CITATION: Unifund Assurance Company v. ACE INA Insurance Company, 2017 ONSC 3677
COURT FILE NO.: CV-16-555856
DATE: 20170620

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Unifund Assurance Company	)	Derek Greenside, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
ACE INA Insurance Company and The Personal Insurance Group	)	Jason Frost, for the Respondent ACE INA
	)	
	)	Shelley Khan for the Respondent The
Respondents	)	Personal Insurance Group
	)	
	)	
	)	
	)	
	)	**HEARD:** April 13, 2017

REASONS FOR DECISION

CAROLE J. BROWN, J.

[1] The appellant, Unifund Assurance Company ("Unifund"), seeks judicial review with respect to reasonableness of the arbitration award of Arbitrator Shari L. Novick dated June 3, 2016, which ordered the Application for Arbitration brought by The Personal Insurance Company ("The Personal") to be dismissed against ACE INA Insurance ("ACE") but succeed against Unifund, and ordered Unifund to reimburse The Personal for the benefits it had paid to date and to assume responsibility for Mr. Andrada's accident benefits claim.

[2] It is the position of Unifund that the Arbitrator erred in law, or in mixed fact and law, concluding that the "transmission of force" doctrine applied with the result that the Unifund vehicle became the vehicle which struck the claimant and that there was insufficient evidence in the submitted Agreed Statement of Fact to conclude that the collision between the ACE vehicle and the claimant would not have occurred but for the actions of the Unifund insured driver.

The Facts

[3] An Agreed Statement of Fact was in evidence on this appeal, which had been before Arbitrator Novick. The following facts are taken therefrom. The claimant, Enrique Andrada, was struck as a pedestrian on March 7, 2014 at approximately 8:25 AM while he was walking on the southeast corner of Pharmacy Avenue and Steeles Avenue in Scarborough, Ontario. The vehicle insured by ACE was proceeding eastbound on Steeles Avenue. It collided with the Unifund vehicle which was travelling westbound on Steeles Avenue, attempting to turn left onto Pharmacy Avenue. The vehicle insured by The Personal was stopped behind the pedestrian crosswalk facing northbound on Pharmacy Avenue. As a result of the impact of the ACE and Unifund vehicles, each was propelled in a different direction following impact. The ACE vehicle proceeded in an east southeast direction toward the claimant and struck the claimant. The Unifund vehicle proceeded in a south east south direction and struck The Personal vehicle. Neither the Unifund-insured vehicle nor The Personal-insured vehicle made contact with the pedestrian.

[4] Based on section 268, the claimant made claim for Statutory Accident Benefits (SABs) against The Personal, which was continuing to pay him at the time of the arbitration. The Application was commenced to determine which of the three insured vehicles was in higher priority under section 268(2)(2) of the *Insurance Act* and should cover the claim.

The Arbitrator's Decision

[5] The Arbitrator had before her the following: the Arbitration Agreement, the Joint Book of Documents, and Agreed Statement of Fact, a signed statement from the driver of the vehicle insured by The Personal who had witnessed the accident while he was stopped behind the crosswalk going northbound on Pharmacy at Steeles, and written submissions from all counsel.

[6] The Arbitrator, in a lengthy decision, determined that the vehicle insured by The Personal was not involved in the incident from which the entitlement to statutory benefits arose and that the claimant was not an "insured" as defined in the legislation. The Arbitrator further found, pursuant to section 268(2)(2)(ii) of the *Insurance Act*, that the claimant had recourse for his SABs against the insurer of the automobile that "struck" him and, in analyzing and applying the jurisprudence adopting the concept of "transmission of force", found that the proper insurer was Unifund, which she found was the source of the transmission of force.

[7] She reviewed the history of the "transmission of force" doctrine developed in various cases through the 1970s, as set forth in the Arbitration Award of Arbitrator Samis in *Co-operators v Royal Insurance* (issued August 29, 1996), in which Arbitrator Samis stated that "as of 1979, the law in Ontario is clear that a person is "struck by" a motor vehicle when that vehicle provides the transmitting force for any injury to occur, even when the actual "contact" is with another vehicle."

[8] In determining which insurer between Unifund and ACE was in highest priority and should be found to be the automobile which "struck" the claimant pursuant to section 268(2)(2)(ii) of the *Insurance Act*, Arbitrator Novick applied the reasoning in the transmission of force concept and found that the Unifund-insured vehicle was the "striking vehicle" for purposes of the *Act*. She held as follows:

> While the ACE vehicle was the one that came into contact with Mr. Andrada, it was propelled in his direction by virtue of its collision with the Unifund-insured vehicle. If the driver of the Unifund vehicle had not attempted to make a left turn into the intersection, the ACE vehicle would not have come into contact with Mr. Andrada. Following the case law cited, and applying the "transmission of force" concept, I conclude that the claimant has recourse against the insurer of the automobile that "struck" him pursuant to section 268(2)(2)(ii) of the *Act*, and that the insurer is Unifund".

The Standard of Review

[9] Pursuant to the Arbitration Agreement, section 12, the parties expressly reserved the right of appeal of any interim or final award of the Arbitrator on issues of law or mixed fact and law.

[10] An appeal to the Superior Court from an insurance arbitrator regarding a priority dispute will engage questions of mixed fact and law and must be reviewed in the administrative law framework established by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: *Intact Insurance Company v Allstate Insurance Co. of Canada*, 2016) ONCA 609. When reviewing a decision for reasonableness, a court must consider the reasons proffered and the substantive outcomes in light of the legal and factual context in which the decision was rendered: *Re Carrik*, 2015 ONCA 866, 128 O.R. (3d) 209. An arbitrator's decision should be given deference.

[11] A decision may be considered unreasonable where the decision-maker fails to carry out the proper analysis or where the decision is inconsistent with underlying legal principles and where the outcome ignores or cannot be supported by evidence: *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108 .

[12] The parties are in agreement that this appeal raises issues of law or mixed fact and law and that the reasonableness standard applies.

The Issues on Appeal

[13] The issue of the involvement of The Personal in the incident and whether the claimant is an insured under the policy issued by The Personal was not in issue on this appeal.

[14] The only issue was whether the Arbitrator's decision that Unifund was in highest priority and the party considered to have "struck" the claimant through the application of the concept of transmission of force was reasonable based on the factual matrix and the jurisprudence.

[15] It is the position of the appellant that the Arbitrator's decision is unreasonable for two reasons:

> 1. She erred in law or in mixed fact and law in finding that the transmission of force principle applied with the result that the Unifund vehicle became the vehicle that struck the claimant;
>
> 2. There was insufficient evidence provided in the Agreed Statement of Fact for the Arbitrator to conclude that the collision between the ACE vehicle and the claimant would not have occurred except for the action of the Unifund driver.

[16] It is the position of the respondent, ACE, that the Arbitrator's decision was reasonable, that there was sufficient evidence before the Arbitrator to reach the findings of fact and decision that she did, particularly based on the Agreed Statement of Fact and the Motor Vehicle Accident Reports, and that the Arbitrator's acceptance of the evidence and the weight she placed on it are not open for review.

The Law

[17] The concept of "transmission of force" was introduced in Ontario jurisprudence in the case of *Re Strum and Cooperators Insurance Association* (1973) 42 D.L.R. (3d) 52. In that case, a pedestrian was struck by a pole which had been hit by a motor vehicle. The issue was whether the individual had been "struck by" the vehicle for purposes of claiming under the insurance policy for injuries sustained. Although the vehicle did not directly strike the pedestrian, Osler J found as follows:

> The force of the impact was transmitted directly to the person of the claimant by an object which was and which remained for the critical period in contact with the automobile. The force was thereby transmitted directly from the automobile to the deceased. This, in my view, amounted to a striking within the meaning of the policy.

[18] In *Re MacGillivray* [1975] I. L. R. [I-695], a pedestrian was standing between two parked vehicles, one of which was struck by a third vehicle which pinned the pedestrian between the two stationary vehicles. In applying the transmission of force principle, the court found that the insured of the third vehicle which had struck the parked vehicle had provided the "transmitting force" and was thereby obligated to pay the benefits pursuant to the policy of insurance.

[19] In the case of *Ezard v Warwick*, 1979 CarswellOnt 732, the Court of Appeal again had occasion to consider the transmission of force in the case of a vehicle that had been stopped on the roadway, which was rear-ended by another vehicle and pushed into a 90° angle to the roadway. As the occupant of the stationary vehicle exited, the vehicle that had rear-ended his vehicle was struck by another vehicle, pinning the party that had exited the first vehicle between the two first vehicles, as a result of which he sustained injuries. He was held entitled to claim benefits from the third vehicle. The Court of Appeal held that both *Re Strum*, *supra*, and *Re MacGillivray*, *supra*, were correctly decided.

[20] All of those cases dealt with stationary objects being propelled into a pedestrian by a third moving vehicle.

[21] In 1981, the case of *Traham v Royal Insurance Co. of Canada* considered the case of two moving vehicles, which collided causing one to strike a pedestrian, as distinct from the previous cases where a stationary object or vehicle struck a pedestrian, in which case no independent force on the part of the object or vehicle existed. In that case, after reviewing all of the above cases, Grange J held as follows:

> "While the principle of "transmission of force" can just as well apply to a moving vehicle as to a stationary vehicle, I do not think it should be applied to the facts of the case at bar. There was here an independent force in the private vehicle although that force was affected by the collision with the ambulance. True, it would never have hit the plaintiff but for the collision, but it was a moving force nevertheless. I would therefore find that it was the private motor vehicle that struck the plaintiff within the meaning of the section.
>
> In so holding, I do not think I am deviating from the principles set out by the Court of Appeal. That court specifically said it was not "engaging in the process of finding fault…". In the case at bar, I do not see how the ambulance 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. I may say that between the two vehicles liability is very much an issue".

[22] Subsequently, the transmission of force doctrine has been applied in numerous insurance arbitration awards involving moving vehicles, which were reviewed on this appeal by counsel for both Unifund and ACE. In the case of *Co-Operators General Insurance Company v Royal Insurance Company*, Arbitrator Samis was asked to determine a dispute as regards a pedestrian standing next to a stationary vehicle which was struck by a moving vehicle, as a result of which the pedestrian claimant was injured. The vehicle that struck the claimant, which had been stationary, was found not to be the "striking" vehicle based on the transmission of force theory.

[23] In *Progressive Casualty Insurance and Coseco Insurance Company* (October 26, 1996), Arbitrator Silver dealt with a priority situation involving moving vehicles, one of which was deflected and struck a pedestrian. In discussing the cases reviewed above, Arbitrator Silver stated as follows:

> The principal uniting these three decisions is that in interpreting the word "struck" one looks to from where the transmission of force originated. This is not the same thing as assigning fault. Accordingly, the question to ask is who transmitted the force or who was the principal force which created the damage in the accident? This question requires a case-by-case analysis.

[24] He further stated:

> The more recent case of *Traham v Royal Insurance*… is consistent with this principle in the employment of a case-by-case approach. It decided in a situation where one moving automobile struck a second moving vehicle, causing the latter to strike a pedestrian, that the pedestrian was "struck by" the second moving motor vehicle which exerted its own independent force. Grange J. distinguished the case from that where the second motor vehicle is stationary and exercises no independent force, in which event the first motor vehicle would have been the transmitter of the force of the accident and the insurer for that vehicle would have been liable.

[25] Arbitrator Silver went on to quote from *Traham*, the paragraphs quoted above at paragraph 21. He thereafter went on to state:

> Grange J. contemplates that utilization of the transmission of force principle would normally render the first vehicle liable, but in this case, the second moving vehicle had its own independent force sufficient for it to be the vehicle which "struck" the pedestrian and therefore liable for the accident. Nonetheless, Grange J indicates that the transmission of force principle can still apply to a moving vehicle, and he in effect does apply it in finding that there was sufficient independent force in the moving private vehicle to render it the principal transmitter of the force which led to the damage in this accident. It is interesting that at some level, Grange J sensed his application of the transmission of force principle because he did not think that he was deviating from the principles set out by the Court of Appeal in *Ezard v Warwick*, which clearly enunciated the principle of "transmission of force".
>
> I feel that I am bound by a case-by-case approach in the transmission of force principle, particularly when the earlier sections at issue in its evolution so closely resemble section 268 (and the issue of insurer liability) at issue in this arbitration."

[26] In that case, Arbitrator Silver found that the vehicle which transmitted force in a perpendicular fashion was the principal force involved in the collision.

Analysis and Conclusions

[27] I have considered the principles as regards standard of review as set forth in *Dunsmuir v New Brunswick*, *supra*; *Re Carrick*, *supra*; and *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108, all cited by the parties. I have further considered all of the evidence before me, that was also before the Arbitrator, the Arbitrator's decision, the applicable jurisprudence and the submissions of counsel.

[28] In the present case, based on all of the evidence before Arbitrator Novick, as well as the jurisprudence regarding transmission of force, which I have reviewed, I find that Arbitrator

Novick erred in her application of the legal principle of transmission of force. Indeed, 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.

[29] I would set aside the decision of Arbitrator Novick as regards the priorities of the two vehicles, Unifund and ACE and find that ACE is in the highest priority and responsible for payment of the claimant's SABs. The Application for Arbitration brought by The Personal against Unifund is dismissed. ACE is to reimburse The Personal for the accident benefits and expenses it has paid out to date and is to assume responsibility for the claimant's accident benefits claim.

Carole J. Brown, J.

Released: June 20, 2017

CITATION: Unifund Assurance Company v. ACE INA Insurance Company, 2017 ONSC 3677
COURT FILE NO.: CV-16-555856
DATE: 20170620

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Unifund Assurance Company

Applicant

– and –

ACE INA Insurance Company and The Personal Insurance Group

Respondents

REASONS FOR DECISION

Carole J. Brown, J.

Released: June 20, 2017