesses, it is useful to have a fuller understanding of the traffic light sequencing at the scene at the time of the accident. The testimony of Mr. James Le Sarge, the Supervisor of Traffic Signals and Systems for the Region of Peel was very helpful in this regard. Mr. Le Sarge testified that after completing the green cycle, the light for eastbound traffic on Steeles would go amber for 4.6 seconds and there would then be a red light for all directions for 2.0 seconds. What happens after that depends upon the traffic for northbound traffic on Goreway. The evidence was that the accident occurred shortly after 5p.m. on a weekday. The witnesses on the scene described the traffic as being generally heavy, rush hour traffic and Mr. Le Sarge testified that given the time and the intersection, he thought that the northbound traffic would be heavy. This is important in that if there was traffic in the northbound left turn lane of Goreway after the "all red", the sensors on the roadway would pick this up and give an advanced green arrow for northbound left turn traffic and a green ball for northbound through traffic. The advanced green for northbound would be for a minimum of five seconds and a maximum of eleven seconds, depending upon the amount of traffic

waiting to turn left onto Steeles. This would then be followed by a three second amber for the northbound left turn lane. The light for southbound Goreway would then turn green.

Based on the evidence cited above, and the witnesses who testified at the hearing, I am satisfied that the lights at the intersection were working properly and that the northbound advanced left turn signal had been activated. While it is not crucial to my final decision, I find that the advanced green was probably activated for more than the five second minimum, given the traffic flow in the area at the time of the accident.

As I stated above, each of the eyewitnesses testified in an open and honest fashion, and each contributed something to the overall picture of what occurred at the time of the accident. It is perhaps useful to review the essence of each of the witness's testimony at this time.

Ms. Caterina Imbery was the first car stopped in the northbound centre lane at the time of the accident. She indicated that she saw the Jakob vehicle stopped in the intersection just past the north-south pedestrian crosswalk lines on the east side of the intersection, waiting to turn left. She stated that the eastbound traffic on Steeles had stopped and she saw the light for northbound traffic turn green, including the advanced green signal for left turning vehicles. The advance green subsequently turned to amber and Ms. Imbery noticed that the Camaro had begun to cautiously complete its left turn. Subsequent to the

advance green turning amber Ms. Imbery noticed the Mack truck. She stated that the northbound light had been green for five to ten seconds before she noticed the truck.

Mr. Keith Kilpatrick was travelling eastbound on Steeles approximately five eighths of a kilometre before Goreway, in the left through lane. At that point he noticed the Mack truck was about ten feet behind him going about eighty kilometres per hour. Mr. Kilpatrick went to change into the right lane to get out of the way of the truck but it moved quickly into the right through lane. The light for eastbound traffic then went amber when Mr. Kilpatrick was at least two hundred feet from the intersection. Mr. Kilpatrick did not actually see the collision or the colour of the light at the time of the impact but he was stopped at the time of the collision.

Mr. James Lamar was in a vehicle northbound on Goreway Drive in the centre lane directly behind Caterina Imbery. He testified that he first noticed the Mack truck when it was about two lamp posts from the intersection and at that point the light for eastbound traffic went amber. He stated that approximately two to five seconds later the light for northbound traffic went green. He indicated that the northbound traffic had an advance green before the impact although he wasn't sure if the full green for northbound through traffic had activated at the time of the impact. He did notice, however, that the light was red for eastbound traffic when the truck was still approximately twenty-five feet from the intersection.

Ms. Cheryl Lindley was the third car in line northbound on Goreway in the curb lane at the time of the accident. She testified that when she first saw the Mack truck it was approximately two to three hundred yards west of the intersection and the light for eastbound traffic was green. She subsequently saw the light for eastbound traffic go yellow and saw the eastbound cars in the curb lane stopping. While Ms. Lindley was not a terribly strong witness with regard to times and distances, she was clear that at the time of the collision the light for northbound traffic was green.

Mr. Bruce Ralph was travelling eastbound on Steeles just prior to the accident when he first noticed the Mack truck. It was travelling at approximately one hundred kilometres per hour and making an erratic lane change. Mr. Ralph noticed the eastbound light go amber while he was still a fair distance from the intersection. At the point when the light went red, Mr. Ralph indicated that the truck was about fifteen car lengths behind him. He then noticed the truck changed lanes and Mr. Ralph apparently thought to himself “I can’t believe this guy is going to take the light”.

It appeared to Mr. Ralph that the Mack truck did not brake prior to entering the intersection. In his estimation the light for eastbound traffic was red for approximately eight to ten seconds before the truck entered the intersection.

Mr. Ostap Mojsiak testified with regard to an incident involving Mr. La Selva, the driver of the Mack truck, and himself that occurred approximately half an hour before the collision. Counsel for Liberty suggested that this incident in some way showed Mr. La

Selva's frame of mind and attitude just prior to the accident. In my view the incident was unrelated to the accident in question and I have discounted Mr. Mojsiak's testimony entirely, in arriving at my decision.

Mr. Noel O'Connor was called to testify on behalf of Hartford. He indicated that he was southbound on Goreway in the left turn lane. He was the third vehicle in line, stopped for a red light. Mr. Connor indicated that he was expecting an advanced green for southbound traffic to turn left onto Steeles and he was therefore watching the light on the southeast corner in order to proceed when the light changed to an advanced green. He testified that he first saw the Camaro when it was stopped in the pedestrian crosswalk lines going north-south on the east side of the intersection. Mr. O'Connor indicated that he saw the Camaro turn and at that time the light for southbound traffic was still red. Mr. O'Connor subsequently saw the collision, however he did not observe the colour of the light for southbound traffic at the time of the collision. He did note that after the collision, when the vehicles involved had come to a rest, the light for southbound traffic was green.

ANALYSIS:

The parties have agreed that in the circumstances, the general rules of negligence should apply to this case. Accordingly, it is appropriate to first refer to the obligations of the drivers pursuant to the *Highway Traffic Act*. In this regard, both drivers have obligations. There is little doubt but that the operator of a left turning vehicle, at a controlled intersection, is to ensure that the turn can be made in safety and is to afford a reasonable

opportunity to the operator of an approaching vehicle to avoid a collision (see Sections 141(5) and 142 (1) of the *Highway Traffic Act*). There is also the obligation of the operator of the vehicle proceeding straight through the intersection to stop for an amber light, if he can do so in safety, or otherwise proceed with caution (see Section 144 (5) of the *Highway Traffic Act*). When facing a red light, the operator is to stop his vehicle and not proceed until a green indication is shown (see Section 144 (19) of the *Highway Traffic Act*).

Counsel for both parties provided me with well prepared briefs and summaries of the law in the area for which they are to be commended.

I am prepared to accept that there is a heavy onus on the operator of the left turning vehicle to ensure that the turn can be made in safety. I am also prepared to accept that failure to ensure that the turn can be made in safety may constitute prima facie negligence (see Saldov vs. Kay, [1992] O.J. No. 2131 and Baldwin vs. Bell, [1933] 1 D.L.R. 232 (S.C.C.)).

It is also clear, however, that the responsibility of the left turning vehicle is not absolute and that they do not necessarily have to wait until every oncoming vehicle has stopped before completing their left turn. Motorists do, in some situations, have the right to expect that other operators will obey the traffic signals. In this regard I adopt the words of Mr. Justice Corry in Chaschuk vs. Lebel, [1981] O.J. No. 157 (C.A.) wherein he stated:

Traffic lights control the flow of traffic. Drivers of vehicles and pedestrians are entitled to proceed on the supposition that such signals will be obeyed. If that were not the case there would obviously be chaos. To enter into an intersection in the face of a traffic signal which has just turned red, may be negligence of the moment. To enter an intersection in the face of a traffic signal that has been red for a significant period of time, is negligence that constitutes a marked departure from the standards by which responsible and competent people in charge of motor vehicles habitually govern themselves. It is thus gross negligence.

In the Chaschuk case, the court found that the defendant entered the intersection on a light which had been red for at least eighteen seconds and hit the plaintiff who was preceding through the intersection at ninety degrees to defendant on a green light.

In our case, I have no hesitation in finding that Mr. La Selva entered the intersection on a light which had been red for a considerable period of time. While the evidence of the witnesses quite naturally varied somewhat, I find that when the accident occurred, the light had been red for Mr. La Selva for a minimum of seven seconds and quite probably a number of seconds longer than that. This is based on the evidence of the traffic light specialist, Mr. Le Sarge, and the testimony of the eye witnesses. I accept, at very least, that the light for northbound traffic was in the advanced green phase, which would mean that the light for eastbound traffic would therefore have been red for at least seven seconds (two seconds all red plus a minimum of five seconds advance green) and probably longer.

This conclusion is reinforced by the testimony of the various witnesses whose evidence I have already summarized. I do note, in particular however that the testimony of Mr.

Ralph, who noted the erratic driving of Mr. La Selva and thought to himself: “I can’t believe this guy is going to take the light”.

The only witness who conceivably assisted Mr. La Selva’s position was Mr. O’Connor, who indicated the light for southbound traffic was still red and that he had not yet been given an advanced green. The difficulty I have with this is that it assumes the southbound traffic was to receive an advanced green when the northbound traffic received one. Mr. Le Sarge, the traffic specialist, testified that it was at best, highly unlikely that Mr. O’Connor would have received an advanced green at this time and I accept his testimony in this regard. If that is the case, then the northbound traffic could have had an advanced green while Mr. O’Connor still had a red and Mr. O’Connor’s testimony is then essentially consistent with that of the other witnesses.

In summary then, I find that Mr. La Selva did enter the intersection on a red light that had been so for an extended period of time, that, combined with the testimony of the various witnesses lead me to the conclusion that his driving was, at very least, both reckless and dangerous.

Having said that, it remains to be determined whether the actions of Ms. Jakobs were negligent in the circumstances. Counsel for both sides have provided me with numerous cases involving left turn situations where liability has varied widely. Ultimately each case must be decided on its particular facts.

If there was any negligence upon Ms. Jakobs, it would have arisen from the suggestion by Hartford that the Mack truck was there to be seen by Ms. Jakobs and that she should have seen it and reacted accordingly before completing her turn.

Ms. Jakobs was unable to testify for medical reasons and the parties agreed that I was not to draw any adverse inference as a result of her failure to testify. Accordingly I am left without knowledge of exactly what she could see and what she was thinking just before the accident. What is clear, however, is that the red Mack truck was proceeding eastbound towards the intersection at a fairly rapid rate of speed as Ms. Jakob's was waiting to turn left. Some assistance as to what may have happened is provided by the evidence of Mr. Ralph who was stopped in the eastbound centre lane. Mr. Ralph indicated that when he was coming to a stop for the red light the Mack truck was travelling directly behind him approximately fifteen car lengths back. When the truck was about eight car lengths back it changed into the passing lane. Mr. Ralph indicated that the truck was travelling at approximately eighty to one hundred kilometres per hour as it passed him and that the light had been red for approximately eight to ten seconds as the truck entered the intersection.

Mr. Ralph was driving a Ford Mustang and it was stopped first in line for the light. Accordingly, Ms. Jakobs would have been able to see the Mack truck behind Mr. Ralph. It is, however, one thing to see a truck behind a stopped vehicle and quite another to expect that a truck, travelling at a fairly high rate of speed would change lanes and proceed to go through a light that had been red for an extended period of time.

While it is true that if Ms. Jakobs had realized the truck was not going to stop she might well have avoided the accident and it was possible to have determined this prior to completing the turn, the law does not demand perfection. As noted above, the Court of Appeal has held that drivers are entitled to proceed on the supposition that traffic lights will be obeyed. In light of all the circumstances I find that Mr. La Selva was entirely responsible for the accident. Accordingly, I find that Hartford Insurance Company is liable to pay the accident benefits paid by Liberty Mutual to or on behalf of Ms. Jakobs as a result of the motor vehicle accident of June 7, 1994. This is subject to the parties agreeing on the amount to be paid. If there is no agreement in this regard the hearing may be reconvened to deal with this issue.

If the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated at Toronto this 17th day of November, 2000.

M. Guy Jones
Arbitrator