

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990,
c. I.8, Section 275 and Regulation 664/90

AND IN THE MATTER OF the *Arbitration Act*, 1991,
S.O. 1991, c.17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

AWARD

Counsel:

Economical Mutual Insurance Company (Applicant): Daniel Strigberger

Intact Insurance Company (Respondent): Kirk McPherson

Introduction:

This matter comes before me pursuant to the *Arbitrations Act*, 1991, to arbitrate a dispute as between insurers with respect to a claim for loss transfer pursuant to Section 275 of the *Insurance Act* and Regulation 664/90. Specifically this claim is with respect to a motor vehicle accident that occurred on November 1, 2010, as a result of which a claim for Statutory Accident Benefits was advanced by Brenda Camplin to Economical Mutual Insurance Company (hereinafter called "Economical").

Economical claims that Intact Insurance Company (hereinafter called "Intact") is responsible for indemnifying Economical pursuant to the loss transfer provisions of the *Insurance Act*. The parties selected me as their Arbitrator on consent and the matter proceeded to a single day hearing on March 4, 2015.

Issue:

There are 3 issues identified in the Arbitration Agreement dated March 4, 2015. However at the arbitration counsel agreed that only the first issue would proceed. That issue is:

What is the respective degree of fault of each insurers' insured, as determined under the fault determination Rules?

Result:

I have concluded that Rule 10 (5) applies to the facts of this case and accordingly Intact's insured is 75% at fault for the incident and Economical's insured is 25% at fault for the incident.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated March 4, 2015

Exhibit 2: Economical's Arbitration Brief tabs 1 through 4

Exhibit 3: The CV of Craig Wilkinson

Exhibit 4: Book of Documents of Intact

Exhibit 5: Bigelow Accident Reconstruction letter January 26, 2015

Exhibit 6: Bigelow Accident Reconstruction letter January 27, 2015

Exhibit 7: Property damage documents for the transport truck

Exhibit 8: Donna Armitage interview/statement of Brenda Camplin March 22, 2011

Position of the Parties:

1. On November 1, 2010 Brenda Camplin was driving a 2003 Chrysler Intrepid (the Economical vehicle) in a southbound direction on County Road 109 in the town of Minto approaching the intersection of Beehive Lane (to the right/west) and 6th Line to the left (east side of County Road 109).

2. Murray Weishar was also proceeding southbound on County Road 109. Mr. Weishar was driving the 2005 Volvo 670 Series transport truck insured by Intact. There was a 53 foot trailer attached. There is no issue that the truck qualifies as a "heavy commercial vehicle" with respect to loss transfer.
3. In or around the intersection of County Road 109 and Beehive an incident occurred between these 2 vehicles. As a result of the accident Ms. Camplin sustained serious injuries and applied to Economical for Statutory Accident Benefits.
4. Economical provided Intact with a loss transfer notice on July 21, 2011 indicating their position that fault determination Rule 10 (5) applied and claiming that Mr. Weishar was 75% responsible for the motor vehicle accident. Economical has also advanced in this arbitration hearing that alternatively they rely on Rule 6 (3) which places 100% liability on Mr. Weishar.
5. Intact takes the position that Rule 19 (b) is applicable or in the alternative pursuant to Section 5 of the fault chart that the ordinary Rules of law are applicable.
6. The relevant fault chart Rules are set out below:
 - a) Rule 10 (1): This section applies when automobile "A" collides with automobile "B" and both automobiles are travelling in the same direction and in adjacent lanes.
 - b) Rule 10 (5): If the incident occurs when automobile "A" is making a left at an intersection and automobile "B" is overtaking automobile "A" to pass it, the driver of automobile "A" is 25% at fault and the driver of automobile "B" is 75% at fault for the incident.
 - c) Rule 6 (1): This section applies with automobile "A" is struck from the rear by automobile "B" and both automobiles are travelling in the same direction and in the same lane.
 - d) Rule 6 (2): If automobile "A" is stopped or is in forward motion the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the incident.
 - e) Rule 19 (b): The driver of automobile "A" is 100% at fault and the driver of the automobile is not at fault for an incident that occurs (b) when automobile "A" is making a u-turn.

- f) Rule 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.
- g) Rule 5(2): If there is insufficient information concerning an incident to determine the degree of fault of the insured it shall be determined in accordance with the ordinary rules of law unless otherwise required by these Rules.
7. Economical submits that the evidence establishes that Rule 10 (5) is applicable. Economical submits that the task of the Arbitrator in this case is first of all to determine what the incident was. Economical submits that the incident is a broader notion than the exact moment of impact and one must look at the circumstances leading up to the impact. I agree with Economical's submission.
8. Economical submits that Rule 10 (5) is applicable as at the time of the incident both vehicles were travelling in the same direction, the vehicles were in adjacent lanes and the evidence supports that the transport truck was in the process of overtaking the Camplin vehicle in order to pass it.
9. Intact on the other hand presses the position that when the incident occurred that Brenda Camplin was making a u-turn. Intact claims that Ms. Camplin had begun turning right on to Beehive Drive and then abruptly made a left turn/u-turn in front of the transport truck resulting in the collision. In those circumstances Rule 19 (b) would be applicable.
10. Each of the Applicant and Respondent rely upon experts' reports and expert evidence that was given at the arbitration. Ms. Camplin has no recollection of how this accident occurred and did not give evidence at the hearing.

11.

Evidence of Murray Weishar:

Mr. Weishar gave evidence at the arbitration and as well there were a series of documents produced including statements from Mr. Weishar, police notes and a transcript of the examination under oath of Mr. Weishar.

Mr. Weishar was born on August 29, 1976 and is employed by Wakeford Transport. He started there in February of 2010. He had been a truck driver for about 1 and ½ to 2 years as of the time of the accident.

On the day of the accident he was coming from Hanover where he had picked up a load and was heading south to Toronto. This is a normal route for him. There were no problems with the vehicle and Mr. Weishar describes the weather as clear, cool and dry.

About 3 miles prior to this accident occurring Mr. Weishar noticed the Camplin vehicle ahead of him proceeding on County Road 109. He was travelling about 85 to 90 kilometers an hour. The posted speed is 80 kilometers an hour. In the area near the incident County Road 109 has 2 lanes and as one approaches the Beehive Lane there is a small right hand turn lane. As Ms. Camplin approached the intersection Mr. Weishar says that she began to move into the right hand lane and put on her right turn signal. She then entered Beehive Lane and suddenly made a left turn/u-turn in front of him. He was unable to say if she was fully in the intersection or whether she has cleared the southbound lane at this point. There was no other signal other than the right turn signal. When Ms. Camplin came back out of the intersection in front of Mr. Weishar he was forced to brake. He claims the impact occurred in the southbound lane and that post impact his truck angled and ended up partially in the northbound lane. Mr. Weishar says he tried to avoid hitting Ms. Camplin by turning the vehicle to the left. The impact was at the right front corner of his truck with the left front corner of the Camplin vehicle. Mr. Weishar claims that once he realized an accident was going to occur that he had his brake on the whole time, he used his horn and tried to veer to the left. He confirms however that there were no skid marks. Mr. Weishar also admitted that after his transport truck came to a stop that it was not moved again before any of the photographs were taken by the investigating officer. Mr. Weishar was adamant in his evidence in chief and cross examination that the impact with the Camplin vehicle occurred in the southbound lane.

While I found Mr. Weishar a reasonable witness there were a number of inconsistencies with his evidence and the physical evidence as shown through the photographs and property damage documents.

Evidence of Craig Wilkinson:

Craig Wilkinson was called by Economical as an expert witness in accident reconstruction.

Mr. Wilkinson has a Bachelor of Applied Science, Engineering Physics which he secured in 1999. He has been the Senior Engineer of MEA Forensic Engineers (with whom he is presently employed) since 1999. His CV shows extensive experience in publications, lectures and presentations. In addition he has been involved in conducting technical investigations for motor vehicle collision reconstruction since 1999. I found Mr. Wilkinson to be an excellent witness.

The essence of Mr. Wilkinson's evidence is that when one looks at the damage to the vehicles and the photographs of where the vehicles ended up post impact (particularly the location of the transport truck) that the only conclusion that one could draw in terms of accident reconstruction was that the tractor trailer had started moving into the northbound lane in order to pass the Camplin vehicle before the Camplin vehicle began to make a left turn.

In the area where this incident occurred both experts agreed that there was one northbound lane and one southbound lane but as one approached Beehive Lane a smaller than normal right hand lane opened up. The southbound centre line is solid in the area of the accident but the northbound centre line is broken. Beehive Lane is oriented east/west and is marked as a no exit to the west of County Road 109. The intersection of County Road 109 and Beehive Lane is controlled by a 2 way stop with traffic travelling along County Road 109 having the right of way.

Mr. Wilkinson's reconstruction of this accident concluded that Mr. Weishar was following the Camplin vehicle in the same lane for some time period. Camplin then put on her right signal and may have moved partially into the right turn lane but then made a sweeping left turn in front of Mr. Weishar. However Mr. Wilkinson's evidence was that it was unlikely that Ms. Camplin would have fully left the southbound lane before she attempted to make the left hand turn.

Mr. Wilkinson believes that Mr. Weishar started moving from the southbound lanes left into the northbound lanes before Camplin made her left turn. Presumably under the belief that with the right turn signal on that Ms. Camplin was going to be moving into the right lane and he intended to pass her. Mr. Wilkinson concluded that Mr. Weishar had completed the lane change maneuver to overtake the Camplin vehicle before the impact occurred. Mr. Wilkinson's evidence was that when the impact occurred Mr. Weishar was already in the northbound lane.

Mr. Wilkinson acknowledged that he had not inspected the scene of the accident before completing his first report but did so later and it did not result in any changes in his conclusion. He was not able to physically examine either of the cars involved in this accident and therefore his expert opinion was based on photographs taken of the scene by the attending officers as well as photographs of the vehicle together with the other evidence that was filed as exhibits at this arbitration hearing.

The key points from a scientific perspective to Mr. Wilkinson's evidence were as follows:

1. The photographs taken at the scene show that the Weishar vehicle, post impact, while on a slight angle is more or less fully in the northbound lane. This is consistent with a move into the left hand lane prior to the impact in contemplation of passing the Camplin vehicle and is not consistent with Mr. Weishar's evidence that he remained in the southbound lane and that the impact occurred in the southbound lane.
2. The position of the truck almost entirely in the northbound lane and the fact that it was more or less straight in that lane is inconsistent with Mr. Weishar's evidence that the move to the northbound lane was as a result of swerving to avoid an impact. If that had occurred then there would have been a lag between the transport truck and the trailer and that lag would have been evident when the vehicle came to rest. The fact that the trailer and tractor are more or less aligned suggests that the vehicle at the time of impact was closer to travelling straight down

the road. This supports Mr. Wilkinson's theory that the tractor trailer was almost entirely in the northbound lane at the time of impact.

3. There was no physical evidence of any efforts on the part of Mr. Weishar to stop and avoid the collision as he alleges. There was no evidence of any skid marks or tire marks. As the road was dry if Mr. Weishar's evidence were to be accepted one would have expected that sort of physical evidence.
4. Based on his review of the damage to the Camplin vehicle Mr. Wilkinson concluded that that damage was more consistent with there being an angle of between 50 to 70 degrees between the vehicle centre lines at the time of impact which is more consistent with the Wilkinson reconstruction than the Intact version.
5. If you accept Mr. Weishar's theory that the impact occurred in the southbound right turn lane then based on the physical location of the Weishar truck and the impact damage there would have been no reason for Mr. Weishar to have moved into the northbound lane as there would have been an unobstructed southbound lane ahead of him. Therefore the Camplin vehicle must have been partially in the southbound lane when Mr. Weishar started to change lanes.
6. Based on the location of the truck, the damage to the vehicles and the location of the Camplin vehicle (25 meters south of the centre line of Beehive facing in a north east direction) it was not possible for the Weishar truck to have been in the southbound lane at the time of impact.
7. Mr. Wilkinson's evidence was that he had conducted various simulations in order to assist in coming to his conclusions.
8. On cross examination Mr. Wilkinson had the theories of Bigelow Reconstruction (Mr. Wang) put to him. I found Mr. Wilkinson's response to the Bigelow expert report to be reasoned, scientifically based and supported by the evidence.

Evidence of Edwin Wang:

Mr. Edwin Wang was called by Intact as a professional engineer to provide expert evidence with respect to the conclusions of Bigelow Accident Reconstruction. Mr. Wang got his Masters of Applied Science Mechanical Engineering from the University of Toronto in 2011 having previously secured his Bachelor of Applied Science and Engineering also from the University of Toronto in 2009. Mr. Wang has been employed by Bigelow Reconstruction since September of 2011. Mr. Bigelow who is a joint author of the report was not called as a witness but his CV indicates that he has been employed with Bigelow since 2007, has previous employment with other reconstruction companies prior to that and completed his Bachelor of Science in Engineering in Michigan in 1994.

Although the reports of Bigelow were very helpful I found Mr. Wang's evidence extremely difficult to follow.

Having carefully reviewed the reports and Mr. Wang's evidence both in chief and cross the main areas in which he takes issue with the MEA Forensic/Wilkinson report appear to be as follows:

1. Bigelow does not accept that the photographic evidence and the property damage documentation support the lane change was made by the transport truck prior to Camplin starting the left turn.
2. They state that the angle of impact between the 2 vehicles was not 50 to 70% but is 80 to 90% based on the front fender lateral crush and that that damage is therefore more consistent with a partial or full u-turn by the Camplin vehicle.
3. The photographs of the tractor trailer do not support that it is parallel to the centre line. Rather it is on an angle (albeit it a slight angle) which is consistent with Mr. Weishar's evidence.
4. Bigelow/Wang raised a number of issues with respect to the methodology that MEA/Wilkinson used. I did not find their arguments with respect to MEA compelling.

Bigelow's position is inconsistent with Mr. Weishar's evidence. Mr. Weishar's evidence is that the impact occurred in the southbound lane. He stated that in his EUO and repeated it at least 2 or 3 times during the examination in chief and cross examination. Both experts concluded that the tractor trailer was at least partially if not fully in the northbound lane at the time of impact. That finding alone is key to determining which Rule applies with respect to the fault chart. Based on the facts scenario presented it makes no sense for Mr. Weishar to have been moving into the northbound lane unless he intended to try to pass the Camplin vehicle.

There is also some disagreement between Wang and Wilkinson as to when Ms. Camplin initiated her left turn. Was she in the southbound lane? Partially in the right turn lane? Was she already in the intersection? I prefer the evidence of Mr. Wilkinson and his analysis in concluding that Ms. Camplin was at least partially, if not fully, in the southbound lane when she initiated her left turn. There is no evidence available to me as to why Ms. Camplin made this left turn. It appears that she resided on Beehive Lane and therefore there is some considerable question as to why she would be making a left hand turn. I do not believe it is helpful to try to guess as to why Ms. Camplin made the left turn. I am satisfied that from the evidence it appears that having moved to the right to some degree from the southbound lane with a right hand turn signal she then for whatever reason executed an aggressive left turn without signaling. I am also aware of the fact that Ms. Camplin was charged pursuant to Section 142 (1) of the *Highway Traffic Act* for failing to properly signal her turn and Mr. Weishar was not charged. However those are facts that are not relevant for my consideration under the fault chart.

Bigelow concludes that the Camplin vehicle was either fully in the southbound right turn lane or was further west onto Beehive Lane when she initiated her right turn and further that Mr. Weishar therefore initiated a lane change and/or a left steering angle as an evasive response to the sudden path intrusion hazard presented by Camplin. The basis for this conclusion was a model used by Bigelow with respect to lane changes. However the model that was used was one for vehicles without trailers in order to determine lane change timing I find this model was not applicable to the Weishar vehicle which was pulling a loaded trailer. I have carefully reviewed Craig Wilkinson's rebuttal report of September 24, 2014 with respect to the Bigelow criticism and I found Mr. Wilkinson's analysis compelling and I accept his expert evidence as set out in his 2 reports and his oral evidence.

Conclusions:

I therefore conclude that the incident occurred as follows:

1. Mr. Weishar was following the Camplin vehicle for some 2 or 3 miles prior to the incident occurring.
2. Ms. Camplin began to initiate a right turn movement towards the right turn lane and initiated her right turn signal.
3. Mr. Weishar on seeing the apparent movement of Ms. Camplin to move to the right and the initiation of her right turn signal began to move into the northbound lane of County Road 109.
4. Ms. Camplin for some unknown reason while either partially in the southbound lane and the right turn lane and/or fully back in the southbound lane without initiating a left turn signal made a left turn. That movement to the left likely started about 2.2 to 2.9 seconds prior to impact.
5. By the time Ms. Camplin made her left turn the Weishar truck was already partially, if not fully, in the northbound lane. This move to change lanes had occurred at least 4 to 4.2 seconds prior to impact.
6. Mr. Weishar was unable to avoid the collision and an impact occurred with the right front of the Weishar truck striking the left side of the Camplin vehicle near the front axle. There was a secondary impact between the left back corner of the Camplin Intrepid and the Weishar truck's right step. At the time of the impact there was an angle of somewhere between 50 to 70 degrees between the vehicle centre lines.
7. The impact likely occurred either fully or partially in the northbound lane.
8. The tractor trailer came to rest 22 meters south of the centre line of Beehive Lane facing south almost entirely in the northbound lane on a slight angle.

9. The Camplin Intrepid came to rest 25 meters south of the centre line of Beehive Lane facing in a northeast direction.
10. This incident occurred when the Weishar vehicle and the Camplin vehicle were both travelling in the same direction and in adjacent lanes and the Weishar vehicle tried to pass the Camplin vehicle that was turning left at the intersection.

Therefore Weishar is found to be 75% at fault and Camplin 25% at fault based purely on a fault chart analysis.

In reaching my conclusion I have reviewed the case law provided by counsel. I have noted the following principles:

1. That Section 275 of the *Insurance Act* and its supporting Regulations is to provide a quick and easy method of reimbursing a first party insurer for payment of no fault benefits from a second party insurer whose insured was fully or partially at fault for the accident. Any determination of fault from criminal charges or through tort litigation is irrelevant. The fault is to be determined strictly in accordance with the fault determination Rules.

Jevco Insurance Company v Canadian General Insurance Company (1993) 14 O.R. (3d) 545 ON CA at page 5

2. The purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion favouring expedition and economy over finite exactitude.

Jevco Insurance Company v York Fire & Casualty [1996] O.J. 646 ON CA

3. The fault chart as set out in Regulation 668 of the *Insurance Act* sets out a series of general types of accident situations to facilitate indemnification without the necessity of allocating actual fault. The Rules allocate fault according to the type of a particular accident in a manner that in most cases would probably, but not necessarily, correspond with actual fault.

Jevco Insurance Company v Halifax [1994] O.J. 3024 (Gen. Div) paragraph 8

4. Considering the statutory background it is the task of the arbitrator to first determine the facts: mainly to determine what was the "incident" and second to determine if that incident was described in any of the Rules. The Arbitrator must then determine if the Rule "applies with respect to the insured". If the incident as found is described in any of the Rules then the Arbitrator is to apply that Rule or Rules even though it may appear arbitrary. If the incident is not described in any of

the Rules then the Arbitrator can determine the degree of fault in accordance with the ordinary Rule of Law.

ING Insurance Company of Canada v Farmers Mutual Insurance Company (Lindsay)
2007 CanLII 20107 (ON SC) paragraph 33

Order:


I find that Rule 10 (5) is applicable to the incident in this case and accordingly Economical Mutual Insurance Company's insured is deemed 25% at fault for this accident and Intact Insurance Company's insured is deemed 75% at fault for this accident for the purposes of indemnification pursuant to Section 275 of the *Insurance Act*.

Costs:

The Arbitration Agreement provides that the expenses of the Arbitrator and of the arbitration shall be apportioned as determined the Arbitrator taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in litigation before the courts. As Economical was entirely successful in having its position with respect to liability on the fault chart accepted I conclude that Intact is responsible for paying the cost of the arbitration and the expenses of the arbitration as incurred by Economical.

If counsel are unable to reach an agreement with respect to costs within the next 60 days we can schedule a further prehearing to set up a date for cost submissions. I also ask counsel to advise whether a prehearing needs to be scheduled to proceed with the other 2 issues set out in the Arbitration Agreement relating to quantum.

Dated this 20th day of May, 2015 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP