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:

PRIMMUM INSURANCE COMPANY

Applicant

- and -

COSECO INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Jamie R. Pollack for the Applicant

Chad Townsend for the Respondent

ISSUES:

1. Does section 12, or section 15 of the fault determination rules apply to this situation or do the ordinary rules of law apply, and if so, what is the degree of fault of each party?

DECISION:

None of the fault determination rules apply. Primmum's insured is 75% at fault and Coseco's insured is 25% at fault for the accident.

HEARING:

The hearing in this matter took place in Toronto, Ontario on March 1, 2006.

FACTS AND ANALYSIS:

This "loss transfer" arises out of an accident that occurred on June 26, 1999. On that date, Mr. Mike Raleza was driving a motor vehicle insured by Coseco Insurance Company ("Coseco"), when it came into contact with a motorcycle operated by Mr. Cosimo Sgambelluri which was insured by Primmum Insurance Company ("Primmum"). As a result of the accident Mr. Sgabmelluri suffered injuries and applied and received statutory accident benefits from Primmum, which is now claiming indemnity from Coseco, the insurer of Mr. Raleza.

Section 275(1) of the Insurance Act, R.S.O, c.I. 8 permits an insurer that pays statutory accident benefits to be indemnified by another insurer for all or part of the accident benefits paid by the first insurer when the second party insurer's insured is fully or partially at fault. Pursuant to section 275(2) of the Insurance Act, indemnification is to be in accordance with the fault determination rules set out in Regulation 668. In the event that none of the rules set out in the Regulation are deemed to apply, the ordinary rules of law are to apply.

The accident which gives rise to this arbitration occurred on June 26, 1999 at approximately 4:55 p.m. Mr. Raleza had been travelling northbound on Dufferin Street, in the passing lane of the two northbound lanes and had begun to execute a left turn from Dufferin Street in order to turn into the Galleria mall which is located on the west side of Dufferin Street approximately 75

metres south of the intersection of Dufferin and Dupont streets in the city of Toronto. Mr. Sgambelluri was southbound on Dufferin on his motorcycle. He was in the southbound passing lane of Dufferin Street when the collision occurred. The Raleza vehicle had been stopped for some brief period of time prior to the collision with the front of the motor vehicle protruding somewhat into the southbound passing lane.

While the basic facts underlying this accident were not in dispute, there was no agreed statement of fact filed and evidence was given by the investigating police officer, P.C. Harrison as well as the driver of the motor vehicle, Mr. Raleza, and two witnesses, Carol Ann Latchford and Harpreet Singh Gulri. It is necessary to review their evidence briefly in order to come to a conclusion as to how the accident happened.

P.C. Harrison investigated the accident. He is a traffic officer with many years experience investigating motor vehicle accidents. From examining the tire skid marks as well as gouge marks that he concluded were left by the motorcycle after it had turned on its side, P.C. Harrison concluded that the motorcycle had been proceeding southbound in the curb of two southbound lanes when Mr. Sgambelluri lost control of the motorcycle and it went on its side. It then continued to slide into the southbound passing lane and came into contact with the Raleza motor vehicle which had been stopped with the front of the motor vehicle in the southbound passing lane. Officer Harrison did testify that if the car had continued with its turn, rather than stopping it might have avoided the accident. He further testified that approximately the entire front half of the car was in the southbound passing lane. Carol Ann Latchford testified on behalf of Coseco. She was located in her car on the west side of Dufferin near the McDonald's restaurant which is

just north of the accident scene. Mr. Latchford gave her evidence in a very honest fashion however, I found it to be confusing and somewhat inconsistent. She had trouble with directions and distances and accordingly I do not place a great deal of weight on her evidence. In any event, she testified that she had seen the driver of the motorcycle perform a "wheely" with the front tire off the ground shortly before the accident. She said that the front wheel of the motorcycle came down and the motorcycle slid onto its side and slid down the road. She was not sure of the precise location of the Raleza car at the time of the accident.

Mr. Harpreet Singh Gulri also testified on behalf of Coseco. He was located in his motor vehicle southbound on Dufferin just north of Davenport Road waiting for the southbound traffic light to turn green. When he first saw the motorcycle it was driving in the middle of the 2 southbound lanes just north of the intersection of the Dufferin and Dupont streets. The motorcycle was described as "moving, with full throttle". Mr. Gulri lost sight of the motorcycle after the intersection and did not see the collision, which he subsequently passed. The motorcycle was then under the car.

Mr. Michael Raleza, the driver of the car, also testified for Coseco. He stated that he had come out of a laneway on the east side of Dufferin, south to the accident scene. He went north on Dufferin. He saw that the light had been red at Dufferin and Dupont and therefore proceeded to make a left turn, planning to go into a mall on the west side of Dufferin. He looked up and saw a motorcycle with only the rear wheel on the ground. The front of the wheel came down, the motorcycle swerved and hit his car. He acknowledged that the front of his motor vehicle was over the center line of Dufferin at the time of the accident. He doesn't recall which lane for

traffic the motorcycle was in when he first saw it nor long how he was stopped prior to the collision. He did testify that he saw something out of the corner of his eye and that he stopped and saw the motorcycle fall and skid into his stopped automobile.

It is Primmum's position that section 12 (1) and (4) of the fault determination rules apply, or alternatively that the ordinary rules of law apply.

Section 12(1) and (4) state:

> 12 (1) this section applies when automobile "A" collides with automobile "B" and the automobiles are travelling in opposite direction and adjacent lanes.
>
> 12 (4) if automobile "B" is over the centre line of the road when the incident occurs, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault.

Based on the evidence, I have no difficulty concluding that the Raleza motor vehicle was over the centre line at the time of the accident as required by section 12 (4). I also have no difficulty concluding that the vehicles were travelling in opposite directions at the time of the accident, as required by section 12 (1). The real issue is whether they were travelling in adjacent lanes at the time of the accident. On the evidence, I find that the motorcycle had been travelling southbound in the curb lane when its driver lost control and the motorcycle slid on its side from the curb lane into the southbound passing lane where it struck the stopped motor vehicle. The motorcycle was not "travelling" in the passing lane prior to the accident. It had been "travelling" in the curb lane

and was passing through the passing lane when the collision occurred. I am in agreement with the approach taken by arbitrator Brown in State Farm vs. Co-operators (unreported decision released March 23, 2005) and arbitrator Robinson in Liberty vs. A1 Transport (unreported decision released May 26, 2004). In those cases the arbitrators held that one had to look at what lane the vehicle is predominantly using prior to the accident and if the vehicle was only incidentally using a lane then it would not be said to be "travelling" in that lane.

In our case the motor vehicle was predominantly using the southbound curb lane and simply skidded into the passing lane on its way to the fateful collision with the stopped vehicle. Accordingly it was not "travelling" in the passing lane within the meaning of section 12 (1) of the fault determination rules.

The consideration of Primmum's position does not stop there, however. Counsel for Primmum argues that the term "adjacent" as used is section 12 (1) is not restricted to simply the passing lane in our case but could also include the southbound curb lane. The term "adjacent" is not defined in section 12 or elsewhere in Regulation 668.

Black's Law Dictionary defines "adjacent" as "lying near or close to; sometimes contiguous; neighbouring". Counsel for Primmum therefore argues that the lanes need not be touching to be adjacent and that the legislature could have used the term "adjoining or contiguous" if they intended to limit the section as is argued by Coseco. He also submits that to so limit the term "adjacent" would restrict the use of section 12 to situations where there was only 1 lane each way. I am not in agreement with that part of counsel's argument, as section 12 could still apply

to multi lane situations but only if the vehicles travelling in it were travelling in the lane immediately beside the other vehicle.

While I find counsel's argument interesting and somewhat persuasive, I am not in agreement with it. When interpreting a term in a statute one reads it in the entire context of the Act or Regulation. As Mr. Justice Iacobucci stated in Rizzo vs. Rizzo Shoes Ltd. [1998] 1SCR 27:

> Today there is only one principal or approach namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objective of the Act and the intention of Parliament.

While not determinative of the issue, I note that section 12 (4) of Regulation 668 includes a diagram to further describe the situation where the rule is to apply. That diagram shows the vehicle travelling in the lane right beside the other vehicle. I also note that sections 10 and 11 of Regulation 668 also use the term "adjacent" and also show the vehicles in the lanes beside one another. Again, while this is not determinative of the issue, it is somewhat persuasive as to the intent of the legislature. In light of the above I find that "adjacent" for the purposes of section 12 of the fault determination rules applies to the lanes immediately beside one another. Accordingly section 12 (4) does not apply to this situation.

Coseco submits that section 15 of the fault determination rules apply. The applicable part of that section states:

> 15 (1) this section applies with respect to an incident that occurs at an intersection with traffic signals.
>
> 15 (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 100% at fault for the incident.

The difficulty that I have with this position is that officer Harrison found that the collision occurred more than 75 metres south of the intersection. Even if one accepts that the motorcycle did go through the red light, the collision occurred so far from the intersection that rule 15 does not apply. The fact that the motorcycle may have gone through a red light was only incidental, at the very most, to the happening of the accident.

Having determined that the fault determination rules do not apply, section 5 of Regulation 668 requires that the ordinary rules of law apply. On the evidence led at trial, I find that the motorcycle had been proceeding southbound in the curb lane with the front wheel off the ground, the driver performing what is commonly known as a "wheely". While the motorcycle may have been travelling at a considerable speed, I do not find on the evidence before me, that it was actually speeding. There is insufficient evidence before me to draw such a conclusion. The above noted actions of Mr. Sgambelluri, were, in my view, negligent in the circumstances. Mr.

Raleza's actions, on the other hand, were not beyond reproach, as he commenced a left hand turn without first determining that it could be done in safety. Given that the intersection was at least 75 meters away from where he was located, he should not have assumed that simply because the light was red at the intersection that it would be clear to turn left. Taking into account all the circumstances, I would attribute 75% liability upon Mr. Sgambelluri and 25% on Mr. Raleza. Accordingly, Primmum is entitled to 25% recovery of the applicable amount of accident benefits it paid to or on behalf of Mr. Sgambelluri.

In the event that the parties are unable to agree upon the issue of costs, I may be spoken to.

Dated in Toronto, this _____ day of June, 2006.

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M. Guy Jones
Arbitrator