

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER THE INSURANCE ACT;**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

- and -

KINGSWAY INSURANCE COMPANY

AWARD

Pursuant to an Arbitration Agreement, annexed hereto, the parties have agreed to submit a loss transfer dispute to me pursuant to section 275 (4) of the Insurance Act.

This matter was heard initially at Toronto on Monday, January 25, 1999. The hearing was reconvened by telephone conference to deal with a further issue, on July 23, 1999. On each occasion Mr. D'arcy McGoey attended on behalf of The Dominion of Canada General Insurance Company. Vance H. Cooper attended on behalf of Kingsway Insurance Company.

The issues which are presented for determination.

The parties have executed an Arbitration Agreement. The issues arise out of the application of Fault Determination Rules set out in O. Reg. 668, made under the Insurance Act. In the context of an Agreed Statement of Fact, the parties have framed the issues as follows:

- "1. The Dominion and Kingsway agree to submit to arbitration pursuant to Section 275 of the Insurance Act, and pursuant to the Arbitrations Act, 1991, the following issues:

- a) does Rule 7 of Regulation 668, R.R.O. 1990 Reg. apply?
- b) does Rule 17 apply?
- c) does Rule 20 apply?
- d) if the answer to the questions referred to in paragraphs (a), (b) and (c) is that more than one rule applies, does Rule 4 apply?
- e) if the answer to questions in paragraphs (a), (b), (c) and (d) is no, then on consent of counsel, the arbitration hearing herein is adjourned for the purposes of counsel gathering further evidence to submit to the arbitrator herein, who will then adjudicate with respect to the indemnification under Section 275 of the Insurance Act, pursuant to Rule 5.
- f) if the answer to the question to the question in paragraph (b) is that Rule 17 applies in conjunction with another Rule, then the Arbitration hearing will be adjourned for the purposes of counsel gathering further evidence to submit to the arbitrator herein as to whether Rule 17(2) applies.

2. If, as a result of the arbitrator's inquiry under paragraph 1 above, it is found that Kingsway's insured was wholly or partially at fault for this accident then Kingsway will reimburse the Dominion in relation to any amounts paid by the Dominion to, or on account of the Claimant's claim for statutory accident benefits, subject to Kingsway verifying amounts and reasonableness of and entitlement to such payments."

The circumstances of the motor vehicle accident

An Agreed Statement of Facts has been entered into for the purpose of the initial phase of this arbitration. These facts disclose that Rock Rousseau was injured in a motor vehicle accident which occurred on a trip northbound on Highway 11 near the Butler Lake truck stop. Yvon Tremblay was the operator of a heavy commercial vehicle insured by Kingsway. The Tremblay vehicle exited from the truck stop on the east side of Highway 11 via a private driveway and was moving through the northbound lane of Highway 11, in the vicinity of Rousseau's vehicle, while making a left turn intending to proceed southbound on Highway 11. Rousseau, believing the northbound lane to be obstructed by the Tremblay vehicle, applied his brakes and lost control of his vehicle and skidded into a collision with a parked pickup truck

owned by Randy Veinott. Significantly, there was no contact between the Rousseau vehicle and the Tremblay truck.

Tremblay was subsequently charged with failing to stop at the scene of an accident, a hybrid offence under the *Criminal Code*.

Rousseau sustained injuries which entitled him to statutory accident benefits from Dominion of Canada General Insurance Company.

These facts raise a number of significant issues.

The nature of "loss transfer"

The essential dispute between the parties arises out of a claimed entitlement to "loss transfer" in favour of Dominion, at the cost of Kingsway. Loss transfer is a statutory entitlement created by section 275 of the Insurance Act. This entitlement came into existence contemporaneously with the creation of extensive no fault benefits in June of 1990. By virtue of loss transfer, in certain limited circumstances, the insurer of a motorist involved in an accident may be obliged to reimburse the insurer of a person claiming statutory accident benefits. In these very specific circumstances, the accident benefits insurer may obtain some reimbursement.

The reimbursement rules do not apply to all motor vehicle accidents and are not directly akin to subrogation. In fact, the entitlement to reimbursement is vested solely in the insurer and is not a right of the insured person. Similarly, the obligation to make reimbursement is solely

an obligation of the insurer of the motorist involved and is not a liability of the driver or owner of the vehicle involved in the accident. Clearly this scheme is intended to provide redistribution of loss costs between automobile insurers.

Section 275 of the Insurance Act creates this scheme and provides as follows:

(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. [10993, c.10, s.1]

(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.

(3) No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection. [1993, c.10, s.1].

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits. [Repealed and substituted by 1993, c.10, s.31]"

Is the Tremblay automobile "involved" in the incident?

An initial issue to be determined is whether or not section 275 applies to this case. Kingsway insures Tremblay. If Tremblay's vehicle is not an automobile "involved in the incident from which the responsibility to pay the statutory accident benefits arose" then section 275 does not apply. This threshold issue might have been addressed by a court application to appoint an arbitrator. However, subsection 17(1) of the Arbitrations Act, 1991, does allow the arbitrator to determine his or her own jurisdiction and the parties have asked me to deal with this issue. Even if I have jurisdiction to act based only on the agreement of the parties, it is

still necessary for me to resolve this issue of "involvement" to address entitlement. If the Tremblay vehicle is not involved in the incident then statutory scheme outlined in section 275 of the Insurance Act does not apply.

The parties did not submit any authorities that considered the scope of being "involved" in an incident. In my view the term "involved" is broader than "in collision with" or other language which requires contact between vehicles. The absence of contact with the Tremblay vehicle is a relevant consideration, but only one of many. I consider the following criteria to be useful:

- a. Whether there is 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.

Having regard to these factors I am satisfied that the Tremblay automobile was involved in the incident from which the responsibility to pay accident benefits arose. The Tremblay vehicle crossed the path of Rousseau. Rousseau, who apparently would have been entitled to the right of way, took evasive action in response to the movement of the Tremblay vehicle and the collision and injury resulted.

I find that the Tremblay vehicle was involved in the incident.

The Fault Determination Rules applicable to this case.

The statute requires that the indemnification be made “according to the respective degree of fault of each insurer’s insured as determined under the “Fault Determination Rules”. These rules, annexed, are found in Regulation 668 published under the Insurance Act. The parties have identified specific provisions that they wish me to address.

The Fault Determination Rules is a set of rules which, by description and illustration, identifies common car accident situations and assigns responsibility to one or more of the vehicle operators. Importantly, if a specific rule does not apply to a fact situation then fault is to be determined in accordance with the ordinary rules of law. A review of the various rules which attribute degrees of responsibility demonstrates that the Fault Determination Rules approximate the experience of the common law. The degree of fault assigned is similar to what one would expect as an outcome following litigation based on negligence principles. As noted by the Court of Appeal these provisions “provide for an expedient and summary method of reimbursing ... no fault benefits”¹.

The rules are also used to determine payment for physical damage sustained by an insured person’s vehicle in an accident. Section 263 of the Insurance Act provides that an insured is entitled to be reimbursed from his or her own insurer, to the extent that the insured is not at fault as determined by these rules or by a court. Hence one purpose of the rules is to determine disputes between an insured and that person’s insurer. A review of the rules discloses that several of the provisions address circumstances where there is presumed to be

1 Jevco v. Canadian General (1993), 14 O.R. (3d) 545

only one "insured" whose actions are to be evaluated. Section 4 of the Fault Determination Rules has this feature.

When the Fault Determination Rules are used pursuant to section 275 of the Insurance Act, there will be more than one insured person whose activities need to be evaluated. Some of the language in the Fault Determination Rules is awkward when applied to loss transfer cases per section 275.

Whether section 3 of the Fault Determination Rules precludes reference to the role of the Tremblay vehicle?

There is certainly an element of "rough justice" involved in the application of the Fault Determination Rules. In particular section 3 of the Fault Determination Rules requires fault to be assessed without regard to "the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the action of pedestrians". In my view this is consistent with a valid policy goal of creating an expedient and summary method of determining fault.

During argument it was suggested that section 3 requires me to examine the circumstances of the collision between Rousseau and Veinott vehicles without consideration of any involvement of the Tremblay vehicle.

However, I interpret section 3 to exclude reference to ambient conditions and the action of pedestrians. Section 3 does not require me to exclude the actions of the Tremblay vehicle in this case, and to do so would be to ignore one of the main events leading to these injuries.

Section 3 of the Fault Determination Rules does not require me to disregard the involvement of the Tremblay vehicle.

Whether Rule 7 of the Fault Determination Rules applies?

It is submitted that Rule 7(3) of the Fault Determination Rules applies to this case. That Rule, in total, provides:

"7. (1) This section applies when automobile 'A' collides with automobile 'B' while automobile 'B' is entering a road from a parking place, private road or driveway.

(2) If the incident occurs when automobile 'B' is leaving a parking place and automobile 'A' is passing the parking place, the driver of automobile 'A' is not at fault and the driver of automobile 'B' is 100 per cent at fault for the incident.

(3) If the incident occurs when automobile 'B' is entering a road from a private road or a driveway and automobile 'A' is passing the private road or driveway and, if there are no traffic signals or signs, the driver of automobile 'A' is not at fault and the driver of automobile 'B' is 100 per cent at fault for the incident."

It is suggested that 100% of liability rests with the Tremblay vehicle operator as a result of this rule. In my view the restriction of this section to incidents where the vehicles "collide" is an important one. It is quite a different situation when there is no collision. One is inclined to closely examine issues of proper lookout and loss of control. There was no collision with the Tremblay vehicle in this case therefore the rule is inapplicable.

In my view Rule 7 does not apply to this case.

Whether Rule 17 of the Fault Determination Rules applies?

The applicability of Rule 17 is an important issue in this case. That Rule provides:

"17. (1) If automobile 'A' is parked when it is struck by automobile 'B', the driver of automobile 'A' is not at fault and the driver of automobile 'B' is 100 per cent at fault for the incident.

(2) If automobile 'A' is illegally parked, stopped or standing when it is struck by automobile 'B' and if the incident occurs outside a city, town or village, the driver of automobile 'A' is 100 per cent at fault and the driver of automobile 'B' is not at fault for the incident."

This rule deals appropriately with simple collisions which involve an impact between a moving vehicle and a parked vehicle.

A component of the accident under consideration, if viewed in isolation from the other material events, would seem to fit within this rule. I am asked to apply Rule 17 to conclude that the liability for the accident rests either with Veinott or Rousseau, and thus to disregard any role that Tremblay may have played. I note that the same submission could be made if there were a collision between Tremblay and Rousseau prior to a second impact between the Rousseau and Veinott vehicles.

In my view it is not appropriate to characterize this accident as a 2 vehicle accident, as contemplated by Rule 17. Having concluded that the Tremblay vehicle is involved, that involvement can not be ignored by blind application of a Rule that deals with another kind of collision. I noted that the Fault Determination Rules do deal with some multiple vehicle accident cases under Rule 9. However no rule addresses the facts of the case at hand.

Rule 17 does not apply to the facts of this case.

Whether Rule 20 of the Fault Determination Rules applies?

Rule 20 provides as follows:

"20. (1) For the purposes of this Regulation, a driver is considered to be charged with a driving offence,

- (a) if, as a result of the incident, the driver is charged with operating the automobile while his or her ability to operate the automobile was impaired by alcohol or a drug;
 - (b) if, as a result of the incident, the driver is charged with driving while his or her blood alcohol level exceeded the limits permitted by law;
 - (c) if, as a result of the incident, the driver is charged with an indictable offence related to the operation of the automobile;
 - (d) if the driver, as a result of the incident, is asked to provide a breath sample and he or she is charged with failing to provide the sample;
 - (e) if, as a result of the incident, the driver is charged with exceeding the speed limit by sixteen or more kilometres per hour.
- (2) The degree of fault of the insured shall be determined in accordance with the ordinary rules of law, and not in accordance with these rules,
- (a) if the driver of automobile 'A' involved in the incident is charged with a driving offence; and
 - (b) if the driver of automobile 'B' is wholly or partly at fault, as otherwise determined under these rules, for the incident."

Tremblay was charged with failing to stop at the scene of an accident. This is a hybrid offence and might be considered as "indictable" for the purpose of this section of the Fault Determination Rules. I have been referred to the Interpretation Act in this regard.

Failing to remain at the scene of an accident is not a charge that could be made solely "as a result of the incident". The incident is the event that led to loss and injury. To be charged, as he was, something further is required: the leaving of the scene with appropriate intent. In my view this is not a charge "as a result of the incident". The "incident" is a necessary but insufficient condition precedent to the charge. The charge is founded upon independent actions subsequent to the "incident from which the responsibility to pay the statutory accident benefits arose".

Additionally, the behaviour of one of the drivers, after the incident, is not necessarily germane to an evaluation of responsibility in relation to the incident. I am not persuaded that Rule 20 requires me to apply irrelevant circumstances to determine the fault allocation.

Rule 20 does not apply to this case.

Conclusions as to the application of the fault Determination Rules.

The circumstances of this accident are unusual enough that it would be difficult to apply simple fact pattern rules to allocate liability. In view of the inapplicability of the Rules discussed, the Fault Determination Rules call for the determination of fault in accordance with the ordinary rules of law.

As directed by subsection 1 (e) of the arbitration agreement, on consent of counsel, the arbitration hearing herein is adjourned for the purposes of counsel gathering further evidence to submit to the arbitrator herein, who will then adjudicate with respect to the indemnification under Section 275 of the Insurance Act, pursuant to Rule 5.

Dated at Toronto this 23rd day of August, 1999.



Lee Samis.
Arbitrator.

Attachments:

1. Arbitration Agreement
2. Agreed Statement of Facts
3. Fault Determination Rules

