

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, C. I. 8,

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17; as amended

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

KINGSWAY GENERAL INSURANCE COMPANY

Applicant

- and -

STATE FARM INSURANCE COMPANIES

Respondents

DECISION

COUNSEL:

Jamie R. Pollack for the Applicant

Michael P. Taylor for the Respondents

ISSUES:

1. Which fault determination rule applies to this matter, if any, or do the ordinary rules of law apply? If the ordinary rules of law apply, what is the liability of the respective parties?

DECISION:

The ordinary rules of law apply. Kingsway General Insurance Company is 100% at fault and must pay the accident benefits to or on behalf of Gabriel Nesrallah.

HEARING:

This arbitration was held on December 21, 2004 in the city of Toronto, in the province of Ontario.

FACTS & ANALYSIS:

This dispute arises out of a motor vehicle accident which occurred on July 2, 2002. On that date, Mr. Gabriel Nesrallah was operating a motorcycle which was insured by Kingsway General Insurance Company (“Kingsway”) when it came into collision with a motor vehicle operated by Mr. Stephen Cameron which was insured by State Farm Insurance Companies (“State Farm”). As a result of the accident, Mr. Nesrallah was injured. He applied for and received certain statutory accident benefits from Kingsway. Kingsway has since sought indemnity from State Farm pursuant to the “loss transfer” provisions of section 275 of the Insurance Act.

Loss transfer was established in Ontario in conjunction with the expanded no fault benefit scheme in June, 1990. It allowed the insurer of certain specified motor vehicles to pay accident benefits to their insured but then pursue the insurer of the other motor vehicle of repayment of the accident benefits paid out. This is an exception to the general rule that there is no recovery for accident benefits from other parties. It was done in recognition of the fact that collisions involving certain types of motor vehicles would likely result in greater payment of accident benefits to injured parties. Loss transfer attempts to spread the cost of providing accident benefits among various insurers. Without loss transfer it was feared that insurance for accident

benefits on these specified motor vehicles would be difficult to obtain and the cost of such insurance would be prohibitive.

Section 275 of the Insurance Act is the enabling legislation for the system and states:

- (1) the insurer responsible under subsection 268 (2) for the payment of statutory accident 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 statutory accident benefits rose.
- (2) Indemnification under subsection 1 shall be made according to the respective degree of fault of each insurer's insured under the fault determination rules . .

Pursuant to section 275 (2), Regulation 668 was enacted which sets out the fault determination rules. It is important to note that when applying the fault determination rules, the system was developed as a quick and efficient method of determining what degree, if any, there should be loss transfer of accident benefits in certain situations. The rules were not expected to cover every situation and section 5 (1) of the Regulation states:

If any incident is not described in any of these rules, the degree of fault of the insured shall be determined in accordance with the ordinary rules of law.

It is in the context of this scheme that we must determine the liability of Kingsway and State Farm resulting from the accident of July 2, 2002.

At the hearing, Kingsway took the position that section 10 (1) and (4) of the fault determination rules applied. That section states:

- (1) this section applies when automobile “A” collides with automobile “B” and both automobiles are travelling in the same direction and in adjacent lanes . . .
- (4) if the incident occurs when automobile “B” is changing lanes, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 % at fault for the accident.

Mr. Nesrallah testified on behalf of Kingsway at the hearing. He testified that on the date in question he was proceeding eastbound on Homer Watson Boulevard in the city of Kitchener. At this location there are four lanes eastbound. He stated that he was travelling at approximately 65 kilometres an hour in the right of the two centre lanes with no vehicles ahead of him for a few hundred metres. Mr. Nesrallah testified that he was an experienced motorcycle operator and was

well acquainted with the area. He was travelling to the left of the centre of the lane which is the accepted practise for experienced motorcycle operators. As he was proceeding along, he noticed a number of vehicles moving at approximately 60 kilometres per hour in the lane immediately to his left. As he was passing a black Camaro located in the adjacent left lane, it suddenly moved to the right. Mr. Nesrallah testified that the passenger door of the Camaro struck his left leg and the left handle bar of his bike hit the passenger window of the Camaro.

As a result of the collision, Mr. Nesrallah lost control of the motorcycle and fell onto the roadway. He subsequently got up and went over to the shoulder of the road and lay on the ground. He testified that the black Camaro subsequently pulled over to the shoulder and the driver came over to where he was being attended to by a pedestrian. The police subsequently arrived and Mr. Nesrallah gave a statement to the investigating officer.

Mr. Stephen Cameron also testified at the hearing. He testified that he had been travelling in the left centre lane of four lanes eastbound on Homer Watson Boulevard. He had slowed down to approximately 10 kilometres per hour due to traffic slowing ahead for a traffic light. Mr. Cameron looked in his passenger side mirror and observed the motorcycle still upright. He observed it again, perhaps a second later, at which time it was falling. After the accident, Mr. Cameron pulled over to the right shoulder and stopped and went back to Mr. Nesrallah in order to see if he could render assistance. By that time a pedestrian was providing assistance and he heard Mr. Nesrallah state to the pedestrian that someone had hit him and taken off. Mr. Cameron testified, and remained firm upon rigorous cross-examination, that at no time prior to the accident did he change lanes nor swerve to the right in order to cause the accident.

No other witnesses were called at the hearing. What we are then left with is two witnesses giving conflicting evidence. The only other additional information filed at the hearing was the police report as well as statements taken by the investigating officer and a sworn statement given by Mr. Nesrallah. Mr. Nesrallah apparently told the police officer that the other vehicle was more than half way into his lane. This is somewhat surprising, given that he himself was to the left of centre of his lane. Mr. Nesrallah explained this by saying that the car made a very quick turn in front of the motorcycle and that the front of the car was therefore that far into his lane.

I also note that at the time of the hearing, Mr. Nesrallah was positive that his left handle bar came into contact with the car. In his signed statement given on July 8, 2002, however, he indicated that only that “it (the car) may have struck my handle bar, I am not certain, but I felt it hit my leg”.

The police officer indicated in his notes that there were no scratches or damages to the Cameron vehicle. With the exception of the above, and some very minor inconsistencies there was very little to choose between the two witnesses’ testimony. Mr. Nesrallah, in his testimony, however, often paused before answering, perhaps considering the consequences of a potential answer. Mr. Cameron testified in a forthright fashion.

Counsel for Kingsway took the position that it was unnecessary for there to have been a collision in order for section 10 to apply. In support of this proposition, he relied upon the decision of Justice Sachs in Kingsway General Insurance Company vs. Dominion of Canada

General Insurance Company (unreported decision, dated January 11, 2000), in which the court confirmed that there need not be a collision for section 17 of the fault determination rules to apply.

I am of the view that there is an important distinction between that case and the case we are dealing with. In that case, the court was deciding with section 7, which speaks of an “incident” rather than a “collision”. In our case, section 10 speaks of a “collision”. One can be involved in an incident without having a collision. In order for section 10 to apply there must be a collision.

In any event, the question of whether or not there must be a collision for section 10 to apply is perhaps somewhat academic in this case. While both witnesses were fairly credible in this matter, the onus is, of course, on the applicant to prove its’ case on a balance of probabilities. Despite the very persuasive and able submissions by counsel for the applicant, I am not persuaded that the applicant has satisfied that onus. Accordingly I find that section 10 does not apply to this case as I am not satisfied on a balance of probabilities that Mr. Cameron changed lanes and struck the motorcycle.

One must then turn to section 5 of the fault determination rules and allocate the degree of fault in accordance with the ordinary rule of law. In this case, I am left with the similar problem in that I am not satisfied that Mr. Cameron swerved to the right causing Mr. Nesrallah to fall. Once again, as the onus is on the applicant, and that onus has not been satisfied, the applicant’s case must fail. Accordingly, Kingsway is responsible for the payment of accident benefits to or on behalf of Mr. Nesrallah.

In the event that the parties are unable to agree on the question of costs, I may be spoken to.

Dated this _____ day of January, in the city of Toronto.

M. Guy Jones
Arbitrator