IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, AND REGULATION 664 AS AMENDED

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

AXA INSURANCE CANADA

Applicant

- and -

LOBLAW COMPANIES LTD.

Respondent

DECISION

COUNSEL

Anastasia Sukalsky
Counsel for the Applicant, AXA Insurance Canada

Dr. Anne Walker
Counsel for the Respondent, Loblaw Companies Ltd.

ISSUE

This Arbitration arises out of a loss transfer request for indemnification received by Loblaw Companies Ltd. (hereinafter referred to as “Loblaw”) from AXA Insurance Canada (hereinafter referred to as “AXA”) in the amount of $109,704.43, for accident benefits paid by AXA to the claimant, Brian Cookman, in respect of a motor vehicle accident which occurred on July 29, 2008.

On July 29, 2008, a Loblaw truck (agreed by the parties to have been a heavy commercial vehicle) struck the rear of the automobile insured by AXA and operated by the claimant, Brian Cookman. This Arbitration is to determine whether this was a simple two vehicle rear-end collision with fault being determined by Section 6(1) and 6(2) of the Fault Determination Rules, or whether there was a third “involved vehicle” taking the situation outside of Section 6(1) and 6(2) of the Fault Determination Rules, thereby giving rise to the application of the ordinary rules of negligence as required by Section 5(1) of the Fault Determination Rules.

PROCEEDINGS

This Arbitration proceeded on the basis of a joint document brief, transcripts of the evidence of involved parties, Books of Authority and written submissions, supplemented by oral submissions made on October 3, 2011.

LAW WITH RESPECT TO LOSS TRANSFER

An historical analysis of the development of the loss transfer regime is helpful in better understanding the issues herein. Although the standard Ontario automobile policy of insurance contained no fault benefits as early as 1972, the significant expansion of available no fault benefits came in 1990. The loss transfer regime (Section 275 of the Insurance Act) was introduced to redress the financial imbalance that was caused by the shifting of what was formally tort liability to no fault liability in the 1990 legislation. In the case of motorcycle insurers, it was accepted that their no fault burden was enhanced in comparison to the general population (due to the severity of injuries suffered by their insureds) and the tort feasor's liability was reduced. Accordingly, those insurers were awarded a right of loss transfer against all other insurers, to the degree of fault of the other insurers insured. It was similarly accepted that heavy commercial vehicles inflicted increased no fault liability on the insurers of other vehicles, so insurers of that class of vehicle were compelled to make loss transfer to the insurers of all other classes of vehicles to the degree of fault of their insured. These concepts are discussed in the following two cases:

> **Jevco Insurance Company v. Wawanesa Mutual Insurance Company (1998), 42 O.R. (3d) 276**
>
> **Royal Insurance Company v. Wawanesa Mutual Insurance Company, (2004), 14 C.C.L.I. (4th) 314**

Relevant portions of the enabling legislation to Ontario's loss transfer regime, namely Section 275 of the Insurance Act, R.S.O. 1990, c.I.8, read as follows:

> ***Indemnification in certain cases***
>
> *275 (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1190, c.I.8, S.275 (1); 1993, c.10, S.275 (1).*
>
> ***Idem***
>
> *275 (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules. R.S.O. 1990, c.I.9, S.275 (2).*

Ontario Regulation 664/90, Section 9, sets out the parameters of the "insured-class condition" and defines the insurers between whom rights of indemnity exist. In essence, it provides that insurers of motorcycles and snowmobiles are entitled to indemnity from the insurer of any other vehicle (except motorcycles or snowmobiles), and that insurers of heavy commercial vehicles are obligated to indemnify any other insurer (except the insurer of a heavy commercial vehicle).

R.R.O. 1990, Regulation 664, Section 9, reads as follows:

INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bic[y]cle as defined in the Highway Traffic Act;

"motorized snow vehicle" means a motorized snow vehicle as defined in the Motorized Snow Vehicles Act";

"off-road vehicle" means an off-road vehicle as defined in the Off-Road Vehicles Act;

"second party insurer" means an insurer required under Section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); 0. Reg. 780/93, ss. 1, 6.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under Section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or *ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); 0. Reg. 780/93, s. 1.*

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under Section 275 of the Act to indemnity a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s 9 (2) 0. Reg. 780/93, s.1.

It is Ontario Regulation 668/90 which establishes the "fault allocation condition", commonly referred to as the Fault Determination Rules. The Fault Determination Rules provide an arbitrary allocation of liability created to regulate issues of liability allocation in the most common of situations. For those situations following outside the common situations, liability would be determined by ordinary principles of law.

INVOLVED FAULT DETERMINATION RULES

This Arbitration involves either Section 6 or Section 5(1) of the Fault Determination Rules. Section 6 reads as follows:

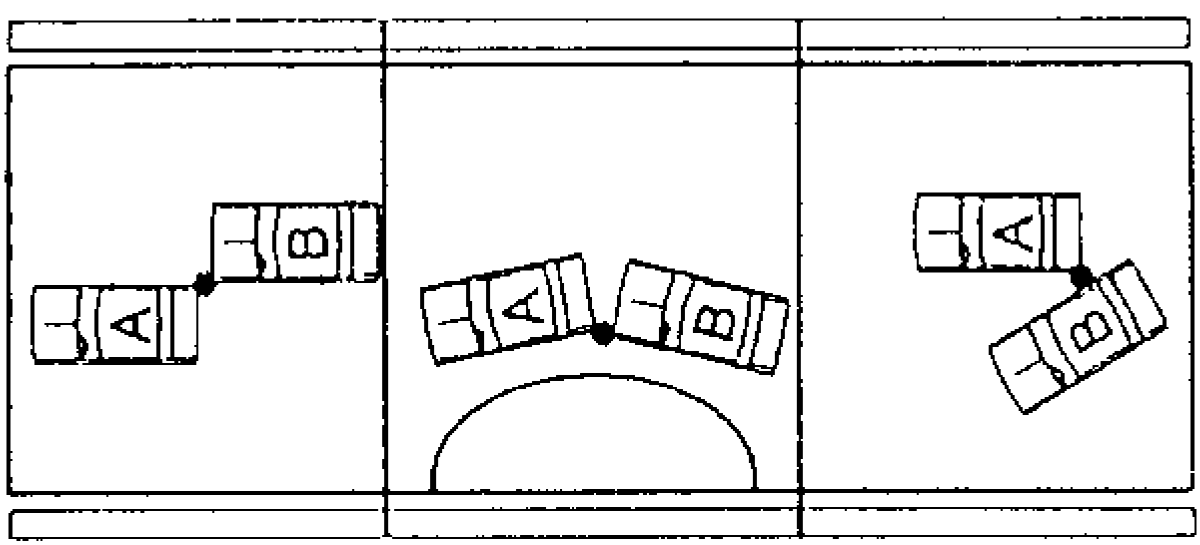
RULES FOR AUTOMOBILES TRAVELLING IN THE SAME DIRECTION AND LANE

6.(1) This section applies when automobile A is struck from the rear by automobile B, and both automobiles are travelling in the same direction and in the same lane.

R.R.O. 1990, Reg. 668, s. 6 (1).

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 per cent at fault for the incident.

Diagram



R.R.O. 1990, Reg. 668, s. 6 (2).

In the event that I were to find that Section 6 of the Fault Determination Rules was inapplicable and by default Section 5(1) of the Fault Determination Rules would apply, it reads as follows:

> 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. R.R.O. 1990, Reg. 668, s. 5 (1).

EVIDENCE AND FACTUAL FINDINGS

In the late afternoon of July 29, 2008, the claimant Brian Cookman was operating a 2006 Pontiac convertible with top down, northbound on Erin Mills Parkway near the intersection of Folkway Drive in Mississauga, Ontario. The Cookman automobile was insured by AXA. Travelling to the rear of the Cookman automobile and in the same lane, was a Loblaw truck operated by Mark Warner. There is some discrepancy in the evidence as to the lane in which these two vehicles were travelling, but I find as a fact that they were travelling in the northbound curb lane of Erin Mills Parkway. Traffic was heavy and could easily be described as stop and go traffic. By coincidence, the daughter of Brian Cookman, Cynthia Richard, was also operating a vehicle, an SUV, in a northbound direction in the middle of the three northbound lanes of Erin Mills Parkway. Cynthia Richard was accompanied by her nine year-old son in the front passenger seat and her four year-old son in the rear passenger seat. The evidence confirms that conversation ensued between the occupants of the Cynthia Richard vehicle and Mr. Cookman. They were chit-chatting back and forth.

Cynthia Richard confirmed that prior to her having conversations with Mr. Cookman, she did not see any gaps in the distance between his vehicle and the vehicles in front of his car. She admitted that she did see gaps between his car and the car in front while they were stopped to have conversation. She said that he was leaving enough room, perhaps half a car length and the amount of room increased when the car in front moved off. Her car would move up, then his car would move up. Cynthia Richard testified that this occurred twice. Cynthia Richard did not notice Mr. Cookman speed up during any point in time prior to the accident, nor slam on his brakes at any point in time. She claims that both her vehicle and the Cookman vehicle were stopped at the time of the accident. Cynthia Richard testified that the impact between Mr. Warner's vehicle and Mr. Cookman's vehicle was a straight-on, rear-end collision.

Brian Cookman does not recall the impact, but did remember blacking out and then awakening to his daughter telling him that he had been rear-ended.

The driver of the truck had a different version of the events which led to this collision. The truck driver stated that the centre lane was moving more slowly than the right hand lane, so that each time the SUV stopped, the Pontiac in front of him would stop and the driver would speak to the occupants of the SUV. Mr. Cookman kept pace with the traffic in the lane beside him, but not with the traffic in his lane. The truck driver claims that Mr. Cookman was smoking and talking on his cellphone. Traffic in both lanes slowed down and stopped at the red light at Folkway. The light turned green. The vehicles ahead of the Pontiac accelerated and drove away faster than the traffic in the middle lane and faster than the Pontiac. The driver of the Pontiac accelerated for a short distance, but then unexpectedly braked in order to let his daughter's SUV catch up to him. By this time, the lane in front of the Cookman Pontiac was clear of traffic by at least seven to ten car lengths. Warner sounded his horn.

The traffic in the middle lane moved forward again and so did the driver of the Pontiac. The driver of the Pontiac then stopped again in order to keep chatting with the occupants of the SUV. The curb lane in front of the Pontiac continued to be clear. Mr. Warner sounded the horn a total of three times. Warner considered Cookman's driving to be erratic and unpredictable. Warner decided to move his truck out of the curb lane and into the centre lane. He checked his mirrors and blind spots before attempting to do so. At the same time, the Pontiac which had previously accelerated, suddenly braked. He was unable to stop the truck in time and struck the rear bumper of the Pontiac.

The Applicant AXA takes the position that this was a straightforward rear-end collision, with Section 6 of the Fault Determination Rules applying, thereby making the Loblaw vehicle 100% at fault for the incident.

The Respondent Loblaw takes the position that this was not a simple two vehicle collision, but involved a third vehicle (the daughter Cynthia Richards' SUV), thereby taking the fact situation out of that contemplated by Section 6 of the Fault Determination Rules with the determination of fault being assessed by the ordinary rules of negligence, as required by Section 5 of the Fault Determination Rules.

The Respondent Loblaw takes the position that Cookman was partially, if not totally, responsible for the collision. The Respondent submits that Cookman did not keep up with the traffic flow in his lane, but instead travelled with the flow of the third vehicle in the middle lane. His concentration was distracted by talking to the occupants of the third vehicle, by talking on his cellphone and by smoking. The Respondent submits that Cookman braked his vehicle suddenly in order to continue his conversations with the occupants of the third vehicle, without consideration of the heavy commercial vehicle travelling behind him. The Respondent submits that as a direct result of the presence of the third vehicle, Cookman's driving was unpredictable and erratic, creating a hazard on the road. The Respondent submits that it was reasonable for Warner to have expected that when the curb lane of traffic moved forward after the stop light, the Cookman vehicle would have moved forward and would have kept up with the traffic flow in the curb lane. In contrast, Cookman abruptly stopped the car in order to keep it alongside his daughter's car in the lane to the left, so that he could continue a social conversation with his daughter and grandchildren. The Repondent submits that it could not be anticipated that this sudden, unreasonable stop would be made when there were many car lengths of open space in front of the Cookman vehicle.There was emergency which required him to stop abruptly. The Respondent submits that Cookman stopped his vehicle unexpectedly and for no legitimate reason. The Respondent submits that on the basis of the aforesaid, Cookman ought to be found fully, or at least partially, responsible for the subject collision.

Before I need consider any split in liability on the basis of the ordinary rules of negligence, I must first determine whether the Cynthia Richard vehicle was an "involved vehicle", so as to take the fact situation outside of Section 6 of the Fault Determination Rules which applies to a two vehicle collision involving automobiles travelling in the same direction and lane.

Arbitrator Samis in <u>Dominion of Canada General Insurance Co.</u> v. <u>Kingsway Insurance Company</u>, August 23, 1999, upheld by Justice Sachs, January 11, 2000, established a criteria for determining whether a vehicle was "involved in the incident". The criteria to be considered is as follows:

(a) Whether there was any contact between the vehicles;

(b) The physical proximity of the vehicles;

(c) The time interval between the relevant actions of the two vehicles;

(d) The possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and

(e) Whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

I have adapted this reasoning in other Arbitration decisions that I have authored and find that the criteria provides an excellent framework to determine whether a vehicle is or is not a vehicle "involved in the incident".

The Respondent submitted that the Richard vehicle fit Arbitrator Samis' criteria of a vehicle "involved in an incident". It was submitted that although there was no contact with the other vehicles, the Richard SUV was in close physical proximity to these vehicles. The Richard and Cookman vehicles maintained their positions, side by side, despite the traffic flow in the Cookman lane, to enable the occupants to engage in conversation. The Loblaw truck was travelling behind the Cookman vehicle. The time intervals between the stopping of the Richard and Cookman vehicles and the collision between the Cookman and Loblaw vehicles were virtually simultaneous. It was submitted by the Respondent that a causal connection was demonstrated between the co-ordinated activities of the Richard and Cookman vehicles and the resulting rear-end collision. It was submitted that had Mr. Cookman not been communicating with the occupants of the Richard vehicle, with his resultant erratic and unpredictable driving and his obstruction to traffic flow, it was submitted that this accident would not have occurred. The Respondent submits that it is foreseeable that the actions of the 3rd party vehicle would directly cause harm or injury to the other two vehicles and their occupants. On this basis, the Respondent submitted that this was not a simple two vehicle, rear-end collision as described by Section 6 of the Fault Determination Rules.

Although the actions of the Cynthia Richard SUV may meet some of the criteria established by Arbitrator Samis in Dominion of Canada General Insurance Co. v. Kingsway Insurance Company (supra), on balance, I find that the criteria would suggest that it was more "not involved" than "involved". Section 6 of the Fault Determination Rules would therefore apply with full fault resting with the rear-ending truck.

I reach this conclusion as I do not believe that criteria (a), (d) and (e) of the aforesaid decision of Arbitrator Samis has been met. There was no contact between the SUV and the Cookman vehicle. Therefore, criteria (a) has not been satisfied. Secondly, there was no causal connection between the actions of the SUV and the actions of the Cookman automobile in the adjacent lane. The actions of the SUV did not force the Cookman automobile to brake suddenly or slow. Cookman did not have to take any evasive action as a result of the actions of the SUV. Cookman merely chose to stay abreast of his daughter's vehicle. I do not find that criteria (d) has been satisfied. Finally, I do not believe that it was foreseeable that the actions of the SUV would cause harm or injury to the vehicle or occupants in the adjacent lane. One can presume that in stop and go traffic, the vehicles would maintain a safe separation distance. One can presume that the operators in the adjacent lane would be keeping a proper lookout. The actions of the SUV did not cause any emergency situation which required panic braking. In my view, it was simply not foreseeable that merely stopping for traffic ahead in stop and go traffic would lead to a collision in the adjacent lane. I do not find that criteria (e) has been satisfied. On the basis of the aforesaid, I find that the SUV was not an "involved vehicle in the incident".

Even if I were to have found otherwise, it would not have necessarily resulted in a different result with respect to fault. I suspect that what happened here is that the operator of the truck simply became frustrated. He was distracted during the process of checking his mirrors to complete his intended lane change and simply did not realize that the Cookman vehicle was slowing to a stop. He was simply following too closely. I am not satisfied that Cookman suddenly braked. Cookman was simply slowing to a stop so as to stay abreast of his daughter's SUV, which was forced to stop because of traffic ahead. I am of the view that the operator of the truck ought to have anticipated this as a pattern had developed even on his own evidence. In my view, this was simply a situation where his frustrations got to him. He was simply following too closely when he began to check his mirrors before completing his intended lane change. By the time he realized that the Cookman vehicle was once again slowing to stay abreast of his daughter, it was too late.

In reaching my decision, I have kept in mind that the purpose of the legislative scheme under Section 275 of the Insurance Act and Regulation 668 was to provide an expedient and summary method of determining fault. The purpose of the legislation is to spread the load amongst the insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude. This has been well established in the caselaw involving loss transfer disputes outlined as follows:

1. The purpose of the legislative scheme under Section 275 of the *Insurance Act* and Regulation 668 is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no fault benefits from the second party insurer whose insured was fully or partially at fault for an accident. The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by Regulation 668.

   Reference: **Jevco Insurance Co. v. York Fire & Casualty Co. [1996] O.J. No. 646 (C.A.)**

   Jevco Insurance Co. v. Canadian General Insurance Co. [1993] O.J. No. 1774

2. The Fault Determination Rules contained in Regulation 668 set out a series of general types of accidents and to facilitate indemnification without the necessity of allocating actual fault, they 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. The thrust of the Fault Determination Rules is based on well established rules of the road to determine the probability of fault.

   Reference: **Jevco Insurance Co. v. York Fire & Casualty Co. [1995] O.J. No. 1352**

3. The Fault Determination Rules are to be liberally construed and applied. Fault determination under the rules is indifferent to factors which would apply under the ordinary rules of tort law.

Reference: Co-operators General Insurance Co. v. Canadian General Ins. Co. [1999] O.J. No. 2578

4. 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.

Reference: Jevco Insurance Co. v. York Fire & Casualty Co. [1996] O.J. No. 646 (C.A.)

5. A common sense approach is to be used when considering the Fault Determination Rules and the diagrams in the regulation.

Reference: Royal & SunAlliance Insurance Co. v. Axa Insurance Co. Arbitrator Bruce Robinson, November 21, 2003

Upon these principles, keeping in mind that the purpose of the legislation is to spread the load amongst the insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude, I cannot help but find that Rule 6(1) and 6(2) of the Fault Determination Rules applicable to the present fact situation.

ORDER

I hereby order that Loblaw indemnify AXA for those payments properly the subject matter of indemnification, together with interest on those amounts.

I hereby order that Loblaw pay to AXA their legal costs on a partial indemnity basis with respect to this loss transfer proceeding.

I hereby that Loblaw pay the Arbitrator's costs.

Should the parties not be able to reach agreement on the amount of the indemnity, interest or costs, then I would be pleased to arrange a further date for submissions with respect to those issues.

DATED at TORONTO this 13th)

day of October, 2011.)

KENNETH J. BIALKOWSKI
Arbitrator