

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 668.

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing

Terry J. Tustin for the Applicant

Kevin S. Adams for the Respondent

Introduction

This matter comes before me as a dispute between two insurers with respect to a loss transfer matter. Both of the parties to this proceeding are insurers carrying on business in the Province of Ontario as insurers of automobiles. As providers of automobile motor vehicle liability insurance policies, the insurers are obliged to participate in the scheme of compensation that is described in Part 6 of the *Insurance Act* and the regulations thereunder. In accordance with those provisions, injured persons are entitled to prescribed benefits when they suffer an impairment as a direct result of use or operation of an automobile. Those benefits, the Statutory Accident Benefits, are set out in particular by a regulation known as the Statutory Accident Benefits Schedule (SABS).

In June of 1990, the introduction of a robust first party compensation system for injured accident victims represented a substantial change in the approach to such compensation. Prior to 1990, almost all compensation for victims of automobile accidents was determined by negligence litigation and the application of common law tort principles, as modified by statute. With the substantial revisions that came into effect in June of 1990, the very extensive first party benefits were introduced and, concurrently, access to tort based compensation was greatly limited.

Not only was this a significant change to apply to victims of automobile accidents, it was a significant change in its application to various automobile insurers.

In particular, this design change was likely to cause a very significant change in loss experience for certain insurers. In particular, insurers that were largely in the business of providing coverage for the operators of motor cycles, and insurers substantially in the business of providing coverage for operators of heavy commercial vehicles, were likely to see dramatic changes in the results associated with their portfolio of coverage. With respect to operators of motorcycles, the sad reality of this activity is that these individuals are likely to sustain severe injuries in motor vehicle accidents, and the risk associated with the injuries sustained by those operators is very much greater than the risk of loss that they may cause to others. Hence, when liability exposure is reduced and first party coverage is increased, motorcycle insurers would find themselves in the position of having greatly increased loss costs.

With respect to heavy commercial vehicles, there is a dislocation in the other direction. While a heavy commercial vehicle might be capable of causing severe injuries to others who are involved in collisions with heavy vehicles, the likelihood of injury claims associated with occupants of heavy commercial vehicles, and the insureds named, is less. Hence, the injury compensation design changes implemented in 1990 could reasonably be expected to create a windfall for the insurers of heavy commercial vehicles at the expense of the other insurers, and their premium paying policy holders.

The Legislative Response

Concurrent with other changes in Part 6 of the *Insurance Act*, section 275 was enacted 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. 1990, c. 1.8, s. 275 (1); 1993, c. 10, s. 1.

Idem

(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. 1.8, s. 275 (2).

Deductible

(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. R.S.O. 1990, c. 1.8, s. 275 (3); 1993, c. 10, s. 1.

Arbitration

(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*. R.S.O. 1990, c. 1.8, s. 275 (4).

Stay of arbitration

(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. 1993, c. 10, s. 31.

This provision creates the framework for a transfer between insurers to overcome the above described problems.

As contemplated by subsection 1 of section 275, Ontario Regulation 668 was enacted and certain definitional provisions were prescribed in Ontario Regulation 664. In the matter before me, there is no issue about the application of the provisions of section 9 of Ontario Regulation 664. The larger question which is raised in this matter is whether or not there is loss transfer when the injured person claiming benefits is a cyclist, injured in connection with an incident that involves a heavy commercial vehicle.

The Background Facts

The parties have agreed on the salient facts which give rise to this loss. An accident took place on September 1, 2005. Michelle G.¹ was riding her bicycle on a highway when she came into collision with a heavy commercial vehicle insured by the respondent, Markel. Michelle G. died as a result of the accident related injuries.

A claim was made to State Farm who was the personal insurer of the deceased's natural mother. State Farm paid various accident benefits and expenses relating to the death of Michelle G. State Farm seeks reimbursement from Markel in accordance with loss transfer provisions.

Analysis

There seems to be no question but that the loss transfer provisions are intended to allow insurers paying Statutory Accident Benefits to claim indemnity from insurers of heavy commercial vehicles when there is a collision involving the vehicles of their respective insureds. Once the facts stray from that most common fact pattern, the rights and obligations of the insurers become less clear. A number of arbitration decisions have been required to address these issues.

The arguments made against loss transfer in these circumstances are essentially twofold:

1. There is no public policy reason to have loss transfer with respect to accidents that involve heavy commercial vehicles and cyclists or pedestrians since that does not represent the departure from the ordinary risk associated with operation of ordinary vehicles (that is to say vehicles which are not heavy commercial vehicles). Accordingly it is argued that there is no public policy reason to support a rule for loss transfer in these circumstances.
2. It is pointed out that various provisions of the legislation and regulations contemplate loss transfer when incidents involve two or more vehicles. Wrapped up in this submission is also a reference to section 3 of Ontario Regulation 668 which requires a determination of the fault of an insured without reference to certain ambient circumstances, including actions of pedestrians.

¹ In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

As evidence of a legislative intent to limit loss transfer to vehicle to vehicle collisions, it is argued that loss transfer rules require the assignment of fault to the participants in the underlying event. It is submitted that there is no allocation of fault to pedestrians in an accident.

Although this argument has been made forcefully in this case and has been advanced in other cases, I do not find it entirely persuasive. In my view, pedestrians can very easily be found to be at "fault" and the concept of allocating fault between a pedestrian and a motorist is not at all foreign to our concepts of automobile injury compensation. Certainly the fault determination rules set out in Ontario Regulation 668 largely address incidents that involve vehicles. But in its residual fault finding provision, section 5 does refer to an incident not described in any of the other rules and requires a determination of fault in accordance with the ordinary rules of law. It is my conclusion that the scope of Ontario Regulation 668 in describing how fault is to be ascertained, does not exclude pedestrian versus motor vehicle accidents.

More troubling are the provisions of section 3 of that regulation. In describing how fault is to be determined the regulation provides as follows:

"The degree of fault of an insured is determined without reference to,

(a) The circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians;..."

I do find this language troubling. One possible interpretation of this provision, urged upon me, is that this necessarily means that there can be no allocation of fault between a pedestrian and a motorist. Therefore, I am urged to conclude that the fault determination rules and hence, loss transfer, do not apply to incidents that involve pedestrians.

There seems to be three possible interpretations of this provision. Firstly, it is possible that the legislature did not contemplate loss transfer in motor vehicle and pedestrian situations. Secondly, it is possible that section 3 (a) is intended to refer to actions of pedestrians other than the insureds. Thirdly, it is possible that it is intended that the rules are to be interpreted so that no fault can ever be ascribed to a pedestrian as far as loss transfer is concerned.

With respect to this latter possibility, I note that the legislation and regulation require the determination of fault by each insurer looking at the respective degree of fault of its own insured. It is conceivable that the legislative intent is that pedestrian/motor vehicle accidents are to be subject to a single focused inquiry: Was the motorist at fault or not? Such focus would preclude assessment of contributory negligence on the part of pedestrians.

The latter seems to me to be unlikely as the intent of the legislature, but I am not unmindful of the fact that Ontario's highway traffic laws do put a reverse onus on the operator of a motor vehicle in these circumstances.

Accordingly, it is not entirely impossible that there was a legislative intent to have comparable rule apply for loss transfer -- a rule that would have the single inquiry focus on the negligence or absence of negligence of the motorist.

However, this is not the same as the rule that applies under the *Highway Traffic Act* with respect to tort claims. The *Highway Traffic Act* rule changes the onus of proof but does not preclude findings of contributory negligence.

In my view, section 3 of Ontario Regulation 668, must be read in conjunction with subsection 2 of section 275 of the *Insurance Act*. In that context it is my interpretation that the “actions of pedestrians” is a reference to actions of persons other than the “insured” as it is included in a list of “circumstances in which the incident occurs”. I do not read section 3 as clearly negating the possibility of loss transfer in pedestrian/motor vehicle accidents.

In this regard, I am in agreement with the decision of Arbitrator Ken Bialkowski as upheld on appeal by Justice Kelly in the case of *Axa v. Co-operators*.

I also agree with the decision of Arbitrator Shari Novick in her characterization of the factors set out in subsection 3 (a), where she concludes that the actions of pedestrians refers to “the type of behaviour...in which the pedestrian is not one of the insured persons whose fault must be considered in accordance with section 2, but rather is a “distraction” that leads to an incident between two other insured parties”.

Conclusion

I conclude that loss transfer is available with respect to this incident.

If counsel wish to make submissions with respect to the question of cost, I would ask you to do so within 30 days.

Dated at Toronto this 4th day of February, 2011.



LEE SAMIS
Arbitrator