

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and s.275, and ONTARIO REGULATION 664/90, s.9;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

FEDERATED INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Michael P. Taylor for the Applicant

David A. Zuber and James S. Schacter for the Respondent

ISSUES:

1. Was the driver, Mr. Tal Clark at fault for the accident, and if so to what degree?
2. Was the owner of the truck, Dick Marshall Fuels Limited at fault for the accident, and if so to what degree? And what are the implications re: loss transfer?
3. Can loss transfer be imposed on Federated for the fault of persons other than Tal Clark and/or Dick Marshall Fuels Limited, if applicable?
4. If there is any fault on Tal Clark and/or Dick Marshall Fuels Limited, is Federated responsible only for that portion of fault attributable to them or also for the fault of the non parties?
5. Does loss transfer apply given that the injured party, Mr. Cruz, was a pedestrian?

DECISION:

1. Mr. Clark was not at fault for the accident.
2. Dick Marshall Fuels Limited was not responsible for the accident.
3. Loss Transfer cannot be imposed on Federated for the fault of persons other than Tal Clark and/or Dick Marshall Fuels Limited.
4. I find that Mr. Callaghan was 80 percent at fault for the accident and Mr. Baptiste 20 percent. However since they were acting as independent contractors, Certas cannot recover for their fault under loss transfer.
5. Loss transfer can apply when a pedestrian is injured.
6. In light of my decision Certas is not entitled to loss transfer in this case.

HEARING:

This hearing in this matter was held in the city of Toronto, in the province of Ontario on July 22, 23 & 24, 2008. It proceeded by way of viva voce evidence and documentary evidence filed.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on April 3, 2002. On that date Mr. Albert Cruz was a pedestrian standing on a sidewalk in the city of Toronto when he was struck by a tire that came off the trailer of a tractor-trailer insured by Federated Insurance Company ("Federated"). It is agreed by the parties that the tractor-trailer was a heavy commercial vehicle for the purposes of loss transfer. Mr. Cruz had a standard motor vehicle liability policy with Certas Direct Insurance Company ("Certas"). Mr. Cruz suffered significant personal injuries as a result of being hit by the tire and applied for and received accident benefits from Certas, pursuant to the Statutory Accident Benefits Schedule.

Certas, by way of letter dated May 14, 2002 requested indemnification from Federated, pursuant to section 275 of the Insurance Act, R.S.O 1990 c. I.8 (the loss transfer provisions).

The parties have decided that the degree of fault should be decided in accordance with the ordinary rules of law, pursuant to Section 5.1 of the Fault Determination Rules.

While there are a number of questions listed above, which must be answered in this case, the first issue to be dealt with, in my view, is who was responsible for the accident. The answer to some of the other questions flow from that determination. In order to answer that question it is necessary to review the facts of the case.

As stated above, Mr. Cruz was injured while standing at a TTC bus shelter, when a wheel from the trailer of the tractor-trailer insured by Federated flew off the trailer and struck Mr. Cruz. The parties are in agreement that there was no fault upon Mr. Cruz or Mr. Tal Clark, the driver of the tractor-trailer. The question remains whether there was any fault on the owner of the tractor-trailer, Dick Marshall Fuels Limited and it's owner/manager, Dick Marshall, Mr. Philip Baptiste the person who certified the road worthiness of the trailer in question, or John Callaghan, the self employed tire installer who installed the tire that flew off.

The evidence at the hearing indicated that Mr. Clark, an employee of Dick Marshall Fuels Limited, was operating a 1999 Sterling tractor with a 1987 West trailer attached. The trailer had 3 rear wheel axles and an additional lift axle located in the middle. The trailer, referred to as Unit #101, had been rebuilt by Dick Marshall Fuels Limited prior to the accident. The tires of the trailer were removed and new tires were installed using what is known as the Budd wheel system. This uses 10 bolts on each set of wheels, which penetrate into the threaded openings in the wheel hub of the axle. There are two wheels at each end of each axle. The two wheels are held together by the bolts. A torque wrench must be used to properly torque the bolts and be sure that they are tightened to the appropriate level.

Mr. John Callaghan testified at the hearing. At the time he was self-employed, operating as "J & S Tire". Mr. Callaghan was then and remains a tire installer who has been licensed by the Province of Ontario to install the type of tires in question. He testified that he had been installing tires for approximately 20 years.

Mr. Callaghan had installed tires for Dick Marshall Fuels Limited in the past. He testified that in late 2001 or early 2002 he was hired by Dick Marshall Fuels Limited to install wheels on the rebuilt trailer known as Unit #101. Mr. Callaghan testified that he put four wheels on each axle, two on each end, using the Budd system which he was well acquainted with. Mr. Callaghan had a somewhat vague or spotty recollection of the work that he did on this unit, and his record keeping was rudimentary to say the least. He does recall putting tires on the rims and putting the rims on the trailer. He did the work at the Marshall yard and recalls that a mechanic in the employ of Marshall Fuels, Mr. Mark Priest, was there at least part of the time that the work was being done. Mr. Callaghan testified that in putting on the bolts to attach the tires he used an air gun to start with and then finished with a torque wrench, which measures the pressure or tightness of the nut on the bolt. Mr. Callaghan testified that there were at least two wheels already on the trailer and he installed the rest. Based on the all of the evidence I conclude that Mr. Callaghan in fact installed all the wheels on the trailer including the one that came off and injured Mr. Cruz.

Mr. Callaghan testified that other than changing one bad tire on one occasion, he did nothing further on Unit #101. He did state that he was hired by Dick Marshall Fuels Limited to do “yard checks”. This, according to Mr. Callaghan, involved checking for flat tires and air pressure for which he charged \$120.00. He testified that Mr. Marshall had not asked him to check the torque pressure on the wheels of the units after they were originally installed. He stated that he would only check torque pressure on wheels if specifically requested by Mr. Marshall and would charge an additional amount for it. He stated that a normal yard check took between 45 minutes and 2 hours, and that if had to do a torque check that could add at least 2 hours to the job.

Mr. Callaghan testified that from when he originally installed the tires until the accident of April 3, 2002, he did not re-inspect or check the torque as he was never asked to do so by Mr. Marshall. He agreed that the torque should be checked roughly 50 miles after the tires were originally installed in order to make sure they were properly secure.

Mr. Dick Marshall, the general manager and operating mind of Dick Marshall Fuels Limited testified at the hearing. He stated that in early 2002 Dick Marshall Fuels Limited had six trucks, used primarily to haul fuel for their and other companies. The company had eight full time and 2 part time employees, including a mechanic, Mr. Mark Priest. Mr. Marshall had considerable experience in the trucking business although he is not a mechanic or certified tire installer. He testified that in late 2001 he decided to convert trailer Unit #101 from tri-axle to a four axle unit. He purchased new hardware (bolts, etc.) to reattach the wheels. Mark Priest, a mechanic with Dick Marshall Fuels Limited generally oversaw the rebuild, but it was John Callaghan who was to install the wheels.

Mr. Marshall stated that he had knew Mr. Callaghan had worked at other companies before he had decided to hire him as an independent contractor to handle tire issues for his company. Mr. Callaghan started working for Dick Marshall Fuels Limited in early 2001. He testified that Mr. Callaghan was to do yard duty bi-weekly and that included anything that needed to be done in the yard regarding tires. He said it was entirely up to Mr. Callaghan to maintain the tires and wheels. This also included fixing flat tires when they occurred on the road.

Mr. Marshall stated that he had occasionally saw Mr. Callaghan doing work at the yard but he did not supervise him, as he considered Mr. Callaghan the expert in the area. He was aware, however, that when wheels were installed, the torque should be checked after 100 kilometres or so. He expected Mr. Callaghan to do this as part of the original installation cost.

Mr. Marshall said that he seen Mr. Callaghan install wheels before and indeed had cautioned him on at least one occasion for installing the nuts with the air gun to the point where the air gun “chattered” which indicated that the nut had tightened as far as it can go. Mr. Marshall was aware that proper procedure was not to allow repeated chatter as it could result in the nut being over tightened. Mr. Marshall says that he told Mr. Callaghan to check the torque after tightening with the air gun. Mr. Marshall also admitted on cross-examination, that he told Mr. Callaghan of his expectations re: checking torque both when first hired Mr. Callaghan and again before the April 2002 accident.

Mr. Marshall also testified that Mr. Mark Priest, the mechanic, had a bad back and therefore did not assist with the installation of the wheels. It was done entirely by Mr. Callaghan.

Mr. Marshall stated that after the wheels were put on by Mr. Callaghan, the unit was sent out and an additional \$5000.00 of work was done on it. Mr. Marshall assumed that when it returned Mr. Callaghan retorqued the wheels. He stated that after the wheels were installed he did not ask Mr. Callaghan if he had retorqued the wheels as he assumed the retorquing was done as that part of his regular duties.

Mr. Marshall testified that he hired Mr. Baptiste to certify the trailer after it was changed. He was aware that Mr. Baptiste did not take the wheels off and assumed he did not check the torque.

Mr. Philip Baptiste also testified at the hearing. He is a licensed auto mechanic. Mr. Baptiste is certified by the Province of Ontario to perform safety inspections on trucks and trailers and certified Unit #101 after it was rebuilt. This was done on January 5th, 2002. He did not recall this particular safety inspection as he has done a fair number of inspections over the years for Mr. Marshall. He testified that he would not have checked the torque on the wheels as he assumed that Marshall's people had checked the wheels. He took it for granted that they had done the tire installation properly. He further stated that he was not required to take the wheels off or check the torque.

Mr. Jason Young, a professional mechanical engineer testified on behalf of Certas. After hearing submissions, I accepted that Mr. Young could testify as an expert witness in mechanical engineering and more specifically, metal fatigue analysis.

He testified that the wheel in question came off because all ten bolts fractured. They fractured due to fatigue in at least five of the bolts. The fatigue was caused, in all likelihood, by the over torquing of the nuts beyond the recommended levels. Mr. Young testified that the over torquing can cause stress fractures of the bolts. A crack develops and eventually gets larger until the bolt can no longer carry the load and it breaks.

Mr. Young testified that the recommended pressure for these bolts was 450-500 foot pounds. He also testified that a one inch air gun could tighten them to a level of up to 1450 foot pounds. Mr. Young was of the opinion that the over tightening probably occurred when the nuts were first installed. He agreed, on cross-examination, that the damage initially caused by over torquing is not usually visible to the naked eye.

The final witness at the hearing was Mr. Rolf Vanderzwaag. He testified as an expert in the field of heavy commercial vehicle wheel installation, maintenance and causes of wheel failure. Mr. Vanderzwaag has had vast experience in wheel safety, including the Budd wheel system. He has trained wheel installers and written manuals on proper wheel installation.

Mr. Vanderzwaag testified while it is permissible to commence installing the wheel with an air gun, it is important to use the smallest gun available and to only use it to start the process. A half inch gun is preferable to a one inch gun which can apply far more pressure than should be used.

Proper procedure would be to use the air gun only to start the process and then use a torque wrench to do the final tightening. In this way you can be sure it is not over tightened. It is important to note that checking the torque is only useful when the torque wrench is used to complete the tightening of the nut. If the nut has already been fully tightened by an air gun, the torque wrench will simply "click" when applied to the nut. This simply indicates that it is at least tightened to the set level of the torque wrench but does not tell if the nut has in fact been over tightened. This distinction is important as checking an already tightened nut with a torque will not tell if it has been over tightened but only if it is not tight enough. Thus any subsequent checking of torque will not reveal over tightening, just under tightening. The only way to check over tightening after the fact would be to loosen the nut off and re tighten it using the torque wrench to the appropriate tension. Even then, this may not solve the problem, as the damage done by the original over tightening may not be visible to the naked eye. It is often not detectable until the bolt breaks. In Mr. Vanderzwaag's view, the bolts broke because of fatigue caused by over tightening of the nuts.

In Mr. Vanderzwaag's opinion, Mr. Marshall had met or exceeded industry standards regarding the installation of the wheels. He had used new bolts and parts, he had a hired a qualified tire installer and had yard duty checks which he felt were above the norm for this type of operation.

Mr. Vanderzwaag disagreed with Mr. Young as to what may happen when the over tightening occurs. Mr. Young stated that once over tightened, the bolt loses its elasticity and thus may cause less clamping and loosening of the nuts. Mr. Vanderzwaag disagreed, and while he agreed that there can be a loss of elasticity, he has not observed less clamping as a result. I prefer Mr. Vanderzwaag's testimony in this regard. I accept Mr. Vanderzwaag's opinion that if you tighten to over 500 foot pounds it is not likely to loosen to under 500 foot pounds. Mr. Vanderzwaag also expressed the view that in 2002, that rechecking torque about 50-100 kilometres was recommended by the manufacturer but not required by law.

Having reviewed the testimony in this matter, and before setting out the various degrees of fault of the participants, if any, I will first deal with some of the legal issues presented by the parties.

Federated has taken the position that loss transfer is not available when there is a pedestrian involved. In support of this position it points to Section 3 of the Fault Determination Rules which provides that the degree of fault of an insured is to be determined without reference to the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians. This position has been rejected in a number of cases including Jevco Insurance Company vs. AXA Insurance Company, a decision of arbitrator Robinsion dated October 23, 2001 and upheld on appeal May 26, 2003. (Court File # 01-CV-221519) Allstate vs. Old Republic, a decision of arbitrator W.D. Griffiths, released May 1, 1997, and more recently decision of myself in Royal and Sun Alliance Insurance Company vs. Aviva Insurance Company of Canada unreported decision released, December, 2007.

Federated also submits that I ought not determine the fault of persons other than the drivers involved in the accident. In support of this position it relies on the wording of Section 3 of the Fault Determination Rules, cited above, and also FSCO Bulletin No. 11/94 which essentially states that the first party insurer is only entitled to reimbursement from the second party insurer

when the driver of the automobile insured by a second party insurer is partially or entirely at fault in the incident. The second party insurer will indemnify the first party insurer for the amount of no fault benefits paid, which is calculated based on the percentage that the driver of the vehicle covered by the second party insurer was at fault in the incident, according to the Fault Determination Rules.

While FSCO Bulletins may be helpful in determining the law, they are, of course, not binding and the law that has developed since the publication of the bulletin supports, in my view, the position that the fault of non-drivers should be taken into account.

Loss transfer is created by Section 275 of the Insurance Act, which states:

“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 rose.”

This issue was dealt with, in part, by Mr. Justice Speigel in Jevco vs. Wawanesa 42.O.R. (3rd) 276 wherein he stated:

“In my opinion, the learned arbitrator placed undue emphasis on the fact the word “insured” is used in the FDR in subsection 2 to 5. As counsel for Jevco points out, the word “driver” is used in subsequent sections, which he submits and envisages a determination of fault of a driver who is not necessarily an insured. On balance, I do not think that the use of the word “insured” in some sections of the FDR and the use of the word “driver” in others is of assistance in interpreting Section 275. In my view Section 275 (2) incorporates the Fault Determination Rules solely as a mechanism for determining the monetary extent of the obligation for loss transfer, conditional on the fault of an insured whom the second party insurer insures against third party liability.”

The issue of considering the degree of fault of non-drivers was also considered myself in the case Royal and Sun Alliance vs. Aviva Insurance Company of Canada (unreported decision dated December 2007). In that case I stated:

“I see nothing in Section 275 of the Insurance Act or Section 5 of the Fault Determination Rules which would preclude determination of fault of Cango Inc. Section 275 (2) speaks of indemnification shall be in accordance with each insurer’s insured as determined under the Fault Determination Rules. This does not preclude fault of a non-insured also being considered when determining fault under the “ordinary rules of law” as set out in Section 5 of the Fault Determination Rules. Certainly, under loss transfer, the party seeking loss transfer can only recover in accordance with the percentage fault of those vehicles covered by loss transfer, but that does not preclude other persons or companies from being considered when determining the overall fault for the accident.”

I note that my decision was recently upheld by Justice Mesbur Aviva vs. Royal, 2008, Can LII 41817 (ont.s.c.)

In light of the above, I am of the view that I should look at the respective fault, if any, of both the parties and non-parties involved in this accident.

As mentioned above, the parties have agreed that there was no fault on the part of the pedestrian, Mr. Cruz, or the driver, Mr. Tal Clark.

In my view, the largest single contributing factor to this accident was the over tightening of the nuts by Mr. John Callaghan, when he originally installed the wheels. I find as a matter of fact that Mr. Callaghan, in using the one inch air gun, in all probability severely over tightened the nuts causing the stress fractures to the bolts which eventually led to metal fatigue and the shearing off of the bolts.

I also accept Mr. Callaghan’s evidence that he did not retorque or check the bolts after approximately 100 kilometres.

On all the evidence, I would assess Mr. Callaghan's fault at 80%. I find that Mr. Callaghan was acting as an independent contractor and accordingly Dick Marshall Fuels Limited is not responsible for his degree of fault.

The question of the fault, if any, of Dick Marshall Fuels Limited is more troubling. Mr. Marshall undoubtedly hired people who he felt were qualified to do the jobs he hired them for. Mr. Callaghan was a certified tire installer who had considerable work experience. Mr. Marshall claims that he had instructed Mr. Callaghan to check the torque on the wheels and also that he expected this to be done as part of the original installation charge. Retorquing or checking the torque on 10 bolts for each set of wheels would involve a considerable period of time and there is no indication in Mr. Callaghan's bills that this was done nor were the amounts charged by him suggestive that this was done. On balance, while I accept that Mr. Marshall generally left it to Mr. Callaghan to ensure that the tires and wheels were in order, I reject the claim by Mr. Marshall that he specifically told Mr. Callaghan to retorquer these wheels.

On the other hand I am mindful of Mr. Vanderzwaag's testimony that Mr. Marshall had more than met the standard in the industry, in that while manufacturers suggested checking the torque there was no legal requirement to do so, and it was generally not done.

Overall, I accept that Mr. Marshall generally left it to expert that he had hired, Mr. Callaghan, to do what was necessary.

In light of this, I find that Mr. Marshall was not at fault for the accident.

Turning to the fault, if any, of Mr. Baptiste, the inspector who certified the trailer and wheels, I am troubled by his actions. Mr. Marshall hired a certified inspector to certify the safety of the trailer. Part of his duties were to inspect the wheels and rims. Item 17 of the commercial check inspection report (see exhibit 2, tab 15) suggests that the inspection is to look for stud hole damage and if the fasteners are loose or missing. Mr. Baptiste testified that he did not retorquer the wheels or test them but relied on the tire installer to do a proper job. This, to me, suggests Mr. Baptiste did not properly carry out his duties to properly inspect the wheels. I am of the view

that Mr. Baptiste was 20 percent at fault. However, as Mr. Baptiste was acting as an independent contractor in the matter and Certas can not claim loss transfer from Federated as a result of Mr. Baptiste's actions.

In light of the above, I find that Mr. Callaghan was 80% at fault for this accident and Mr. Baptiste 20%.

Counsel for Certas has submitted that if any degree of fault is found upon a party responsible to pay loss transfer, then Certas can recover 100% subject to any fault of its insured. While that point is mute in light of my finding of fault, I will deal with it briefly since counsel argued the point.

In my view, there is not joint and severed liability for reasons set out in my decision, Liberty Mutual Insurance Company vs. Zurich Insurance Company of Canada, unreported decision dated September 2006. I also took this position in Aviva vs. Royal, unreported decision released February, 2008, upheld on appeal by Justice Mesbur, 2008 Can LII 41817 (ont.s.c).

In light the above I find that Certas is not entitled to loss transfer from Federated.

In the event that the parties are unable to agree with regard to the issue of cost I may spoken to.

Dated at Toronto, this _____ day September 2008.

M. Guy Jones
Arbitrator