

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,  
c. I. 8, and REGULATION 664, s. 9

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

AND IN THE MATTER OF AN ARBITRATION

**BETWEEN:**

**THE DOMINION OF CANADA GENERAL INSURANCE COMPANY**

Applicant

- and -

**ROYAL AND SUN ALLIANCE INSURANCE COMPANY**

Respondent

**AWARD**

**COUNSEL:**

Chris Blom for the Applicant

Mark Donaldson for the Respondent

**ISSUE:**

How should fault for the accident of September 23, 1999 between Richard Jayne's vehicle, insured by Dominion of Canada, and the tractor trailer, driven by Roy Hurlbert and insured by Royal and SunAlliance, be apportioned under section 10 of the Fault Determination Rules in *Regulation 668 of the Insurance Act*?

**RESULT:**

Rule 10(4) of the Fault Determination Rules applies and results in a finding that the tractor trailer driven by Mr. Hurlbert and insured by Royal and SunAlliance is 100 per cent at fault for the accident.

**HEARING:**

The arbitration hearing took place on October 30 and 31, 2006, in the City of Toronto, before me, Shari L. Novick, Arbitrator.

**THE FACTS:**

The parties agree on the following facts: the accident in question occurred on September 23, 1999 at approximately 6 a.m., on the eastbound QEW, at the Burlington Skyway bridge. Richard Jayne was driving a Pontiac Grand Am, insured by Dominion of Canada (“Dominion”), in the curb lane. Roy Hurlbert was driving a tractor trailer, insured by Royal and SunAlliance (“Royal”), in the lane immediately to the left of the curb lane. There are four lanes across the eastbound section of the Skyway at that point.

The parties also agree that the tractor trailer was a “heavy commercial vehicle” as defined in section 9 of *Regulation 664* to the Act.

The parties filed a joint document brief at the hearing, the relevant parts of which contain the police report and notes relating to the officer’s investigation of the accident, as well as various witness statements.

Both drivers testified at the hearing, as well as Jennifer Lane, an independent witness. Ms. Lane’s evidence was not germane to the issue in dispute, and I will accordingly not refer to it in this decision.

Another independent witness, Robert Teiml, provided statements both to the police officer that investigated the accident and subsequently to a private investigator retained by Dominion. I was advised that Mr. Teiml was served with a Summons to appear and testify at the hearing, but did not do so.

The crux of the dispute between the parties revolves around whether or not the location of the vehicles can be determined at the time of impact; if it cannot, Rule 10(3) applies and results in each driver being found 50 per cent at fault for the accident. If, on the other hand, it is determined that the accident occurred while the tractor trailer was changing lanes, Rule 10(4) would apply and result in a finding that the truck driver was 100 per cent at fault for the accident.

For ease of reference, I will set out the wording of the two Rules referenced above:

**10(3)** If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.

**10(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 per cent at fault for the accident.

*Mr. Jayne’s evidence*

Richard Jayne testified that he first noticed the truck driven by Mr. Hurlbert as he drove up the Burlington Skyway. He recalled that he was driving at a constant speed of 100 km/hour, in the right hand curb lane, and that the truck was in the lane to the left of his vehicle. He stated that the truck began to slow down as it headed up the incline of the bridge, and that his car started pulling ahead of it. He testified that when his car was approximately at the truck’s fuel tank, he saw the turn signal activate, and the truck started moving into his lane. Mr. Jayne stated that the front right passenger side of the truck collided with the back of the driver side of his car, causing his vehicle to spin. He recalled a second impact with the truck at the point of his driver’s side door, and

explained that this caused his car to spin out to the left across four lanes of traffic, eventually coming into contact with the concrete median on the opposite side of the highway.

On the key question of whether the impact between the two vehicles occurred while the truck was changing lanes, Mr. Jayne stated that the truck had entered his lane “by a couple of feet”. I note that is consistent with the statement he gave to the investigating police officer from the hospital on the day of the accident, when he stated that the truck driver “put on his signal light, and at that stage, he started to make his lane change to the right”.

*Mr. Hurlbert's evidence*

Mr. Hurlbert recalled that he was delivering a load by truck to Toronto on the day in question. He explained that his truck began slowing down as it headed up the Burlington Skyway, and that he intended to change from the third lane into the right curb lane, which opens up at that point on the bridge. He recalled signalling his intention to turn, checking his mirrors, and when he did not see anything in his intended path, he started to move over. He stated that he then “felt something” and heard a noise, and explained that he thought he had blown a tire, until he saw Mr. Jayne’s car veering in front of his truck.

When asked under cross-examination whether his truck had begun to cross into the curb lane prior to the impact, he agreed with counsel’s suggestion that he would have moved the truck “some distance into the other lane”. When questioned subsequently about that, he stated that he could not recall exactly, but that it was probable that the truck was partly in each lane at the time of impact.

I also note that this evidence is consistent with what he advised the investigating police officer when he was interviewed on the day of the accident. When asked then to describe where his vehicle was when he heard the impact, he responded “I was somewhere between the two lanes”.

Mr. Hurlbert also acknowledged an email response contained in the document brief filed, that he had sent to the investigator retained to investigate the accident in 2005. In his description of the accident in that document, Mr. Hurlbert stated that as he was driving the truck up the bridge, “I looked in my mirrors and then signalled..... I looked again before pulling over into the right hand lane”.

*Statements of Robert Teiml*

Mr. Teiml was an independent witness to the accident in question, driving in the curb lane directly behind the Jayne vehicle at the relevant time. He was interviewed by the police officer that investigated the accident on October 2, 1999, approximately ten days after the accident. He provided a statement to the officer, which was filed at the hearing. The relevant parts of it state that as the Jayne vehicle and the transport truck were parallel to each other travelling up the Skyway, Mr. Teiml saw Mr. Jayne’s vehicle slowly gaining on the tractor trailer and then starting to shift over into the third lane towards the truck. He stated that he observed Mr. Jayne “jerk the wheel” and that his car began to swerve first away from, and then toward the truck, and that it ultimately drove into the truck. When asked by the officer to describe where the truck was before and during the accident, Mr. Teiml responded that, “he maintained his third lane”. He also stated that he did not recall seeing any turn signals activated on either vehicle.

Mr. Teiml also provided a subsequent statement to an investigator in January of 2001. He essentially provided the same information, stating then that he noticed the Jayne car start to swerve at the point that he was parallel to the cab of the transport truck, and that the car weaved about three times and started to spin, travelling into the third lane where the truck was driving, and “caused the front of the truck to hit the passenger side of the car”. He also stated that as “he started to swerve, the momentum carried him (the car) into the third lane”.

Mr. Teiml estimated that his car was approximately 100 feet behind the vehicles in question when the accident occurred. As noted above, Mr. Teiml was served with a Summons to appear and testify at the hearing, but failed to do so.

## **PARTIES' ARGUMENTS:**

Counsel for Dominion submitted that Rule 10(4) of the Fault Determination Rules applies to this situation, as the evidence supports a finding that the accident occurred while one vehicle was changing lanes. Counsel referred to the testimony provided by both drivers to the effect that the truck driven by Mr. Hurlbert had begun a lane change when the impact occurred. He specifically noted the truck driver's statement that at the point of impact he was "somewhere between the two lanes", and argued that the facts clearly trigger the application of Rule 10(4), and that Mr. Hurlbert, the truck driver, is 100 per cent at fault for the accident.

Counsel for Royal argued that when all of the evidence is taken into account, the location of the vehicles on the road at the time of the accident cannot be determined, and that Rule 10(3) applies.

He acknowledged Mr. Jayne's evidence regarding the truck moving into the curb lane, but contended that Mr. Hurlbert was equivocal in his testimony about whether or not his truck had begun to change lanes, and only went as far as agreeing with Mr. Blom's suggestion that it had done so after persistent cross-examination.

He also noted Mr. Teiml's reference in the statements provided that Mr. Jayne's car had swerved into the truck, and that the truck had not moved out of its "third" lane.

The main thrust of Mr. Donaldson's arguments focused on the police report. He noted that the officer who had investigated the accident decided not to lay any charges, and reached the conclusion that the vehicles made contact "for unknown reasons". Counsel also highlighted the notations in the boxes around the periphery of the text of the report, noting that the codes used by the officer indicated that both drivers were changing lanes, and that the impact took place in the lane that the truck was occupying. Counsel submitted that the officer had carefully and thoroughly interviewed all of the parties

involved as well as an independent witness, and argued that her conclusions should be given significant weight

### **FINDINGS/ ANALYSIS:**

The issue before me is narrow and relatively straightforward. Rule 10(4) provides that if an incident occurs when one vehicle is changing lanes, the driver of the vehicle making the lane change is 100 per cent at fault for the accident. The Fault Determination Rules are paramount in this context; no other factors such as road conditions, or whether or not charges have been laid under the *Highway Traffic Act* may enter into the analysis. Accordingly, my sole focus is on the question of whether or not the tractor trailer was involved in a lane change at the time that it collided with Mr. Jayne's vehicle.

As set out above, I have concluded that Rule 10(4) of the Fault Determination Rules applies to the fact scenario described, which leads to a finding that Mr. Hurlbert is 100 per cent at fault for the accident. My reasons for so finding are set out below.

Having considered all of the evidence before me, I am persuaded that Mr. Hurlbert was making a lane change at the time of impact. Not only did Mr. Jayne, the driver of the car that was struck, testify that the truck entered his lane before the collision, but Mr. Hurlbert himself stated that he had started to change from the third lane to the curb lane after activating his turn signal and checking his side mirrors and not seeing anything in his intended path. Counsel for Royal contended that Mr. Hurlbert only admitted to this after it being persistently suggested by Mr. Blom in cross-examination, but I note that in his examination in chief, Mr. Hurlbert stated on two occasions that once he checked his mirrors and thought the lane was clear, he started heading over to the right lane. I also note that he advised the police officer investigating the accident that his truck was "somewhere between the two lanes" when he first heard the impact, and again advised the private investigator by email some years later that after looking in his mirrors and signalling his intention to turn, he "pulled over into the right hand lane". In my view, that addresses Royal's argument that this admission was only made under the pressure of cross examination.

I have reviewed both of Mr. Teiml's statements in detail, in which he suggests that Mr. Jayne swerved his vehicle towards the tractor trailer, entered the lane it was travelling in and caused the accident. Mr. Teiml did not appear at the hearing to provide his version of events under oath, and consequently, his evidence was not tested under cross-examination. Given that, and the fact that his statements conflict with the evidence provided by both drivers involved in the accident on a few points, I cannot place much weight on this evidence.

The other piece of evidence that is inconsistent with that of both drivers on the key issue of whether the truck had begun its lane change is the police report. Mr. Donaldson noted that the investigating officer indicated on the report that the point of impact was in the third lane, in which the truck had been travelling, and that both vehicles were changing lanes at the time. While I appreciate that the investigating police officer would have interviewed the participants and the relevant witnesses and presumably arrived at her conclusions based on the information obtained, an analysis of the report and the officer's notes raises many questions. Firstly, the report indicates that it was completed on October 1, 1999, some eight days after the accident. Mr. Teiml's name is noted in the "witness" section, although the accompanying statement from Mr. Teiml is dated October 2. That then begs the question of how the officer arrived at the conclusion that the impact occurred in the third lane, as Mr. Teiml is the only one who would have provided that information, both Mr. Jayne and Mr. Hurlbert being of the view that the truck had crossed into the curb lane at the time of impact. I am also puzzled by the officer's notation on the report that there were "conflicting statements"; a review of the statements provided to her by both drivers are consistent on how and where the accident occurred. In the final analysis, I also place little weight on the findings in the police report.

Counsel for Royal submitted that my role as the arbitrator in this matter is similar to that of the investigating police officer, in that we both face the task of listening to the witnesses' accounts and deciding who was at fault, if anyone, for the accident, with the officer having had the benefit of conducting her inquiry one week after the fact, as

opposed to the seven years that transpired between the accident and this arbitration hearing. While I agree that our task may be similar in a very general way, the processes involved are quite different. The officer did not have the benefit of hearing the key witnesses cross-examined in a detailed way by expert counsel, as I did, and as no accident reconstruction was done, she likely did not conduct an in depth inquiry into the details of the accident. And finally, the focus of her inquiry was on whether or not charges should be laid under the *Highway Traffic Act*, while mine is on which of the Fault Determination Rules should apply. Accordingly, I conclude that the findings in the police report are not ultimately persuasive.

As a final matter, counsel advised that only the issue of fault was to be determined at this stage, with the issue of quantum being left for another day.

**COSTS:**

The parties have agreed that costs are to be borne by the unsuccessful party. I may be spoken to in the event that the parties are unable to come to an agreement on the quantum of costs payable to Dominion of Canada from Royal and SunAlliance.

**DATED THIS \_\_\_\_\_ day of January, 2007 in the City of Toronto, Province of Ontario.**

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**Shari L. Novick**  
**Arbitrator**