

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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

**TRADERS GENERAL INSURANCE COMPANY
(AVIVA CANADA INC.)**

Applicant

-and-

ING INSURANCE COMPANY OF CANADA

Respondent

AWARD

Rudolph Lobl, Esq., Q.C. : Counsel for the Applicant

Ms. Louis A. James : Counsel for the Respondent

This Arbitration arises out of a motor vehicle accident which occurred on November 20, 2000 on Highway 400 in the northbound lanes, north of Major MacKenzie Drive in the Town of Vaughan.

A Honda Accord operated by Arline Tindale was proceeding northbound in the most westerly of three northbound lanes of Highway 400. A tractor-trailer unit operated by Sukhwant Singh was also proceeding northbound in the centre of the three northbound lanes prior to the subject accident.

This Arbitration is a Loss Transfer matter. Traders General Insurance Company paid benefits to Arline Tindale under the *Statutory Accident Benefits Schedule*. Traders General seeks to recover the amount paid out in benefits from ING Insurance Company of Canada pursuant to the provisions of s. 275 of the *Insurance Act*.

Pursuant to s. 275 of the *Insurance Act*, Traders General, the insurer responsible for the payment of no-fault benefits, is entitled to indemnification in relation to such benefits paid by Traders General, from ING Insurance Company of Canada, since ING insured a tractor-trailer unit, which was a “heavy commercial vehicle”.

There is no issue between the parties that the aforesaid tractor-trailer unit was a “heavy commercial vehicle”.

The indemnification referred to above, according to s. 275(2) of the *Insurance Act* “shall be made according to the respective degree of fault of each insurer’s insured as determined under the Fault Determination Rules”.

The Fault Determination Rules are set out in Ontario Regulation 668, made under the *Insurance Act*.

Section 5(1) of the Fault Determination Rules sets out as follows:

“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.”

The first issue that I must determine is whether or not the accident in question is described in any of the Fault Determination Rules.

IS THE ACCIDENT DESCRIBED IN ANY OF THE FAULT DETERMINATION

RULES

In essence, it was the evidence of Arline Tindale, which will be further described below, that when she was proceeding in a northerly direction in the most westerly northbound lane of Highway 400 that day, that the tractor-trailer unit also proceeding northbound in the centre lane of Highway 400 drifted into her lane which caused her take evasive action and move to the shoulder on her left. There was ice on the shoulder and her vehicle skidded and struck the guardrail and then bounced off and struck the right rear wheel of the tractor-trailer unit.

It was the evidence of the operator of the tractor-trailer unit that his vehicle was in the centre of the three northbound lanes at all times and that he did not drift into the lane to his left.

It is submitted on behalf of Traders General, by Mr. Lobl, that Section 10 of the Fault Determination Rules applies to this case.

Section 10(1) provides as follows:

“This section applies when automobile “A” collides with automobile “B”, and both automobiles are travelling in the same direction and in adjacent lanes”.

Section 10(2) sets out as follows:

“If neither automobile “A” nor automobile “B” changes lanes, and both automobiles are on or over the centre line when the incident (a “sideswipe”) occurs, the driver of each automobile is 50 percent at fault for the incident.”

Section 10(3) sets out as follows:

“If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs, cannot be determined, the driver of each automobile is 50 percent at fault for the incident.”

Section 10(4) provides as follows:

“If the incident occurs when automobile “B” is changing lanes, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 percent at fault for the incident.”

It was the submission of Ms. James, on behalf of ING, that Section 10 did not apply to this case. Simply, she argued that the tractor-trailer was not changing lanes at any time and there was no sideswipe.

It was also argued on behalf of ING that the facts in this accident case are different than those addressed in Section 10 of the Fault Determination Rules.

Simply, in this case, it is alleged by Ms. Tindale that the tractor-trailer drifted into her lane. That caused her to take evasive action and led to her loss of control and her ultimate collision with the rear wheel of the tractor-trailer unit.

The facts as argued are not the facts covered by Section 10(2) because this was not a “sideswipe” case. Section 10(3) is similarly not applicable to this case since, again, this is not a “sideswipe”.

Since neither driver alleges a lane change, section 10(4) is also not applicable.

In the result, I find that section 10 of the Fault Determination Rules does not apply to this Arbitration.

Since the accident in question is not described in any of the Fault Determination Rules, I must proceed to determine the degree of fault of each insured person in accordance with the ordinary Rules of Law.

EVIDENCE OF ARLINE TINDALE

Ms. Tindale, as set out above, was proceeding in a northerly direction on Highway 400 north of Major MacKenzie Drive at the time of the subject accident. She was operating a Honda Accord and was proceeding to a nanny job in King City.

It was the evidence of Ms. Tindale that it was cold on the day in question and that there were some flurries falling, but that the roadway was not snow-covered. She stated that the accident occurred shortly after 7:00 a.m. on November 20, 2000.

Ms. Tindale stated that the traffic was light that day.

Ms. Tindale noticed a tractor-trailer unit in the lane to her right. She stated that she noticed that it was drifting into her lane. She said that her only alternative was to move to the shoulder on her left. It turned out there was ice on the shoulder and when her wheel hit that area, her vehicle lost control and struck the guardrail and then bounced off and hit the rear wheel of the tractor-trailer unit.

Ms. Tindale stated that the tractor-trailer unit came over and she had nowhere else to go.

She stated that after the impact, her vehicle spun around a couple of times and her vehicle came to rest in the ditch on the east side of the roadway, with the vehicle facing in a southerly direction.

The police investigated and Ms. Tindale spoke with the police officer.

Under cross-examination, Ms. Tindale admitted that she gave a statement to the police, she signed another detailed statement for her insurer and that there was also a brief description of the accident on her Application for Accident Benefits. In addition, she swore a Statutory Declaration in which she described how the accident incident occurred.

Ms. Tindale was confronted under cross-examination with a statement in the Statutory Declaration that the police did not attend at the scene. That same Statutory Declaration also set out that she was single with no dependants, when the truth was that she did have dependants.

Notwithstanding those contradictions in her Statutory Declaration, I do not believe that those errors had any relevance to her testimony about how the subject accident occurred.

Ms. Tindale was also examined under oath on April 11, 2007.

When examined under oath, there is no doubt that her evidence was that the rear wheels of the tractor-trailer unit struck the front passenger side of her vehicle and that after that, she struck the guardrail.

That evidence was contrary to all of her earlier statements.

In her initial statement to the police, she stated:

“I was in far left lane and the truck was coming up, his wheels were drifting a bit to my lane so I didn’t want to hit him so I went further to the left to the soft shoulder, then it was icy, I hit into the guardrail, then it skidded and slipped into the truck, then it spun and I ended up in the ditch”.

In the more lengthy statement taken from her, she repeated a description of the incident similar to what she had stated to the police officer. The same version of

the accident was set out in her Application for Accident Benefits and in her Statutory Declaration. It was argued on behalf of ING that her evidence ought not to be accepted since her evidence when examined under oath was so far different from her earlier statements.

Mr. Lobl argued that the examination under oath of Arline Tindale was conducted more than six years after the accident. He submitted that her earlier statements were all consistent as to how the accident occurred. I examined her statement to the police, her lengthy statement to an insurance person, her description of the accident in her Application for Accident Benefits and even her description of how the accident occurred in her Statutory Declaration dated May 23, 2001. There was consistency with her description as to how the accident occurred in all of those statements. Notwithstanding that, it is still troubling that she changed her version of what happened when she was examined under oath as part of this Arbitration process. Notwithstanding that her examination under oath was conducted more than six years after the accident, it is difficult to understand why her version of what happened changed so much.

In the final analysis, I have Arline Tindale stating that the tractor-trailer unit drifted into her lane and caused her to take evasive action which ultimately led to the impact with the guardrail and the ultimate impact between her vehicle and the rear wheels on the driver's side of the tractor-trailer unit.

EVIDENCE OF SUKHWANT SINGH

Sukhwant Singh did not give oral evidence at the Arbitration Hearing. Instead, a transcript of his examination under oath was filed as part of the evidence. Mr. Singh denied any lane change and denied that his vehicle drifted into the lane to his left.

He claims that because of snow on the roadway, water was being sprayed upwards off the tractor-trailer unit and that Ms. Tindale must have seen that.

CONCLUSIONS

I must determine whether the tractor-trailer unit drifted into the lane to its left or not.

I have already determined that Section 10 of the Fault Determination Rules does not apply to this case. Section 10(2) is an interesting section because it sets out that in a sideswipe situation, with neither automobile "A" nor automobile "A" changing lanes, the driver of each automobile is 50 percent at fault for the incident, i.e. the sideswipe.

Section 4 of the *Negligence Act* sets out as follows:

"If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent."

On the facts of this case, I have one driver claiming that the other vehicle drifted into her lane and I have the other driver denying that that took place. Mindful of Section 10(2) of the Fault Determination Rules, although it does not apply to this case, and taking into consideration Section 4 of the *Negligence Act*, I find that it is not practicable to determine the respective degree of fault or negligence as between the parties, and I find that each of the parties is equally at fault or negligent. I find each of the insureds to be 50 percent at fault for the subject accident.

The parties have already agreed as to the quantum of benefits in issue, i.e. **\$20,609.90**. Accordingly, I find that ING Insurance Company of Canada must indemnify Traders General Insurance Company for 50 percent of that sum, plus appropriate interest.

If the parties are unable to agree as to the amount of interest owing, I will make that determination.

I will shortly call upon counsel to make Submissions as to Costs.

DATED this 18th day of June, 2007.

Stephen M. Malach, Q.C., Arbitrator