

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

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

ROYAL & SUN ALLIANCE INSURANCE COMPANY

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Stanley C. Tessis for the Applicant.

Harry Brown for the Respondent.

ISSUES:

What percent, if any, is Royal & Sun Alliance responsible to pay by way of loss transfer as a result of injuries suffered to Timothy Wry in a motor vehicle accident that occurred on December 16, 2001?

DECISION:

Royal & Sun Alliance is responsible to pay thirty percent of accident benefits paid to or on behalf of Timothy Wry, subject to any claim by Royal & Sun Alliance that the amount paid was not reasonable.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred at approximately 6:30 a.m. on December 16, 2001. At that time, Mr. Timothy Wry had been working as a gas bar attendant at a gas station located on the west side of County Road 46, just north of Highway 41. At the time of the accident, Mr. Wry was employed by Cango Inc.. Shortly prior to the accident, a fuel truck, owned by Cango Transport Inc., and driven by one of its employees, Mr. Barry Norman, and insured by Royal and Sun Alliance (“Royal”) arrived to deliver gas to the station. The layout of the station was such that it was necessary for the fuel truck to back out of the station onto County Road 46 in order to depart. In the process of assisting Mr. Norman, Mr. Wry went onto the southbound lanes of traffic and was hit by a motor vehicle driven by Mr. Vinay Menon, which was insured by Security National Insurance Company. Shortly thereafter, Mr. Wry was hit by a northbound motor vehicle driven by Ms. Jean Jenkins, and insured by State Farm Insurance Company.

At the time of the accident, Mr. Wry was insured by Aviva Insurance Company (“Aviva”) pursuant to a valid motor vehicle liability policy. As a result of the accident, Mr. Wry suffered

personal injuries and applied for and received accident benefits from Aviva. Aviva subsequently made a loss transfer claim against Royal, which forms the basis of this arbitration.

PRELIMINARY ISSUE:

Pursuant to section 275 of the *Insurance Act*, Aviva is entitled to claim loss transfer against certain classes of vehicles as may be named in the Regulation. Subsection 2 of that section requires that indemnification shall be made according to the respective degree of fault of each insurer's insured as determined by the fault determination rules.

The parties to this arbitration have agreed that none of the rules set out in the fault determination rules (Ontario Regulation 668) applies to this fact situation. Accordingly section 5 (1) of Regulation 668 applies which states:

If an incident is not described in any of these rules, the degree of fault of the insured shall be in accordance with the ordinary rules of law.

Counsel raised two preliminary issues that I will deal with at this time. First, counsel for Royal argues that Timothy Wry was a pedestrian and therefore his actions ought not to be considered in light of section 3 (1) of the fault determination rules which state:

The degree of fault of an insured is determined without reference to:

- (a) the circumstances in which the incident occurred, including weather conditions, road conditions, visibility or the actions of pedestrians.

With the greatest respect, I do not agree with this position. In my view, once section 5 (1) is invoked, “in accordance with the ordinary rules of law”, then it is necessary to look at all the usual causes for the accident, and one is not precluded from looking at the actions of pedestrians or others that may have caused the accident.

Counsel for Aviva argues that I ought not look at the liability, if any, on the part of Cango Inc., the owner/operator of the gas bar. He submits that as the company had no motor vehicle liability and section 275 (2) of the *Insurance Act* states that:

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.

Furthermore, counsel argues that section 5 (1) of the fault determination rules speaks of “the degree of fault of the insured shall be determined in accordance with the ordinary rules of law”.

Counsel for Aviva relies on the decision of arbitrator Malach in Pilot Insurance Company vs. Lombard Canada, (unreported decision released April 8, 2006). In that case, a cyclist was struck by a vehicle while crossing the ramp of a roadway. There was a suggestion at the hearing that the accident may have been caused, in part, by the set up of the ramp which was the responsibility of the Ministry of Transportation and Communications. Arbitrator Malach held that he should not consider the possible negligence of the Ministry in that case, nor the non use of a safety helmet or the violation of a city by-law prohibiting the use of bikes at certain

locations. With the greatest respect, I do not agree with arbitrator Malach in this case. I see nothing in section 275 of the *Insurance Act* or section 5 of the Fault Determination Rules which would preclude a determination of the fault of Cango Inc.. Section 275 (2) speaks of indemnification shall be in accordance with each insurer's insured as determined under the Fault Determination Rules. This does not preclude fault of a non-insured also being considered when determining fault under the "ordinary rules of law" as set out in section 5 of the Fault Determination Rules. Certainly, under loss transfer, the party seeking loss transfer can only recover in accordance with the percentage fault of those vehicles covered by loss transfer, but that does not preclude other persons or companies from being considered when determining the overall fault for the accident.

Counsel for Aviva referred me to the decision of the Ontario Court of Appeal in Jevco Insurance Company vs. York Fire Casualty Company (1996) 27 O.R. (3rd) 483. In that case, a person was injured in a motor vehicle accident while not wearing his seatbelt. The Court of Appeal held that the determination of fault under the Fault Determination Rules "must be intended to refer to the degree of responsibility for the accident itself". I am in agreement with this, and am of course bound by that decision. In our case, depending upon my findings of fact, below, Cango Inc. may bear some degree of responsibility for the accident itself and accordingly I will include their possible fault in my considerations. I would point out that this is also consistent with my decision in Liberty Mutual Insurance Company vs. Zurich Insurance Company of Canada (unreported decision released September 2000). In that case I took into account of the fault of vehicles not covered by loss transfer when allocating the overall fault for the accident.

THE ACCIDENT & FAULT OF THE VARIOUS PARTICIPANTS:

There were five possible persons or companies at fault for this accident. These include: Timothy Wry (the injured party), Barry Norman (the driver of the Cango Transport Inc. fuel truck), Cango Inc. (the owner/operator of the gas bar), Vinay Menon (the driver of the first car that hit Wry), and Jean Jenkins (the driver of the second car to strike Wry). In order to determine their respective fault for the accident, it is necessary to examine the facts of the accident in greater detail.

As noted above, the accident occurred on County Road 46, just north of the 401. There are traffic lights some distance away. County Road 46 at this point has two lanes northbound and two lanes southbound. The gas station is located upon the west side of County Road 46 and was not particularly well lit other than by the lights of the gas bar itself.

Across the highway and slightly to the north was located a gas station and parking lot area. It gave very limited light to the accident area. The layout of the Cango station is such that when the delivery has been completed it is necessary for the fuel truck to back out eastbound across County Road 46 before then turning north or south and travel along the roadway.

On this particular day, Mr. Barry Norman was delivering fuel to the station at roughly 6 a.m. It was still dark at the time and there may have been mist in the air as was suggested by at least one of the witnesses. In any event, after delivering the fuel, Mr. Norman approached the gas bar

attendant, Mr. Timothy Wry and requested that he assist Mr. Norman in backing the truck out onto the roadway. Mr. Norman had delivered fuel for some time and had been at this station many times before. He was a very experienced driver and was used to making the manoeuvre that was required to leave the station.

Timothy Wry, on the other hand, was a seventeen year old at the time of the accident and had only been working at the station for approximately one week. This was his second night shift at the gas bar. His training with regard to assisting fuel trucks to leave the station was essentially non-existent. He had seen another attendant walk out onto the road and direct the fuel truck during the day and has assisted one other attendant on a day shift. He was given no safety gear, such as a fluorescent vest, or a light to use at night. He was given no safety training.

On the evidence, it would appear that Timothy Wry, when requested by the much older and experienced Congo transportation driver requesting help to back up the truck, simply went out into the dark and tried to assist.

It was the evidence of Mr. Norman, which I accept, that he gave no specific instructions to Timothy Wry how he should assist him. Having said that, Mr. Norman was an experienced, professional driver, dealing with an obviously young person. Mr. Norman could not help but notice that he had no safety vest on, that the area was not well lit, and that he had no light.

While the evidence varied somewhat, it would appear that Timothy Wry was wearing primarily, if not exclusively, dark clothing. I find that Timothy went out onto the southbound lanes where

traffic with the intent to stop any oncoming traffic and assist Mr. Norman getting the truck out of the station.

Mr. Norman testified at the hearing. He indicated that after asking Timothy Wry for assistance in getting the truck out, he got into his truck, started it up and put his headlights on. He testified that he put the truck in reverse and may have crept back a foot or so but he could not see Mr. Wry and he therefore got out of the truck and spoke to Timothy Wry. Before doing so, however, he took his flashlight out of his truck and gave it to Mr. Wry. This was not a full sized flashlight but rather a small unit with a very limited beam of light.

At the hearing Mr. Norman testified that he did not know if Timothy Wry had actually gone out onto the roadway in order to assist him, prior to giving him the flashlight. In his statement to the investigating police officer, however, he stated:

I was going to back out the truck out of the gas station lot. They (gas station attendants) do it all the time. He went out on the road and I couldn't see him so I gave him my mini-mag flashlight. He just got out on the road and got hit.

Based on all of the evidence, I find that Mr. Norman knew that Timothy Wry had gone out onto the roadway prior to giving him the flashlight. I further find that he did not warn Timothy Wry not to do so when he gave him the flashlight.

Mr. Norman testified that when he gave Timothy Wry the flashlight so that he could see Timothy giving him directions. I find that Mr. Norman knew that Timothy Wry had been out on the

roadway even before giving him the flashlight and could have reasonably expected that he would be doing so again. Mr. Norman stated that he had not anticipated that Mr. Wry would attempt to stop traffic with a small flashlight. Given that I have found that he already knew that Mr. Wry had been on the roadway once, and he reasonably knew that traffic might well be coming along, I find that Mr. Norman knew, or he reasonably ought to have known, that Mr. Wry would not only go onto the roadway but that he would attempt to stop traffic if necessary.

In any event, when Mr. Norman got back in the truck, he still did not see Timothy Wry and after some time he got out of the truck and found Mr. Wry injured on the roadway.

Timothy Wry testified at the hearing. He stated that he had received no training in assisting trucks to back out of the station and was basically repeating what he had seen another employee do during the daytime. He was approached by Mr. Norman and asked to assist in getting the truck onto the roadway. He had initially gone out onto the roadway but then Mr. Norman got out of the truck and gave him a small flashlight. After receiving the light, he went into the southbound curve lane and managed to stop a pick-up truck. He then moved to the southbound passing lane. He believed that he had given the light to stop traffic and used it for that purpose. He was standing in the southbound passing lane when he was hit by a southbound vehicle driven by Mr. Vinay Menon. Mr. Menon did not testify at the hearing but he did give a statement to the investigating police officer, O.P.P. Officer James Kristy whose statement was read into the record at the hearing. Mr. Menon told officer James Kristy:

I was southbound on 46 County Road outside lane. I was going about 40 to 50 kilometres with a couple of cars ahead. All of a sudden, I saw somebody in the middle of the road. Suddenly he walked into the side of my vehicle. He seemed to be facing east and then stepped back and walked into my car.

I note that the speed limit at this location was 70 kilometres per hour.

After Timothy Wry was struck, three or four people came to his assistance. He had been thrown into the passing lane, northbound. He was there for a brief period of time before being struck by a northbound vehicle driven by Ms. Jean Jenkins. She gave the following statement to officer Kristy:

I was northbound, I had just come off the 401 Highway. I was going about 50 kilometres per hour. I didn't see anything until I hit something on the road. I pulled over and stopped.

Ms. Jenkins also testified at the hearing. She stated:

... I was going, and then I just became aware of - - something black. I couldn't see it. It just looked as if it was like, you know, a garbage bag or something like twisted. And so I couldn't pull right over because I was just aware that there was a car on this side. And then as I went, I veered as much as I could, but I felt something bump the side of my car.

She further testified that she saw no one trying to jump out of the way of her car prior to the collision although after she stopped, she saw four or five people around Timothy Wry.

She further testified that she did slow down before the collision.

Mr. Robert Brenner also testified at the arbitration. He had been getting gas at the station across the road, on the east side of County Road 46, just north of the accident scene. He turned left or south after exiting the gas station. He indicated that it was extremely dark out and there was a mist in the air. He stated:

... it was very dark, and I wouldn't have even realized what had happened had I not seen vehicles sitting on the side of the road and tanker truck. And just as I got to where the young lad was laying on the road, that's when - - I was just about on top of him before I actually saw there was someone lying on the road.

He noted that the tractor-trailer had its lights on but not the four way flashers. Interestingly, he noted that the rear of the tractor-trailer was three to four feet into the curb lane which would indicate that it had initiated its exit prior to this point. He further indicated that when he arrived at the scene, there was a pick-up truck stopped in the southbound curb lane. This would have been the vehicle that Timothy Wry had successfully stopped prior to the accident.

As Mr. Brenner approached the scene of the accident, he noted people standing on the road. By this time, Timothy Wry had already been struck a second time.

While he did not testify at the hearing, Mr. Ron Beer, the driver of the southbound vehicle in the curb lane that Timothy Wry stopped, gave a statement to the investigating police officer, which was filed as an exhibit.

He stated:

I was southbound on Brock Road. I saw a faint figure in the dark so I locked up my brakes not to hit him and put my four ways on. There were cars coming he was looking south when he got hit. He was lying there when he got hit by the northbound car.

Interestingly, Mr. Beer said nothing of seeing a flashlight beam catching his attention prior to the accident. This reinforces my view that the light was wholly inadequate to draw the attention of oncoming vehicles.

A statement to the police by Mr. Sumitra Lagoo, a passenger situated in the front passenger seat of the first car to hit Timothy Wry was also filed at the hearing. Mr. Lagoo stated, in part:

“We didn’t see the person until right when we hit him.”

A statement to the police by a Mr. Peter Durica was also filed at the hearing. He was driving a tractor-trailer in the southbound curb lane on County Road 46. He confirmed that it was dark, there was a bit of fog, and the roads were wet. He noticed what he first thought was a garbage bag in the centre of the northbound passing lanes. He was about thirty metres away when he first noticed the garbage bag. The car immediately ahead of him hit Timothy Wry. Mr. Durica noted that Timothy Wry was wearing dark clothing and visibility was poor, although better on the west side, due to gas station light.

Turning to the negligence, if any, of the various parties, it is clear to me that Timothy Wry must bear considerable responsibility for this accident. While young, and not trained to do the job he performed, it was not reasonable for him to walk out onto a four-lane roadway on a dark, misty night and attempt to stop traffic with a small flashlight. I would assess his negligence at 50 percent.

Mr. Norman, and through him, Cango Transport Inc., also bears some responsibility. He was an experienced driver who while not formally in a position of authority over Timothy Wry, was delivering gas to Timothy's employer. Mr. Norman asked Timothy Wry for assistance as he had previous attendants at that station. It was not surprising that Timothy Wry agreed to assist him. While Mr. Norman was not aware that Timothy Wry was a new and untrained employee, he was aware that Timothy Wry was a very young man. He saw that Mr. Wry was dressed in dark clothing and let him perform the job without a fluorescent vest. I find that he was aware that Timothy Wry had been out on the actual roadway before Mr. Norman gave him the flashlight and he should have realized that Mr. Wry would do so again in his efforts to help Mr. Norman exit from the station. I also note that Mr. Norman gave Mr. Wry a small flashlight that was totally inadequate in the circumstances. I also note that there were other precautions that Mr. Norman could have taken to exit the station, including using his C.B. radio to call other drivers to see if the road was clear.

In light of all of the above, I would assess Mr. Norman's negligence at thirty percent.

Turning to the possible negligence of Cango Inc., the employer of Timothy Wry, there is no doubt that they too bear some responsibility for the accident. Timothy Wry was clearly not trained in the procedures to use in assisting delivery trucks to leave the station. In addition, they did not provide adequate personal safety equipment such as fluorescent vests, lights, etc and I would therefore assess their fault at twenty percent for the accident.

I would assess no fault on Mr. Menon, the driver of the first car that struck Timothy Wry. There is no indication that he was speeding or showing an inadequate lookout. It is not reasonable that he would expect a darkly clothed person to step out onto the roadway on a dark and misty night. While the pick up truck in the curb lane southbound was able to avoid hitting Mr. Wry by locking his brakes, this did not mean that Mr. Menon was negligent by not being able to stop in time. While Timothy Wry did have a small flashlight, it was totally inadequate for the purpose of drawing the attention of oncoming drivers. I do note that the driver of the pick up truck did not even mention the flashlight in his statement to the police. When considering all of the evidence, one is left with the impression that Mr. Menon was faced with a dark object appearing on the roadway on a dark and misty night. For these reasons I assess no fault on him.

The situation with regard to the second vehicle, Ms. Jenkins is somewhat different. By the time she approached the accident scene there were some persons already standing at or near the scene of the accident. There were additional vehicles stopped there. On the other hand, unlike when Mr. Menon struck him, Timothy Wry was no longer standing and did not have the flashlight to warn oncoming drivers. He was lying on the roadway on what was still a dark night. The evidence before me indicates that Ms. Jenkins was travelling below the speed limit. Once again

we have a driver coming upon a dark object on the highway. While there were additional vehicles on the scene and persons standing on the roadway, this is somewhat offset by the fact that Timothy Wry was now lying on the roadway with no flashlight. On all the facts, I find no fault on Ms. Jenkins for this accident.

In light of my findings, Royal must pay to Aviva thirty percent of the accident benefits paid to or on behalf of Timothy Wry ,subject to any claim by Royal that the payments were unreasonable in the circumstances.

In the event that the parties are unable to agree upon the issue of costs, I may be spoken to.

Dated this _____ day of December, 2007.

M. Guy Jones