IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 275, as amended,
and REGULATION 664, s. 9, R.S.O., as amended

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Edyta Wiezel and Dwayne Burns for the applicant, Liberty Mutual Insurance Company

Eric Zeldin for the respondent, Zurich Insurance Company

ISSUES:

1. Does Rule 17 (1) or Rule 6 of the fault determination rules apply or do the ordinary rules of law apply to this situation?

2. Is the applicant entitled to be compensated for the cost of the D.A.C. reports?

DECISION:

1. Rule 6 and 17 (1) do not apply. The ordinary rules of law apply.

2. Subject any findings regarding liability the applicant would be entitled to be compensated for the cost of the D.A.C. reports.

HEARING:

This hearing was held in Toronto, Ontario on May 3, 2005 before me, M. Guy Jones, arbitrator.

FACTS & ANALYSIS:

This loss transfer matter arises out of an accident which occurred on August 22, 1997. At that time Jay and Drew MacIntosh and three of their friends were operating their scooters westbound on Canborough Road in the Township of West. The group realized that they might be lost and be decided to pull over onto the north shoulder of the road and check a map. After checking the map, and waiting on the shoulder to turn around, a motor vehicle driven by Ms. Lisa Parry struck the motor scooters of both Jay and Drew MacIntosh. At the time of the accident Jay and Drew MacIntosh were insured with Liberty in pursuant to a standard scooter insurance policy.

As a result of the accident, Jay and Drew MacIntosh suffered personal injuries. They applied and received statutory accident benefits from Liberty. Liberty also incurred the cost of assessment at DAC's pursuant to the statutory accident benefit schedule in the amount of $2,407.50 for Jay MacIntosh and $4,545,50 for Drew MacIntosh.

Liberty has commenced an arbitration against Zurich, claiming that Rules 6 or 17 (1) of the fault determination rules apply and accordingly they should be compensated pursuant to section 275 of the Insurance Act and Regulation 664/90. Liberty also claims the cost of the DAC assessments.

DOES RULE 6 APPLY?

Rule 6 (1) and (2) state:

> (1) this section applies when automobile "A" is struck from the rear by automobile "B" and both automobiles are travelling in the same direction and in the same lane.
>
> (2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the incident.

I am of the view that Rule 6 does not apply to this situation, as the vehicles were not travelling in the same lane. This accident occurred at approximately 10:50 p.m. on August 22, 1997. The five motor scooters had pulled completely off to the north shoulder of the road and had checked a map for directions. Two of the scooters had already turned around and gone to the south shoulder and were waiting for the other three scooters to turn around. The motor vehicle driven by Ms. Parry came around a curve in the road in the dark and left the paved portion of the road and then struck the three scooters on the shoulder. While the collision occurred in one lane, or rather on the shoulder of the road, it would not be accurate to say that they were "travelling in the

same direction and in the same lane". Ms. Parry was in the process of going from one lane onto the shoulder of the road when the accident occurred. They were not travelling in the same lane.

DOES RULE 17 (1) APPLY?

Rule 17 (1) states:

> If automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the accident.

Liberty takes the position that the scooters were parked and therefore this rule should apply. Zurich, on the other hand, takes the position that the scooters were stopped rather than parked and therefore the rule does not apply.

In analyzing the applicability of this rule, one must first determine whether or not it matters whether the scooters were parked or stopped. In other words, did the drafters of the legislation intend for there to a distinction between "parked" and "stopped" for the purpose of rule 17 (1). If one examines the wording of rule 17 (2) one notices it deals with "illegally parked, stopped or standing" vehicles. Rule 17 (1) however states that it deals only with "parked" automobiles. This strongly suggests to me that the drafters did intend to make a distinction between parked, stopped and standing automobiles.

That being the case, it now remains to be determined if the MacIntosh scooters were parked or stopped at the time of the accident.

The term “parked” is not defined in the fault determination rules or the Insurance Act. Section 1 of the Highway Traffic Act defines the following terms:

> “parked” or “parking” when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of or while actually engaged in loading or unloading merchandise or passengers;
>
> “standing” or “stand” when prohibited, means the halting of a vehicle, whether occupied or not, except for the purpose of and while actually engaged in receiving or discharging passengers.
>
> “stopped” or “stopping” when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except where necessary to avoid conflict with other traffic or in compliance with the direction of a police officer or via traffic control signal or sign or signal

The oxford dictionary defines “park” to mean “leave (a vehicle) usually temporarily, in a car park, by the side of the road, etc. .

The Ontario Court of Appeal in Speer et al. vs. Griffin et al [1939] O.R. 552, concluded that the word “park” involved more than a momentary stop. In that case, the driver of a truck drove his vehicle off private property and through an open gate. He then stopped the truck, parking partially on the highway, in order to allow a passenger to get out and close the gate. After closing the gate, the passenger was approaching the truck when it was struck by another motor

vehicle. The Court of Appeal held that the word "park" or "leave standing" as found in section 40 (1) of the Highway Traffic Act did not apply to this situation, as the word "park" involves more than a momentary stopping, and the words "leave standing" are not satisfied by the mere stopping of the vehicle, the driver remaining in his place, and intending to proceed directly.

From the case law and the definitions above, I think that one must look at the duration of the stopping, the method of stopping and the intent of the person, when determining if the person was parked or stopped.

Turning to the facts of this case, it is clear, on the evidence, that the party of five motor scooters had stopped fully on the north shoulder of the road way to check their directions. They had been intending to travel to a scooter gathering and had become lost. There were five scooters, each with one person on the scooter. Not surprisingly, there were varying versions of how long the scooters were stopped and who got off their scooters, etc. What is clear, however, is that they all had pulled over to the shoulder in order to check a map and clarify where they were, prior to proceeding. Estimates of how long they were stopped prior to the collision varied from 2-3 minutes to 10 minutes. It is clear that the scooters were stopped long enough to put their stands up, and for at least one and probably more of them to huddle over headlights of one of the scooters to check a map in order to locate themselves. The map was simply a one-page document that gave direction to the scooter gathering. The scooters were left running at all times, with their lights on. Jay MacIntosh testified at the hearing that he got off his scooter and went to another scooter to look at the map in its headlights. He could not recall if Drew MacIntosh got off his scooter. The documentary evidence filed at the hearing left it somewhat

unclear as to exactly who did and did not get off their bikes to check the map. It is clear that not all of them got off their bikes. In any event, after checking the map and consulting briefly, two of the scooter drivers returned to their bikes and moved to the south shoulder of the road as it had been determined that they had gone too far and accordingly had to turn around and retrace their steps. The two scooters on the south side were then waiting briefly for the other scooters to turn around, when the westbound Parry vehicle came around the curve and struck, among others, the Jay and Drew MacIntosh scooters which were still on the north shoulder. Both youths were waiting to make their u-turns at the time of the collision.

While it is impossible to be precise as to how long the scooters were stopped prior to the collision, I find, on the evidence, that they were likely stopped for a shorter rather than a longer period of time. They were not checking a sophisticated or complex map, and it did not appear that the discussion between the scooter drivers was a long one.

Based on the evidence presented at the hearing, I am of the opinion that Jay and Drew MacIntosh were not "parked" at the time of the accident. They had stopped briefly for the purpose of checking their location and they were about to proceed. While the fact situation is slightly different than that of in Speers case, I think that the principles are the same and the facts are quite similar.

Accordingly, I find that the Jay and Drew MacIntosh scooters were not parked and therefore Rule 17 (1) does not apply. Accordingly the ordinary rules of law apply. If the parties are

unable to agree as to the liability situation applying the ordinary rules of law, the hearing may be reconvened to lead further evidence in this regard.

In light of the above, since I ruled that the fault determination rules do not apply, the question of whether Liberty is entitled to be compensated for the cost of the DAC reports is somewhat academic, however, since the parties have made submissions I will deal with it briefly.

Liberty takes the position that they are entitled to recover the costs of the DAC assessments as they paid for the costs of the medical examinations made pursuant to section 43 of the statutory accident benefits schedule.

Statutory authority for loss transfer is provided by section 275 of the Insurance Act and section 9 of Regulation 664/90. Section 275 (1) states:

> (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 statutory accident benefits arose.

In support of their position, Liberty relies upon the reasoning of arbitrator Bruce Robinson in Allstate Insurance Company of Canada vs. Axa Boreal Insurance Inc., (unreported decision dated May 7, 1999). Arbitrator Robinson stated:

> Section 275 (1) uses the words "is entitled to indemnification". O.I.C. Bulletin no. 11/94, while not binding upon me, is some indication as to the manner in which it was anticipated the loss transfer provisions would apply. Statutory Accident Benefits Schedule under discussion in this particular case allows for the recovery of costs of any assessment conducted under the Schedule…I find the intent of the legislation was that all payments made by the first party insurer should be reimbursed by second party insurer, except where it involved direct overhead, office overhead, adjuster overhead and such items as surveillance.

Zurich takes the position that the D.A.C. assessment costs are not "benefits" and are therefore not recoverable under loss transfer. They point to the decision of arbitrator Craig Brown in State Farm Mutual Automobile Insurance Company vs. ING Insurance Company (unreported decision dated February 16, 2005). Arbitrator Brown held that the cost of D.A.C. assessments were not recoverable in loss transfer cases as they could not be considered "benefits" under the Schedule. He found that he was bound by the decision of Justice Mandel in the case of Jevco Insurance Company vs. Prudential Insurance Company (1995) O.R. (3rd), which held that independent medical examinations were not "benefits" and therefore not recoverable.

Mr. Justice Mandel in Jevco relied heavily upon the decision of arbitrator R.E. Holland in Jevco vs. Guarantee Company affirmed by Mr. Justice Moldaver, sitting in Divisional Court. That case involved the previous legislation, Bill 68, and the cost of various assessments.

Mr. Justice Mandel held that independent medical assessments were not benefits under the schedule, but rather "cost control" efforts or expenditures and therefore not recoverable.

The O.I.C. (now F.S.C.O.) occasionally issues bulletins in order to give guidance to parties as to how it believes various motor vehicle insurance issues should be dealt with. Under the previous legislation, Bill 68, it issued a bulletin which indicated that costs of independent medical examinations were not recoverable, and it is worthwhile to note that this bulletin was relied on, in part, to justify that independent medical examinations were not recoverable in the Jevco vs. Guarantee Company decision. In 1994, however, the O.I.C. published bulletin 11/94 stating that the following was recoverable under loss transfer:

- the cost of any assessments conducted under the schedule
- all expenses under the schedule

Mr. Mandel rightly pointed out that the O.I.C. bulletins, while highly persuasive, are not binding. Mr. Justice Mandel went on to find that the independent medical examinations were not "benefits" but rather "cost control" measures and therefore not recoverable. If we were dealing with independent medical examinations, I would agree with arbitrator Brown that we are bound by Justice Mandel's decision. There are, however, some important distinctions between independent medical examinations and D.A.C.'s. Independent medical examinations are strictly

cost control measures. There are used by insurers who retain medical experts to determine if the applicant is entitled to a benefit. This situation is somewhat different however. Under section 37 (3) of the Schedule, the insurer is required to inform the insured person that he has the right to an assessment by a D.A.C. pursuant to section 43 of the Schedule. The insured may elect whether to have the D.A.C. assessment or not. The insurer does not choose the D.A.C. asessors who perform the assessment but rather the choice is determined in accordance with the schedule.

In my view while the independent medical examinations may be a cost control measure, I think that the D.A.C. reports are somewhat different. They are designed, among other things, to determine what kind of treatment, if any, the insured person should have. As such, it is a benefit. It is not controlled by the insurer. While it may be a cost control measure to some extent, this does not mean that it is only that. I therefore find that I am not bound by Mr. Justice Mandel's decision with relation to the D.A.C. reports and I find that they are recoverable. I do note, however, in this case, Liberty was not successful on the fault determination rule issue. Liberty will only be entitled to the cost of the D.A.C. reports if they are not responsible for the accident in accordance with the ordinary rules of law.

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

Dated this _____ day of August, 2005.

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M. Guy Jones
Arbitrator