

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 275 and ONTARIO REGULATION 668**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

- and -

AVIVA CANADA INC.

Respondent

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Charlia von Buchwald for the Respondent

ISSUE:

1. What is the respective degree of fault between the two drivers involved in the incident that led to the Claimant's accident benefits claim, pursuant to the Fault Determination Rules contained in *Ontario Regulation 668* ?

RESULT:

1. In accordance with section 5 of the regulation, the Aviva insured is 100% at fault for the incident.

BACKGROUND:

1. Ali Shalforoushzadeh was injured when he lost control of the motorcycle he was driving and fell to the ground on May 1, 2009. The incident took place as he was proceeding southbound on Yonge Street, at its intersection with Richmond Street, in Richmond Hill, Ontario. He alleges that a car driven by Eric Basciano and insured by Aviva Canada (“Aviva”) turned left into his path of travel and caused him to swerve and lose control of his motorcycle.

2. There was no contact between the vehicles. The intersection in question does not have any traffic lights guiding the flow of traffic.

3. Mr. Shalforoushzadeh submitted an application for the payment of accident benefits to State Farm Mutual Insurance Company (“State Farm”). They have paid benefits to him, and seek reimbursement from Aviva for the benefits paid out, in accordance with the Loss Transfer provisions in section 275 of the *Insurance Act*.

4. The parties agree that section 5 of the Fault Determination Rules apply, and that the degree of fault to be attributed to Mr. Basciano should be determined in accordance with the ordinary rules of law.

5. The parties also agree that my findings should be restricted to determining the degree of fault between the drivers, and that the quantum of benefits owing, if any, is to be determined at a later date, if required.

ARBITRATION AGREEMENT:

6. The parties agreed to be bound by the following terms, and requested that I set them out in the decision.

- (i) *Rights of appeal* – each party has the right to appeal the arbitration award on issues of law or mixed fact and law, without leave, within thirty days from the date of receipt of the award.
- (ii) *Costs* – the successful party shall be awarded costs of the arbitration, the quantum of which will either be agreed upon by counsel, or determined by the arbitrator.

EVIDENCE:

7. Both the Claimant and Mr. Basciano, the driver of the car involved in the incident, were called to testify at the hearing. Both parties had also been examined for discovery in the tort action brought by Mr. Shalforoushzadeh in February 2012, and the transcripts of those examinations were referred to by counsel at the hearing. Various documents were filed in a joint Document Brief, and were also referred to by counsel at the hearing.

Ali Shalforoushzadeh

8. Mr. Shalforoushzadeh was twenty-eight years old at the time of the accident, and had obtained a Class ‘G’ M1 motorcycle license. He testified at his examination for discovery that he was driving his motorcycle in the southbound curb lane on Yonge Street approaching its intersection with Richmond Street in the early evening of May 1, 2009. He stated that he had started to merge into the passing lane just north of the intersection in order to avoid some cars that were parked ahead of him in the curb lane.

9. When asked about his recollection of the events that followed, the Claimant stated that he could only recall falling off his motorcycle and hitting the ground. He could not state whether or not he had been struck by the car. He testified that he did not see Mr. Basciano’s car until he was passing through the intersection, and had “no idea” how far he was from the car when it turned left across Yonge Street.

10. The evidence provided by the Claimant at the arbitration hearing was slightly different than that set out above. He recalled that he was traveling approximately thirty kilometres per hour as he approached the intersection, well below the speed limit of fifty kms/hour on that stretch of Yonge Street. He acknowledged that vehicles were stopped in the lane to his left,

which obstructed his view. He testified that he first saw Mr. Basciano's car when he was approximately ten feet away from it, and that his next memory was being "on the ground looking up at the sky". When it was suggested to him in cross-examination that he should have known that northbound vehicles could be turning left across the intersection, he responded that he had the right of way, and that he had not expected cars to "pop out of nowhere squealing".

11. When asked about the discrepancy between his statement at the arbitration that he was ten feet away from the Basciano vehicle when he first noticed it and his evidence at discovery that he "had no idea" when he first saw the car, Mr. Shalforoushzadeh stated that he may have misunderstood the question when it was posed to him at the discovery.

12. The Claimant had a class 'G' M1 motorcycle licence at the time of the accident. He acknowledged that that is the first level in a graduated licensing system, and that it carries restrictions with it such as no riding after 8 pm, no alcohol consumption and no highway driving. He agreed that he had not had to pass a road test in order to get that license.

Eric Basciano

13. Mr. Basciano testified at his examination for discovery that he was driving in the northbound passing lane on Yonge Street in heavy traffic, on his way back to the hair salon that he owned near the intersection of Yonge and Richmond Streets. He stated that he was stopped at the intersection for at least five minutes, waiting for southbound traffic to subside so that he could turn left and drive westbound onto Richmond Street in order to park his car.

14. He recalled that the cars in the southbound passing lane had stopped to allow him to make his left turn, and that one of the drivers had waved him through. He stated that he had "edged closer" to the southbound side of the intersection, did not see any vehicles in the curb lane and proceeded to make his left turn. He stated that he never saw the Claimant on his motorcycle, and that it was only after he had completed his turn that he heard 'skidding sounds'. He then checked his rear view mirror and saw a motorcycle skidding through the intersection.

15. Mr. Basciano provided a statement to the police after the accident. It is essentially consistent with the evidence provided above, although it states that Mr. Basciano told the police that the Claimant “was braking and he wiped out”. It also contains the additional comment that he had been asking “the politicians” to put in a crosswalk and traffic lights at that intersection for many years.

16. Mr. Basciano elaborated on that concern in his testimony at the arbitration. He explained that he had been working in the neighbourhood for 25 years, and that the intersection in question had been the site of several accidents over the years. He stated that a car trying to turn left onto Richmond St from the northbound lanes of Yonge Street would sometimes have to wait ten to fifteen minutes for the southbound traffic to clear.

17. Mr. Basciano also testified that he had looked to the southbound curb lane before making his turn, and had not seen any vehicles coming toward the intersection. He provided the opinion that the Claimant must have been speeding and had then hit his brakes hard, causing the motorcycle to skid.

18. Mr. Basciano was eighty years old at the time of the accident, wore eyeglasses and is five feet, four inches tall. He testified that he had his eyesight tested shortly prior to the accident. He disputed counsel’s suggestion during cross-examination that he would have had trouble seeing over the dashboard of the Oldsmobile sedan that he was driving at the time of the accident.

RELEVANT PROVISIONS:

Insurance Act – Section 275

(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 the statutory accident 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.*

Ontario Regulation 668

3. *The degree of fault of an insured is determined without reference to,*
- (a) *the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or*
 - (b) *the location on the insured's automobile of the point of contact with any other automobile involved in the incident.*
5. (1) *If an 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.*
12. (5) *If automobile "B" turns left into the path of automobile "A", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.*

Highway Traffic Act

141. (5) *No driver or operator of a vehicle in an intersection shall turn left across the path of a vehicle approaching from the opposite direction unless he or she has afforded a reasonable opportunity to the driver or operator of the approaching vehicle to avoid a collision.*
142. (1) *The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement.*

PARTIES' ARGUMENTS:

State Farm

19. Counsel for State Farm contended that fault for this incident should lie entirely with Mr. Basciano as the driver of the left-turning vehicle. He submitted that under the 'ordinary rules of

law' analysis dictated by section 5, a driver turning left must yield the right of way to vehicles proceeding straight through an intersection. He submitted that this was consistent with the sections of the *Highway Traffic Act* referenced above, noting the requirement that a left-turning driver must "first see that the movement can be made in safety", and that no driver "shall turn left across the path of a vehicle approaching from the opposite direction unless he or she has afforded a reasonable opportunity to the driver...of the approaching vehicle to avoid a collision".

20. Mr. Strigberger contended that while the "ordinary rules of law" must be applied, a consideration of liability under a Loss Transfer scenario calls for a different approach than that of a pure negligence analysis in a tort claim. He noted that section 3 of the Fault Determination Rules provides that the degree of fault of an insured is to be determined without reference to weather or road conditions, or various other factors. He submitted that section 5 must be applied in accordance with these guidelines as well as the principle of expediency underlying the Loss Transfer scheme.

21. Counsel acknowledged that there was no contact between the Claimant's motorcycle and Mr. Basciano's car. He noted that if there had been a collision, Rule 12(5) would dictate that Mr. Basciano be found 100% at fault for the incident. He contended that it is clear that Mr. Basciano's left turn caused the Claimant to lose control of his motorcycle, and that Rule 12(5) should inform the analysis.

22. Mr. Strigberger referred to Mr. Basciano's statement that he did not see the Claimant's motorcycle approaching the intersection when he made his turn. He submitted that Mr. Shalforoushzadeh was there to be seen, and that if Mr. Basciano's view of oncoming traffic was obstructed, he should not have made a left turn, regardless of the fact that another driver may have "waved him through" the intersection. He contended that this was especially so in view of the fact that Mr. Basciano was very familiar with the intersection, and knew that many accidents had taken place there over the years.

23. Counsel cited the principles expressed in the case law on the issue of whether liability for an accident should be attributed to drivers with the right of way. He noted the Supreme Court of

Canada's statement in *Walker v. Brownlee and Harmon* [1952] 2 D.L.R. 450 that unless the driver with the right of way had a sufficient opportunity to avoid the accident, the other driver entering the intersection is fully liable. He also cited two cases involving collisions between motorcycles and cars decided by courts in British Columbia (*Pacheco v. Robinson* [1993] 38 A.C.W.S. (3d) 203, and *Ulmer v. Weidmann* [2011] BCSC 130). He contended that these stand for the proposition that a driver with the right of way is not required to guard against every conceivable possibility, and that the "existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care".

Aviva

24. Counsel for Aviva disputed that the liability analysis in a Loss Transfer scenario differs from that required in a tort case. She submitted that section 5 of the Fault Determination Rules clearly states that fault is to be determined in accordance with the ordinary rules of law, which she contended are identical to the rules of negligence. She argued that the case law has made it clear that each Rule must be considered separately, and that if none of them accurately describe the incident in question, section 5 requires that the analysis revert to liability being determined in accordance with the ordinary rules of law. She stated that accordingly, neither section 3 nor Rule 12(5) can be considered.

25. Counsel also contended that Mr. Shalforouzhzadeh should bear some fault for the accident, as it was clear that he was not keeping a proper lookout. She referred to his statement that it had not crossed his mind that the vehicles in the passing lane next to him were stopped to allow a left-turning vehicle to cross, and that he should have taken note of this. Ms. von Buchwald cited the Ontario Court of Appeal's decision in *Nash v. Sullivan et al.* (1974) 1 O.R. (2d) 133, a case that also involved a collision between a motorcycle and a left-turning car that was "waved through" an intersection. While the trial judge found the defendant taxi driver to be fully at fault for the accident, the Court of Appeal varied that judgment by imposing 50% contributory negligence on the plaintiff motorcycle driver who had the right of way.

26. Counsel highlighted the appeal court's comments in the *Nash* case, *supra*, that a "standard of perfection" should not be imposed on a defendant in these circumstances, and that there is an obligation on a plaintiff who approaches an intersection with a line of cars stopped to his left to act prudently. She contended that the facts of this case are identical to those in the *Nash, supra*, and that the decision should be followed.

27. Ms. von Buchwald submitted that while State Farm contends that it was Mr. Basciano's left turn that caused the Claimant to fall off his motorcycle, it was equally probable that he lost control when he attempted to veer into the passing lane from the curb lane in order to avoid the parked cars ahead. She suggested that it was also possible that he was traveling too fast and had misjudged his ability to maintain control of the motorcycle.

28. Counsel submitted that the Claimant's statement that he had been traveling at a speed of 30 kilometres per hour should not be accepted, given the inconsistencies between his evidence at the discovery and his testimony at the arbitration. She also suggested that it was odd for Mr. Shalforoushadeh to have recalled exactly how fast he was going, when he claimed not to remember important facts such as when he had obtained his motorcycle license and how long he had owned the motorcycle he was driving at the time of the accident. In contrast, she contended that Mr. Basciano's evidence on the relevant points was credible, and given his familiarity with the intersection, he would have likely been prudent before turning left across the path of oncoming traffic.

ANALYSIS & FINDINGS:

29. While counsel made detailed submissions on both drivers' recollections of the circumstances surrounding the incident, many of the important facts are not in dispute. The Claimant clearly had the right of way as he proceeded southbound on Yonge Street, approaching the intersection in question. He acknowledged that he did not have a full view of the intersection as he was approaching, as some cars were stopped in the passing lane to his left. Mr. Basciano was stopped for awhile waiting for an opportunity to make a left turn, and was "waved through"

the intersection by a driver who was stopped in the southbound passing lane. He did not see the Claimant's motorcycle before making his turn.

30. Mr. Shalforoushzadeh testified that he was traveling at a speed of approximately 30 kilometres per hour, which was well below the posted speed limit of 50 km/hour. Counsel for Aviva suggested that I not accept this statement, but conceded that there is no concrete evidence to dispute it. She proposed a few possible scenarios to explain why the Claimant lost control of his motorcycle, in which he would bear significant degrees of fault. While I did not find Mr. Shalfooushzadeh to be the most credible of witnesses, I am not prepared to accept those more speculative scenarios on the evidence before me.

31. Section 5 of the Fault Determination Rules requires that I determine the degree of fault of the Aviva insured in accordance with the ordinary rules of law. How should the 'ordinary rules of law' be applied in a Loss Transfer case in these circumstances? Counsel for State Farm contends that this question must be considered within the broader context of the Loss Transfer scheme, which was set up to establish an efficient and expedient way to resolve these types of claims. I agree with that proposition.

32. While section 5 requires me to determine the "degree of fault of the insured" in accordance with the ordinary rules of law, that provision forms part of the Fault Determination Rules. The Rules are a complete code referenced in section 275 of the *Act*, and any liability determination conducted under the Rules must be informed by the instruction provided in section 3. That section acts as a type of 'umbrella provision' and in my view, requires that the degree of fault be determined without reference to the various factors set out in (a) and (b), such as the weather or road conditions, actions of pedestrians or point of impact between the vehicles. While none of these factors are present in this case, I find that this provision creates a construct that calls for an analysis that is distinct from the approach required in a pure tort analysis.

33. To clarify, I am not suggesting that the provisions of the *Highway Traffic Act* or established case law arising out of negligence actions should be ignored. I do find, however, that I can take note of the fact that *Regulation 668* provides that in the event of a collision between a

left-turning vehicle and one proceeding straight through an intersection, Rule 12(5) dictates a finding of 100% liability on the left-turning vehicle.

34. In any event, the *Highway Traffic Act* provisions regarding left-turning vehicles cited above are consistent with Rule 12(5). Section 141(5) of the *Act* states that a driver must not turn left at an intersection into the path of an oncoming vehicle unless he has “afforded a reasonable opportunity to the driver of the approaching vehicle to avoid a collision”. In this case, Mr. Basciano, the driver of the left-turning vehicle, testified that he did not see the Claimant approaching the intersection on his motorcycle, and so, could not have provided him the opportunity to avoid a collision. I find that the fact that there was no impact between the vehicles does not take away from the driver’s obligation in this regard.

35. Should any fault be attributed to the Claimant in these circumstances? I note his evidence that he knew that he had the right of way, and did not expect cars to “pop out of nowhere” into the intersection through which he was proceeding. The British Columbia Court of Appeal found in *Pacheco v. Robinson, supra*, (relying on the Supreme Court of Canada’s findings in the *Walker* case, *supra*) that the existence of a left-turning vehicle does not raise the presumption that something unexpected might happen, and cast a duty on the driver with the right of way to take extra care. It does, however, carve out an exception in the circumstance where cars are stopped to the left of a driver who is approaching an uncontrolled intersection (at para.23).

36. If I was considering these facts in the context of a tort case, I may well have attributed some contributory negligence to the Claimant, in the wake of the Ontario Court of Appeal’s decision in the *Nash* case. However, given my comments above regarding the analysis required in a Loss Transfer scenario, I find Mr. Basciano, the Aviva insured, to be 100% at fault for the accident. While he testified that he did not see Mr. Shalforoushzadeh approaching the intersection, it is clear that the motorcycle was there to be seen. Again, while some of the evidence provided by the Claimant was inconsistent, he did have the right of way.

ORDER:

37. I hereby order Aviva to reimburse State Farm for 100% of the benefits it has paid out to Mr. Shalforoushzadeh as a result of the incident in question that are properly recoverable under the Loss Transfer provisions in section 275 of the *Act*. If further benefits are paid out in the future, Aviva should reimburse State Farm on the same basis.

38. If any issues arise regarding the quantum of benefits to be repaid, counsel may contact me and a pre-hearing call will be arranged to discuss this.

COSTS:

39. State Farm is entitled to recover its costs of this proceeding. If counsel cannot agree on the amount of costs to be paid, I invite them to contact me and I will hear submissions and determine the matter.

DATED at TORONTO, ONTARIO this 14 DAY OF FEBRUARY, 2014.



Shari L. Novick

Arbitrator