

The Nature of the Force Matters: A Priority Dispute and the Transmission of Force

Alon Barda
September 2017

The conceptual interplay of physics and law was on display in the recent appeal case of *Unifund Assurance Company v. ACE INA Insurance Company* (2017 ONSC 3677). The facts in this priority dispute were somewhat convoluted and the decision hinged on an interpretation of the “transmission of force” doctrine.

The claimant was a pedestrian walking on the southeast corner of Pharmacy Avenue and Steeles Avenue. The vehicle insured by ACE was travelling eastbound on Steeles Avenue when it collided with the Unifund vehicle, which was travelling westbound on Steeles Avenue and attempting to make a left turn onto Pharmacy Avenue. A vehicle insured by The Personal was stopped northbound on Pharmacy Avenue behind the pedestrian crosswalk.

As a result of the impact, the ACE vehicle was propelled towards and ultimately struck the claimant. The Unifund vehicle was propelled in a different direction and ultimately collided with The Personal vehicle.

The arbitrator first found that The Personal vehicle was not involved in the incident from which the entitlement to SABS arose and that the claimant was not an “insured” under the policy issued by The Personal (the claimant was also not insured under any other policy of automobile insurance at the time of the accident). The Arbitrator then turned to section 268(2)2(ii) of the *Insurance Act*, which states that the claimant next has recourse against the insurer of the automobile that “struck” the claimant.

On the facts, it is apparent that only the ACE vehicle struck the claimant. Nevertheless, the Arbitrator noted the added “twist” with the analysis of the term “struck”. She discussed the evolution of the “transmission of force” concept dating back to the 1970s and agreed with the comments of an earlier arbitration case on the issue, which held that a person is considered “struck by” a vehicle when that vehicle provides the transmitting force for the injury to occur.¹ Most notably, this occurs even when the actual contact is made with another vehicle.

The Arbitrator applied the above reasoning and found that the Unifund vehicle was the “striking vehicle” and, therefore, the priority insurer. She reasoned that, while the ACE vehicle came into contact with the claimant, it was propelled in that direction by the Unifund vehicle and would not have made contact with the claimant if the Unifund vehicle had not engaged in the left turn.

The decision was overturned on appeal as it was found to be unreasonable.

In the appeal decision, Justice Brown canvasses various cases that applied the transmission of force principle and highlights the distinction between cases where stationary objects (including vehicles) are propelled into a pedestrian by a third moving vehicle and those with two moving vehicles colliding, which causes one vehicle to strike the pedestrian (this latter scenario involving independent force on the part of the striking vehicle as opposed to a stationary object simply being propelled).

Justice Brown ultimately found that the arbitrator erred in her application of the legal principle of transmission of force. She held that while the ACE vehicle was diverted or deflected by the Unifund vehicle, it nevertheless “continued under its own propulsion and momentum that had existed prior to the collision, and exerted its own ‘independent force’.”

¹ See: *Co-operators v. Royal Insurance*, Arbitrator Samis, August 29, 1996 (involving the transmission of force between a moving vehicle and a stationary vehicle).

Furthermore, Justice Brown held that 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.”

This is well-reasoned decision that accords with the findings in the various cases cited. Most notably, this case reinforces the importance, when assessing priority pursuant to 268(2) of the *Insurance Act* in accidents with a similar factual matrix to the one in this case, to consider all vehicles involved and to particularly consider whether the vehicle that was propelled into another vehicle exhibited its own propulsion and independent force.

Look to a future newsletter for updated commentary as an Application for leave to the Court of Appeal was filed in July 2017.