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

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

AND IN THE MATTER OF AN ARBITRATION

**BETWEEN:**

**PRIMMUM INSURANCE COMPANY**

Applicant

- and -

**ALLSTATE INSURANCE COMPANY OF CANADA**

Respondent

# DECISION

**COUNSEL:**

Derek Greenside for the Applicant.

Catherine Zingg for the Respondent

**ISSUES:**

**1.** Does section 10 (4) or 15 (2) of the fault determination rules apply to this motor vehicle accident or do the ordinary rules of law apply?

**2.** If the ordinary rules of law apply, what is the apportionment of liability for the motor vehicle accident?

**DECISION:**

**1.** Section 15 (2) of the fault determination rules applies.

**HEARING:**

**1.** This arbitration was held on July 7, 2004 in the city of Toronto, in the province of Ontario. The hearing proceeded by way of an agreed statement of facts. No witnesses were called.

**FACTS AND ANALYSIS:**

The facts of this accident are relatively straightforward. On May 20, 2001, Hilario Bautista was northbound on Highway 27 in the centre lane on a motorcycle insured by Primmum Insurance. Rabil Brown was driving a Dodge van insured by Allstate, also northbound, but in the passing lane.

At the intersection of Highway 27 and Queen's Plate Drive, which is controlled by traffic lights, both Mr. Bautista and Ms. Brown entered the intersection northbound on a green light. As they did so, an unidentified green SUV type motor vehicle which had been westbound on Queen's Plate Drive, turned left against the red light into the northbound lanes of Highway 27.

In order to avoid a collision with the SUV, Ms. Brown swerved to the right and came into contact with the Bautista motorcycle. While Mr. Bautista managed to keep his motorcycle upright, he was injured in the collision. The unidentified SUV continued northbound and was not apprehended.

The insurer of the motorcycle, Primmum, paid accident benefits to or on behalf of Mr. Bautista. Primmum then commenced an arbitration pursuant to section 275 of the Insurance Act which provides for indemnification in certain circumstances between the insurers of different classes of vehicles. Motorcycles are one of the specified types of motor vehicles named in the Regulation. Section 275 (2) provides that indemnification shall be made in accordance with the respective degree of fault with each insurer's insured as determined under the fault determination rules.

The question has arisen as to whether Rule 10 (4), 15 (2), or the ordinary rules of negligence law apply to this case. Before examining this issue, it may be useful to first review the loss transfer system as established in the province of Ontario.

Loss transfer was established in Ontario in conjunction with the expanded no fault benefits in Ontario in June 1990. It allowed the insurer of certain specified motor vehicles to pay accident benefits to their insured but then pursue the insurer of the other motor vehicle for repayment of the accident benefits paid out. This is an exception to the general rule that there is no recovery for accident benefits from other parties. It was done in recognition of the fact that collisions involving certain types of vehicles would likely result in greater payment of accident benefits to injured parties. Loss transfer attempts to balance the cost of providing accident benefits between the various insurers. Without such loss transfer, it was feared that insurance for accident benefits on these specified motor vehicles would be difficult to obtain and the cost of insurance to those motor vehicles would be prohibitive.

Section 275 of the Insurance Act is the enabling legislation for this system and states:

(1) The insurer responsible under sub section 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 sub section 1 shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules…

Pursuant to section 275 (2), Regulation 668 was enacted which sets out the fault determination rules. It is important to understand, when applying the fault determination rules, that the system was developed as a quick and efficient method of determining what degree, if any, there should be loss transfer of accident benefits in certain situations. The rules were not expected to cover every situation and section 5 (1) of the Regulation states:

> If any 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.

It is in the context of this scheme then, that we must determine which rule applies, or if the ordinary rules of law apply.

I will deal first with the question of whether section 10 (4) applies. It states:

> (1) this section applies when automobile "A" collides with automobile "B", and both automobiles are travelling in the same direction and in adjacent lanes . . .

(4) if the incident occurs when automobile "B" is changing lanes, the driver of automobile "A" is not at fault and the driver of automobile "B" is one hundred percent at fault for the incident.

Counsel for Primmum submits that this rule applies to this situation. Counsel for Allstate, argues, however, that it does not, as the real cause of the accident were the actions of a third party, the SUV. I agree that a narrow reading of section 10 (1) and (4) suggests that this rule does in fact apply. Undoubtedly automobiles "A" and "B" collided and both were travelling in adjacent lanes. In addition, the incident occurred when automobile "B" changed lanes. The question is, can one ignore the actions of the SUV when applying the rule?

Counsel for Primmum argues that section 3 (a) applies and the actions of the SUV should be ignored. That section states:

3. the degree of fault of an insured is determined without referring to:

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

The scope of section 3 was considered by Arbitrator Samis in the Dominion of Canada General Insurance Company and Kingsway Insurance Company (unreported decision dated August 23, 1999). In that case, a heavy commercial vehicle driven by a Mr. Tremblay was pulling out of a private driveway onto a highway. At the same time an auto driven by a Mr. Russeau was travelling on the highway, when the Tremblay vehicle turned left in front of Mr. Russeau. Mr. Russeau swerved to avoid the heavy commercial vehicle and in doing so came into collision with

a parked pick-up truck owned by a Mr. Vinott. The question arose as to whether Arbitrator Samis should, because of section 3 (a), ignore the actions of the heavy commercial vehicle in applying the Rules, as there was no contact with it, even though it clearly played a role in the accident.

Arbitrator Samis stated:

> I interpret section 3 to exclude references to ambient conditions and the actions of pedestrians. Section 3 does not require to me to exclude of the actions of the Tremblay vehicle in this case, and to do so would be to ignore one of the main events leading to these injuries.

I am in general agreement with Arbitrator Samis' comments in that case, although I would not suggest that the list of consideration set out in section 3 (a) are necessarily the only matters to be taken into consideration. However, when the other considerations are so fundamental to the happening of the incident, to the point where the rule no longer properly describes the incident, then the rule is not applicable as it no longer accurately describes the fact situation.

This interpretation is I believe, consistent with section 5 (1) of the regulation, which states:

> 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.

Section 10 (4) refers to a "collision"; whereas section 5 refers to an "incident". There is a difference between the two terms. Arbitrator Samis in Dominion of Canada General Insurance Company vs. Kingsway Insurance Company, cited above, noted the distinction between

collisions and incidents. An incident does not necessarily involve a collision. Section 10 (4) requires there to be a collision, however, that section does not properly reflect the entire incident, and since the **incident** is not described in section 10 (4), then rule 5 (1) suggests you do not apply that section. Section 10 (4) would apply to a simple two-vehicle collision.

Counsel for Allstate submitted that section 15 (2) applies. That rule states:

> 1. this subsection applies with respect to an incident that occurs at an intersection with traffic lights.
> 2. if the driver of automobile "B" fails to obey a traffic signal, the driver of automobile "A" is not at fault and the driver of automobile "B" is one hundred percent at fault.

The issue arises as to whether section 15 (2) applies as there was no collision with the SUV or vehicle "B". I note that section 15 (2) applies to **incidents** rather than **collisions**. In our case, there was no collision between the SUV and the van but there was an incident that led to the injuries and payments of accident benefits. Accordingly, I find that section 15 (2) applies to this situation and the SUV is one hundred percent at fault for the accident.

If I am incorrect with respect to the applicability of section 15 (2), then the rules of negligence law apply, and the result is the same. Based on the facts that were before me, the unidentified SUV clearly disobeyed the red light. There is no evidence that the driver of the van, Ms. Brown, did anything wrong. There is no evidence of improper speed or lookout. All the cases cited to me by counsel for Primmum involved facts where there was failure on the part of the party to evaluate and respond to the changing situation.

The situation in this case is different in that there is absolutely no evidence to suggest that Ms. Brown did anything wrong. This was not a "res ipsa loquitor" situation as there are many explanations for the cause of the accident. Rather it was, in my view, a situation where Ms. Brown was faced with an emergency not of her making. In such a situation there is no liability on the person facing the emergency as long as they acted reasonably in the circumstances, and that is what I find here.

In light of the above, the driver of the unidentified SUV was one hundred percent responsible for the accident and there is no loss transfer.

In the event that the parties cannot agree on the issue of costs, I may be spoken to.

**Dated this 15th day of September 2004.**

_____

**M. Guy Jones**
**Arbitrator**