

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
s.275 and REGULATION 664;

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL & SUN ALLIANCE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

John P. Pavoni for the applicant

Derek Greenside for the respondent

ISSUES:

1. Is Allstate entitled to the indemnified pursuant to loss transfer from Royal & Sun Alliance, and if so, what is the respective liability, if any, of the parties?

DECISION:

Royal & Sun Alliance's insured, Mr. Hackett, was not responsible for the accident and accordingly there is no loss transfer in this matter.

HEARING:

This matter proceeded by way of written submissions and the filing of documents before me, M. Guy Jones, arbitrator. No oral evidence was called.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on May 18, 1999. On that date, a Mrs. Kamaljit Deol was driving a motor vehicle insured by Allstate. It was hit by a heavy commercial vehicle driven by a Mr. Leo Hackett, and insured by Royal. Mrs. Deol suffered injuries in the accident and applied for and received various accident benefits from Allstate, pursuant to the Statutory Accident Benefits Schedule. Allstate took the position that the loss transfer provisions applied and made a claim for indemnification from Royal. At an earlier preliminary hearing, I decided that the fault determination rules were not applicable to this situation and accordingly pursuant to section 5 of Regulation 668, it remains to be determined what degree of fault lies with each party in accordance with the ordinary rules of law.

The fact situation in this matter is somewhat complex. The accident occurred on Steeles Avenue, at or near its intersection with Bramalea Road, in the city of Brampton. Steeles Avenue runs in an east-west direction. There are three lanes for westbound traffic on Steeles Avenue at this location. Bramalea Road runs in a north-south direction. There are three lanes for Bramalea Road for southbound traffic plus a left and a right turn lane. The intersection is controlled by traffic lights. In addition, the right turn lane for southbound traffic turning onto Westbound Steeles is controlled by a yield sign. The accident occurred at 6:20 p.m. and it was raining at the time.

Just prior to the accident, Mrs. Deol was driving her husband's car westbound on Steeles Avenue, approaching the intersection of Bramalea Road. Mrs. Deol was in the left lane of the three through lanes. Mr. Hackett was travelling immediately behind Mrs. Deol in the left lane at

a speed of 55 kilometres per hour. He was driving a model 600 Mack Truck carrying a load of bubble wrap. The parties agree that the Hackett truck was a heavy commercial vehicle for the purposes of the loss transfer provisions.

A tractor trailer driven by Mr. Albert Poelstra was also travelling westbound on Steeles Avenue approaching Bramalea Road. The Poelstra vehicle was in the centre lane and slightly ahead of the Hackett vehicle. As Mr. Poelstra came to within fifty feet of the intersection he saw a red car driven by a Mrs. Loretta White come southbound on Bramalea and entered the intersection in the centre lane. The light for westbound traffic was green. According to Mr. Poelstra, the white vehicle came to a stop facing southbound in the middle of the intersection, between the centre and the curb lanes. It then turned right from a stopped position. When the White vehicle turned right, Mr. Poelstra was almost directly behind it. Mr. Poelstra tried to veer to the right into the westbound curb lane. Mr. Poelstra stated at his examination for discovery that he did not have time to brake. Mr. Poelstra was unable to avoid the White motor vehicle and hit the rear of the White car with the left front of his truck. By this time both vehicles had crossed the intersection. As a result of the collision the White vehicle spun in a counter clockwise direction and went to the left and struck the Deol vehicle which was in the westbound left lane of Steeles Avenue. The Deol vehicle, after being struck by the White vehicle continued forward and was struck by the Hackett vehicle. The Deol vehicle ended up partially in the westbound centre median west of the intersection. In all there were three impacts on the Deol vehicle. First by the sign which fell after being struck by the White vehicle, then by the White vehicle and finally by the Hackett vehicle.

Allstate takes the position that Mr. Hackett was responsible for the collision between the Hackett and Deol vehicles, arguing that Mr. Hackett was travelling too fast for the conditions, was following the Deol vehicle too closely and did not keep a proper look out. It also argued that Mr. Hackett ought not to be travelling in the left hand lane with the heavy commercial vehicle. Royal, on the other hand, submitted that Mr. Hackett was faced with an emergency situation, not of his own making, and was not negligent in the circumstances.

Both sides cited a number of cases which support their respective positions. Ultimately, however, each case depends very much upon its own peculiar set of facts.

Allstate argues that Mr. Hackett struck the Deol vehicle in the rear, and since the Hackett vehicle "rear-ended" the Deol vehicle, Hackett was 100 percent responsible for the collision. While I agree that rear ending vehicle is often completely or at least largely responsible for such accidents, I am of the view that this was not a straight rear end collision. The initial event that lead to the eventual collision was caused by Mrs. White. She entered the intersection on a red light. At her examination for discovery, she admitted that she would have had to hurry through her turn in order beat the westbound traffic through the intersection. It was her intention to turn left at the next set of lights, which was a short distance away. She had to cross three lanes of westbound traffic in order to make the intended left hand turn.

Mr. Poelstra, at his examination for discovery, testified that the incident happened very quickly. He did not have time to apply his brakes. He immediately tried to make a lane change to the right to avoid the collision. Unfortunately this resulted in a collision with the right rear of the White vehicle, causing the White vehicle to spin counter clockwise into the left lane and the median, and strike the Deol vehicle and shortly thereafter the Hackett vehicle struck the Deol vehicle.

Mr. Hackett testified at his examination for discovery that he was travelling at approximately 55 kilometres in an 80 kilometre zone, just prior to the accident. It was raining heavily at the time and traffic was heavy. Mr. Hackett had been in the centre westbound lane, behind the Poelstra transport truck, but had moved to the left lane, as he was eventually going to have to turn left. The Poelstra transport truck blocked some of Mr. Hackett's view to the northwest, including the White vehicle prior to its collision with the Poelstra vehicle. Mr. Hackett first saw the White vehicle as it spun off the Poelstra transport truck. He then saw it come into contact with the Deol motor vehicle which was approximately 1 ½- 2 car lengths ahead of him, in the same lane. Mr. Hackett indicated that he braked severely, but could not swerve to the right because of the Poelstra transport trailer. He could not swerve to the left because there were vehicles in the

eastbound left turn lane. Mr. Hackett testified that the impact between himself and the Deol vehicle occurred when she was still partially in the intersection.

Based on all the evidence, I do not find that Mr. Hackett's speed was excessive. He was travelling approximately 55 kilometres in an 80 kilometre zone. Mrs. Deol testified at her examination for discovery that most vehicles were travelling about 60-70 kilometres per hour.

Mr. Hackett's lookout would appear to have been adequate. He, like Mrs. Deol did not see the White car until it made contact with the Poelstra transport trailer. This, in all likelihood, was because the Poelstra transport trailer blocked the view to the northwest. One is left with the impression that Mr. Hackett was met with an emergency situation, not of his own making. While I agree that a driver must proceed with care and attention, having regard to the circumstances, one cannot expect a driver to prepare for an unforeseen emergency. Mr. Hackett cannot be expected to have anticipated that Mrs. White would turn out in front of traffic when she was facing a red light. Only when Mr. Hackett reasonably became aware of the situation created by Mrs. White can he be expected to respond, and on the evidence before me, I find that he did so. The evidence before me was that Mr. Hackett was about 1 ½-2 car lengths behind the Deol vehicle prior to the collision. I was not provided with any evidence as to the stopping distance of the vehicles in question. While it may take a truck longer to stop than a car in some circumstances, there was no evidence before me that Mr. Hackett was following too close in the circumstances.

Counsel for Allstate submitted that section 158 of the Highway Traffic Act should apply, which provides that when driving at a speed in excess of 60 kilometres per hour a commercial motor vehicle shall not follow within 60 metres of another motor vehicle. The problem that I have with this is that the uncontradictive evidence of Mr. Hackett was that he was not travelling that fast. According section 158 of the Highway Traffic Act has no applicability.

Counsel for Allstate also submitted that since a municipality can, pursuant to section 186 (1) of the Highway Traffic Act, prohibit the operation of a commercial motor vehicle that exceeds 6.5 metres in length from travelling in the left lane of a highway containing 3 or more lanes for

traffic in each direction where the maximum speed is 80 kilometres per hour or more, I should find that Mr. Hackett should not have been in the left lane. Steeles Avenue had 3 lanes for each direction and the posted speed limit is 80 kilometres per hour. However, there was no evidence before me that the Municipality passed the necessary by-law. Mr. Hackett was travelling legally in the left lane and was going to turn left shortly. I do not find this submission persuasive.

I also find that the submission made by counsel for Royal, that the tort parties settled their action on a certain basis, unpersuasive. Their decision has no impact on these proceedings.

On the basis of all the evidence before me, I find that Mr. Hackett was faced with an emergency situation, not of his own making. As such, there is no liability on Mr. Hackett and Allstate is therefore not entitled to loss transfer from Royal.

If the parties are unable to agree on the issue of costs, I may be spoken to.

Dated at Toronto, this _____ day of January, 2006.

**M. Guy Jones
Arbitrator**