

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.1.8
SECTION 268(2) AND *REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Ashu Ismail for the Respondent

ISSUE:

1. Which of the Fault Determination Rules in *Regulation 668* to the *Insurance Act* applies to the incident that Digish Dave was involved in on May 24, 2009, if any, and what is the result of that finding?

RESULT:

1. Rule 12(4) applies and the Economical insured driver is 100% at fault for the accident.

BACKGROUND:

1. Digish Dave was riding his motorcycle on Creditview Road in Brampton on May 24, 2009, returning from a family picnic in Eldorado Park. He was travelling in the southbound lane, just before the two-lane road narrows into a one-lane bridge crossing over the Credit River. As he approached the bridge, he encountered a car travelling in the opposite direction, that had just crossed the bridge. It was driven by Ryan Pooran, and insured by Economical Mutual. Mr. Dave's motorcycle was insured by State Farm.

2. Mr. Dave applied his brakes as he rounded a curve in the road, and swerved in order to avoid colliding with the car. The motorcycle "dropped" as a result of his reaction. Mr. Dave slid to the right and eventually landed on the shoulder of the road. His bike travelled to the left and collided with the car shortly after Mr. Pooran brought his vehicle to a stop. Mr. Dave sustained a fractured right ankle and injuries to his right shoulder.

3. Mr. Dave sought payment of accident benefits under the *Schedule* from State Farm. State Farm now seeks indemnification for the benefits it has paid out from Economical, pursuant to the Loss Transfer provisions of the *Insurance Act*. State Farm contends that Rule 12(4) of the *Fault Determination Rules* applies, and that the Economical insured driver is accordingly 100% at fault for the accident.

4. Economical disputes that Rule 12(4) applies. It claims that the collision between the two vehicles was not the cause of the Claimant's injuries, and that in any event, the vehicles were not travelling in adjacent lanes. Economical asserts that Rule 14(2) better describes the above incident, in that Mr. Dave failed to obey a yield sign. It contends that in accordance with that rule, 100% fault for the accident should be attributed to the Claimant.

RELEVANT PROVISIONS:

5. The following provisions set out the statutory and regulatory backdrop to my determination of this matter:

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.

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

Regulation 664

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;

Regulation 668

1. In this Regulation,

“centre line” of a roadway means,

(a) a single or double, unbroken or broken line marked in the middle of the roadway, or

(b) if no line is marked, the middle of the roadway or that portion of the roadway that is not obstructed by parked vehicles, a snowbank or some other object blocking traffic.

2. (1) *An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.*

12. (1) *This section applies when automobile “A” collides with automobile “B”, and the automobiles are travelling in opposite directions and in adjacent lanes.*

(2) If neither automobile “A” nor automobile “B” changes lanes and both automobiles are on or over the centre lane when the incident (a “sideswipe”) occurs, the driver of each automobile is 50 per cent at fault for the incident.

(3) If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.

(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 per cent at fault for the incident.

14. (1) *This section applies with respect to an incident that occurs at an intersection with traffic signs.*

(2) If the incident occurs when the driver of automobile “B” fails to obey a stop sign, yield sign or a similar sign or flares or other signals on the ground, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.

EVIDENCE:

6. Both drivers were examined for discovery in the course of the tort claim brought by Mr. Digish. Transcripts from these examinations were filed at the hearing. Various documents and photos of the area in which the accident occurred were also filed and relied on by counsel. The police were not called to the scene of the accident, so the “record” did not include any police notes or Reports.

7. In addition to considering the documentary evidence filed, I also heard the testimony of three witnesses - Digish Dave (the Claimant), Ryan Pooran (the driver of the car) and Franco Massacci, the supervisor of Traffic Outside Services for the City of Brampton.

8. Many of the underlying facts are not in dispute. The parties agree on the sequence of events that transpired, as well as the physical layout of the area in which the incident took place. Creditview Road is a two-lane road running north and south near the point at which it crosses over the Credit River, south of Eldorado Park. Drivers proceeding southbound on Creditview past the park encounter a curve to the right, before the road turns into a one-lane bridge that crosses over the Credit River.

9. Vehicles approaching the bridge in the northbound lane encounter a stop sign before the one-lane bridge. There is no stop sign facing vehicles approaching the bridge in the southbound lane. Southbound drivers do encounter a “yield ahead” sign, a subsequent sign warning that there is a narrow, one-lane bridge ahead, and a further yield sign just before the bridge.

10. The parties agree that the accident took place in the area immediately north of the bridge. The bridge was described as being one lane wide, and a few car lengths long. The photographs filed depict low fencing on both sides of the road on each side of the bridge, and higher archways in the middle of the bridge. The pictures also show a painted yellow line separating the northbound and southbound lanes, as the road curves to the right north

of the bridge. The yellow line does not continue all the way to the bridge, but rather ends north of the bridge around the point at which a driveway abuts the road.

11. The parties agree that Mr. Dave was driving his motorcycle in the southbound lane. He began rounding the curve north of the bridge, and saw the Pooran vehicle approaching from the other direction. He applied his brakes, his motorcycle swerved and dropped to the ground, and he fell off. The parties agree that he was dragged under the bike for a distance, and that it then slid away from him. While Mr. Dave slid to the right and eventually stopped at the side of the road, the bike slid to his left, crossed into the northbound lane and collided with the front of Mr. Pooran's car. Mr. Dave was not on the motorcycle at the time that it collided with the car. The car was stopped when it was struck by the motorcycle.

12. There are two main points of disagreement between the parties - where Mr. Dave was on the roadway relative to the bridge when he fell off of his motorcycle, and where Mr. Pooran's car had stopped, at the point at which it was struck by the bike. Counsel for State Farm contends that Mr. Pooran's car had passed over the one-lane bridge when the vehicles collided, and that it was over the "center line" encroaching into the southbound lane of travel. Counsel for Economical asserts that while the front half of the car may have been off of the bridge, the back half remained on the bridge when Mr. Pooran braked and stopped. Economical denies that the vehicle was over the center line or that any part of the car was in the southbound lane.

13. Both drivers testified at the hearing. Each gave evidence in a clear and credible manner, although not surprisingly, both had difficulty recalling certain details about the location almost eight years later. Mr. Dave testified that he had driven past the area in question and had crossed over the bridge while travelling northbound earlier in the day, on his way to the park. He testified that he noticed the oncoming car as he was rounding the curve in the road, and that it was at least partly in his southbound lane of travel. When asked to specify on a picture depicting the scene where he had fallen off of his

motorcycle, Mr. Dave pointed to an area well north of the bridge. I note that the photos clearly depict two lanes separated by a yellow line at that point in the roadway.

14. Ryan Pooran was nineteen years old at the time of the accident. He had never driven on that stretch of Creditview Road before. He recalled travelling in the northbound lane, crossing the bridge slowly, and then seeing Mr. Dave's motorcycle coming around the curve. He testified that when he saw the motorcycle lose control and drop to the ground, he stopped his car. The motorcycle struck the car a few seconds later. He testified that when he first saw the motorcycle, his vehicle was still partly on the bridge.

15. Mr. Pooran was asked about the position of his vehicle when he drove off of the bridge. He stated that when he first saw the motorcycle approaching, he "was in the process of moving to the right" and that the front half of his car was to the right. When asked whether he was over the center line at that point, he testified that there was no center line on the roadway where he stopped his car.

16. Franco Massacci was also called to testify. Mr. Massacci was the supervisor of Outside Traffic Services for the City of Brampton at the relevant time, and managed the department responsible for the installation of traffic signs for the area in question. Prior to that position, he was employed in the city department that painted lanes on the roadways.

17. Mr. Massacci testified that he had reviewed the history of the traffic signs in the area, and had determined that they were installed in May 2006, three years prior to the accident. He testified that there was no indication in the records that the signs were either changed or replaced in May 2009. He stated that the only reason for moving a sign would be if there was construction or development in the area, and confirmed that there was no record of either having occurred in the area in question.

18. Mr. Massacci was referred to a picture of the road showing a yellow line separating the two lanes of travel just north of the bridge, that appears to fade out as the road approaches the bridge. He explained that the line would have ended north of the

bridge, near where the yield sign warning of the upcoming narrow bridge was located. He noted that there was a driveway off Creditview Road leading into a residential property just north of the bridge, and explained that the city does not paint dividing lines over an area of road that is adjacent to a private driveway.

19. Mr. Massacci was also shown a photo of the roadway just north of the bridge where Mr. Pooran had testified that he had stopped his vehicle. When asked whether the road opened up to two lanes at that point, Mr. Massacci stated that the road gradually widened from one lane on the bridge to two lanes further north, and that it was difficult to determine exactly when the two lanes are re-established.

PARTIES' ARGUMENTS:

State Farm's submissions

20. Counsel for State Farm contends that Rule 12 clearly applies to the incident, as it involved a collision between two vehicles that were travelling in opposite directions and in adjacent lanes. Mr. Strigberger suggested that the "incident" was not the collision between the vehicles, which did not cause any injury, but rather the act of Mr. Dave swerving to avoid a collision and dropping his bike. He contended that this happened when Mr. Dave reacted to the oncoming car, after it had crossed over the one-lane bridge. He suggested that there were two lanes on the roadway at that point, and that the requirement that there be 'adjacent lanes' is therefore satisfied.

21. Counsel noted Mr. Pooran's statement that he was in the process of moving his car to the right once he crossed over the bridge. He argued that this establishes that the car was over the centre line of the road when the incident occurred, and that Rule 12(4) would therefore apply. He contended that Mr. Pooran should accordingly be found to be 100% at fault for the accident.

22. State Farm argued alternatively that if I do not accept that Mr. Pooran's vehicle was over the center line when the incident occurred, I should apply either Rule 12(2) or 12(3), each of which would attribute 50% fault for the accident to each driver.

Economical's submissions

23. Counsel for Economical agreed that the incident giving rise to the Claimant's injuries was the act of him dropping his motorcycle, rather than the collision between the car and the motorcycle that followed that event. She contended that as the contact between the car and the motorcycle was incidental to the event causing the injuries, the focus should shift to the fact that Mr. Dave lost control of his motorcycle as he drove around the curve. In her view, Rule 12 would then not apply.

24. Ms. Ismail stated that if I do find that the incident giving rise to the claim calls for a consideration of the application of Rule 12, I must determine the location at which the incident occurred. She noted Mr. Pooran's evidence that part of his car remained on the one-lane bridge when he came to a stop, and contended that the vehicles could not therefore have been travelling in adjacent lanes, which would preclude the application of Rule 12. She submitted that if I find that Rule 12 does apply, State Farm had not met the onus it faces to prove that the Pooran vehicle was over the center line, noting that the Claimant had testified that his motorcycle struck the car in the northbound lane, suggesting that Mr. Pooran's car had remained on the northbound side of the road.

25. Finally, counsel contended that Rule 14(2) best applies to the circumstances described. Rule 14 applies "with respect to an incident that occurs at an intersection with traffic signs". Ms. Ismail contended that the fact Creditview Road narrows from two lanes of travel to a one-lane bridge in the area of the accident creates "an intersection". Rule 14(2) then provides that if the incident occurs when the driver of one vehicle "fails to obey a stop sign, yield sign or a similar sign" that driver is 100% at fault for the incident. She contended that Mr. Dave's failure to yield appropriately as he approached the one-lane bridge was the cause of the incident, and that he should be found to be 100% at fault in accordance with that Rule.

Reply

26. Mr. Strigberger disputed that Rule 14(2) applied. He acknowledged that the term "intersection" is not defined in the regulation, but contended that a two-lane road that

gradually turns into a one-lane bridge is not an “intersection”. He also argued that in order for any of Rule 14 to apply, the basic facts of the incident must fit within the ‘gatekeeper’ provision of Rule 14(1), and that Rule 14(2) cannot be applied if the facts do not fit within Rule 14(1).

ANALYSIS & FINDINGS:

27. I must analyse the evidence presented bearing in mind the legal principles that have developed regarding the application of the Loss Transfer provisions in section 275 of the *Act*. The courts have sent a clear message that these provisions are meant to provide an expedient and summary method for reimbursement of no-fault benefit payments made, if a second party insurer’s insured is either fully or partially at fault for an accident (*Jevco Insurance v. Canadian General Insurance* (1993) 14 O.R. (3d) 545 (C.A.)).

28. The oft-cited phrase from the Court of Appeal’s decision in *Jevco Insurance v. York Fire Casualty* (1996) 27 O.R. (3d) 483 (C.A.) that the scheme spreads the cost of accident benefits among insurers “in a somewhat arbitrary fashion, favouring expediency and economy over finite exactitude” has recently been restated by the Court of Appeal in *State Farm v. Aviva Canada* 2015 ONCA 920 CanLII (see paras. 56 & 67). This approach has often been referred to as the application of “rough justice” (see *Wawanesa Mutual Insurance Company v. TD Home and Auto Insurance*, unreported decision, December 5, 2016).

29. I also note that in reference to applying the *Fault Determination Rules*, the court in *Jevco Insurance v. Halifax Insurance* [1994] O.J. No. 3024 stated that these rules set out a series of general types of accidents, and allocate fault according to the type of accident in a manner that in most cases would “probably but not necessarily correspond with actual fault”. Following this theme, Justice Perell stated in *ING Insurance v. Farmer’s Mutual Insurance* (2007) CanLII 20107 (O.N.S.C.) that the task for an arbitrator in a Loss Transfer case is to first determine the facts and the “incident” in issue, and then determine which rule, if any, “applies with respect to the insured”. If the facts fit

within a particular rule, that rule must be applied even if doing so appears arbitrary or expedient (at para.33).

30. Keeping these principles in mind, I turn to the facts in this case. In my view, the judicial pronouncements above require that I approach the question of whether to apply a particular Rule in a relatively ‘mechanical’ manner, rather than by delving into a detailed analysis of every aspect of the case. I am not suggesting that relevant evidence be ignored, but rather that when determining whether a rule applies, the focus should be on whether the key requirements or preconditions have been met.

31. The central question in this case is whether Rule 12 applies to the circumstances outlined. As set out above, there are three preconditions to the application of this rule – that two vehicles have collided, and that they were travelling in opposite directions and adjacent lanes. There is no dispute that Mr. Dave’s motorcycle collided with Mr. Pooran’s car, and that the vehicles were travelling in opposite directions. Clearly, two of the three conditions are fulfilled.

32. Economical challenges State Farm’s assertion that the two vehicles were travelling in adjacent lanes. Counsel relies on Mr. Pooran’s evidence that his vehicle remained partially on the one-lane bridge at the moment that the vehicles collided, if that is the relevant time. If the point at which Mr. Dave reacted to the oncoming car and dropped his bike is the important moment, Mr. Pooran was clearly still driving on the bridge. Counsel for Economical contends that if the car was stopped on a one-lane bridge, the vehicles could not have been travelling in adjacent lanes and Rule 12 would not apply.

33. Much of the parties’ submissions focused on whether there were two lanes or only one on Creditview Road at the relevant point in time. The photos filed reveal that there was no center line immediately north of the bridge, although Mr. Massacci explained that lines are not painted on the road where there is an adjacent driveway, as is the case here. Mr. Massacci also explained that the road gradually widened back to two lanes north of

the bridge. As I was not provided with any specific evidence regarding the width of the road at different points north of the bridge where the incident allegedly occurred, I accept his evidence in this regard.

34. I am inclined to find that the Pooran vehicle was just past, or north of the one-lane bridge, when it was struck by the motorcycle. Mr. Pooran testified that his car was still partly on the bridge when he first saw the motorcycle. It is fair to assume that a few seconds passed between the time he first noticed Mr. Dave on his motorcycle and his bringing the car to a stop, which would likely put him just north of the bridge when the vehicle was struck by the bike. This corresponds with the point he noted on one of the photographs filed, when he was asked to indicate where his car had stopped.

35. I find, however, that it is ultimately unnecessary to resolve this question. The “rough justice” approach outlined in the decisions cited above dictate that I not engage in a detailed analysis to pinpoint the exact location of the vehicle at a precise point in time, in order to determine whether there was one lane or two. It is clear that the vehicles were travelling in opposite directions on the same road, and the fact that the two-lane road narrowed to a one-lane bridge for a few car lengths does not preclude a finding that as a general matter, they were travelling in adjacent lanes.

36. The next issue to resolve is whether Rule 12 should be applied when, as acknowledged by both parties, the collision between the vehicles took place after the event that led to the Claimant’s injuries. In Ms. Ismail’s words, the collision of the two vehicles was “incidental” to, rather than the cause of the Claimant’s injuries, which arose from him falling off his bike. Should this then be a relevant factor in the choice of which rule to apply?

37. Having considered the question closely, I conclude that the fact that the collision between the two vehicles did not Mr. Dave’s injuries does not preclude the application of Rule 12 in this case. There is nothing in Rule 12(1) requiring that the collision itself be the cause of the injuries. As stated above, I am mandated by the courts to first determine

the facts, and to then decide if a particular rule applies. Having found that the three preconditions to apply Rule 12 have been met, I need not go further to determine whether there is a direct causal link between the injuries suffered and one of the preconditions.

38. Furthermore, I note the Court of Appeal's finding in *State Farm v. Old Republic* (2015 ONCA 699) that the term "incident", as used in the *Fault Determination Rules*, can mean different things in different contexts (at para.85). The Court's finding that the term "incident" in one subsection of Rule 9 does not carry the same meaning in another subsection of that rule supports my conclusion that the "collision" that triggers the application of Rule 12(1), does not necessarily need to equate with the "incident" referred to in Rule 12(4).

39. Rule 12(4) provides that if an automobile is over the centre line of the road when the incident occurs, that driver is 100% at fault for the incident. The definition in section 1 of the Rules states that the term "center line" includes both a line marked in the middle of the roadway, or if no line is marked, "the middle of the roadway". The fact that this definition includes both possibilities does away with the need to determine whether Mr. Dave's evidence that the incident occurred when there was a clear yellow line separating the two lanes on the road, or Mr. Pooran's statement that there was no dividing line on the road where he stopped, is more believable.

40. The key question then boils down to whether Mr. Pooran's car was beyond the middle of the roadway, partially in the southbound direction of travel when the incident – being Mr. Dave's reaction to the oncoming car – occurred. I find that it was. In his testimony, Mr. Pooran stated that when he first saw the motorcycle approaching, he "was in the process of moving to the right" and that the front half of his car was to the right. I conclude from this statement that he was slightly over the center of the road when he was first spotted by Mr. Dave as he was rounding the bend on his motorcycle.

41. The timing of the two vehicles being where they each were, at the precise moments that they were, was unfortunate. Mr Dave was a relatively experienced

motorcycle rider who had passed through the area in question a few hours earlier, on his way to the park. I conclude that the only reason that he reacted in the manner that he did was because he saw the Pooran vehicle partly in his lane of travel as he rounded the curve. I therefore find that Rule 12(4) applies in the circumstances, and results in Mr. Pooran being determined to be 100 per cent at fault for the incident.

42. While that determines the matter, I will address counsels' submissions on Rule 14. I find that Rule 14 does not apply in these circumstances. Rules 6 through 16 of the *Fault Determination Rules* set out different types of accidents, identified by general titles or descriptions. In each of these rules, the first subsection specifies the preconditions to their application. Once these conditions are met, the next step is to review the subsequent clauses of the rule, to see if they capture the circumstances of an incident. However, the only way to access one of these subclauses is to satisfy the preconditions set out in the first clause.

43. Rule 14(1) states clearly that the section applies with respect to an incident that occurs "at an intersection with traffic signs". While there were clearly traffic signs in the area, I find that the incident did not occur at an intersection. While creative, I do not accept counsel for Economical's submission that the fact that a two-lane road becomes a one-lane bridge constitutes an intersection. Though that term is not defined in the regulation, I find that in the context of roads and highways, the plain meaning of the word "intersection" requires two things to meet and cross at a certain point, which did not occur in the area in question.

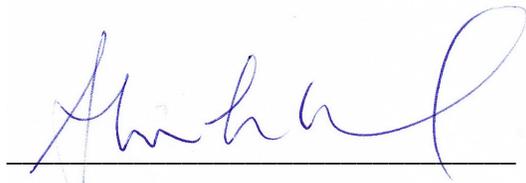
CONCLUSION & ORDER:

44. For the reasons set out above, I find that Rule 12(4) applies and that the driver of the Economical insured vehicle was 100% at fault for the incident. Economical is therefore liable to indemnify State Farm for the benefits it has paid out to Mr. Dave on that basis, in accordance with the Loss Transfer provisions of the Act.

COSTS:

45. Given the result, and the parties' Arbitration Agreement, I find that Economical shall pay the legal costs incurred by State Farm on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, I invite them to contact me so that an arrangement for submissions can be made.

DATED at TORONTO, ONTARIO this __31st__ DAY OF MARCH, 2017.



Shari L. Novick

Arbitrator