

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 664, s. 9**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

**THE ECONOMICAL INSURANCE GROUP and
KENT & ESSEX MUTUAL INSURANCE**

Respondents

ARBITRATION DECISION

COUNSEL:

Jamie Pollack for the Applicant

Daniel Strigberger for the Respondent, Economical Insurance

Mary-Joe Renaud for the Respondent, Kent & Essex Mutual Insurance

ISSUE:

Which of the respondent insurers is liable to indemnify Jevco Insurance under the Loss Transfer provisions in section 275 of the *Insurance Act* for accident benefits it has paid out to its insured, John Robert?

RESULT:

Kent & Essex Mutual, as the insurer of the driver of the vehicle that was responsible for the accident, is liable to indemnify Jevco Insurance for any accident benefits paid to or due to Mr. Robert.

BACKGROUND:

John Robert was injured while driving his motorcycle on October 3, 2006. He was riding with another motorcyclist when a car pulled into an intersection and struck the other motorcycle, causing Mr. Robert to swerve in order to avoid a further collision. Mr. Robert's motorcycle was insured under a policy issued by Jevco Insurance ("Jevco").

The driver of the vehicle in question was Gertrude Duplessis. Ms. Duplessis owns a vehicle that is insured by Kent and Essex Mutual Insurance ("Kent & Essex"). On that day, however, she was driving a "loaner" vehicle owned by Tilbury Collision. Ms. Duplessis had brought her own vehicle in for repairs, and the shop provided her with a vehicle for her use while her car was being repaired. The loaner vehicle involved in the accident was insured under Tilbury's fleet policy, issued by Economical Insurance ("Economical").

Jevco has been paying benefits under the *Statutory Accident Benefits Schedule* to Mr. Robert, and continues to do so. It asserts that this claim is subject to the loss transfer provisions in section 275 of the *Act*, and that it is therefore entitled to be reimbursed both for the amounts paid out, and for any further amounts that it will continue to be liable to pay to Mr. Robert, from either Economical or Kent & Essex.

Both Economical and Kent & Essex have agreed that they are "second party insurers" within the meaning of section 275 in these circumstances, but each take the position that the other is liable to indemnify Jevco.

At Mr. Pollack's suggestion, counsel agreed to follow the same process undertaken in *Primum Insurance v. ING Insurance and Co-operators' General Insurance* (unreported decision of Arbitrator Jones, August 2007), whereby the responding insurers file written submissions in support of their positions, and I then determine the issue, while Jevco "waits in the wings".

Counsel for both Economical and Kent & Essex filed detailed written submissions, as well as Reply submissions, the gist of which are set out below. Mr. Pollack did not file any submissions on Jevco's behalf, or comment on the other submissions filed.

PARTIES' SUBMISSIONS:

Both counsel's submissions addressed the *Primum* decision referenced above.

In that case, a motorcycle insured by Primum was struck by a Ford van owned by an auto dealership. The dealership insured the van under its garage policy, issued by ING. At the time of the accident, the van was being driven by a Mr. Dooreleyers, who was an employee of an automobile detailing business called Finishing Touches. That company had a garage policy with Co-operators' Insurance, which also covered the van. It was accepted by all parties that in accordance with Rule 7(3) of the Fault Determination Rules, Mr. Doorleyers was 100% liable for the accident. In considering whether the insurer of the owner of the vehicle, or the insurer of the driver of the vehicle should be responsible to indemnify Primum under the loss transfer provisions, Arbitrator Jones stated (at p. 7):

Loss transfer is based, however, on the fault of the insured as Section 275(2) and the fault determination rules make clear. In our case, it is the actions of Mr. Dooreleyers acting as an employee of Finishing Touches, who was at fault for the accident. If one considers the overall scheme of loss transfer it is clear that the legislature was attempting to distribute loss based on the degree of fault. Accordingly, in this case Co-operators', as the insurer of Finishing Touches, is first in priority and must pay the monies paid out ..by Primum.

Counsel for Economical contends that in accordance with Arbitrator Jones' decision in *Primum*, when a fault-based analysis is applied here, Ms. Duplessis' personal insurer should be the one to indemnify Jevco for Mr. Robert's benefits, rather than the insurer of the owner of the vehicle, who bore no fault in the circumstances. He argued that as long as Kent & Essex is available to indemnify Jevco fully, based on the degree of fault of its insured, it is obliged to do so without any contribution or indemnity from Economical.

Counsel for Kent & Essex contended that the facts in the instant case are distinguishable from those in *Primum*. She noted that the *Primum* case addresses the obligations of two commercial parties who both insured the same vehicle, pursuant to identical garage policies. She stated that unlike in this case, the first party insurer there (*Primum*) was not seeking loss transfer indemnification from the at fault driver's personal insurer, and that consequently, a different analysis should be applied.

Counsel for Kent & Essex also noted that section 275(1) of the *Act* refers to automobiles "involved in the incident from which the responsibility to pay the statutory benefits arose". She argued that the statutory language thus makes clear that the focus should be on the insurer of the automobile involved in the accident in question. She further cited the Ontario Court of Appeal's decision in *Jevco Insurance Co. v. Canadian General Insurance Co.* [1993] 14 O.L.R. (3d) 545, in which the court found that the insurer paying no fault benefits under a policy insuring a motorcycle was entitled to claim indemnity from the insurer of an automobile involved in the accident, when the driver of the automobile was fully or partially at fault for the accident. Counsel contended that the judicial authorities are clear that the second party insurer responsible for indemnifying the first party insurer is the insurer of the automobile involved in the accident, which in this case is Economical Insurance.

As stated, both counsel filed Reply submissions, commenting on the positions set out in each other's initial submissions.

Counsel for Economical contended that Kent & Essex’s focus on the insurer of the vehicle involved in the incident was misplaced, and that her submission that her client did not insure a vehicle that was involved in the incident is inconsistent with its admission that it is a second party insurer in this matter.

Counsel for Kent & Essex acknowledged in her Reply submission that her client did insure the vehicle involved in the collision inasmuch as its policy provided coverage for Ms. Duplessis when she drove Temporary Substitute Vehicles or Other Automobiles under section 2.2.2 and 2.2.3 of the OAP 1. She stated that for that reason, her client agreed that it was a “second party insurer” in this instance. However, Ms. Renaud contended that Kent & Essex should only be called upon to respond to the claim if there was no primary policy of insurance on the vehicle, and as Economical’s policy was in place on the date of loss, she argued that its policy should stand “in priority” to that of Kent & Essex.

ANALYSIS & DECISION:

The issue to be decided in this case is essentially whether the loss transfer obligation should be borne by the insurer of the owner of the vehicle involved in the collision, or the personal insurer of the driver. This question is another version of the query that frequently arises in situations that are not directly addressed by the statute or regulations – does coverage follow the person or the vehicle?

The statutory and regulatory references to loss transfer are general in their language and do not provide any specific guidance in circumstances such as these, in which there are two insurers who are potential payors in a loss transfer scenario. Section 275(1) of the *Insurance Act* states:

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.

We must then turn our attention to section 9 of Regulation 664. Section 9(1) simply defines a “second party insurer” as “an insurer required under section 275 of the Act to indemnify the first party insurer” who pays accident benefits. Section 9(2) requires that

9. (2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

The above provisions simply set out the general notion that second party insurers must indemnify first party insurers in the situations identified. We are then only left with the direction in section 275(2) of the Act, which provides:

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.

I agree with the view expressed by Arbitrator Jones that given the wording in section 275(2), as well as the Fault Determination Rules set out in Regulation 668 to the Act, the overall focus of the loss transfer scheme is on the fault of insured drivers. In my view, in the absence of any statutory or regulatory language directing otherwise, that focus leads

to the conclusion that coverage should follow the driver, as opposed to the vehicle, in the scenario presented by this case.

Counsel for Kent & Essex contended that the facts of the *Primum* case are sufficiently different than those in the instant case, and that that decision is therefore distinguishable. She focused on the fact that the two insurers in that case had issued garage policies to two companies, and that the at-fault driver was acting in the course of his employment at the time of the accident. While I acknowledge that the dispute in that case did not involve a first party insurer seeking loss transfer from the at-fault driver's personal insurer, I do not agree that that changes the nature of the discussion. The question in that case, namely which of two potential insurers were obliged to pay under the loss transfer scheme, is the very same question that is posed in this case, and I find that the issue of whether the policies are garage policies or individual policies is not material.

As acknowledged by counsel for Kent & Essex in her submissions, Ms. Duplessis' policy extends her coverage under sections 2.2.2 and/or 2.2.3 to the "loaner" Ford vehicle that she was driving, owned by the body shop. Given that fact, both Kent & Essex and Economical were insurers of the vehicle involved in the accident. Kent & Essex then contends that as the Ford Escort was presumably a "described vehicle" on the Economical policy, that policy should be primary and should respond first to a loss transfer claim. While there is arguably some logic to that argument, the statute and regulations are silent on that point: in the absence of any statutory authority or reference in the regulations directing that outcome, I cannot accept that argument.

Instead, having determined that "coverage follows the driver", I find that Kent & Essex, as Ms. Duplessis' personal insurers, are liable to indemnify Jevco Insurance for accident benefits paid out or due to Mr. Robert, pursuant to the loss transfer provisions of section 275 of the Insurance Act.

I remain seised of this matter in the event that counsel experience any difficulty in the implementation of my decision.

DATED AT TORONTO, ONTARIO this _____ day of March, 2009.

Shari L. Novick

Arbitrator