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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

ROYAL INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Lisa E Hamilton for the Applicant

Jamie R. Pollack for the Respondent

ISSUE:

1. Does loss transfer, pursuant to section 275 of the Insurance Act apply in this case?

DECISION:

Loss transfer does apply in this case.

HEARING:

This arbitration proceeded by way of written submissions and no oral evidence was called.

FACTS & ANALYSIS:

The facts of this case are relatively straightforward. Mr. Sarabajaet Bhangu was involved in a single motor vehicle accident in Vermont, U.S.A., on August 10, 2001. At the time he was employed as a truck driver and was driving a truck owned by B.A.B. Transport, which was insured by Royal Insurance Company of Canada ("Royal"). The truck was licensed in Ontario. At the time of the accident, Mr. Bhangu owned a private passenger vehicle which was insured under an Ontario policy of motor vehicle insurance by Wawanesa Mutual Insurance Company of Canada ("Wawanesa").

Mr. Bhangu submitted an application for statutory accident benefits to Wawanesa who paid the benefits. Wawanesa then made a claim for loss transfer against Royal, pursuant to the provisions of the Insurance Act. Royal takes the position that Wawanesa is not entitled to loss transfer as the accident occurred in the United States and the law of the place where the accident happened (lex loci delicti) rather than the forum, (lex fori) should apply. There apparently is no loss transfer in Vermont and therefore in Royal's submission, there can be no loss transfer.

Leading case in this area is Unifund vs. Insurance Corporation of British Columbia, (2003) 227 D.L R (4^{th}) 402 (S.C.C) In that case, an Ontario insurer sought loss transfer against a British Columbian insurer for an accident occurring in British Columbia. It was held that the provisions of the Ontario Insurance Act did not apply in that case since the accident occurred in British Columbia – it was unconstitutional to impose a civil obligation in Ontario to a British Columbian insurer as a result of a British Columbia accident. In arriving at its decision, the Supreme Court of Canada relied upon its decision of Tolofson vs. Jensen, [1994] 3 S.C.R 1022, wherein the Court held that the substantive law to be applied in a proceeding is the law of the place where the activity occurred rather than the law of the forum. The Court made it clear that the lex loci delicti applied to domestic and provincial situations, without exception. The reason behind this approach is to insure that there is a certain and predictable rule across the country.

The situation with regard to accidents occurring outside of Canada as opposed to within a Canadian province, outside of Ontario, is somewhat different. In cases involving another country, there is a discretion to depart from the lex loci delicti rule in the appropriate circumstances.

In Hanlan vs. Sernesky (1998), 38 O.R. (3rd) 479 C.A., the Ontario Court of Appeal dealt with a situation somewhat similar to ours. In that case there was a motor vehicle accident which occurred in Minnessota. The Court of Appeal applied the law of Ontario (lex fori) rather than the law of Minnessota (lex loci delicti), as:

I) the parties were raised in Ontario
II) the contract of insurance was issued in Ontario
III) there was no other connection with Minnesota other than it was the place of the accident,
IV) the consequences (damages and losses) to the injured plaintiff's family was felt in Ontario,
V) the plaintiff's claim were not permitted in Ontario.

In that case the Ontario Court of Appeal held that there was a sufficient connection to Ontario for the exception to the general rule to apply.

In Wong vs. Wei, [1999] B.C.J No. 768 (B.C.S.S.) the British Columbia Supreme Court dealt with a situation where the motor vehicle accident occurred in California but all the parties were Canadian residents and citizens. A tort action in California was stayed on the grounds that it was forum non conveniens. The British Columbia Court held that the B.C. law applied to the action as, with the exception of the place of the accident, the case was connected in all significant respects with British Columbia. It would have been unjust to apply any law of damages other than British Columbia to an action involving only B.C. residents.

In Wong the B.C. Supreme Court was concerned with the different monetary limits available for general damages in tort cases between California and British Columbia. Justice Kilpatrick stated:

> "In my view, very serious policy concerns expressed by the imposition of the "rough upper limit" are an overriding consideration and a cause to depart from the general rule that the lex loci delicti should apply. It would be unjust, in my view, to apply any law of damages other than that of British Columbia to an accident involving only B.C. residents."

The Ontario Court of Appeal dealt with this issue in Wong vs. Lei, (2002) 58 O.R. (3rd) 398. In that case, the plaintiff, a resident of Ontario, was injured in a single motor vehicle accident in New York state while a passenger in a car owned and driven by an Ontario resident. The car was insured by a policy of automobile insurance issued in Ontario and the plaintiff's insurer was an Ontario resident. A motion's judge held that this was a proper case for him to exercise his discretion and deviate from the rule of the proper substantive law is the lex loci delecti, and ruled that the applicable law was that of Ontario (lex forti). The Motions Court judge's reasoning was based, in part, on the fact that in Ontario, the plaintiff's recovery would be subject to a statutory deductible and a threshold, whereas there were no such limits under New York State law.

The Ontario Court of Appeal in a 2-1 decision held that this was not a case where the exception should apply and held that New York State law should be applied. The majority in the decision recognized that there was a trend in the case law since Tolofson towards a broadening of what, in its view, was intended to be a very narrow rule that the lex loci delicti rather than the lex lori should apply.

The Ontario Court of Appeal in Wong took a somewhat narrower view of when the Court should exercise its discretion. It held that the mere fact that the parties may be from one jurisdiction is not enough to move away from the general rule. There must be some injustice in applying the general rule. Furthermore, the Court held that it was not mere differences in public policy that

would allow the exceptions to the lex loci delecti rule. The injustice must be something beyond ordinary differences between the laws of the forums.

I note that the decision in Wong was written by Justice Feldman with Justice MacPherson concurring and Justice Borins writing a dissent. In his dissent Justice Borins expressed the view that the motions judge had not improperly exercised his discretion therefore the Court of Appeal ought not to intervene. He also noted that the facts in Wong were very similar to the facts in the Hanlon decision.

In reviewing Hanlon and Wong it is very difficult to reconcile these two decisions. Certainly the Court of Appeal in Wong had the benefit of having reviewed the Court of Appeal's earlier decision in Hanlon, yet chose to express what seems to be a somewhat narrow interpretation of when the Court should exercise its discretion.

What I take from the Court of Appeal decisions is that it is only in very exceptional cases that the Court should deviate from the general rule of that the lex loci delecti should apply. In our case, the following facts might suggest that the Ontario law (lex fori) should possibly apply:

1. Mr. Bhangu was a resident of Ontario
2. The truck that Mr. Bhangu was in at the time of the accident was licensed and registered in Ontario
3. The truck was insured by Royal Insurance pursuant to a standard Ontario policy of motor vehicle insurance, issued in Ontario
4. Royal is an Ontario insurer
5. Mr. Bhangu's personal automobile was licensed and registered in Ontario
6. Mr. Bhangu's personal automobile was insured by Wawanesa pursuant to a standard policy of motor vehicle insurance, issued in Ontario.
7. Wawanesa is an Ontario insurer
8. Statutory accident benefits paid to Mr. Bhangu derived from losses and expenses incurred in Ontario.

These reasons alone would probably have been sufficient, if one were to follow the Hanlan decision to justify the exercise of discretion in favour of applying Ontario law. They may not be sufficient if one were to follow the Wong decision. One must, therefore, look for any further injustice that might be created if we were to apply the general rule and have the Vermont law apply. The mere fact that Vermont does not have a statute allowing Wawanesa to recover statutory accident benefits paid, might not, in and of itself, have been a sufficient injustice to allow the Court to exercise its discretion and deviate from the general rule. It is necessary, however, to look at the issue more closely and see whether a further injustice, if any, exists. In our case, Mr. Bhangu received statutory accident benefits pursuant to his Ontario motor vehicle liability policy. The providing of these benefits is mandatory pursuant to Ontario law. To have the insurer be forced to pay accident benefits pursuant to Ontario law and an Ontario contract for an accident in Vermont, and then forbid them from recovering the costs of those benefits which it would be allowed to do under Ontario law (loss transfer), has all the hallmarks of injustice. This goes beyond simply having different general damages entitlement as applied in the Wong vs. Wei case. Here there is a payment pursuant to Ontario law and it is unjust that there should not be recovery which would subsequently under Ontario law.

For these reasons I am of the opinion that Wawanesa can recover monies paid out to Mr. Bhangu for accident benefits arising out of the accident of August 10, 2001. This is subject to any arguments as to liability and the reasonableness of the payments.

I may be spoken to with regard to the issue of cost in the event that the parties cannot agree on this matter.

Dated at Toronto this _____ day of February, 2006.

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M. Guy Jones
Arbitrator