

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and s.275, and ONTARIO REGULATION 664/90, s.9;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

COACHMAN INSURANCE COMPANY

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Stanley C. Tessis for the Applicant

Chris J. Blom for the Respondent

ISSUES:

1. Is Coachman Insurance Company (“Coachman”) entitled to indemnification from ING Insurance Company of Canada (“ING”) for statutory accident benefits paid to Coachman’s insured, Alexander D’Ettore as a result of a motor vehicle accident, which occurred on November 7, 2001?

DECISION:

1. Coachman is entitled to 100 per cent indemnification pursuant to s.12(4) of the fault determination rules.

HEARING:

This hearing in this matter was held in the city of Toronto, in the province of Ontario on April 24, 2008. It proceeded by way of viva voce evidence and documentary evidence filed.

FACTS & ANALYSIS:

This loss transfer dispute arises out of a motor vehicle accident which occurred at approximately 6:50 p.m. on November 7, 2001. On that date Mr. Alex D’Ettore was southbound on “Ogoki Road” when he collided with a northbound tractor-trailer driven Mr. Joe Turgeon. As a result of the accident Mr. D’Ettore was injured and claimed and received statutory accident benefits from his own insurer, Coachman. As Mr. Turgeon was driving a heavy commercial vehicle at the time of accident, Coachman is claiming indemnification from Mr. Turgeon’s insurer, ING, pursuant to section 275 of the Insurance Act (loss transfer). More specifically, Coachman claims that section or rule 12 (4) of the fault determination rules applies.

Section 12 applies to automobiles travelling in opposite directions. The potentially relevant parts of that section are:

- 12 (1) This section applies when automobile “A” collides with automobile “B”, and the automobiles are travelling in opposite directions and in adjacent lanes....
- (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.
- (4) If automobile “B” is over the centre line of the road when the incident occurs, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the accident.

The “centre line” of a roadway is defined in s.1 of the regulation as:

- (a) a single or double, unbroken or broken line marked in the middle of the roadway, or

(b) if no line is marked the middle of the roadway or that portion of the roadway that is not obstructed by parked vehicles, a snow bank or some object blocking traffic.

Coachman takes the position that the ING insured, Mr. Turgeon was over the centre line at the time of the accident and pursuant to section 12 (4) of the regulation, ING is 100 percent at fault. ING takes the position that the location on the road at the point of impact cannot be determined and therefore section 12 (3) applies and each side is 50 per cent at fault.

In order to determine which rule should apply, it is necessary to briefly review the evidence in this matter.

Mr. Alex D'Ettore, the driver of the Coachman motor vehicle testified at the hearing. Mr. D'Ettore is a mechanic who had earlier that day been working on repairing a bulldozer on Ogoki Road, which is a gravel surface, timber road, used almost exclusively to haul timber out of the woods. It is located in the Thunder Bay District of northern Ontario.

Mr. D'Ettore testified that he had spent a long day repairing heavy equipment. He awoke around 3:30 a.m. and started work around 4:00 – 4:30 a.m. He finished at approximately 6:00 – 6:30 p.m. Mr. D'Ettore indicated that he was southbound on Ogoki Road, from mile marker 130km. There was approximately 3-4 inches of snow on the ground, and was snowing such that the gravel surface of the road was covered. The edges of the road were covered with snow banks up to approximately 12 inches high. The truck traffic had established separate tracks in the snow for both northbound and southbound traffic. He was following the southbound tracks.

He testified it is the practise of drivers on the road to call on their radios at each 2km point on the road to allow other users of the road to know that they may be meeting other traffic. Mr. D'Ettore made his call at 130km and heard a call from what was later determined to be the Turgeon tractor-trailer indicating it was northbound at the 124km marker. Mr. D'Ettore indicated that he had been travelling at approximately 50 – 60 km per hour, which is posted as a 70km per hour zone. As he reached the 128km marker he made his location announcement on the radio but heard nothing from the northbound tractor-trailer. Just as he put the microphone back on the

radio he saw northbound headlights reflecting on the trees. At that point Mr. D'Ettore testified that he began to slow down and pull to the right, as he wanted to give the tractor-trailer plenty of room to get by. It is worthwhile to note at this point, as one is travelling south at this location there is a curve to the right and then a curve to the left. The roadway was approximately 30 feet wide as one approached the left curve but would appear to be somewhat wider at the actual left curve, where the accident occurred.

In any event, Mr. D'Ettore testified that when he first saw the headlights reflecting on the trees he was perhaps a couple of hundred feet away. In a few seconds he then saw the actual headlights of the tractor-trailer. At that point Mr. D'Ettore was partway into the left curve, southbound. When he first actually saw the truck the tractor-trailer was approximately one tire width into Mr. D'Ettore's southbound lane and encroaching further as it came northbound. Mr. D'Ettore testified that he was already close to the right shoulder or "wind roll" at this time.

As the cab of the tractor-trailer passed Mr. D'Ettore they were still clear of each other. Mr. D'Ettore then observed the trailer and it had "jack knifed" or more properly, swung out from behind the cab such that it was on 45 –50 degree angle relative to the cab. Mr. D'Ettore saw snow and gravel being thrown up from the trailer wheels as it spun on an angle towards him. In a defensive manoeuvre, Mr. D'Ettore then laid down to his right on the seat and pulled his steering wheel to the right. He testified that he felt the front right tire drop down off the right side of the road and then the collision occurred. It would appear that the rear wheels of the tractor-trailer came into contact with front driver's corner and side of Mr. D'Ettore's vehicle. The impact, according to Mr. D'Ettore pushed his vehicle onto the right shoulder of the southbound side of the roadway.

After the collision Mr. D'Ettore eventually extracted himself from the wreckage. He located his flashlight and walked out in front or south of his vehicle. He noticed some of the tools that had on his truck were strewn about and noticed debris from the collision including his grill and headlight etc., to the south of his vehicle in the southbound lane. He walked over to the northbound lane but did not see any debris in the northbound lane. He eventually lay down in the

northbound side of the roadway. The other driver, Mr. Turgeon apparently put his vehicle in reverse and came back and assisted Mr. D'Ettore, who was then taken to the hospital.

Mr. Joe Turgeon did not testify at the hearing, however, his examination for discovery transcript in the tort action was filed as an exhibit. Mr. Turgeon's evidence was that he was northbound on Ogoki Road but there was only a single set of tracks in the snow as opposed to Mr. D'Ettore's testimony that there was a set for northbound and a set for southbound traffic. As Mr. Turgeon was proceeding in what was for him a right curve, the tracks were completely on his side of the road. While Mr. Turgeon admitted that his tractor-trailer jack knifed just prior to the accident, it did so because Mr. Turgeon "gave a quick turn of the wheel" to avoid Mr. D'Ettore who he would otherwise hit head on. When he was questioned at the examination for discovery he was initially uncertain as to where the point of impact was on the road (see exhibit 2, tab 3, questions 345-361), however he then indicated that he did not go into the southbound lanes (see exhibit 2, tab 3, questions 362-363).

There were no witnesses to the accident and the police did not investigate at the scene.

The first person to arrive at the scene from whom some evidence was filed at the hearing was Mr. Cliff Abbott. He was a grader for the highway at the time and arrived at the accident scene minutes after Mr. D'Ettore had been taken from his vehicle. His statement, given approximately five weeks after the accident, indicated that Mr. D'Ettore's vehicle was lying on the right shoulder of the roadway. More importantly, he stated:

"I could see his (Mr. D'Ettore's) tire tracks starting about 500-1000 feet from the point of impact. I could see the tracks which showed he was in the course of getting over to the right side of the road.... the trailer tracks were way over to Axel's [sic] side of the road. The trailer tracks looked to me as if the trailer was trying to correct itself at the point of impact."

Mr. Abbott estimated the road width to be approximately 30 feet.

A statement given by a Mr. Roy Lappalaingen, dated December 11, 2001 was also filed at the arbitration. Like Mr. Abbott, he was a grader, working for the same company as Mr. Abbott and Mr. D'Ettore. He did not arrive at the accident scene until the next morning. He indicated:

“It looks like Alex never made the half way point in the curve....from what I could determine, Alex’s vehicle was on his side of the road on impact.”

Attached to Mr. Lappalaingen’s statement was a diagram of the scene. It shows Ogoki Road as being approximately 30 feet wide north and south of the curve, but about 50 feet wide at the accident scene. It shows the D’Ettore vehicle near the west shoulder of the roadway. It also shows what Mr. Lappalaingen has referred to as “debris field” as about 10 feet to the south of Mr. D’Ettore’s vehicle and close to the west shoulder of the road.

Mr. Neil Bigelow, a professional engineer and expert in motor vehicle accident reconstruction testified on behalf of Coachman. He concluded, among other things, that the damage to the D’Ettore truck was consistent with the tractor-trailer swinging out and sliding to the left and further opined that the point of impact was in the southbound lane of traffic.

Mr. Craig Wilkinson, also a professional engineer and expert in motor vehicle accident reconstruction testified on behalf on ING. He concluded, among other things, that the two vehicles were likely angled at between five and fifteen degrees relative to each other at the time of the impact, that Mr. D’Ettore’s vehicle was more likely not at the extreme right edge of the road at the time of impact as the vehicles came to rest on the road surface and the collision forces would have projected the D’Ettore vehicle to the right. He conceded on cross examination, however, that the two vehicles could have hooked upon on impact and this could have affected where the D’Ettore vehicle ended up.

Mr. Wilkinson concluded that it was impossible to tell on which side of the roadway the impact took place.

ANALYSIS:

The onus in this matter is upon Coachman to prove on a balance of probabilities that ING’s insured was over the centre line of the road if section 12 (4) of the fault determination rules is to apply. I am satisfied that Coachman has satisfied this onus.

Because there were no independent witnesses to the accident, and the evidence available to expert witnesses was limited, one is forced to consider the somewhat conflicting evidence of the two drivers involved in the accident more carefully. Mr. D'Ettore struck me as a very forthright and credible witness. While I accept that he has an ongoing tort action arising from the accident, which could potentially influence his testimony, I found that he answered the questions put to him in a straightforward and honest fashion, without embellishment. His evidence withstood a vigorous cross examination.

The driver of the tractor-trailer, Mr. Turgeon, did not testify at the hearing but at the examinations for discovery. He admitted that his trailer had jack knifed. He was initially unclear where on the roadway the accident had occurred, although he eventually stated that it occurred on his side of the roadway. Where there is a conflict between the evidence of Mr. D'Ettore and Mr. Turgeon I prefer that of Mr. D'Ettore whose evidence was subject to cross examination.

The evidence of the two witnesses who came on the scene after the accident, Mr. Abbott and Mr. Lappalaingen must be approached with some caution, as it would appear that they both knew Mr. D'Ettore and they were not called as witnesses and therefore not subject to cross examination. Nonetheless, their evidence is of some value, and for the most part supports Mr. D'Ettore's version of where the accident occurred. Mr. Abbott arrived at the accident scene shortly after the accident. He indicated that he could see Mr. D'Ettore's tire tracks 500-1000 feet prior to the impact and it showed him getting over to the right side of the roadway. He also indicated that the trailer tracks "way over to Mr. D'Ettore's side of the road".

Mr. Lappalaingen arrived at the scene of the accident the next morning. He found Mr. D'Ettore's vehicle close to the west curve of the road, and a "debris field" to the south and west of Mr. D'Ettore's truck. He indicated in his statement "from what I could determine, Alex's vehicle was on his side of the road on impact". It is not clear how Mr. Lappalaingen reached this conclusion and accordingly I do not put any particular weight on that conclusion, nonetheless his observation of where the D'Ettore vehicle was located after the accident as well as the debris field, is consistent with Mr. D'Ettore's evidence. I am cognizant of the fact that it had snowed

overnight and that some or all of the debris field may have been covered with snow. The location of the debris field is potentially consistent with Mr. D'Ettore's version of the events.

I note that in the diagram of the accident scene Mr. Lappalaingen has shown the roadway approaching the curve where the accident happened as being approximately 30 feet wide and the accident scene approximately 50 feet wide. The 50-foot width differs from the estimate of Mr. D'Ettore as well the measurements taken by Mr. Bigelow, some year and a half after the accident. This could be explained, in part, by the fact that we are dealing with a gravel road with snow banks and erosion etc. In addition Mr. Lappalaingen measurements were only an estimate. I accept that the road may well have widened out somewhat at the curve in question. While that change in width could potentially be important in terms of where the mid point of the road was, I am still satisfied, on all the evidence, that the collision occurred on Mr. D'Ettore's side of the road.

I do not put particular weight on the evidence given by the two expert witnesses in the matter, who tended to give their evidence in a somewhat predictable manner. In addition, they did not have a lot of physical evidence to go on, and accordingly their evidence was of limited value.

I am somewhat troubled by the fact the D'Ettore vehicle ended up near the west shoulder of the road rather than totally off the roadway. Mr. D'Ettore himself testified that just before impact he felt his right front wheel go off the right shoulder of the road. If he was then struck by the tractor-trailer, one would have thought that this would have pushed him further west off the roadway. I note that Mr. Wilkinson, the motor vehicle accident reconstruction expert, on cross examination, conceded that if the two vehicles locked or hooked up on impact, that would effect where Mr. D'Ettore's would end up. Alternatively, Mr. D'Ettore may have been mistaken and the right wheel may not have been over the shoulder but rather hit a pothole or rut just prior to the impact.

In any event, based on all the evidence, I am satisfied on a balance of probabilities that the collision occurred on Mr. D'Ettore's side of the road. Accordingly, section 12 (4) of the fault determination rules, applies and Coachman is entitled to be indemnified on a 100 percent basis.

In the event that the parties are unable to agree with regard to the issue of cost I may spoken to.

Dated at Toronto, this _____ day May 2008.

M. Guy Jones
Arbitrator