IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 275

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

FARMERS' MUTUAL INSURANCE COMPANY (LINDSAY)

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Harry P. Brown for the Applicant

Chris T.J. Blom for the Respondent

ISSUES:

1. Which, if any, of the fault determination rules apply in this matter, or do the ordinary rules of law apply?

2. If the ordinary rules of law apply, what is the respective degree of liability, if any, of the parties?

DECISION:

Rule 17 (2) of the fault determination rules apply and therefore ING must reimburse Farmers' Mutual for accident benefits paid in this matter.

HEARING:

This hearing was held in Toronto on April 4 & 5, 2005 before me, M. Guy Jones.

FACTS & ANALYSIS:

This loss transfer arbitration arises out of a motor vehicle accident which occurred on September 26, 1999 on Mountjoy Road in the Municipality of Scugog, in the County of Durham, at approximately 5:45 p.m. An automobile owned and operated by Mr. William Churchill, and insured by Farmers' Mutual Insurance Company, was westbound on Mountjoy Road. It came into contact with the rear of a tractor-trailer unit that had been parked along the north edge of the roadway. The tractor-trailer unit was insured by ING Insurance Company of Canada. In addition to Mr. Churchill, the Churchill vehicle contained his wife, Gail and their son Lee. Unfortunately, Lee Churchill suffered serious injuries and Gail Churchill also suffered injuries in the accident.

As a result of the accident the Churchill family made application to Farmers' Mutual for various accident benefits which were paid pursuant to the statutory accident benefit schedule. Farmers' Mutual takes the position that this accident was subject to the loss transfer fault determination

rules and that ING, as the insurer of the tractor trailer, should reimburse Farmers' Mutual pursuant to section 17 (2) of the fault determination rules. ING takes the position that rule 6 of

the fault determination rules apply. Both parties suggest, in the alternative, that if the fault determination rules do not apply then the ordinary rules of law should apply. If so, both sides suggest that the other side is wholly or partially responsible for the accident.

Loss transfer disputes between insurers are governed by section 275 of the Insurance Act and Regulation 664/90. Section 9 of that Regulation provides, in effect, that a first party insurer paying benefits under a policy of insurance to a person involved in an accident with a "heavy commercial vehicle" is entitled to claim indemnity from the heavy commercial vehicle when the driver of that vehicle is fully or partially at fault for the accident. The degree to which the first party insurer can claim indemnity is governed by Regulation 668. The fault determination rules, which fix fault in accordance with certain diagrams and descriptions of the manner in which the accident occurred, pursuant to section 2 of the fault determination rules.

The parties have agreed that the transport trailer unit in question was a heavy commercial vehicle for the purposes of the Regulation and that it therefore remains to be determine which rule, if any, applies or whether the ordinary rules of law apply.

Farmers' Mutual takes the position that Rule 17 (2) of the fault determination rules applies. That rule states:

> If automobile "A" is illegally parked, stopped, or standing when it is struck by automobile "B" and if the incident occurs outside a city, town or village, the driver of automobile "A" is 100% at fault and the driver of automobile "B" is not at fault for the incident.

Farmers' Mutual takes the position that the transport trailer was illegally parked or stopped, contrary to By-law 32-88 of the Corporation of the Township of Scugog, as amended by By-law 13-95. The Scugog By-law adopts the Highway Traffic Act, R.S.O. 1990, c. H. 8 definition of "parked or parking" and "stopped or stopping" which are defined as follows:

> "Park" or "parking", when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily and for the purpose of and while engaged in loading or unloading merchandise or passengers;
>
> "Stop" or "stopping", when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the direction of a police officer or of a traffic control sign or signal.

Section 9 of the By-law states:

> "no person shall park a commercial motor vehicle which exceeds 2.5 metres in width or 6.5 metres in length or having a vehicle weighed in excess of 4500 kilograms on any highway, except in an industrial area, unless such vehicle is actually engaged in the loading or unloading of goods, wares, merchandise or passengers to adjacent premises.

It is now necessary to briefly review the fact situation in order to determine if Rule 17 (2) or some other rule or the ordinary rules of law apply.

Mountjoy Road at this location is a two-lane country roadway. Approximately one-quarter mile east of the accident location is the crest of a hill. The road is otherwise flat and straight. The transport truck in question, insured by ING, was parked on the north side of the roadway. The shoulder of the roadway is quite narrow and approximately 80 % of the truck was on the westbound roadway. The transport trailer had been parked there by Mr. Richard Geisberger for some period. The witnesses gave various estimates as to how long the transport truck had been parked there. It would appear that it was parked there at roughly 4:45 p.m. and the accident occurred at approximately 5:45 p.m. The trailer had been parked in order to allow Richard, Ron and Arnold Geisberger to load grain from the adjoining field. The evidence led suggests that when Richard Geisberger arrived with the trailer, Arnold Geisberger had not yet cut

a sufficient area of grain to permit the transport trailer into the field without destroying the crop, so the transport trailer was parked along the northern edge of the roadway.

On the day of the accident, William Churchill was driving his family to a restaurant for dinner. Mr. Churchill lived near the accident scene and was well aware of the layout of the road. As he was westbound, approximately a quarter-mile to the east of the accident scene, he came over the crest of the hill. As the sun was setting at that time, Mr. Churchill had adjusted his sun visor to block the sun. While the sun may have affected his vision somewhat, I find, on the evidence, that Mr. Churchill had a clear view of the transport trailer shortly after cresting the hill or approximately one-quarter mile away. As he approached the accident scene, Mr. Churchill was driving approximately 70 kilometres per hour in an 80 kilometre zone, and then slowed to approximately 60 kilometres an hour shortly before breaking just prior to the accident.

Mr. Churchill testified that he had pulled out to pass the transport trailer, but that there was an oncoming eastbound car. As the transport trailer covered a large portion of the westbound lane, Mr. Churchill was unable to pass the transport trailer. Instead he braked and veered to the right, striking the left rear of the transport trailer. On the evidence, it is clear that the westbound car could not pass the transport trailer without going into the eastbound lane of traffic.

Based on this set of facts, I am satisfied that Rule 17 (2) of the fault determination rules apply to this situation. There is little doubt but that the transport trailer was parked at the time of the accident. There was some question raised at the hearing as to whether it was parked or stopped.

I reviewed the meaning of these terms as it relates to loss transfer and my decision in Liberty Mutual vs. Zurich (unreported decision released August 25, 2005). In short, one must look at the duration of the stopping, the method of stopping and the intent of the person when determining whether the vehicle was parked or stopped.

In this case, the transport trailer had been left on the side of the road unattended with the motor off, for some period approaching one hour. It was going to be left there until there was sufficient grain for it to be harvested and be loaded. Under these circumstances I have little difficulty finding that the transport trailer was parked rather than stopped.

The accident undoubtedly occurred outside a city, town or village. There was some question as to whether or not the transport trailer was illegally parked. Pursuant to section 9.6 of the applicable Scugog Bi-law, "it is illegal to park a vehicle of the type in question unless "such vehicle is actually engaged in the loading or unloading of goods, wares, merchandise or passengers to adjacent premises".

The evidence led at the hearing suggests that the transport trailer had been parked there because the field in question was not yet cleared to allow the transport trailer to be parked in the field. Indeed, it would appear that none of the field had been cleared when the transport trailer was parked. It would appear that the combine was on its' first or second trip around the field when the accident occurred and it took three or four trips around the field by the combine before there would have been enough grain to load the trailer. This, in my view, would not constitute

"actually engaged in the loading of goods, wares or merchandise" as required by the By-law in order to not contravene the By-law.

Counsel for ING has suggested that section 17 (2) applies to 2-vehicle accidents and that the accident in question involved a third motor vehicle, the eastbound car and therefore section 17 (2) does not apply. In support of this proposition he sets two cases, Dominion of Canada General Insurance Company and Kingsway Insurance Company (unreported decision of Arbitrator of Lee Samis, released August 23, 1999) and Primmum Insurance Company and Allstate Insurance Company (a decision of myself released September 15, 2004).

In the Dominion case, Arbitrator Samis found that the actions of the third motor vehicle were so fundamental of the happening of the accident that rule 17 no longer applied. Similarly in the Primmum case, I found that an unidentified third motor vehicle turned left against a red light in front of other two vehicles, thereby causing the accident. In that case, the fact situation was so fundamentally different than the rule contemplated, that I found that it did not apply.

The fact situation in this case is somewhat different. Here Mr. Churchill simply pulled out to pass the transport trailer and saw another oncoming vehicle travelling legally in the eastbound lane. Mr. Churchill then braked and veered to the right and struck the parked transport trailer. While the oncoming car did play some role in the accident, it did not change the situation so fundamentally such that the rule ought not to apply. The loss transfer rules were established as a relatively quick and inexpensive way of determining loss transfer in accident benefit cases. They

have been recognized by arbitrators and by the courts as such and, in some cases, as dispensing "rough justice". To the extent that the rules generally apply to the fact situation they ought to be applied. Only when the fact situation is so fundamentally different then that contemplated by the rules, should the fault determination rules not be applied. To do otherwise would minimize the applicability of the fault determination rules. While I accept that it may be difficult, in some situations, to determine if the fact situation is so fundamentally different than the rule, in this case I am of the view that it is not and rule 17 (2) applies.

Counsel for ING submitted that rule 6 should apply. It states:

> (1) this section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are travelling in the same direction and in the same lane.
>
> (2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 percent at fault for the incident.

The difficulty that I have with applying rule 6 (2) to this fact situation is that clearly the transport trailer was parked rather than simply stopped. The fault determination rules do make a distinction between the two terms and for the reasons set out earlier in this decision, I am of the

view that the transport trailer was parked rather than stopped. Accordingly section 6 does not apply.

In light of my decision regarding the applicability of rule 17, it is not necessary for me to comment upon the degree of fault of the parties should the ordinary rules of law apply. Since the parties spent a considerable period of time dealing with this question, however, I will comment upon it briefly.

There is little doubt in my mind but that Mr. Churchill saw the transport trailer at the side of the road while he was sufficiently far away so that he could have stopped. While the setting sun may have played some minor role, I am satisfied, based on Mr. Churchill's own evidence, that the sun played at very best a minimal role. Based on the evidence on Dr. Marc Green, an expert in human perception and reaction, Mr. Churchill had more than enough time to see the truck and stop in safety.

Mr. Churchill testified at the hearing while he saw the transport trailer, he was not sure if it was stopped or moving when he saw it prior to the accident. As Dr. Green pointed out, had the truck been moving, this would have meant it would have taken longer for Mr. Churchill to pass it, and made the accident perhaps more likely to have happened.

I am somewhat troubled by the failure of Mr. Geisberger to put his flashing lights on, put flares out or even put reflective triangles out behind the transport trailer. Had Mr. Geisberger taken any of these basic precautions Mr. Churchill would have, in all likelihood, have been alerted very

early on that the tractor trailer was stopped rather than moving slowly, as Mr. Churchill thought. In light of all the facts, it would have been reasonable for Mr. Geisberger to put out the reflective triangles which were available to him.

This is not a simple case of "ultimate negligence", as suggested by counsel for ING. On the evidence of Mr. Churchill, he was of the view that the transport trailer was moving slowly. Had Mr. Geisberger taken the reasonable precaution of putting out the reflective triangles, Mr. Churchill would have been aware that the transport truck was in fact stopped and might have taken different action and the accident might not have occurred. In the circumstances, if the normal rules of law were to have been applied, I would have assessed liability at 90 percent on Mr. Churchill and 10 percent upon Mr. Geisberger. I have, of course, found that rule 17 (2) of the fault determination rules apply and therefore ING must reimburse Farmers' Mutual for the accident benefits paid in this matter.

In the event that the parties cannot agree upon costs I may be spoken to.

Dated this _____ day of October, 2005 in the city of Toronto.

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M. Guy Jones
Arbitrator