

IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and *ONTARIO REGULATION 283/95* THERETO;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WESTERN ASSURANCE COMPANY

Applicant

- and -

STATE FARM / CERTAS HOME AND AUTO INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Lora Castellucci for the Applicant

Celina Aguero for the Respondent

ISSUE:

1. Which party is the “insurer of the automobile that struck” Ms. Arnaud, and is therefore in priority to pay accident benefits under the *SABS*, pursuant to section 268(2)2(ii) of the *Act* ?

RESULT:

1. Western is the “insurer of the automobile that struck” the Claimant, and is in priority to pay benefits to her in accordance with section 268(2)2.

BACKGROUND:

1. Modesta Arnaud was injured while crossing the street at the intersection of Jane Street and Wilson Avenue, on the evening of April 18, 2016. Her injuries resulted from the collision of two cars in that intersection – a Dodge van driven by Liane Hempel, and a black BMW driven by Lawrence Gibson. Ms. Hempel was driving northbound on Jane St. facing a green light, when her vehicle was struck by the Gibson vehicle traveling eastbound on Wilson Ave through a red light.
2. The Hempel vehicle was insured by Western Assurance (“Western”) at the time, and the Gibson vehicle was insured with State Farm / Certas (“State Farm”). Mr. Gibson did not stop at the accident scene, and was later apprehended. He was charged with Careless Driving under the Highway Traffic Act.
3. Ms. Arnaud had been standing on the southeast corner of the intersection before the cars collided. She was struck by an object as she began to cross the street, and apparently lost consciousness. The parties have different theories on how she came to be injured, and the Claimant does not have a clear recollection of what happened. She was transported to Humber River Hospital from the accident scene, and was discharged later that evening.
4. Ms. Arnaud submitted an Application for payment of accident benefits under the *Schedule* to Western, and they have paid benefits to her and on her behalf. Western

contends that Ms. Arnaud was struck by the front bumper of Ms. Hempel's van, which flew off of her vehicle as a result of its collision with the State Farm vehicle. It argues that the State Farm vehicle is responsible for the 'transmission of force' to the object that struck the Claimant, and that State Farm is therefore the insurer of the "striking vehicle" and is in highest priority to pay benefits to Ms. Arnaud.

EVIDENCE:

5. The parties agreed to have this issue determined by way of an exchange of written submissions. No witnesses were called nor oral submissions made. Counsel did not file an Agreed Statement of Facts, but various documents including the MVA Report, the Police Officers' field notes and witness statements taken, property damage documentation and pictures, as well as a transcript from the Claimant's Examination Under Oath were provided with their submissions. These documents reveal the following:

6. The Motor Vehicle Accident Report was completed by Police Constable Ovid Mac. It contains a diagram depicting the intersection in question, and shows the two vehicles colliding in the south eastern part of the intersection. The description accompanying the diagram states that the Gibson (State Farm) vehicle collided with the Hempel (Western) vehicle when the Gibson vehicle crossed through the intersection on a "solid red traffic signal". It notes that Mr. Gibson drove away from the scene, and that he was charged under section 130 of the *Highway Traffic Act*.

7. The report also refers to Ms. Arnaud as a pedestrian that was involved in the incident. It states "debris from collision strikes pedestrian standing on southeast corner of the intersection".

8. Ms. Hempel provided a statement to the police officer after the accident. The relevant part reads – "I was driving N/B on Jane St in the right lane as I was crossing Wilson Ave. All of a sudden there was a bang and I was stopped. I was shaken up and wondering why my vehicle had stopped. I looked over to my right and saw a black car

driving away real fast”. There is no reference to Ms. Arnaud or any pedestrian in the statement.

9. It appears that Police Constable D’Souza also assisted in the investigation. His notes contain a short interview with the Claimant at the hospital, some witness statements and notations about the damage sustained by both vehicles involved in the accident. He recorded that Ms. Arnaud advised that she remembered two cars crashing, and then stated – “I go down. The bumper go to the stomach not too strong”. When she was asked which car the bumper belonged to, Ms. Arnaud responded that she did not know.

10. Some of the officer’s handwritten notes are difficult to decipher. They contain the statement “debris hit a female pedestrian from the accident”. At another point they state – “unknown if hit by vehicle or flying debris, as there is a bumper and other car parts strewn in s/e quadrant of intersection”. It is not clear if that is the officer’s statement, or a comment made by a witness.

11. The police notes also refer to the damage sustained by each of the vehicles. The Western insured vehicle is noted as having considerable front end damage, and that its front bumper was sheared off. The State Farm vehicle is noted as having severe damage to the doors on the right side.

12. Counsel also filed some of the Claimant’s post-accident medical records. They indicate that Ms. Arnaud visited her family doctor’s office on April 20, 2016, two days after the accident, complaining of pain in her chest wall. She reported that she had been told by the police that she was “hit by the car’s bumper”.

13. An OCF 1 form was submitted by the Claimant (or on her behalf) on April 22, 2016, four days after the accident. In the section asking for a description of the accident, it states “I was walking across the intersection of Jane St. and Wilson Ave. and suddenly struck by a bumper and debris from two vehicles colliding”. It also refers to her having “blacked out during the accident”.

14. The Claimant later provided a signed statement on July 18, 2016, advising that she was standing on the southeast corner waiting to cross Wilson Avenue at Jane. She stated that she was crossing from south to north on the east side of the intersection on a green light, and that cars were going in the same direction as she was. She stated that “when I was around the middle I saw a vehicle and it came to me on my left side and I lost consciousness”.

15. The Claimant was also examined under oath as part of this process on March 1, 2017. A review of the transcript indicates that the evidence she provided was confusing and at times contradictory. She referred a few times to one of the vehicles from the accident being “on top of her”. When questioned further, she stated that “the vehicle or some pieces of the vehicle fell on top of me”. She recalled that witnesses had told the police that she was struck by “parts of the vehicle” that had broken off, and that the police officer had told her son that witnesses had reported that parts of a vehicle fell on top of her.

16. Finally, I note that the pictures of the Dodge van insured by Western that were taken after the accident clearly show that the front bumper is no longer attached to the vehicle.

FACTUAL FINDINGS:

17. As noted above, there are some inconsistencies in the evidence before me with regard to what struck Ms. Arnaud and caused her injuries. She herself does not have a clear recollection of the sequence of events that occurred. She stated at times that she was struck by a vehicle, but also told the police on the evening of the accident that she was struck by a bumper “to the stomach not too strong”. It is not surprising that she lacks a clear memory of the events, as she is reported to have lost consciousness at the scene.

18. The police notes at one point state that it is not known whether Ms. Arnaud was struck by a vehicle or by flying debris, but the description accompanying the diagram on the MVA Report only refers to her being struck by debris.

19. Despite the inconsistencies above, I am prepared to make factual findings on the best evidence available. While I would usually request that *viva voce* evidence be presented in a case involving many factual inconsistencies, I am persuaded that that would not assist in this case, given that the Claimant has no clear recollection of the relevant events, and the police officers involved did not witness the incident. The statement provided at the scene by Ms. Hempel, the driver of the van, also indicates that she was shaken up and confused by the unexpected collision, to the point where she wondered why her vehicle had stopped. This suggests that it is unlikely that she would have been able to explain clearly, a few years after the events, exactly how Ms. Arnaud had been struck.

20. The evidence raises two key questions – was the Claimant struck by a vehicle, or by debris from a vehicle? If she was struck by debris, what vehicle did it come from ?

21. On the evidence before me, I find that it is most likely that Ms. Arnaud was struck by debris from a vehicle, rather than by one of the vehicles involved in the collision. Other than her EUO testimony in which she recalled that a vehicle was “on top of her”, the preponderance of evidence suggests that it was debris, rather than one of the vehicles that struck her. While the details of the Claimant’s injuries were not before me, I think it is fair to assume that if one of the vehicles had actually landed on top of her, her hospital stay would have been longer than the few hours that it was.

22. In making the above assessment, I have also put more weight on the statements made by the Claimant shortly after the events in question, over those provided months later. I note that the statement provided by Ms. Arnaud to the police on the evening of the accident, her report to her doctor two days later, and the reference in the OCF 1 form filed a few days after the event all refer to her being struck by debris. The only evidence suggesting that she may have been struck by a vehicle was provided at her Examination Under Oath, which was conducted almost one year following the incident. As noted

above, she also stated during the examination that “some pieces of the vehicle fell on top of me”.

23. I also note that while there was a reference in the police notes to the possibility of Ms. Arnaud being struck by a vehicle or by debris, the investigating officer appears to have ultimately determined that it was “debris from collision” that struck Ms. Arnaud, given that this is what appears in the description of the incident on the MVA Report.

24. Having found that the Claimant was struck by debris, the question then becomes – where did the debris come from ? Again, based on the best evidence available, I find that it was the front bumper or other debris from the Western vehicle that struck Ms. Arnaud. While the police officer does not state this specifically in the report, the property damage documentation filed clearly shows that the front bumper was torn off of the Western insured vehicle. The police field notes also refer to this, and state that the van had considerable front end damage. The Gibson vehicle, once recovered by the police, is noted as having severe damage to its right side doors, but there is no reference to missing parts.

25. In her Reply submissions, counsel for Western contends that Ms. Hempel’s vehicle came to a stop within the intersection, *after which* its bumper was propelled in an easterly direction from the force of the State Farm insured vehicle travelling eastward. There is no evidence before me to support this contention. The only evidence relating to whether or when the Western insured vehicle was moving or stopped is Ms. Hempel’s statement, provided to the police officer at the scene. It states that she was driving across Wilson Ave when she heard a bang “and I was stopped”. She then states that she wondered why her vehicle had stopped, looked to her right and saw a black car driving away quickly. She also states that she realised that she was blocking the intersection and that the front end of her vehicle was smoking, and that she then drove her car into a nearby parking lot to wait for the police.

26. I conclude from the above that the Western insured vehicle came to a stop once it was within the intersection, as a result of its collision with the State Farm vehicle. In my view, the reference to the front end of the vehicle “smoking” suggests that it was the front of the van that bore the brunt of the impact. In my view, the most likely scenario is that the front bumper was sheared off on impact, while both vehicles were moving, rather than falling off after the Western vehicle came to a stop.

RELEVANT PROVISIONS:

The relevant provisions of the *Insurance Act* are set out below:

Insurance Act:

268(2) The following rules apply for determining who is liable to pay statutory accident benefits:

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

PARTIES' ARGUMENTS:

27. Both counsel referred to various court decisions dating back to the 1970s in which the “transmission of force” principle was introduced, as well as the more recent discussion on its application when two moving vehicles are involved in the decision in *Unifund Assurance v. ACE INA Insurance* [2017] O.J. No. 3172.

28. Essentially, counsel for Western contends that it was the force of the State Farm insured vehicle colliding with its insured’s vehicle that caused the front bumper from Ms. Hempel’s van to fly off and strike Ms. Arnaud. She submitted that it was not the movement of the Western vehicle that caused injury to the Claimant, but rather the force

of the State Farm insured vehicle that caused Ms. Hempel's bumper to be propelled in a different direction than the vehicle itself.

29. She argued that if it were not for the force of the State Farm vehicle speeding through the intersection, against a red light, the bumper would not have been sheared off the Western insured van, and the Claimant would not have been struck. She urged me to conclude that the vehicle that transmitted the force - namely the State Farm insured BMW- was therefore the "striking vehicle" in the scenario.

30. Counsel for State Farm noted that the courts' decisions in *Strum v. Co-operators Insurance* (1973) O.R. (2d) 70 (Ont. Supreme Ct.), *Re MacGillivray* [1975] I.L.R. 1254, and *Ezard v. Warwick et al.* 104 D.L.R. (3d) 315 (Ont. C.A.) in which the "transmission of force" principle was applied all addressed situations in which a moving vehicle propelled a stationary object into a pedestrian or bystander. She contended that they were therefore distinguishable from the facts of this case, involving two moving vehicles. She noted that the judge in *Traham v. Royal Insurance Co. of Canada* (1981) 121 D.L.R. (3d) 495 stated that it is more difficult to apply the "transmission of force" principle when both vehicles are moving, as each vehicle may exert its own independent force.

31. Counsel noted that in the appeal decision of *Unifund v. ACE, supra*, Justice Brown applied the reasoning in *Traham, supra*, to find that it was the force provided by the ACE insured vehicle that caused it to strike the pedestrian, rather than the force transmitted by the second vehicle insured by Unifund that had caused the collision. She contended that the facts in this case are on all fours with those in the *Unifund* case, and that if the Western vehicle itself, or its bumper, struck the Claimant, its force originated with Ms. Hempel's vehicle and continued on under its own momentum. Counsel argued that that this reasoning leads to the conclusion that the Western vehicle was the "striking vehicle" referred to in section 268(2)2(ii) of the Act.

32. Ms. Castellucci noted in her reply submissions that the judge in the *Traham* case stated that he would have determined the matter differently if the vehicle that he found to be the striking vehicle was a “purely passive factor” in the accident. She contended that in the circumstances of this case, the front bumper of the Dodge van that struck the Claimant was a passive factor in the accident, and that if it were not for the force transmitted by the State Farm vehicle, the bumper would have remained on the Western vehicle, and would not have struck Ms. Arnaud.

ANALYSIS /FINDINGS:

33. The question to be determined is whether Western or State Farm is “the insurer of the vehicle that struck” the Claimant, as set out in section 268(2)2(ii) of the *Act*.

34. As discussed above, I have determined on the evidence filed that Ms. Arnaud was struck by the front bumper of the Western insured vehicle. I have also found that that vehicle was still moving at the point at which its bumper was torn off as a result of the collision with the State Farm insured vehicle. As submitted by counsel, these facts raise the question of whether or how the “transmission of force” principle discussed in the cases cited above should be applied.

35. It is settled law at this point that when a moving vehicle strikes a stationary object or second vehicle, and causes that vehicle or object to strike a pedestrian, the moving vehicle is considered to be the “striking vehicle”, even though it may not have been in direct contact with the pedestrian (see *Strum, MacGillivray, Ezard*, and also *Co-operators General Insurance v. Royal Insurance (Samis, August 29, 1996)*). However, later case law indicates that a different and more nuanced analysis is called for when a pedestrian is struck as a result of a collision between two moving vehicles.

36. In *Traham v. Royal Insurance, supra*, a passenger vehicle insured by Royal was driving south on Parliament Street through its intersection with Queen Street in Toronto, facing a green light. An ambulance insured by Scottish & York was proceeding west on Queen Street, through a red light. The ambulance collided with the passenger vehicle and

caused that vehicle to strike the plaintiff, who had been standing on the southwest corner of the intersection.

37. Justice Grange discussed the “transmission of force” principle in his ruling. He found that it can apply to a moving vehicle as well as to a stationary vehicle, but determined that the principle should not be applied to the facts of that case. He determined that the passenger vehicle was traveling with an “independent force”, even though that force was affected by its collision with the ambulance. He acknowledged that the passenger vehicle would never have hit the plaintiff “but for” the collision with the ambulance, but stated that the private vehicle nevertheless created a moving force. Justice Grange stated that he did not think that his finding deviated from the principle set out by the Court of Appeal in *Ezard v Warwick, supra*, and that he did not see how the ambulance that caused the collision could be found to be the striking vehicle, “unless it be determined also that the private vehicle was a purely passive factor in the accident”.

38. This reasoning was referred to and applied by Justice Brown in her appeal decision in *Unifund v ACE INA, supra*. In that case, a vehicle insured by ACE was driving eastbound on Steeles Avenue when it collided with a vehicle insured by Unifund that was traveling westbound on Steeles and attempting to turn left through the intersection. Both vehicles were propelled in different directions as a result of the collision, and the ACE insured vehicle struck a pedestrian who was walking on the sidewalk near the intersection. Justice Brown rejected my finding that the transmission of force principle applied, and determined instead that the “striking vehicle” was the car insured by ACE that actually made contact with the claimant. She stated as follows:

...applying the reasoning of Grange, J in Traham, supra, the pedestrian Claimant was struck by the ACE vehicle, which while diverted or deflected by the Unifund vehicle, continued under its own propulsion and momentum that had originated and existed prior to the collision, and exerted its own “independent force”. As in the case of Traham, supra, this case involved two moving vehicles which collided, causing the ACE vehicle to be diverted and strike the pedestrian. The ACE vehicle, while deflected by the collision, continued under its own propulsion or “independent force”. It was not the Unifund vehicle that applied the

transmission of force to the ACE vehicle propelling it into the claimant, but rather the ACE vehicle's own, albeit diverted movement, or the actions of the ACE insured driver which caused the ACE insured vehicle to strike the pedestrian.

(at para.28)

39. These two judicial decisions make it clear that it is not enough to find that a moving vehicle would not have struck a pedestrian “but for” another vehicle colliding with it. Rather, the only way that a vehicle that strikes another vehicle or object that then strikes a pedestrian can be found to be the “striking vehicle” under section 268(2)2(ii) of the *Act* is if the vehicle that makes contact with the pedestrian does not exert its own independent force. As Justice Grange put it in *Traham, supra*, it must be a purely “passive factor” in the accident. While I struggle to understand how a moving vehicle can be a purely “passive factor” in this sense, I am bound by the above rulings and reasoning.

40. Turning to the facts of this case, I must determine whether the bumper from the Western vehicle that struck the Claimant did so as a result of force that originated with the Western vehicle, as asserted by State Farm, or whether the bumper was a purely “passive factor” in the accident, as contended by Western. While I do not have the benefit of an expert report before me opining on what action created what force, I can not distinguish these circumstances from the ones in the *Traham* and *Unifund* cases, and conclude that the bumper that was sheared off the Western insured van was a purely passive factor in the incident. Both vehicles were clearly moving when they collided, and it is reasonable to assume that the force of that collision caused the bumper to separate from the Western insured vehicle and strike Ms. Arnaud.

41. I therefore find that while it was the force of the State Farm vehicle colliding with the Western vehicle that caused the bumper to be sheared off of that vehicle, the Western vehicle, and by extension its bumper, exerted its own independent force and was therefore the “striking vehicle”. The result of this finding is that Western is “the insurer of the automobile that struck” the Claimant, and is in higher priority to pay benefits to her.

ORDER:

Western Assurance Company is the priority insurer for payment of benefits under the *SABS* to Modesta Arnaud resulting from injuries suffered in an incident on April 18, 2016. The Application for Arbitration is hereby dismissed.

COSTS:

Given the result, State Farm is entitled to its legal costs from Western, on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, they may contact me and a further pre-hearing call will be convened to discuss a process for resolving that issue.

DATED at TORONTO, ONTARIO this ___12th ___DAY OF OCTOBER, 2018.



Shari L. Novick

Arbitrator