

IN THE MATTER OF AN ARBITRATION pursuant to the provisions of
the Arbitration Act, 1991, S. O. 1991, c. 17;

AND IN THE MATTER OF the *Insurance Act*,
R.S.O. 1990, c. 1.8 and s. 268 thereof and Regulation 283/95

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE
(Motor Vehicle Accident Claims Fund)**

Applicant

-and -

**CGU GROUP CANADA LTD.
(Commercial Union Assurance Company of Canada)**

Respondent

AWARD

APPEARANCES:

John Friendly, Esq., on behalf of Her Majesty the Queen

Brian C. Atherton, Esq., on behalf of CGU Group Canada Ltd.

ISSUE:

Is the Motor Vehicle Accident Claims Fund or is CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) responsible to pay Statutory Accident Benefits to Patricia Paterson pursuant to s. 268 (2) of the *Insurance Act*, R.S.O. 1990, c. 1.8, as amended, as a result of injuries sustained in a motor vehicle accident which occurred on January 8, 1998.

RESULT:

CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) is responsible to pay Statutory Accident Benefits to Patricia Paterson pursuant to s. 268 (2) of the *Insurance Act*, R.S.O. 1990, c. 1.8, as amended, arising out of the accident of January 8, 1998.

HEARING:

The hearing was held in the City of Toronto on February 9, 2000 before me, Bruce R. Robinson, Arbitrator.

WITNESSES:

Detective Constable Frank Brittin

Vince DeCecco

Mark Joshua

Patricia Paterson

EXHIBITS:

See Appendix "A".

BACKGROUND:

Mrs. Patricia Paterson alleges that she was struck by a white van as she was crossing Davisville Avenue in the City of Toronto on January 8, 1998. The Motor Vehicle Accident Claims Fund has been paying Statutory Accident Benefits. CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) insured a white GMC van operated by Mark Joshua on the day in question. The Respondent denies that a collision occurred between the white van and Patricia Paterson. The

parties to this proceeding seek a ruling as to the priority issues involved pursuant to s. 268 (2) of the Insurance Act.

LAW:

Section 268 (2) of the *Insurance Act* establishes priority rules for determining liability to pay Statutory Accident Benefits to occupants and non-occupants involved in motor vehicle accidents.

The relevant section reads as follows:

Section 268

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

- 1 . 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 any automobile involved in the incident from which the entitlement to statutory accident 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.

EVIDENCE:

Mrs. Patricia Paterson resides at 33 Davisville Avenue, Apt. 1006 in the City of Toronto. She is now 86 years of age. It was her practice in the afternoons to go for a walk which involved her crossing Davisville Avenue from the south side of the street to the north side, and then proceeding around the block. On January 8", 1998, she came out of her apartment, turned to the west and walked a short distance towards Yonge Street. She saw that the traffic lights at that intersection were red for traffic going east and westbound and she therefore chose to cross the street before getting to the intersection. She looked to her right for traffic coming in a westbound direction and saw what she thought was a car a considerable distance away, possibly at Mt. Pleasant Avenue. It was her impression that she could safely proceed northbound across Davisville Avenue.

She crossed the first two southbound lanes and came to a stop on the dividing yellow line. In looking to her right, she was surprised to see a white van approaching her at a distance of 40 to 50 yards and coming somewhat rapidly. She saw the white van slow down and come to a stop. She made eye contact with the male driver who appeared to have stopped to allow her to cross. She waved her hand in thanks and began to move in a northbound direction. She also saw this driver look up to his left at an apartment building on the south side of the street. She had moved a short distance when she was struck by the white van which threw her "quite a little distance". Mrs. Paterson weighs only 92 pounds. She placed her right hand behind her head and fell on her left side and left hip. Her body came to rest laying in an east-west direction by the north curb of Davisville Avenue in front of the Davisville Public School.

Several people came to her aid. When she looked up the van had gone. The ambulance

arrived within 15 to 20 minutes after the accident and she was transported to Women's College Hospital.

She recalled being assisted by a young woman who placed a coat over her and also by a man who was talking to her.

Mr. Vince DeCecco was an independent witness and a pedestrian on the south side of Davisville Avenue at the time of the accident. He had just finished lunch at a restaurant slightly north of Davisville Avenue on Yonge Street. He was proceeding in an eastbound direction across Davisville Avenue to his vehicle. It was his intention to go back to work and he was not in any particular rush. He placed the time of the accident at approximately 1:15 in the afternoon.

As he was walking eastbound on the south sidewalk of Davisville Avenue, he heard a "moan" and a cry for help. He turned his head to the left and looked in a north direction. He saw a white van moving in a westerly direction. It appeared to be directly opposite him. As the van passed, he saw Mrs. Patricia Paterson laying on the roadway face up. Mr. DeCecco immediately went across the street to offer assistance. Several other people from the nearby school also attended. Mr. DeCecco was the first person to reach Mrs. Paterson. He positioned himself on the roadway to prevent any other vehicles from striking Mrs. Paterson and also comforted her while waiting for the arrival of the ambulance.

As he approached Mrs. Paterson, he saw the white van continue in a westbound direction towards and through the intersection of Davisville Avenue. On the back of the van he clearly read a logo which said "Trimark".

He described the weather on this day as being wet, with snow falling and melting as soon as it hit the ground. He was not wearing a hat nor carrying an umbrella and he had a clear and unrestricted view of the white van. He did not actually see the Trimark van strike Mrs. Paterson, but assumed that it had done so. There was no other white van on the road.

Detective Constable Frank Brittin was called to review the various police reports that were filed in this matter. He presently works with the Metropolitan Toronto Police Force in the Traffic Service Unit. This unit investigates various types of hit and run accidents, including fatal accidents. The first constable on the scene was P.C. Chornoboy. In his initial Motor Vehicle Accident Report, he drew a diagram showing the position of the vehicle and the pedestrian on the roadway at the point of impact, with a short description of the impact, but it did not have any identification of the van. Subsequently, a second Motor Vehicle Accident Report was prepared which named the driver of the vehicle as Mark Joshua and the vehicle itself as being a white GMC van owned by Trimark Maintenance.

Detective Brittin indicated that Constable Chornoboy had initially investigated the accident and had taken a statement from Mr. Joshua. Due to the circumstances of the accident, a "fail to remain" report was prepared. The information contained on this report was forwarded to Detective Brittin for his comments. Constable Chornoboy and Detective Frank Malone had interviewed Mr. Joshua with regard to the accident and obtained information that he was in the area when the accident occurred. The field notes of Constable Chornoboy indicated as follows:

This suspect Mark Joshua was interviewed by myself and Detective Frank Malone, 53 Div CIB on Jan. 9 and 10, 1998. During this time the defendant did not admit striking the pedestrian and did not admit ever seeing the pedestrian in front of him while he was driving.

He does admit he was in the area working, because he does maintenance for Greenwin Rental Buildings on Davisville av. around other near by buildings.

My opinion along with Sgt. Frank Malone opinion there is no independent witness that saw the van strike the pedestrian and after interviewing the suspect we are not satisfied he was the vehicle that struck this pedestrian and if he did we do not believe he was aware that he came in contact with this pedestrian in view of statements he made to us.

This report is sent to you for your final disposition."

Detective Constable Brittin followed up on the written statement obtained by Constable Chornoboy and had difficulty with the language and the terminology used by Mr. Joshua in his statement. In his expert experience, he felt that the statement was an attempt to divert attention away from the questions that were being asked. He therefore pursued further investigation of this accident and contacted Mr. Joshua by telephone.

He asked Mr. Joshua to attend for a polygraph test to clear his name and arranged various dates for this to take place. Unfortunately, Mr. Joshua was unable to attend on those dates. When new dates were set, these also were not available. As a result, Mr. Joshua never did attend for a polygraph test. At this point, Detective Brittin felt there was no reason to pursue the matter and marked the report "driver apprehended, no charges". There was no apparent visible damage to the van found by Constable Chornoboy. Detective Brittin felt that he would be unable to successfully prosecute any charges arising out of this incident due to the onus in such criminal matters.

Mark Joshua is a 34 year old married man who has two children. He operates Trimark Maintenance. At the time of the alleged accident, Mr. Joshua was operating one of the two white vans which bore the logo of his company on both the driver and passenger doors and across the back. The logo read "Trimark". One of his regular clients is Greenwin Properties who owns various apartment buildings on the south side of Davisville Avenue. In fact, he had worked on one of the buildings following a fire some time before January 8th, 1998.

On the day in question, he had attended at 111 Davisville Avenue which is east of Yonge Street and east of 33 Davisville Avenue. He had measured up the front entranceway for glass. On exiting 111 Davisville, he made a left turn and proceeded westbound towards Yonge Street at approximately noon hour. He had some difficulty with the exact time, but felt that he had arrived at his next destination at Caledonia Road somewhere between 1:15 and 1:20 p.m. He had proceeded directly across Davisville Avenue through the intersection of Yonge Street and on to Chaplin Crescent. He states that he never stopped his vehicle as he crossed Davisville Avenue.

His estimated his speed approaching Yonge Street to be 30 to 40 km. per hour; however, he did remove his foot from the gas pedal and slowed down as he passed the apartment building at 33 Davisville Avenue. I find this to be a very important fact in this case. There had been a fire in this building and his company had renewed some glass windows at one corner. He glanced up to his left at the area where the repairs had been made. At this point, his vehicle had slowed down. Mr. Joshua stated that at no time did he see Patricia Paterson nor was he aware of any accident.

While at the Caledonia job site, he received a phone call from Richard Morano, the property manager for Greenwin, and was asked to return to 77 Davisville Avenue. He did so and spoke very briefly with Richard Morano who advised him that a police officer was investigating a pedestrian accident on Davisville Avenue. Mr. Joshua therefore returned to the Greenwin offices on Davisville Avenue.

Police Constable Chornoboy identified himself to Mr. Joshua and questioned him as to what had occurred earlier in the day. An inspection of the van apparently did not disclose any visual damage. Mr. Joshua indicated that his van was extremely dirty and that the windows were also dirty. He described the weather on the day in question as being grey and miserable, and that it has started to snow as he was driving across Davisville Avenue.

Mr. Joshua was subsequently contacted by Constable Chornoboy and asked to attend at the police station to give a formal statement. This was done in the presence of Detective Malone. Mr. Joshua was concerned about the manner in which the questioning was conducted and felt that it appeared to be a "good cop-bad cop" routine which was conducted in a very rude fashion.

Subsequent to giving statements to these officers, he was contacted by Detective Brittin and discussions took place concerning the taking of a lie detector test. For various reasons due to business commitments, Mr. Joshua indicated that he was unable to attend to take the test.

I find that substantially, the evidence of the various witnesses is consistent. Mrs. Paterson, while stopped on the centre yellow line, saw a white van driven by a man

stop to allow her to go by. She saw this driver look up to his left at the apartment building at 33 Davisville Avenue. Mr. DeCecco identifies a white van on the roadway and identifies the name, Trimark, across the back of the van. He saw this van pass by immediately after Mrs. Paterson had cried out for help. Mr. Joshua indicates that he was in the area at the time and, in fact, had slowed down as he approached 33 Davisville Avenue and looked up to the left. Mr. DeCecco did not see any other vehicles near Mrs. Paterson when he went to her.

The issue to be decided by me rests on whether or not Mrs. Paterson was struck and, if so, was she struck by Mr. Joshua's white van. I find that the evidence of all of the witnesses is extremely consistent, and I find that Mr. Joshua's white van did in fact strike Mrs. Paterson knocking her to the ground. The onus in a civil case is not a preponderance of evidence, but a balance of probabilities. I find it is more probable that Mr. Joshua's van struck Mrs. Paterson than any other vehicle. There was no other vehicle in the area that fits that description of Mr. Joshua's white van, or is consistent with the evidence of all the witnesses at the hearing. It is more probable than not that Mr. Joshua's white van struck Mrs. Paterson. There is no other explanation before me. Where there is a divergence in the evidence of the witnesses, I accept the evidence of Mrs. Paterson and Mr. DeCecco over that of Mr. Joshua. The white van was specifically identified by Mr. DeCecco, a totally independent witness. Also I look to the admission by Mr. Joshua that he was in fact driving across Davisville Avenue and looking at 33 Davisville Avenue at the time when the accident occurred. I find that on a balance of probabilities, the Trimark vehicle, insured by CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) struck Mrs. Paterson and, as such, is responsible to pay Statutory Accident Benefits to her pursuant to the priority provisions of s. 268 (2) of the *Insurance Act*.

RESULT:

I find as a fact that Mr. Joshua's white van struck Mrs. Paterson knocking her to the ground. The Applicant has satisfied the onus in this case on a balance of probabilities.

I find that as a result of the Trimark vehicle striking Mrs. Patricia Paterson on January 8, 1998, CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) must pay to Mrs. Paterson the Statutory Accident Benefits pursuant to the provisions of the Insurance Act, R.S.O. 1990, c. 1.8, and in particular, s. 268 (2) thereof.

ORDER:

I hereby order CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) to pay Statutory Accident Benefits to Mrs. Patricia Paterson pursuant to s. 268 (2) of the *Insurance Act*, R.S.O. 1990, c. 1.8 as a result of injuries sustained by her in a motor vehicle accident of January 8", 1998.

COSTS:

I order that CGU Group Canada Ltd. (Commercial Union Assurance Company of Canada) will pay to Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance (Motor Vehicle Accident Claims Fund) their costs of the within Arbitration throughout on a party and party basis.

DATED at Toronto this 3 day of March, 2000.

BRUCE R. ROBINSON, Arbitrator

APPENDIX “AII”

EXHIBITS

1. Completed Motor Vehicle Accident Report - Ministry of Transportation Form
2. Preliminary Motor Vehicle Accident Report - Ministry of Transportation Form
3. Fail to Remain Report (1 page)
4. Field Notes (5 pages)
5. Hit and Run - Work Sheet
6. Typed statement of Mr. DeCecco (copy)
7. Statement of Mark Joshua (copy)
8. Statement of Patricia Paterson (copy)