

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 275 and ONTARIO REGULATION 668**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY OF CANADA

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Dana R. Spadafina for the Applicant

No one appearing for the Respondent

ISSUE:

1. Which of the Fault Determination Rules in *Regulation 668* to the *Insurance Act* apply to this accident, if any, and what is the result of this finding?

RESULT:

1. None of the Fault Determination Rules in the regulation describe the incident. Section 5 therefore requires that the degree of fault of the driver of the truck be determined in accordance with the ordinary rules of law. I find that Mr. McGinnis is 100% at fault for the accident, and that Empire Fire & Marine, as subsidiary of Zurich Insurance Company, is therefore required to indemnify the Personal for all benefits paid out to Ms. Sohan and Mr. Gayle in accordance with section 275 of the *Insurance Act*.

BACKGROUND:

Janice Sohan and Kevon Gayle were involved in an accident on February 23, 2006 when the vehicle that they were driving in was struck by a tractor trailer. Kevon Gayle is Ms. Sohan's son. Ms. Sohan was driving a 2001 Honda Civic, insured by the Personal. The truck that struck them was driven by Randy McGinnis and owned by Schafers' Fisheries, a company located in Illinois, in the United States. It was insured by Empire Fire & Marine, a subsidiary of Zurich Insurance Company ("Zurich").

The accident took place at the intersection of Dixon Road and Islington Avenue, in Toronto. Both vehicles were traveling westbound on Dixon Road in the curb lane.

Both Ms. Sohan and Mr. Gayle alleged that they sustained injuries in the accident, and submitted applications for payment of accident benefits pursuant to the *Statutory Accident Benefits Schedule* to the Personal. Both claims have now been settled on a full and final basis. A total of \$68,023.20 was paid by the Personal to Ms. Sohan or on her behalf, and benefits amounting to \$28,780.15 were paid by the Personal to Mr. Gayle.

The Personal provided notice to Empire Fire & Marine of its intention to seek indemnification for the benefits it would be called upon to pay under section 275 of the *Insurance Act* (also known as and referred to hereinafter as “the Loss Transfer

provisions”) on April 7, 2006. Empire is located in Omaha, Nebraska. Empire did not respond to the request, nor to subsequent attempts made by the Personal to follow up.

The Personal then instructed counsel to pursue reimbursement under the Loss Transfer provisions against Zurich, the parent company of Empire Fire & Marine, in late 2009. Letters were sent to Donald Myers, who had been identified as a Claims Adjuster with Zurich in Omaha, Nebraska, on January 13, 2010 and June 9, 2010. These letters set out details of the request for reimbursement pursuant to the Loss Transfer provisions, and include the statutory provision relied on. Fax confirmation forms filed with me confirm that the letters were in fact transmitted, but no response was received.

Counsel for the Personal then forwarded a Demand to Participate in the Appointment of an Arbitrator to Mr. Myers on June 30, 2010. No response was received, and an Application was subsequently filed with the Ontario Superior Court of Justice seeking an Order appointing myself as Arbitrator. Justice Perell issued the Order sought on February 17, 2011, along with a costs order in the amount of \$2,700 plus GST. The Order was sent to Mr. Myers, but no response was received nor any payment made.

Counsel for the Personal contacted my office in late April 2011, and requested that an initial arbitration pre-hearing be scheduled. A letter was sent to both Ms. Spadafina, counsel for the Personal, and Mr. Myers on May 18, 2011, advising that a pre-hearing call would be convened on June 8, 2011 at 9 a.m. When I contacted the number provided for Mr. Myers, I was directed to his voice mail box and left a message requesting that he contact me prior to the end of June to advise whether Zurich intended to defend the matter. I did not receive any phone call or communication of any sort from him.

I subsequently realised that Omaha, Nebraska is in the Central Standard Time zone, and that it was possible that Mr. Myers expected the pre-hearing call to be convened at 9 a.m. central time, as opposed to 9 a.m. EST. A further call was then scheduled for November 29, 2011 at 4 p.m. EST, (3 p.m. Central Standard Time), and a further letter was sent to both parties confirming the new time. My letter advised that an arbitration date would be

set at that time, and Mr. Myers was encouraged to appoint counsel to defend the arbitration. When the call was convened at the appointed time, Mr. Myers did not answer his phone.

Given the lack of co-operation on Zurich's part and its decision not to participate in the telephone pre-hearings convened, I decided that the parties should file written submissions in support of their positions. I wrote a letter to Ms. Spadafina and Mr. Myers advising that submissions in support of their respective positions should be provided to me by May 31, 2012. I received written submissions from Ms. Spadafina on that date, but no submissions were received from Mr. Myers or from anyone else representing Zurich.

I note that no letters sent either by my office or by counsel for the Personal have been returned by the post office, and that the phone number that I used to contact Mr. Myers had a voicemail message identifying it as his extension. I can only conclude from this that Zurich was aware that the arbitration had been convened, and made a conscious decision not to participate in the process.

RELEVANT PROVISIONS:

Insurance Act – section 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.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

(3) No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection.

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Regulation 664 –

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

Regulation 668 –

5. (1) 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.

(2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

10. (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 100 per cent at fault for the incident.

18. The driver of automobile “A” is 100 per cent at fault and the driver of automobile “B” is not at fault for an incident in which automobile “A” collides with automobile “B” when the driver of automobile “A” fails to obey,

(c) a prohibited passing sign;

Arbitration Act, 1991 -

54. (1) An arbitral tribunal may award the costs of an arbitration.

(2) The costs of an arbitration consist of the parties’ legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

EVIDENCE / FACTS:

As set out above, no material or submissions of any sort were received by Zurich, Empire or any representative acting on their behalf. Accordingly, I am left to make my findings on the documents and submissions filed by counsel for the Personal.

Ms. Spadafina provided me with a copy of the police Motor Vehicle Accident report. It indicates that the truck “turned out wide to commence a right turn to travel northbound on R2 and trailer caught V2 (the Claimants’ vehicle). V2 was w/bound in L3 and stopped to allow V1 (truck) to turn.” The codes on the police report indicate that the truck driver made an improper turn, and that Ms. Sohan was driving properly.

I also note that Ms. Sohan reported on the application form she submitted to the Personal that she was “struck by the tail of a truck while making a right turn”. Her son’s application states that “our vehicle was struck by a truck while making a right turn”.

The police report also indicates that the tractor trailer was owned by Schafers’ Fisheries of Fulton, Illinois, and insured by Empire Fire & Marine under policy #CLA85463. I am satisfied from the information provided in the police report that the truck meets the definition of “heavy commercial vehicle” in *Regulation 664*.

ANALYSIS & FINDINGS:

The Loss Transfer provisions cited above permit ‘first party insurers’ who pay accident benefits to their insureds in accordance with the *Statutory Accident Benefits Schedule* to be indemnified by another insurer (‘second party insurer’) insuring a heavy commercial vehicle for all or part of the benefits paid out, when the insured of the second party insurer was partly or fully at fault for the accident.

I am persuaded that the requisite elements for the application of the Loss Transfer provisions have been made out in this case.

I will turn now to the evidence before me regarding liability for the accident. Counsel for the Personal contends that either Rule 10(4) or Rule 18(c) of the Fault Determination Rules (*Ontario Regulation 668/90*) apply to these circumstances. As set out above, Rule 10(1) specifies that the section applies when there is a collision between two automobiles that are travelling in the same direction and in adjacent lanes. Rule 10(4) provides that if an incident occurs when a vehicle is changing lanes, the driver of that vehicle is 100 per cent at fault for the incident.

As the evidence before me indicates that the two vehicles were initially in the same lane (i.e. the curb lane of Dixon Road) and that the tractor trailer then turned out wide in order to make the turn, it is not entirely accurate to say that the vehicles were in adjacent lanes and that the incident occurred when the truck was changing lanes. In actual fact, the collision occurred because the truck did not turn widely enough or enter the middle lane fully in order to avoid its trailer striking Ms. Sohan's vehicle. I therefore find that Rule 10 is inapplicable to the facts before me.

In my view, section 18(c) is similarly inapplicable, as it describes an incident in which one driver fails to obey a prohibited passing sign. Nothing in the evidence before me suggests that that is what occurred here. None of the other Fault Determination Rules apply to the circumstances described, and consequently, pursuant to section 5 of the regulation, the degree of fault must be determined in accordance with the ordinary rules of law. Relying on the facts before me, specifically the notation on the police report that the truck driver made an "improper turn", and that the Sohan vehicle had stopped to permit the truck to make its turn, I find that the driver of the tractor trailer was 100% at fault for this accident.

The result of this finding is that the Personal may seek full reimbursement from Empire Fire & Marine and/or Zurich for the accident benefits that it has paid out to both Claimants.

QUANTUM OWING BY EMPIRE/ZURICH :

The Personal provided a payment summary indicating that Ms. Sohan had been paid the following benefits pursuant to the *Statutory Accident Benefits Schedule* - \$7,709.00 for housekeeping assistance, \$14,935.71 for caregiver benefits, \$15,431.45 for medical/rehabilitation benefits and \$8,811.60 for reimbursable medical assessments, totalling \$46,887.76. When the statutory deductible is applied, the amount owing is \$44,887.76. In keeping with the Ontario Court of Appeal's decision in *Wawanesa Mutual Insurance v. AXA Insurance* (2012 ONCA 592, September 11, 2012), the second party insurer is not required to indemnify the first party insurer for the cost of Insurer Examinations (an amount of \$21,135.44 for Ms. Sohan)

The Personal advised that \$8,000 in attendant care benefits, \$11,690.52 in medical/rehabilitation benefits and \$7,147.31 for reimbursable medical assessments totalling \$26,837.83 have been paid out to Mr. Gayle. When the \$2,000 deductible is applied, the amount owing for his claim is \$24,837.83. (does not include amount of \$1,942.53 paid for Insurer Examinations)

I am advised that both accident benefit claims have been resolved on a full and final basis, so no further payments will be made to the Claimants. The Personal also claims interest on the above amounts, legal fees incurred in pursuing this arbitration and the costs relating to having to bring an application in court to obtain a court order appointing an arbitrator.

As set out above, section 54(1) of the *Arbitration Act* provides an arbitrator with jurisdiction to award "costs of the arbitration". Subsection 54(2) specifies that this consists of "the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration". Having reviewed the dockets submitted to me by the Personal, and considering the fact that Zurich completely ignored every step taken by the Personal to assert their rights under the *Act*, I am prepared to award costs on a full indemnity basis for both claims in the amount of \$4,695 plus HST, for a total of \$5,305.35. I am not prepared to award any disbursements, other than those relating to

having to obtain the court order, which I understand is in the amount of \$2,700 plus HST, for a total of \$3,051.

Zurich is also responsible for paying all arbitration fees. I will direct my account to the Personal, and assume that they will add it to the amount that Zurich is directed to pay, set out below.

ORDER:

In accordance with my findings above, Zurich is required to pay the following amounts to the Personal forthwith:

| | |
|--|--------------------|
| Benefits recoverable – Sohan | \$44,887.76 |
| Benefits recoverable – Gayle | \$24,837.83 |
| (Interest owing on above amounts in accordance with the <i>Courts of Justice Act</i>) | |
| Legal costs (incl. of HST) | \$ 5,305.35 |
| Costs related to obtaining court order (incl. HST) | \$ 3,051.00 |
| Arbitration fees (incl. of HST) | \$ 6,978.88 |
| Total | \$85,060.82 |

DATED at TORONTO, ONTARIO this ____ DAY OF NOVEMBER, 2012.

Shari L. Novick

Arbitrator