

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,  
s. 275, and Regulation 664 and 668 thereunder;

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA

Respondent

## **AWARD**

### **Counsel Appearing**

Helen D.K. Friedman for the Applicant

Arthur Camporese for the Respondent

### **Introduction**

This matter comes before me as a loss transfer dispute between two Ontario automobile insurers. Economical Mutual Insurance Company, the Applicant, is paying and has paid statutory accident benefits on behalf of Dana P.<sup>1</sup> She was the operator of a vehicle which was involved in a collision with another vehicle operated by Ramdath M.<sup>2</sup> The second vehicle was insured by Royal & Sun Alliance Insurance Company and is agreed to have been a heavy commercial vehicle.

The *Insurance Act*, s. 275, mandates that the dispute between the two insurers for this case shall be determined by arbitration in accordance with the *Arbitration Act* 1991. The parties have entered into an Arbitration Agreement to give effect to this intention and that Arbitration

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<sup>1</sup> In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

<sup>2</sup> *Ibid.*

Agreement was marked Exhibit 1 to these proceedings. In furtherance of the hearing, the parties also entered into an Agreed Statement of Facts which set out the background circumstances that are not in dispute. That Agreed Statement of Facts executed July 18 and 19, 2011, was marked as Exhibit 2 to these proceedings.

In addition to the Agreed Statement of Facts, the parties submitted a Documents Brief. It was agreed by the parties that the documents contained in the Documents Brief could be admitted as part of the record without further proof and that I would be at liberty to accept or reject the facts related in those documents. The Documents Brief was a Joint Documents Brief and was marked as Exhibit 3 to these proceedings. Exhibit 3 contains transcripts from Examinations for Discovery. I gather that there are other proceedings underway with respect to this accident. During the course of those tort proceedings, counsel involved in this loss transfer dispute were also present and participated to some extent.

On July 19, 2011, we had an evidence hearing, at which time the drivers of the two vehicles involved testified and were cross-examined. Subsequent to that evidence, the parties made their submissions with respect to liability and have asked me to make my ruling on the liability issues at this time<sup>3</sup>.

### **The Central Issue**

In this loss transfer dispute, the liability issues come down to the competing versions of an accident told by the two drivers involved in the accident.

### **The Evidence of Dana P.**

Dana P. is the SAB's claimant and she was the operator of a small Pontiac automobile southbound on Highway 427 on the morning of September 28, 2007. She was a relatively new driver and her experience or lack thereof is possibly a factor in understanding how this accident took place.

She had only had her vehicle since May of that year and she had only had a license for a short period of time. She was only 17 years of age at the time of the accident. All of these factors might cause one to tend to question her experience, her behaviour and reactions in the moments leading up to the collision and thereafter. She testified before me and was cross-examined. She had previously been examined under oath in the context of tort proceedings and that transcript was before me.

Dana P. gave her testimony in a straight forward manner. She answered questions put to her directly and she was quite consistent in the way she described the events of the day. Her version of events is entirely exculpatory. It is flatly contradicted by the evidence of the other driver involved, Ramdath M.

Dana P.'s version of events was that she had left Kitchener early in the morning to attend some kind of program at a facility in downtown Toronto near Spadina Avenue. It was an area of Toronto that she had travelled to previously, perhaps 4 or 5 times, based on her evidence. She stated that her intended route of travel for the occasion was to proceed eastbound on Highway 401 to Highway 427 south. At that point she intended to take Highway 427 southbound to its conclusion and then take the Gardiner eastbound into downtown Toronto. She indicated that as

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<sup>3</sup> No reporter was available to take down the evidence of the witnesses, but the parties elected to proceed.

soon as she got onto the southbound 427 she immediately moved into the lane of traffic which was the second lane from the left. She testified that there were 4 lanes for southbound traffic on Highway 427. According to Dana P. she stayed in that same lane, the second lane from the left, for the entirety of her trip southbound on Highway 427 up until and including the point in which the accident took place.

She described the traffic conditions as being moderately heavy with vehicles in the roadway ahead of her and beside her. She recalled overtaking at least one car which was travelling in the southbound lane to her left, which subsequently she saw behind her in her rearview mirror.

She has no recollection of ever having seen the truck that was involved in the collision at any point prior to the accident. She was unable to say when she last checked her rearview mirror prior to the accident. Accordingly, she could give no testimony about the movements of the vehicle insured by RSA leading up to the accident.

However, her testimony was quite unambiguous that she was in the second lane from the left, and that there was traffic in the lane to her left. She adamantly states that she had been in the same lane for almost the entire course of her travel on Highway 427 that morning. In effect she indicated that she was travelling in the same lane from Highway 401 up to the point of the accident, near Dundas Street.

She described how she was faced with a situation of traffic ahead slowing down. She testified about touching her brakes and then accelerating again.

It would surprise no one to understand that morning traffic going into Toronto would be slowing down at the end of Highway 427 where it approaches and merges into the Gardiner Expressway and the Queen Elizabeth Way.

It was at this juncture that Dana P. testifies that she was struck from the back. She heard nothing by way of a warning or the sound of tires on a roadway or anything else which would have given her an indication of an impending collision. She indicates she was about two car lengths back from the car in front of her at that time and her speed was reduced but she was definitely still moving. For reasons that are unclear, she took the step of jerking the steering wheel of her car to move her vehicle to the right. I confess having difficulty understanding this maneuver. Pointedly, she did not attribute this to a need to avoid a collision with a vehicle ahead.

Her vehicle moved to the right, across 2 lanes, she says, and then hit the guardrail on the right side of the southbound roadway. She says that her vehicle bounced off that guardrail and then came back onto the right most lane, and then she maneuvered it back onto the side of the roadway where she waited.

She gave testimony about events that happened subsequent to the collision itself. She told us that she called her father by telephone and he had given her some instructions with respect to having the vehicle towed, etc. Her vehicle was not drivable. Police were called to the scene but they took a very long time to arrive and when they did arrive they simply directed the motorists to go to the collision reporting centre for the purpose of filing a report of the accident. She admits to a conversation with the operator of the other vehicle involved in the accident, but denies making any admission of fault or extending any apology to him. She did attend the same day at the collision reporting centre and completed a report which forms part of Exhibit 3 to these proceedings. Based on her presentation during testimony before me, I found her

evidence to be given in a straight forward and credible manner. I didn't find any reason why I should regard her evidence as patently untruthful or inaccurate. Absent to any other evidence, I would have no difficulty in accepting her version of events.

### **The Evidence of Ramdath M.**

The testimony of Ramdath M. was similarly tested by Examination for Discovery in tort proceedings, and then by examination and cross examination in the hearing before me.

Ramdath M. is a 41 year old man who has earned his living as a truck driver operating various types of vehicles for the last 8 years and at least 4 or 5 years prior to the accident. He described his previous employments, which were several, and the kind of work that he did at each of those employments. I am quite satisfied that his experience at the time of the accident was significantly more than the experience of Dana P. I was impressed by Ramdath M.'s testimony and the confidence with which he described the events of September 28, 2007.

He indicated that he had already delivered a load of cargo to an address in Concord, Ontario, and then had gone from there towards his next stop which was going to be in Hamilton, Ontario.

His route took him across Highway 401 westbound, where he merged onto Highway 427 southbound. In the lead up to the accident, he says that he was in the third lane from the left as far as moving lanes of traffic were concerned. Importantly, he testified that the area which would normally be the far left lane for traffic was closed and marked off by construction pylons. So according to his testimony, the far left lane normally open for traffic used to travel to the Gardiner Expressway was closed, and only one lane remained available for traffic travelling into downtown Toronto. According to Ramdath M., this traffic was moving very slowly. He described the traffic conditions as "dense".

According to Ramdath M.'s version of events, he was proceeding in one of three open lanes of traffic in a southbound direction. He was in the right most lane. He was coming up to the point near Dundas Street where the right lane ended and he was required to move over one lane to his left. He said that he caused his vehicle to "bear right" to move into to the centre lane of traffic. He indicates that this lane was relatively free from traffic and that it was a lane for traffic that would be diverted westbound onto the QEW ahead at the end of the 427.

According to Ramdath M.'s version of events, Dana P.'s vehicle then emerged from the left most lane of traffic, where the traffic was slow, and moved suddenly into the same lane that Ramdath M. was "bearing" into.

There is significant discrepancy about the relative speeds of the vehicles, but it seems clear, according to Ramdath M., that Dana P. was moving very much more slowly than Ramdath M. was when both vehicles found themselves in the same lane. According to Ramdath M., this created something of an emergency when he applied his brakes forcefully, apparently locking up his wheels with blue smoke coming off the tires. There seemed to be some uncertainty in his part about whether or not he even struck the Dana P. vehicle, but he ultimately seemed to acknowledge that this in fact happened. The photographic evidence shows a mark on the rear bumper of Dana P.'s vehicle about 18 inches to the right of the license plate on the back of the bumper.

Importantly, Ramdath M. and Dana P. are consistent on the physical locality and mechanics of the accident at the moment of collision. Both state that Dana P.'s vehicle was squarely in the

same lane of traffic that Ramdath M. was driving in. Both state that Ramdath M.'s vehicle struck Dana P.'s vehicle from behind.

The irreconcilable discrepancy is about the events preceding the accident and leading up to the relative position of vehicles on the roadway.

Under cross-examination, Ramdath M. was challenged about a number of his statements about speed and the description of the accident locale. At no time do I conclude that the witness was being less than forthright in his testimony about any of these items. In fact, I thought he was careful to be clear that with respect to such matters as speed he was making an estimate of what he believed his speed to be. The inconsistencies in his statements on this subject were very minor and entirely to be expected when witnesses are offering estimates of such items.

There was a question raised about the fact that Ramdath M. testified at the arbitration that the very left lane of southbound traffic on Highway 427 was closed to traffic because of construction. It was suggested that this was not mentioned by him at the Examination for Discovery which had taken place in December of 2010. I reviewed the discovery transcript in this regard and do not see this as an inconsistency between Ramdath M.'s evidence on the two occasions. In the discovery testimony in December of 2010, he was not asked about this and didn't give any evidence about that point. He did, however, at the end of the Examination for Discovery, unambiguously state that there was only one lane of traffic proceeding from southbound Highway 427 onto to the Gardiner Expressway into Toronto. Accordingly, one of the 2 lanes normally opened for that route was closed according to his testimony at the discovery. On this point I do not see any inconsistency between what Ramdath M. testified to.

I was struck by Ramdath M.'s candid estimates about the time interval between his lane change and the collision events. He estimated this as being a few seconds and indicated the location of the accident was between 15 and 30 meters from where he changed lanes into that centre lane prior to the accident. He was asked about this several times and was relatively consistent about this short time frame and short distance.

I thought that Ramdath M. was a credible witness. He has significant experience in driving a truck. I thought he was candid in his testimony and not in any way evasive or embellishing any of the accident circumstances.

His testimony with respect to the roadway layout, lane closures, and traffic patterns struck me as somewhat more persuasive than the evidence of Dana P. Ramdath M. seemed to have a better perception of the highway environment. His description of the traffic pattern was more precise and logical in the circumstances. He was able to offer a degree of detail that was absent from Dana P.'s recollection.

### **Analysis**

This is not a case where I can say that I choose to disbelieve one of the witnesses and accept the testimony of the other. I found the witnesses' credibility to be comparable. In some ways, the testimony of Dana P. was a bit too "pat", and one got the sense that it had been somewhat rehearsed. On the other hand, Ramdath M.'s testimony was marked by some vagaries and minor inconsistencies on the margins. To an extent, this is to be expected from a witness to events that take place in split seconds, under stress, years ago. I thought that the frailties of his evidence went slightly beyond this, but these problems emerged only in relation to ancillary

issues such as the date of his attendance at the collision reporting centre and conversation and events following the accident at the accident scene.

In my view, it is most telling to consider the versions of the accident in an attempt to understand “why” this accident happened. It is in this analysis that I find that the two versions are quite distinct.

Dana P.’s version implies that both vehicles were driving southbound in relatively clear traffic that was occasionally slowing and then picking up speed again. She reports a reduction in her speed, but there is no sense of any emergency situation or sudden braking involved. She attests to having touched her brakes slightly prior to the collision but then indicates that she was accelerating again. Clearly this is not the normal circumstances for a rear end collision on a highway. Weather was not a factor. Visibility was not a factor. Dana P.’s versions of events require us to conclude that Ramdath M., for no apparent reason, drove into the back of a vehicle in plain sight ahead. Dana P.’s version also causes us to question the movement of her vehicle following the collision. The vehicle clearly moved sharply towards the right, crossed one or two lanes of traffic, and came up against the right side of the road, perhaps striking the guardrail [Dana P. said she struck the guardrail, but there doesn’t seem to be anything in the way of damage to the vehicle that corroborates any violent collision such that she described, bouncing off the guardrail back into the southbound right hand lane].

Ramdath M.’s version of the accident strikes me as much more plausible. Essentially he describes two vehicles moving into one lane of traffic at almost the same moment. Seconds apart, Ramdath M. moved from the right of 3 lanes to the centre lane, and Dana P. moved from the slow moving left lane to the centre lane. This portrays circumstances which are easy to understand in the context of the traffic pattern at the time. The two vehicles understandably are found within the same lane and are travelling at vastly different rates of speed creating an emergency for the following vehicle.

Accordingly, I find the version of events offered by Ramdath M. as more understandable and consistent with the experience we all have in how rear end accidents can happen on controlled access highways. In my view, the balance of probabilities favours the version of events offered by Ramdath M.

### **Application of Fault Determination Rules**

The *Insurance Act* requires this dispute to be determined by using the Fault Determination Rules that are found under Regulation 668 under the *Insurance Act*.

In large part, the Fault Determination Rules set out a variety of rules describing various kinds of accident circumstances. The Regulation requires us to apply those rules to determine the degree of fault of an insured. Importantly, section 3 of the Regulation says that the degree of fault of an insured is to be determined without reference to “the circumstances in which the incident occurs”. However, section 5 provides that if an incident is not described in any of the rules, the ordinary rules of law should be applied.

The parties have submitted that two alternative rules might apply to this accident, depending on the findings of fact that I might make on the evidence. In favour of Economical’s position would be the application of Rule 10(4). Rule 10 applies when both automobiles are travelling in the same direction and in adjacent lanes. Rule 10(4) addresses an incident occurring when one of

the vehicles is changing lanes. In that circumstance, the driver of the vehicle changing lanes is 100% at fault for the incident.

The alternative rule is Rule 6(2). Rule 6 applies when automobiles are travelling in the same direction, and in the same lane, and one automobile is struck from the rear by the other automobile. Rule 6(2) specifically provides 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% at fault for the incident. In this context, automobile "A" is regarded as the vehicle struck from the rear by automobile "B".

I regard this as a codification of a very commonly encountered type of rear end collision accident which happens very often on our roadways. But what is important from the point of view of our case is the mandatory nature of the Fault Determination Rules. If both automobiles are travelling in the same direction and in the same lane, the Fault Determination Rules rigidly imply 100% fault on the vehicle striking from the rear.

The case law about use of the Fault Determination Rules is significant in that it sets the tone of the entire regime as one of looking for expedient resolutions. Case law has recognized that the Fault Determination Rules allocate fault according to a type of accident, and not necessarily in accordance with actual fault. The Court of Appeal has recognized that the purpose of the legislation is to spread losses in a "gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude"<sup>4</sup>.

The Legislature has made the policy choice that expedient disposition is important enough to truncate the search for negligence that might otherwise apply. Necessarily this means that the application of the Fault Determination Rules will, on occasion, result in loss allocation that varies from the expected outcome in a negligence analysis.

In the case of *ING v. Farmers Mutual Insurance Company*<sup>5</sup>, May 14, 2007, Justice Perell makes it clear that my task is to first determine the facts as to what was "the incident". Thereafter, I should determine if the incident is described in any of the rules. If I determine that the incident is described in any of the rules then it is my task to apply that rule or rule "arbitrary and expedient as the application of the Fault Determination Rules might be". Finally, if the incident is not described in any of the rules, then I should look at the degree of fault in accordance with the ordinary rules of law.

So in this case, I must make a finding as to what was "the incident". Section 275 of the *Insurance Act* refers to "the incident from which the responsibility to pay the statutory accident benefits arose". Necessarily, I must make some decision about which antecedent events are part of "the incident" for the purpose of application of the Fault Determination Rules. Should I regard the "incident" simply as one vehicle rear ending another; or should I be more expansive and regard the incident as occurring when the Dana P.'s vehicle suddenly changed lanes into the path of the Ramdath M. vehicle; or should I take a broader approach and view the incident as the combination of two vehicles moving into the same lane at about the same time, but at disparate speeds? I am concerned that as one takes a larger and larger view embracing the antecedent events, one strays further and further from the legislative mandate to impose an expedient summary process to loss allocation.

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<sup>4</sup> *Jevco v. York Fire & Casualty*, 1995, CanLII 594 (Ont. Court of Appeal); *Jevco v. Halifax* [1994] O.J. 3024; *Jevco v. Canadian General* (1993), 14 O.R. (3d) 545 (CA).

<sup>5</sup> *ING v. Farmers Mutual Insurance Company*, 2007, CanLII 20107 (Ont. Superior Court) at para. 33.

I return to the words of section 6(1) of Regulation 668. "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."

The three essential components of this rule are found in this case, whichever version of the evidence one chooses to accept. Dana P.'s vehicle was struck from the rear by Ramdath M.'s vehicle. Both automobiles were travelling in the same direction. Both automobiles were travelling in the same lane.

I hasten to add that that status within the lanes, although not of long duration, was squarely established for both vehicles. This is not a case of one vehicle or another being partially through an incomplete lane change. The evidence indicates that those lane changes, by both drivers, were fully completed at the moment of collision.

Therefore, it is appropriate to regard the "incident" as a rear end collision which occurred when both automobiles were travelling in the same direction and in the same lane. Accordingly, rule 6(2) establishes Ramdath M.'s vehicle as 100% at fault with respect to the loss transfer allocation. On the facts of this case, in my view, it is not appropriate to delve into antecedent events, prior to lane changes, as might be done in a negligence case seeking to apply the ordinary rules of law. The Fault Determination Rules clearly describe an incident circumstance entirely congruent with the facts of our case. To look at antecedent events beyond that would seem to me to require a conclusion that the antecedent events are inexorably intertwined in the subsequent loss to the point that those antecedent events can be regarded as the proximate cause of the incident. I do not find the evidence to establish that in this case.


### **Conclusion**

Therefore, I conclude that I am required by section 275 of the *Insurance Act* and section 6(2) of Ontario Regulation 668 to allow loss transfer on a 100% basis.

The parties have agreed that costs in this case should follow the event subject to my discretion. I am not aware of any reason why costs should not follow the event in this matter. I would ask counsel to provide me any submissions with respect to costs within 30 days of receipt of this award.

Counsel have also reserved to this arbitration questions of indemnity and interest which have not yet been determined by me. I would ask the parties to advise me in due course as to the desirability of a further pre-hearing conference to address those issues.

Dated at Toronto this 11<sup>th</sup> day of August, 2011.



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LEE SAMIS  
Arbitrator