IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 275 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

BETWEEN:

ING INSURANCE COMPANY

Applicant

- and -

ZURICH NORTH AMERICA CANADA

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

George Wray for the Applicant

Dalia Fudim for the Respondent

PRELIMINARY ISSUE:

1. Do the "loss transfer" provisions contained in section 275 of the *Insurance Act* and section 9 of Regulation 664 apply to claims arising out of motor vehicle accidents involving pedestrians ?

RESULT:

1. Yes, the loss transfer provisions do apply to claims arising out of motor vehicle accidents involving pedestrians.

Accordingly, ING Insurance Company ("ING") can proceed with its claim for indemnity from Zurich North America Canada ("Zurich") for accident benefits it has paid out in response to a claim made on behalf of Bruno Adriano.

BACKGROUND:

This arbitration arises out of a tragic accident involving a pedestrian, Bruno Adriano, and a truck driven by John Gregg and insured by Zurich on September 13, 2007. Mr. Adriano was attempting to cross the street at the intersection of Finch Avenue and Oakdale Road in Toronto, when he was struck by the truck as it made a left turn. Mr. Adriano subsequently died as a result of the injuries he sustained in the accident.

Mr. Adriano was insured under an auto policy with ING, and a claim was made to ING for payment of death benefits and funeral expenses under the *SABS*. ING paid out a total of $41,000 to Mr. Adriano's estate in response to this claim. ING now seeks indemnity from Zurich for the amounts it has paid out, pursuant to the loss transfer provisions in section 275 of the *Insurance Act*. The parties agree that the truck involved in the accident is a "heavy commercial vehicle" as defined in section 9 of Regulation 664.

Zurich takes the position that indemnity pursuant to the loss transfer provisions is not available in accidents involving pedestrians. Counsel agreed to file written submissions on this issue, and have me render a preliminary decision on this point. I received detailed submissions from both counsel, referencing various arbitration and court decisions.

RELEVANT STATUTORY PROVISIONS:

The following provisions are relevant to this issue:

Insurance Act – Section 275

> ***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.*
>
> *(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.*

Regulation 664

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;*
>
> *"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.*
>
> ***(3)*** *A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify 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.*

Regulation 668 "Fault Determination Rules"

> ***2.*** *(1) An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.*
>
> ***3.*** *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; or*
>
> *(b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.*
>
> ***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.*

PARTIES' ARGUMENTS:

As mentioned above, Zurich contends that the loss transfer provisions are not meant to apply to incidents involving pedestrians and heavy commercial vehicles, and accordingly, ING's application for arbitration should be dismissed. After considering the matter, I do not accept this contention. However, given counsels' thorough and cogent arguments in this regard, and Zurich's submission that this issue has not been considered and determined as a central issue at an arbitration before, I will set out the essence of the parties' positions below.

(a) Zurich's submissions - loss transfer is not applicable to incidents involving pedestrians

The main arguments relied on by counsel for Zurich in support of his position are that it would be inconsistent with the underlying rationale of the loss transfer scheme to allow the insurer of a pedestrian who is involved in an accident with a heavy commercial vehicle to seek indemnity from the insurer of the truck, and that the wording of both sections 2 and 3 of the Fault Determination Rules in Regulation 668 prove that the provisions were not meant to apply in these circumstances.

(i) inconsistency with the rationale underlying loss transfer provisions

Counsel contended that the loss transfer scheme was created as a statutory response to the perceived inequity inherent in the current no-fault statutory accident benefits scheme, in which insurers of certain classes of vehicles (such as motorcycles and snowmobiles) whose passengers *suffer* a disproportionate amount of harm when involved in accidents, pay out more on claims than insurers who insure heavy commercial vehicles, which *cause* a disproportionate amount of harm to occupants of other vehicles when involved in accidents with them. He submitted that the purpose of section 275 is to redress this imbalance by permitting the insurer of the more vulnerable class of vehicle to claim indemnity from the insurer of the other vehicle involved in the accident, thus re-allocating the cost of accident benefits claims in a more equitable way.

Counsel referred to Bulletin 11/94 issued by the Ontario Insurance Commission outlining the loss transfer scheme, as well as the decision in *Royal Insurance v. Wawanesa Mutual Insurance* [2004] O.J. No. 2924, affirmed [2005] O.J. No. 2639 (Ont. C.A.), in which Justice Stach summarized the above and stated –

> Accordingly, the loss transfer scheme is based in part on the classification of vehicles by size, use and weight. Once classification is determined, the scheme permits claims for the transfer of accident benefit losses based on fault.

Counsel for Zurich argued that since pedestrians are vulnerable to serious injuries when they are involved in accidents with any vehicle, no matter which class it belongs to or what size it is, no cost balancing is achieved, and the underlying rationale for the right to indemnify is not present. He submitted that if the drafters of the legislation intended to extend loss transfer to incidents involving pedestrians, they would have specifically identified insurers of pedestrian claimants as a class of insurers eligible for loss transfer indemnity against insurers of any class of vehicle.

Counsel also noted that indemnification by way of loss transfer is an exception to the rule against subrogation for accident benefits claims, and contended that the provision should therefore be narrowly construed. (*Jevco Insurance. v. Pilot Insurance* (2000) 49 O.R. (3d) 760, per Justice Nordheimer's comments at para. 14).

(ii) pedestrians cannot bear requisite fault under section 2 of Fault Determination Rules

Counsel for Zurich notes that section 2 of the Fault Determination Rules requires an insurer to determine the level of its insured's fault "for loss or damage arising directly or indirectly from the use or operation of an automobile". He submitted that as pedestrians are never using or operating automobiles at the time of the accident, an insurer cannot determine or assess the level of an insured's pedestrian's fault or negligence. Counsel contends that given this impossibility, the loss transfer provisions are not triggered in accidents involving pedestrians.

(iii) section 3 of Fault Determination Rules – actions of pedestrians not to be considered

Counsel for Zurich notes that section 3(1) of the Rules specifically excludes consideration of the actions of pedestrians, and argues that consequently, the plain meaning of the regulation does not support loss transfer indemnity in these circumstances.

(b) ING's submissions – wording of provisions and case law support the application of loss transfer to incidents involving pedestrians

Counsel for ING asserted that permitting indemnity between insurers in circumstances in which pedestrians are involved in accidents with heavy commercial vehicles is consistent with the purpose and rationale underlying the loss transfer provisions, as a pedestrian is likely to suffer more serious injuries when involved in an accident with a truck, as compared to a regular passenger vehicle. She submitted that there are several arbitration awards as well as decisions from the courts that address this point, all of which make clear that loss transfer is applicable in these circumstances.

Counsel also contended that the wording of section 275(3) of the *Act* is straightforward, and clearly obligates an insurer of a heavy commercial vehicle to indemnify a first party insurer, unless the claimant receiving benefits has applied to the first party insurer under a policy insuring a heavy commercial vehicle. She contended that if the legislature had intended to exclude loss transfer from applying in pedestrian cases, it would have explicitly so stated.

ANALYSIS & FINDINGS:

(i) Relevant jurisprudence

Any consideration of the loss transfer provisions in section 275 of the *Insurance Act* should be approached with the comments of the Court of Appeal in the two oft-cited Jevco cases heard in the mid-1990's in mind. In *Jevco Insurance Co. v. Canadian General Insurance Co.* [1993] 104 D.L.R. (4th) 289, the court was asked to consider the meaning of an "unsettled claim" in subsection 275(5). In the course of his discussion on the issue, Justice Griffiths described the scheme of the legislation as being "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 the accident."

In *Jevco Insurance Co. v. York Fire & Casualty Co.* [1996] 133 D.L.R. (4th) 592 the court was asked whether the amount of the indemnity being claimed by the first party insurer should be reduced, on account of the passenger's failure to wear a seat-belt at the time of the accident. Justice Carthy referred to the court's comments in the earlier Jevco case, and stated – "what I take from this excerpt is that 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." It is against this backdrop that I consider the later cases filed and relied on by the parties in this matter.

The issue of how broadly the loss transfer provisions should be applied arose in the case of *Allstate Insurance Company of Canada vs. Old Republic Insurance Company,* decided by Arbitrator Griffiths (unreported decision, dated May 1, 1997). In that case, a passenger in a heavy commercial vehicle was killed when his truck was involved in a single vehicle collision. His personal insurer sought indemnity from the insurer of the truck for death benefits and funeral expenses it had paid out under the *SABS*. The insurer of the truck argued that indemnity could only be sought under the loss transfer provisions when a heavy commercial vehicle is involved in an accident with at least one other passenger vehicle in which an injured claimant is an occupant, and that the provisions do not apply in the case of a single vehicle accident.

The arbitrator did not accept this argument. He found that the language of section 275 is clear, and does not "require proof of multiple vehicle involvement before the transfer provisions should be invoked". He stated –

> In my view, the language of section 275 is clear and unambiguous in providing for indemnity by the second party insurer according to the respective degrees of fault of each insured involved in the accident. In the case of injury to a pedestrian, a bicyclist or where the occupant claimant was a passenger in a single commercial vehicle, then under the Fault Determination Rules, liability should be determined according to common law principles.

Arbitrator Griffiths also notes that the incident in the *Jevco v. York Fire, supra,* case cited above involved a claim by a passenger in a van who was injured in a single vehicle accident, and that the issue of the availability of loss transfer in a single vehicle accident was not raised, nor commented on by the court. He found that the language in the legislation contemplates the involvement of "two insurers in determining the degree of fault for the purpose of the loss transfer, not necessarily two or more motor vehicles." (emphasis in the original)

Most interestingly for our purposes, he goes on to state –

> there is nothing in the legislation to suggest directly or by inference that an exception should be made in the case of pedestrian claims, and indeed such an exception would defeat the clearly expressed intention of section 275 of the Act.

Counsel for ING submits that this case is directly on point, and remains good law.

A review of some of the subsequent cases relied on by counsel for ING feature similar facts to the instant case, in which a pedestrian is struck by a heavy commercial vehicle and the pedestrian's personal insurer seeks indemnity from the insurer of the truck. In most of these cases, the second party insurer did not raise the question of whether or not the provisions would apply, given the involvement of a pedestrian. One such case is Arbitrator Malach's decision in *York Fire & Casualty Insurance Company v. Royal and SunAlliance Insurance* (unreported decision, October 5, 2000). The fact that the claimant was a pedestrian is only mentioned by way of background; the sole focus of the arbitrator's analysis is on whether or not the pick-up truck involved in the accident meets the definition of a "heavy commercial vehicle" under the regulations.

Counsel for ING also relies on Justice Spiegel's appeal decision in *Jevco Insurance Company v. Wawanesa Insurance Company; Jevco Insurance Company v. Pilot Insurance Company* [1998] 42 O.R. (3d) 276. That case reviewed two arbitration awards that raised the question of whether the loss transfer indemnity rules apply when the driver of an fault vehicle was either driving without consent, or was designated as an "excluded

driver". The court determined that the provisions would not be engaged in the case of an "excluded driver", but that they would be in a situation in which a vehicle is driven by someone without the owner's consent. Justice Spiegel emphasizes the point that the second party insurer's obligation to indemnify is not dependent on there being valid third-party liability coverage for the accident.

While neither of the situations analysed in this decision involve pedestrian claimants, counsel for ING referred to the court's comment that the second party insurer's obligation to indemnify "derives from it having a policy in force on a class or automobile specified by the regulations that was involved in the incident from which the responsibility to pay SABS arose", and submits that the case stands for the proposition that the clear language of section 275 must be interpreted to mean that as long as a heavy commercial vehicle is involved in an accident, the right to indemnity is created.

Arbitrator Robinson quoted extensively from Justice Spiegel's reasons in the above *Jevco v. Wawanesa* appeal in his decision in *Jevco Insurance Company v. AXA Insurance Company* (unreported decision, dated November 5, 2001). In that case, the Jevco insured was run over by a Chevrolet truck, the driver of which had stolen the vehicle while it was parked in front of the Jevco insured's home. The arbitrator relied on Justice Spiegel's decision, and determined that Jevco was entitled to claim loss transfer indemnity from AXA, the insurer of the truck that had been stolen. I note that AXA did not raise the issue that loss transfer did not apply because the claimant was a pedestrian.

The same comment can be made about the appeal decision in *Aviva Insurance Company of Canada v. Royal and SunAlliance Insurance Company* (2008) CanLii 41817 (Ont. Sup. Ct.). In that case, Arbitrator Jones determined at first instance that fault should be allocated among various parties for injuries sustained by a gas station employee who was struck by two vehicles as he stood on a dark county road. The employee was assisting the driver of a large fuel truck in his effort to reverse the truck out of the gas station, and was not holding any lights or wearing reflective clothing. Aviva Insurance paid accident benefits to the claimant, and sought indemnity from Royal and SunAlliance, the insurer

of the fuel truck. At the arbitration hearing, counsel for Royal raised the fact that the claimant was a pedestrian as a preliminary issue, contending that section 3(1) of the Fault Determination Rules precludes his actions from being considered.

Arbitrator Jones dismissed this argument, expressing the view that once section 5(1) of the Rules is invoked (determination of fault to be made "in accordance with the ordinary rules of law"), an arbitrator is not precluded from considering the actions of pedestrians or any others who may have caused the accident. He went on to assess 50% fault for the accident to the claimant himself, 30% to the driver of the fuel truck and 20% to Cango Inc., the claimant's employer, for not providing him with adequate training. Both insurers appealed the decision. Royal advanced three grounds of appeal, none of which challenged the arbitrator's finding on the pedestrian issue and consequently, that issue was not discussed in the court's appeal decision.

Finally, ING relied on another decision of Arbitrator Jones, in the case of *Certas Direct Insurance Company v. Federated Insurance Company* (unreported, dated September 2008). In that case, the claimant was injured when he was struck by a tire that flew off the trailer of a tractor-trailer while he was standing at a bus shelter, waiting for the bus. Certas paid out accident benefits and sought indemnity from Federated, the insurer of the truck. Counsel for Federated argued at the hearing that loss transfer indemnity is not available when a pedestrian is involved in an accident, relying on section 3 of the Fault Determination Rules. Arbitrator Jones dismissed the argument, noting that that contention had been rejected in a number of cases, and specifically cited the decision of Arbitrator Griffiths in *Allstate v. Old Republic, supra,* Arbitrator Robinson's decision in *Jevco vs. AXA, supra,* and his earlier decision in *Royal vs. SunAlliance* referred to above (at p. 8).

(ii) Findings and Analysis

I accept the widely held view that the underlying rationale of the loss transfer provisions is to redress the imbalance between the greater costs that would otherwise be borne by insurers of motorcycles and snowmobiles, and the fewer claims made by insureds driving

heavy commercial vehicles in a no-fault accident benefits regime. In considering this issue, I am mindful both of the general approach to statutory interpretation requiring that this underlying statutory purpose be kept in mind, as well as the Court of Appeal's specific view, as expressed in *Jevco v. York Fire & Casualty, supra,* that the loss transfer provisions are an attempt to "spread the load among insurers in a gross and somewhat arbitrary fashion", with no room for "finite exactitude". I also note the cases referred to by counsel for Zurich, which hold that the right to indemnify under section 275 should be given a narrow interpretation.

I start the analysis with a review of the wording of the relevant provisions. The language of section 275(1) of the *Act* is somewhat obtuse, but entitles the "priority insurer" under subsection 268(2) of the *Act* to seek indemnification for benefits it has paid out from "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 accident benefits arose. Section 9 of Regulation 664 defines a "first party insurer" as an insurer under section 268(2) responsible to pay benefits. Clearly, ING would fit within this definition in this case.

Subsection 9(3) then provides that a second party insurer under a policy insuring a heavy commercial vehicle is obligated to indemnify a first party insurer, unless the person receiving benefits from the first party insurer is himself claiming them under a policy insuring a heavy commercial vehicle. There is no dispute here either that the vehicle that struck Mr. Adriano meets the definition of a '"heavy commercial vehicle" (defined in section 9 as well), or that Mr. Adriano was not claiming under a policy insuring a heavy commercial vehicle, which leads to the conclusion that Zurich fits the definition of a "second party insurer".

Section 275(2) then directs that the indemnification be made according to the respective degree of fault of each insurer's insured, as determined under the Fault Determination Rules. Those are the only guidelines provided by the Act and regulations, and in my view, they establish the right of ING to claim indemnity from Zurich in this case. The

ultimate determination of the quantum payable, if any, will depend on whether the driver of its insured vehicle bears any fault for the accident in question.

Section 275 does not refer to pedestrians either being included or excluded from the loss transfer scheme. As outlined above, arbitrators and courts have consistently determined that there is no reason to exclude accidents involving pedestrians from the provisions, and I also endorse that view. This conclusion is in keeping with both the findings of Arbitrator Griffiths in *Allstate v. Old Republic, supra,* and with Justice Spiegel's conclusion in the Jevco appeals cited above that it is the involvement of two insurers that triggers the application of the provisions, as opposed to two motor vehicles.

Zurich contends that this result is not in keeping with the underlying rationale of the loss transfer provisions. I do not agree. If the intent of the provisions is to permit insurers of those who are more vulnerable to injury when involved in accidents with heavy commercial vehicles to seek indemnity from insurers of those vehicles, so that the relative cost of benefits is not skewed in favour of the insurer of heavy vehicles, that is precisely what is achieved by this outcome. Simply put, trucks will generally cause more damage and injury to either other vehicles or pedestrians that they come into contact with than do regular passenger vehicles. In this case, Mr. Adriano died as a result of injuries sustained in the impact he had with the Zurich-insured truck: it is not at all clear that had he crossed at the same spot at the intersection while a passenger car was turning left, his collision with that vehicle would have resulted in his death.

Zurich also argues that section 2 of the Fault Determination Rules makes it clear that the provisions are not intended to be applied to pedestrians, as they cannot be assessed to be at fault for loss or damage "arising directly or indirectly from the use or operation of an automobile". Again, I cannot agree with this proposition. The provision does not specify "his or her" use or operation of an automobile; it states "the use or operation of an automobile". The rest of the language is equally broad. The choice of the word "arising" over the phrase "caused by", and the inclusion of "indirectly" evidences a clear intention on the drafters' part not to restrict the allocation of fault to insured persons who are

operating vehicles. I note that this same phrase appears in section 239(1) of the *Insurance Act* defining the scope of coverage of an owner's policy, and has been interpreted in a very broad manner by both the courts and many arbitrators at the Financial Services Commission of Ontario.

In my view, it is logical to conclude that a pedestrian who is injured when he is struck by a car after darting out into traffic without warning, or is hit when he crosses an intersection against a red light, would bear some fault pursuant to section 2 of the Fault Determination Rules for "loss or damage arising directly or indirectly from the use or operation of an automobile".

The wording of section 3 of the Rules was also raised in support of Zurich's argument. Section 3(a) provides that the degree of an insured's fault should be determined "without reference to the circumstances in which the incident occurs" and goes on to specifically include weather and road conditions, visibility, and the actions of pedestrians in this category. Arbitrator Jones considered this argument in *Aviva vs. Royal and SunAlliance*, *supra.* He concluded that once the 'default provision' in section 5(1) is invoked and the degree of fault must be determined in accordance with the ordinary rules of law, all causes of an accident must be looked at, and "one is not precluded from looking at the actions of pedestrians or others that may have caused the accident". While I agree with the result he reached on the issue, I would express the reasons for arriving at it in a different manner.

I do not believe that the "fault allocation" called for by section 5 requires an arbitrator to disregard the instructions set out in section 3, as implied in the above case. The factors outlined in clause (a) of section 3 – weather conditions, road conditions, visibility, the actions of pedestrians - can be described as distracting or surrounding circumstances. In my view, the intent of this section is to express that if one of the Fault Determination Rules applies, it must be applied regardless of the fact that one of the identified distractions may have played a role in the accident. For example, in a case where Rule 6(2) would dictate that a driver is at fault for a rear-end collision, the fact that the road

may have been icy or the visibility poor should not be considered, and the driver who collided with the vehicle in front of him should be found to be 100 % liable. Similarly, if a pedestrian darts out onto the roadway causing a truck driver to suddenly change lanes, and in doing so results in the truck colliding with a passenger vehicle, the truck driver who changed lanes should be found to be 100% at fault, pursuant to Rule 10 (4), regardless of the fact that it was his response to the pedestrian's negligent conduct that caused the accident.

The scenarios outlined above are different than the circumstances of this case, in which a pedestrian was one of the 'participants' in the incident, rather than an external distraction. I find that the phrase "actions of pedestrians" in section 3 refers to the type of behaviour set out above, 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, in the same way as poor weather or road conditions may do so. Given that Mr. Adriano was one of the 'participants' in the incident rather than an external distraction, I find that section 3 does not exclude his actions from being considered.

Finally, Zurich submitted an article written by John McNeil titled "The Enigmatic Exemption to the Bar Against Subrogation: s. 275 of the Insurance Act", that appeared in *The Advocates' Quarterly* (2008) 34. Given that Zurich relied heavily on the views expressed in this article, I will comment briefly on it. The essential thesis of the article is that neither passengers in single vehicle accidents, cyclists, nor pedestrians should be covered by the loss transfer provisions, given that the "inequity of disproportional financial burden that the legislation was intended to cure does not arise unless there are two or more vehicles involved in an accident." With reference to pedestrians, Mr. McNeil simply states – "in the case of pedestrians, there is no "relevant fault" to trip the operation of s. 275, and there is no principled reason upon which to base the argument that loss transfer was meant to be available in these cases."

I disagree with the above comments, for all of the reasons expressed above. The case law outlined above suggests that many other arbitrators and judges do as well. I would also state that the author's review of the jurisprudence in the area is neither complete nor current. As an example, I note his comments (at p. 178) to the effect that the only relevant conduct for assessment of fault is conduct in relation to the use or operation of a vehicle, and that no other kind of conduct is contemplated as fault-bearing. This is in stark contrast to the findings of the arbitrator in the *Aviva vs. Royal*, *supra*, decision, which were explicitly upheld by Justice Mesbur in her appeal decision.

For all of the reasons expressed above, I dismiss Zurich's preliminary argument that indemnity under the loss transfer provisions is not available in motor vehicle accidents involving heavy commercial vehicles and pedestrians.

As agreed by the parties, the case will now proceed to a hearing at which liability will be assessed in accordance with section 5 of the Fault Determination Rules. I will have my assistant contact counsel so that a further pre-hearing teleconference can be scheduled, and a hearing date set.

DATED at TORONTO, ONTARIO this _____ DAY OF JULY, 2009.

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Shari L. Novick
Arbitrator.