

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 AND REGULATION 664 AS AMENDED
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17
AND IN THE MATTER OF AN ARBITRATION**

BETWEEN:

THE ECONOMICAL INSURANCE GROUP

Applicant

- and -

MARKEL INSURANCE COMPANY OF CANADA

Respondent

LOSS TRANSFER ARBITRATION DECISION

LAWYERS

Nathalie V. Rosenthal
Lawyer for the Applicant, The Economical Insurance Group

J. Claude Blouin
Lawyer for the Respondent, Markel Insurance Company of Canada

ISSUES IN DISPUTE

This loss transfer dispute arises out of personal injuries sustained by Mr. Pangiatis Roccas arising from a motor vehicle accident which took place on September 19, 2006. Pangiatis Roccas has been receiving accident benefits paid by the Economical Insurance Group. The Economical Insurance Group seeks indemnity pursuant to Section 275 of the Insurance Act, R.S.O. 1990, c.I.8, as amended and Ontario Regulation 664/90 and Ontario Regulation 668/90.

The fault issues submitted for adjudication in this Arbitration are:

1. Which, if any, of the Fault Determination Rules apply to this situation?
2. If the ordinary rules of law apply to this situation, what is the respective degree of fault of the two motorists involved?

LAW WITH RESPECT TO LOSS TRANSFER

An historical analysis of the development of the loss transfer regime is helpful in better understanding the issues herein. Although the standard Ontario automobile policy of insurance contained no fault benefits as early as 1972, the significant expansion of available no fault

benefits came in 1990. The loss transfer regime (Section 275 of the Insurance Act) was introduced to redress the financial imbalance that was caused by the shifting of what was formally tort liability to no fault liability in the 1990 legislation. In the case of motorcycle insurers, it was accepted that their no fault burden was enhanced in comparison to the general population (due to the severity of injuries suffered by their insureds) and the tortfeasor's liability was reduced. Accordingly, those insurers were awarded a right of loss transfer against all other insurers, to the degree of fault of the other insurers insured. It was similarly accepted that heavy commercial vehicles inflicted increased no fault liability on the insurers of other vehicles, so insurers of that class of vehicle were compelled to make loss transfer to the insurers of all other classes of vehicles to the degree of fault of their insured. These concepts are discussed in the following two cases:

Jevco Insurance Company v. Wawanesa Mutual Insurance Company (1998), 42 O.R. (3d) 276

Royal Insurance Company v. Wawanesa Mutual Insurance Company, (2004), 14 C.C.L.I. (4th) 314

Relevant portions of the enabling legislation to Ontario's loss transfer regime, namely Section 275 of the Insurance Act, R.S.O. 1990, c.l.8, read as follows:

Indemnification in certain cases

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. R.S.O. 1190, c.l.8, S.275 (1); 1993, c.10, S.275 (1).

Idem

275 (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. R.S.O. 1990, c.l.9, S.275 (2).

Ontario Regulation 664/90, Section 9, sets out the parameters of the "insured-class condition" and defines the insurers between whom rights of indemnity exist. In essence, it provides that insurers of motorcycles and snowmobiles are entitled to indemnity from the insurer of any other vehicle (except motorcycles or snowmobiles), and that insurers of heavy commercial vehicles are obligated to indemnify any other insurer (except the insurer of a heavy commercial vehicle).

R.R.O. 1990, Regulation 664, Section 9, reads as follows:

INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the Highway Traffic Act;

"motorized snow vehicle" means a motorized snow vehicle as defined in the Motorized Snow Vehicles Act";

"off-road vehicle" means an off-road vehicle as defined in the Off-Road Vehicles Act;

"second party insurer" means an insurer required under Section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(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

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

i) if the motorized snow vehicle 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. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(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. R.R.O. 1990, Reg. 664, s 9 (2) O. Reg. 780/93, s.1.

It is Ontario Regulation 668/90 which establishes the "fault allocation condition", commonly referred to as the Fault Determination Rules. The Fault Determination Rules provide an arbitrary allocation of liability created to regulate issues of liability allocation in the most common of situations. For those situations following outside the common situations, liability would be determined by ordinary principles of law.

EVIDENCE AND FACTUAL FINDINGS

The evidence before me consisted of a documents brief and the oral evidence of three witnesses given at the Arbitration hearing on March 12, 2010. The individuals providing oral evidence were as follows:

1. Pangiatis "Peter" Roccas (operator of the automobile);
2. Michael Wolfe (operator of the tractor-trailer);
3. Roland Landry (independent witness).

This loss transfer dispute arises out of a motor vehicle accident which occurred on September 19, 2006. The Applicant, the Economical Insurance Group (hereinafter referred to as "Economical"), insured a 1997 Acura EL operated by the claimant, Pangiatis "Peter" Roccas. The tractor-trailer involved in the subject accident was insured with the Respondent Markel Insurance Company of Canada (hereinafter referred to as "Markel") and operated by Michael Wolfe. As a result of injuries sustained in the accident, Roccas applied for and has been paid statutory accident benefits by Economical.

The Applicant Economical submits that Rules 10 (1) and 10 (4) of the Fault Determination Rules are applicable and that the application of these Rules would result in the insurer of the tractor-trailer being fully responsible for payment of statutory accident benefits. Rules 10 (1) and 10 (4) are the Rules applicable to vehicles travelling in adjacent lanes in the same direction. They are commonly referred to as the Rules applicable to "lane change" situations. The Respondent submits that Rules 10 (1) and 10 (4) are inapplicable to the present fact situation and that fault determination ought to be determined by the ordinary rules of law as required by Rule 5 (1) of the Fault Determination Rules. At risk of oversimplification, the Respondent contends that the accident did not occur when the tractor-trailer was changing lanes, but rather occurred later, after an attempted lane change when the tractor-trailer had already gone back into its own lane.

There is a divergence of evidence as to how this incident occurred. The common evidence is that this incident took place on the afternoon of September 19, 2006 in the southbound lanes of Highway 427, just south of the 401. It was a sunny and dry day. The lane furthest to the left was described as lane 1. The lane second from the left was described as lane 2. The lane third from the left was described as lane 3.

Pangiatis "Peter" Roccas testified that he was operating a 1997 Acura EL motor vehicle in the southbound lanes of Highway 427 when this incident occurred. He had entered southbound Highway 427 at Renforth. He stated that he quickly moved over from the merge lane to lane 2. He stated that he was in lane 2 at a speed of approximately 100 km/h for 20 to 30 seconds. The tractor-trailer operated by Michael Wolfe was travelling in the lane to his right (lane 3). While overtaking the transport trailer, he observed the left turn signals of the tractor-trailer being activated and the tractor-trailer beginning to move to the left into his lane of travel. Roccas testified that he was halfway down the side of the tractor-trailer when he made these observations. He swerved and slammed on his brakes. He believes the back of the trailer hit his car. His car then veered to the left, striking the guardrail and bouncing back into a collision with the tractor-trailer.

Michael Wolfe testified that he was operating a tractor-trailer in a southbound direction on Highway 427 when this incident occurred. He too, entered Highway 427 at Renforth. The tractor-trailer was in lane 3 when he formed the intention to move to the left, given the merging traffic on the right entering Highway 427 from eastbound Highway 401. He activated the left turn signal and

checked his sideview mirror. He saw the Roccas vehicle in the lane to his left, approximately 50 yards behind. He had no idea as to the speed that it was going. He assumed that since there were 50 yards separating the vehicles, it would be safe to move to the left. He commenced his lane change with his left turn signal having been activated for two seconds and having flashed two or three times. He then noticed the Roccas automobile speeding up and the gap closing quickly. Roccas appeared to be doing 140 km/h. With the tractor portion of his vehicle three or four feet into lane 2, Wolfe decided to be defensive and move back into lane 3. He observed Roccas jerk the steering wheel to the left and lose control. He stated that there was no contact between the vehicles. Roccas vehicle moved left, striking the guardrail and then came back into collision with the side of the truck.

The independent witness Ronald Landry observed this incident through his rearview mirror, having already overtaken the tractor-trailer. He confirmed that the truck was not speeding. He first saw the Roccas automobile when it pulled out from behind the tractor-trailer. He described the automobile's manoeuvre as a "race car manoeuvre". He testified that the Roccas automobile accelerated. When the cab of the truck was two to three feet into lane 2 and the trailer portion still in lane 3, the driver of the automobile suddenly jerked his wheel to the left and lost control. He believes that there was contact between the automobile and the truck. Thereafter, the automobile moved left striking the guardrail and bouncing back into a further collision with the tractor-trailer.

As stated earlier, there is clearly a divergence of evidence as to how this incident took place.

I find that the incident did not occur in the fashion described by Roccas. I much prefer the evidence of Wolfe, which is largely supported by the evidence of the independent witness, Landry. Roccas presented his evidence in a nervous, hesitating fashion, particularly when pressed as to whether he was operating his vehicle as part of the courier business that day. The evidence of the independent witness must be viewed by taking into account that the observations were made through a rearview mirror, some 200 feet ahead of where the incident occurred.

The challenge that I faced was the characterization of the incident itself. If I were to characterize the incident as a collision where both motorists were trying to change lanes at the same time, then Rule 10 (4) would not be applicable and I would have to apply the ordinary rules of law. However, if I were to characterize this incident as a "lane change" situation, I would be bound to apply Rule 10 (4) of the Fault Determination Rules; even though the application of the ordinary rules of law might give rise to a radically different liability finding.

On the evidence adduced, I find that the tractor-trailer was proceeding southbound on Highway 427 at or about the speed limit. The Roccas vehicle was travelling southbound on Highway 427 at a much higher speed and came upon the tractor-trailer. Roccas moved from lane 3 to lane 2 just as the operator of the tractor-trailer made the decision to move from lane 3 into lane 2. I accept the evidence of the operator of the tractor-trailer that Roccas was some 50 yards to the rear when he commenced his lane change manoeuvre. I find as a fact, given the evidence of the independent witness, that Roccas must just have entered lane 2 when first observed by the operator of the tractor-trailer. Michael Wolfe commenced the lane change assuming that a 50 yard gap was sufficient to safely complete the lane change, particularly when his left signal had already been on for two seconds. He commenced the lane change without first ascertaining the speed of the Roccas automobile relative to his tractor-trailer. He did not realize the significant difference in speeds until the tractor portion of his vehicle was three or four feet into lane 2. He immediately started moving back into lane 3. In the meantime, Roccas reacted to the commencement of the lane change by the tractor-trailer by swerving to the left and braking. This caused a loss of control with contact between the two vehicles, as stated by both Roccas and the independent witness Landry. The Roccas vehicle then moved to the left, striking the guardrail and then back into collision with the tractor-trailer. At the time of this incident, I find that the speed of

the Roccas automobile was far in excess of the posted speed limit. I find that his manoeuvre was like a "race car manoeuvre" as described by the independent witness Landry. I find that he continued at his excessive speed in disregard to the left signal on the tractor-trailer which ought to have alerted Roccas to the fact that the operator of the tractor-trailer was going to make a lane change. Rather than slowing down to allow the tractor-trailer to change lanes, Roccas continued at his excessive speed until he was forced to make an emergency movement to avoid contact with the tractor-trailer.

On the evidence and factual findings aforesaid, I cannot help conclude that the characterization of this incident ought to be a "lane change" situation as contemplated by Rule 10 (4) of the Fault Determination Rules. When the operator of the tractor-trailer first observed the Roccas vehicle, he was fully established in lane 2. The tractor-trailer was fully within lane 3. The operator of the tractor-trailer ought not to have commenced his manoeuvre before determining whether or not there was a significant speed differential between the two vehicles. Although the "race car manoeuvre" and high speed of the Roccas vehicle, together with his disregard for the left signal on the tractor-trailer, may give rise to a far different result with the application of the ordinary rules of law, I am bound by my characterization aforesaid to find that Rule 10 (4) is applicable.

In reaching my decision, I rely heavily on the basic principles that have evolved from the case law relative to loss transfer disputes outlined as follows:

1. The purpose of the legislative scheme under Section 275 of the *Insurance Act* and Regulation 668 is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no fault benefits from the second party insurer whose insured was fully or partially at fault for an accident. The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by Regulation 668.

Reference: Jevco Insurance Co. v. York Fire & Casualty Co.
[1996] O.J. No. 646 (C.A.)

Jevco Insurance Co. v. Canadian General Insurance Co.
[1993] O.J. No. 1774

2. The Fault Determination Rules contained in Regulation 668 set out a series of general types of accidents and to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of a particular accident in a manner that, in most cases, would probably but not necessarily correspond with actual fault. The thrust of the Fault Determination Rules is based on well established rules of the road to determine the probability of fault.

Reference: Jevco Insurance Co. v. York Fire & Casualty Co.
[1995] O.J. No. 1352

3. The Fault Determination Rules are to be liberally construed and applied. Fault determination under the rules is indifferent to factors which would apply under the ordinary rules of tort law.

Reference: Co-operators General Insurance Co. v. Canadian General Ins. Co.
[1999] O.J. No. 2578

4. The purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.

Reference: Jevco Insurance Co. v. York Fire & Casualty Co.
[1996] O.J. No. 646 (C.A.)

- 5. A common sense approach is to be used when considering the Fault Determination Rules and the diagrams in the regulation.

**Reference: Royal & SunAlliance Insurance Co. v. Axa Insurance Co.
Arbitrator Bruce Robinson, November 21, 2003**

Upon these principles, keeping in mind that the purpose of the legislation is to spread the load among the insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude, I cannot help but find that Rule 10 (4) of the Fault Determination Rules applies to this situation given my characterization of this as a "lane change" situation as contemplated by Rule 10 (4) of the Fault Determination Rules.

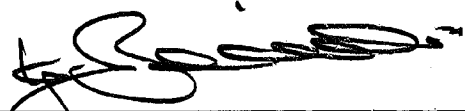
ORDER

On the basis of the findings aforesaid, I hereby order that Markel reimburse Economical for all accident benefit payments, properly the subject matter of indemnification, together with appropriate interest calculated in accordance with the Courts of Justice Act. I order that Markel pay to Economical its legal costs on a partial indemnity basis.

I order that Markel pay the Arbitrator's costs.

In the event that the parties cannot resolve the issues of indemnity, interest or costs, I would be pleased to remain involved.

DATED at TORONTO this 13th)
day of January, 2011.)



KENNETH J. BIALKOWSKI
Arbitrator