IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ARBITRATIONS ACT, 1991

B E T W E E N:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

ROYAL INSURANCE COMPANY

Respondent

AWARD

This matter was heard before me at Toronto on August 29, 1996. Ms Philippa Samworth appeared on behalf of the applicant, Co-Operators General Insurance Company. Mr. A. Wayne Edwards appeared on behalf of the respondent, Royal Insurance Company.

This matter was submitted to me for arbitration of a dispute between two insurance companies. The parties have submitted this matter pursuant to the Arbitrations Act. I have been asked to determine which insurer is obliged to pay certain insurance benefits.

Accident Circumstances

The incident underlying the dispute between the two insurers is a motor vehicle accident which occurred on December 12, 1994. Javed Mann was injured in that motor vehicle accident. He is entitled to statutory accident benefits from one of the two insurers.

It is the accident circumstances which create the dispute between the insurers. At the moment of injury, Javed Mann was not the occupant of a motor vehicle. He apparently was standing on the roadway between two motor vehicles. He was proximate to a vehicle insured by Co-Operators (the Co-Operators vehicle). The Co-Operators vehicle was impacted by a vehicle insured by Royal (the Royal vehicle). As a result of the impact, the Co-Operators vehicle came into contact with Mann and he was injured. The parties' Agreed Statement of Facts is annexed to this Award.

The Statutory Scheme

Entitlement to statutory accident benefits is clear in the post 1990 automobile insurance environment. Some circumstances give rise to confusion about the correct insurer to pay benefits and this is one of those circumstances.

Section 268 of the Insurance Act[1] has addressed many of the issues about obligations to pay benefits. The provisions clearly establish a regime where most accident victims will be obliged to collect statutory accident benefits from their own insurers regardless of the involvement of the insured vehicle in the incident giving rise to an accident. In this sense, no fault compensation has become a personal, portable, coverage which follows the individuals and not the vehicles. As it turns out, Mr. Mann does not have his own policy of insurance. He is not the spouse of someone who has a policy of insurance and he is not a dependant of a person who has a policy of insurance. Hence, Mr. Mann's access to statutory accident benefits does not arise from his contractual relationship with an insurer but arises from the accident circumstances. Section 268 (2) of the Insurance Act addresses these issues. In paragraph 2 of that section, the statute deals with access to benefits for people who are not occupants of an automobile at the time of the accident. Those provisions are as follows:

> "2. In respect of non-occupants,
>
> i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to no-fault benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund."

Is Mann Described in 268 (2) 2. i.?

It is to be noted that Mr. Mann is firstly obliged to claim benefits from a policy where he is an "insured". Under the definitions imposed on all automobile insurers, the *Statutory Accident Benefits Schedule* defines "insured person" to include all individuals involved in accidents with the described automobile. Thus Mr. Mann is an "insured person" both under the Co-Operators policy and under the Royal policy. Does this then mean he must claim from those policies in accordance with clause 2. i. as an "insured"? In my view the ranking rules which are set out in the Insurance Act would make no sense if the term "insured" in clause i. was held to have the same meaning as the term "insured person" as set out in the definitions of the *Statutory Accident Benefits Schedule*. The legislation clearly contemplates in clauses ii. and iii. categories of persons who are not "insured" but who are within the broader definition of "insured person" under the *Statutory Accident Benefits Schedule*. Thus, I conclude that Mr. Mann is not a person described in section 268 (2) 2. i.

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[1] Insurance Act, R.S.O. 1990, c. I, s. 268 (2)

Application of Section 268 (2) 2. ii.

Since Mr. Mann has no recourse pursuant to that provision, we look to 268 (2) 2. ii. The essential feature of this provision is to say that Mr. Mann must claim benefits from the insurer of the automobile by which he was struck.

This leads to the essential dispute as to whether Mr. Mann was "struck" by a vehicle insured by Co-Operators or "struck" by a vehicle insured by Royal. The facts are not in question. Actual physical contact was with the vehicle insured by Co-Operators. The transmission of force which resulted in the contact emanated from the vehicle insured by Royal.

The Intercompany Agreement

Case law, which precedes the current version of section 268 of the Insurance Act, has interpreted the concept of being "struck" by a vehicle with insurance. Importantly, an agreement was entered into by a number of insurance companies that deals with "standardization of claims forms and practices and guidelines for the settlement of claims." This agreement sponsored by the Insurance Bureau of Canada deals with many important issues that are pertinent to the efficient handling of insurance claims. Both Royal Insurance Company and Co-Operators Insurance Company are signatories to this agreement. The agreement applies in all Provinces of Canada.

Rule 11A of the agreement deals with priority of payment of accident benefits for pedestrians. Clause 1. of Rule 11A says that a pedestrian shall claim accident benefits from the insurer of the motor vehicle that struck the pedestrian, and only secondarily claim accident benefits from his own personal insurer. This is contrary to the basic premise of having no fault coverage which follows individuals, introduced in 1990. Clause 5. of Rule 11A provides as follows:

> "In this rule, any reference to a pedestrian struck by a motor vehicle means a person not the occupant of a motor vehicle or of railway rolling stock that runs of rails, with whom the motor vehicle has come in physical contact."

If applicable to the case at hand, Rule 11A of this agreement would be very important.

However, the parties have concluded that Rule 11A has no application to accidents after June 22, 1990 when the current version of section 268 of the Insurance Act came into force. I agree with the parties in this regard. It is clear that the interpretation rule set out in the agreement has application to the previous no fault insurance scheme with a different system of priorities and it does not appear that the agreement has been updated to reflect subsequent changes in the Province of Ontario. The agreement appears to go back to 1984 or earlier.

I therefore conclude that Rule 11A of the Intercompany Claims Agreement respecting standardization of claims forms and practices and guidelines for the settlement of claims does not apply to determine priority of coverage in this case.

Meaning of "Struck"

If Co-Operators is the insurer of the automobile that "struck" Mann, then they must pay the benefits. If Royal is the insurer of the automobile that "struck" Mann, then Royal must pay the benefits.

There is pre 1990 case law on this issue but it refers to a different section of the Insurance Act. Under the former section 236 of the Insurance Act a provision was found which said, in part:

> "Where a person entitled to benefits...
>
> (b) is a pedestrian and is struck by a motor vehicle, the insurer of the owner of the motor vehicle shall, in the first instance, be liable for the payment of the benefits provided by the insurance.

This provision is no longer applicable but there is case law in Ontario dealing with the meaning of "struck by a motor vehicle." That case law is germane to the problem at hand.

In the 1973 case of Strum and Co-Operators[2] Justice Osler dealt with a case where a car collided with a street sign, the street sign hit an individual who was injured and died. Justice Osler had to determine whether or not the individual had been "struck by" the motor vehicle. He held as follows:

> "The words 'struck by the described automobile', if taken to mean only that there must be direct physical contact between the automobile and the person of the claimant, could make the possibility of recovery depend upon minute differences in circumstances, entirely unpredictable, such as, for example, whether the claimant had been able to interpose between himself and the automobile some article he was carrying such as a suitcase, a box of tools or unusually thick clothing. In such cases, the force of the impact is transmitted directly to the person of the injured party, regardless of the fact that he has not been 'struck by' the automobile in that there is no direct physical contact between himself and it.
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> Had this been a case of an object dislodged by the automobile or flung from the automobile striking the claimant, the matter might have presented more difficulty. Here, however, without dislodging the street sign, the automobile caused it to bend in such a way as to strike the claimant and injure her in such a manner as to bring about her death. Here 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."

Justice Osler thereby introduced the concept of the transmittal of force in order to determine whether or not a person had been struck by a vehicle.

In 1975, Justice O'Driscoll dealt with the case of Re MacGillivray[3]. In this case the

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[2]Re Strum and Co-Operators Insurance Association, (1973) 42 D.L.R. (3d), 52 (Ontario High Court).

[3]Re MacGillivray [1975] I.L.R. [1-695] (Ontario Supreme Court).

In 1975, Justice O'Driscoll dealt with the case of Re MacGillivray[3]. In this case the MacGillivray vehicle struck the Marks vehicle which then struck the Gibson vehicle. An individual was injured when struck by the Marks vehicle.

Justice O'Driscoll therefore had to distinguish between two involved automobiles to determine which vehicle the victim was "struck by". Justice O'Driscoll referred favourably to the reason of Justice Osler in the Strum case and held as follows:

> "In my view, on the facts before me, it makes no difference whether the "object" is a stalled motor vehicle rather than a hydro pole and I say this even though the stalled vehicle may still be a "motor vehicle" for the purposes of the Criminal Code of Canada."

Justice O'Driscoll concluded that the insurer of the vehicle which had provided the transmitting force was obliged to pay the benefits.

Subsequently, the Court of Appeal dealt with a similar issue in the case of Ezard v. Warwick[4]. That case involved a multiple vehicle collision wherein a pedestrian was struck by a vehicle which in turn had been the subject of an impact with a vehicle. The court was asked to determine the applicable insurance.

The matter came on before Mr. Justice Hughes who expressed doubt about the reasoning of Justice O'Driscoll in the MacGillivray case. He, therefore, made a reference to the Court of Appeal which dealt with the matter in 1979. The court concluded that the no fault insurance benefits should be paid by the insurer of the vehicle which provided the force for the impact. Justice Jessup, on behalf of the court, expressed the opinion that both Strum and Co-Operators and Re MacGillivray were correctly decided.

Thus, as of 1979, the law in Ontario was clear that a person is "struck by" a motor vehicle when that vehicle provides the transmitting force for an injury to occur, even when the actual "contact" is with another vehicle.

On behalf of Royal, it has been submitted that a rule that determines obligation to pay statutory accident benefits based on "contact" leads to more certainty than a rule that applies to transmittal of force. I believe that this is correct. A "contact" based rule would lessen some disputes, but it would not eliminate all disputes between insurers in these cases. I also note that recent regulations provide specific rules to ensure payment to injured victims while insurers settle entitlement disputes between themselves. Thus any uncertainty is not visited upon the accident victim.

While a "contact" rule might be very sensible, it has not been adopted by the legislation which changed the automobile system in 1990 and thereafter. In fact, the drafters have continued the use of the language employing the term "struck" and they must be presumed to know the interpretation that has been placed upon that term by the Ontario Courts.

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[3] Re MacGillivray [1975] I.L.R. [1-695] (Ontario Supreme Court).

[4] Ezard v. Warwick et al. (1979), 104 D.L.R. (3d) 315, (Ontario Court of Appeal).

Royal's counsel argued that the case law is not applicable to the current environment. It is correctly pointed out that the 1994 automobile insurance environment is quite different than the automobile insurance environment of the 1970's. Counsel for Co-Operators reviewed the comparable legislative provisions on this issue and discuss the differences. The differences between the systems are very significant. In the 1970's compensation was based largely on tort awards. This was supplemented by a modest amount of no fault benefits. In 1994, compensation is based upon no fault benefits with a possibility of a modest tort award. Nonetheless, the same challenge exists for policy makers. They must describe the obligations of insurers with respect to various persons who may be injured in automobile accidents. In the 1970's and in the 1990's, it is necessary to set out rules which indicate which insurers must pay no fault benefits. I do not see any compelling reason why the changes in the compensation system would justify concluding that the existing case law is no longer valid or applicable. Significant as the changes are, the issues about interpreting "struck" continue to be the same. The similarity in the facts of the reported cases to the facts of the case at hand is notable.

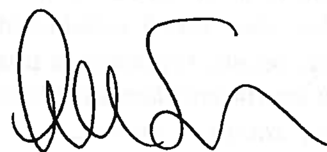
There was some argument that the term "struck" necessarily implies contact but I do not think that that is correct. Dictionary definitions support the view of the case law that "striking" may or may not imply direct contact. Transmittal of force is consistently required.

Conclusion

Based on the Ontario case law and the statutory provisions and the absence of any contractual agreement between the parties to the contrary, I conclude that Mann was "struck" by the automobile insured by Royal and, therefore, Royal has the obligation to pay the benefits in question.

As agreed by the parties in their submission to me, the cost of this arbitration will follow the event and, therefore, will be payable by Royal. The parties have advised me that I need not make any further order with respect to the parties' respective rights and obligations based on this decision.

Dated at Toronto this 29th day of August, 1996.



Lee Samis

Attachment:
Agreed Statement of Facts