

# Economical Mutual Insurance Company v. Northbridge Commercial Insurance Company

[Indexed as: Economical Mutual Insurance Co. v. Northbridge Commercial Insurance Co.]

Ontario Reports

Ontario Superior Court of Justice,

Faieta J.

January 21, 2016

129 O.R. (3d) 344 | 2016 ONSC 458

## Case Summary

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**Insurance — Automobile insurance — Statutory accident benefits — Loss transfer — Deductible under s. 275(3) of Insurance Act applying to loss transfer claim by first party insurer for each person to whom it has [page345] paid statutory accident benefits and not just to claim for statutory accident benefits that it has paid to its named insured — Insurance Act, R.S.O. 1990, c. I.8, s. 275(3).**

A heavy commercial vehicle insured by Northbridge rear-ended a passenger vehicle insured by Economical. Economical made statutory accident benefit payments to or on behalf of the driver of the passenger vehicle and the three passengers, and requested loss transfer from Northbridge with respect to each of those payments. Northbridge applied the deductible under s. 275(3) of the *Insurance Act* to the first \$2,000 requested by Economical for each of the people involved in the accident. The arbitrator ruled that the right to a loss transfer payment under s. 275 was subject to only one \$2,000 deductible, in respect of the operator of the insured vehicle. Northbridge appealed.

**Held**, the appeal should be allowed.

The deductible in s. 275(3) of the Act applies to a claim for loss transfer by a first party insurer for each person to whom it has paid statutory accident benefits, and not only to a claim for statutory accident benefits that it has paid to its named insured.

### Cases referred to

*Arsenault v. Dumfries Mutual Insurance Co.* (2002), 57 O.R. (3d) 625, [2002] O.J. No. 4, 152 O.A.C. 224, [2002] I.L.R. I-4086, 20 M.V.R. (4th) 165, 110 A.C.W.S. (3d) 1138 (C.A.); *Markevich v. Canada*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, 239 F.T.R. 159, 223 D.L.R. (4th) 17, 300 N.R. 321, J.E. 2003-506, 2003 D.T.C. 5185, 120 A.C.W.S. (3d) 532; *Progressive Casualty Co. v. Jevco Insurance Co.*, [1994] O.J. No. 3152, 27 C.C.L.I. (2d) 234, 52 A.C.W.S. (3d) 1123 (Gen. Div.), affg October 12, 1994 (Arb. Hon. Richard E. Holland, Q.C.); *R. v. Nowegijick*, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2

C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 18 A.C.W.S. (2d) 2; *State Farm Mutual Automobile Insurance Co. v. Aviva Canada Inc.* (2015), 128 O.R. (3d) 321, [2015] O.J. No. 6852, 2015 ONCA 920; *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)* (2012), 112 O.R. (3d) 354, [2012] O.J. No. 4196, 2012 ONCA 592, 296 O.A.C. 199, 354 D.L.R. (4th) 457, 38 M.V.R. (6th) 76, 15 C.C.L.I. (5th) 1, 220 A.C.W.S. (3d) 409

### Statutes referred to

*Insurance Act*, R.S.O. 1990, c. I.8, ss. 224 [as am.], 268 [as am.], 275(3) [as am.], (4) [as am.]

### Rules and regulations referred to

*Fault Determination Rules*, R.R.O. 1990, Reg. 668

### Authorities referred to

Financial Services Commission of Ontario, Interpretation Bulletin No. A-11/94, "Loss Transfer: Standardized Forms and Procedures" (June 6, 1994)

APPEAL from an order of an arbitrator.

*Joyce Tam*, for applicant.

*Amanda M. Lennox and Rebecca Brown*, for respondent. [page346]

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## FAIETA J.: —

### *Introduction*

[1] The issue on this appeal is whether the \$2,000 deductible under s. 275(3) of the *Insurance Act*, R.S.O. 1990, c. I.8 applies to a claim for loss transfer by a first party insurer for each person to whom it has paid statutory accident benefits rather than only to a claim for statutory accident benefits that it has paid to its named insured.

[2] For the reasons described below, I have granted the appeal. In my view, under s. 275(3) of the *Insurance Act* a deductible of \$2,000 applies to a claim for loss transfer by a first party insurer for each person to whom it has paid statutory accident benefits.

### *Background*

[3] Economical issued a notice of initiate arbitration against Northbridge pursuant to s. 275(4) of the *Insurance Act* on April 18, 2012. The arbitration proceeded on the basis of the following agreed statement of facts:

- (1) On or about July 16, 2010, a "heavy commercial vehicle" insured by Northbridge rear-ended a passenger vehicle insured by Economical and driven by Muneer Khan (the "accident").
- (2) As a result of the accident, Economical has made statutory accident benefits payments to or on behalf of Naseer Khan, Amtul Khan, Fawad Khan and Muneer Khan.
- (3) Economical has requested loss transfer from Northbridge with respect to these payments.
- (4) Northbridge has applied a deductible under s. 275(3) of the *Insurance Act* to the first \$2,000 requested by Economical for each of Muneer Khan, Naseer Khan, Amtul Khan and Fawad Khan. Otherwise, Northbridge has reimbursed Economical for the loss transfer amounts sought to date.
- (5) The parties agree that Northbridge is entitled to apply at least one \$2,000 deductible to the amounts paid by Economical to the amounts paid by Economical to or on behalf of Muneer Khan, Naseer Khan, Amtul Khan and Fawad Khan.

[4] Paragraphs 1-3 of the arbitration agreement describe the arbitrator's mandate and powers as well as the questions for his determination as follows: [page347]

1. The Arbitrator shall determine all matters in dispute between the parties arising out of dispute for loss transfer reimbursement with respect to accident benefits paid to and on behalf of Muneer Khan, Fawad Khan, Amtul Khan, and Nasser Khan; plus costs and interest, arising out of a motor vehicle accident which occurred on or about July 16, 2010.
2. The questions for the Arbitrator are as follows:
  - A) Is the [Economical] entitled to reimbursement from [Northbridge] for \$6,000, in respect of the deductibles applied to Muneer Khan, Fawad Khan, Amtul Khan and Naseer Khan?
    - a. Is the Economical entitled to indemnity from Northbridge in respect of the first \$2,000 of statutory accident benefits paid in respect of Muneer Khan?
    - b. Is the Economical entitled to indemnity from Northbridge in respect of the first \$2,000 of statutory accident benefits paid in respect of Fawad Khan?
    - c. Is the Economical entitled to indemnity from Northbridge in respect of the first \$2,000 of statutory accident benefits paid in respect of Amtul Khan?
    - d. Is the Economical entitled to indemnity from Northbridge in respect of the first \$2,000 of statutory accident benefits paid in respect of Naseer Khan?
  - B) If a reimbursement amount is found to be owing to Economical, is interest payable and, if so, at what amount?

3. The Arbitrator shall have the power to grant any relief appropriate to the facts and circumstances that would be within the jurisdiction of a Judge of the Ontario Superior Court of Justice at trial in that Court.

*The Relevant Statutory Provisions*

[5] Section 224 of the *Insurance Act* provides the following definitions:

224(1) In this Part,

"automobile" includes,

- (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
- (b) a vehicle prescribed by regulation to be an automobile;

.....

"fault determination rules" means the rules prescribed under paragraph 21 of subsection 121(1);

.....

"insured" means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person; [page348]

.....

"occupant", in respect of an automobile, means,

- (a) the driver,
- (b) a passenger, whether being carried in or on the automobile,
- (c) a person getting into or on or getting out of or off the automobile;

.....

"statutory accident benefits" means the benefits set out in the regulations made under paragraphs 9 and 10 of subsection 121(1);

"*Statutory Accident Benefits Schedule*" means the regulations made under paragraphs 9 and 10 of subsection 121(1).

[6] Section 268 requires coverage for statutory accident benefits be provided in every motor vehicle liability policy. It states, in part, that:

*Statutory accident benefits*

268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

.....

*Liability to pay*

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,
  - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
  - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
  - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
  - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
2. In respect of non-occupants,
  - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured, [page349]
  - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
  - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
  - iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

*Liability*

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

.....

[7] The loss transfer scheme is found in s. 275 of the *Insurance Act* which states:

*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.*

*Idem*

(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.*

*Deductible*

(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.*

*Arbitration*

(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, 1991.*

*Stay of arbitration*

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits.

(Emphasis added) [page350]

*The Decisions*

[8] The arbitrator, Lee Samis, decided that he was bound by an earlier arbitration decision in *Progressive Casualty Co. v. Jevco Insurance Co.*<sup>1</sup> that was upheld on appeal by this court.<sup>2</sup> In *Jevco*, the court found that the right to a loss transfer payment under s. 275 of the Act was subject to only a \$2,000 deductible in respect of the operator of the insured vehicle rather than a \$2,000 deductible for each person that was paid no-fault benefits. Although he disagrees with the *Jevco* decision, Arbitrator Samis followed the *Jevco* decision as he determined that he was bound by that decision.

[9] In order to better appreciate the arbitrator's decision that is now under appeal, I will reproduce the analysis found in the *Jevco* decisions.

[10] In *Jevco*, the arbitrator, the Honourable Richard E. Holland, Q.C., stated:

Were the payments made to the passenger "paid in respect of a person described in (subsection 2)?

The person described in subsection (2) is the "insurer's insured" and indemnification is to be paid "according to the respective degree of fault" of each such insured.

Under the regulations "insured person" is defined to include "an occupant of the insured automobile". Automobile includes motorcycle. In the result, the passenger in this case is an "insured person". The degrees of fault are determined under the regulations pursuant to fault determination rules.

*It would have been simple for the persons drafting subsection (3) of section 275 to provide that no indemnity is available in respect of the first \$2,000 of no-fault benefits paid in respect of an "insured person", instead of "in respect of a person described in subsection (2)". In that event, the deductible would have applied to both the owner and the passenger (occupant). But that is not what was done and by linking the deductible to "a person described in subsection (2)" (i.e. "the insurer's insured") the drafters must have intended that the deductible only apply to the named insured[.]*

(Emphasis added)

[11] In dismissing the appeal from the Arbitrator Holland's decision, Somers J. stated [at paras. 2-8]:

This is an appeal from an award of an arbitrator the Honourable R.E. Holland Q.C. dated October 12th, 1994. The appellant Progressive Casualty Company, which was the second party insurer in the matter involving the two insurance companies, seeks to set aside the findings of the arbitrator and to recover a sum of \$2,000.00 which it claims it overpaid to the [page351] respondent Jevco, the first party insurer in the same matter. Payments were made by the applicant by way of what is a loss transfer payment.

This is a mechanism established under the *Insurance Act* by which automobile insurers who pay no-fault benefits (in this case Jevco) may be reimbursed by the second party insurer (in this case Progressive) for all or part of their claim. Such payments are only available in accident cases involving different classes of vehicles. It was intended by the Legislature in establishing this scheme to find some form of balance in the payment of no-fault benefits between different classes of vehicles. Another required condition is that the second party vehicle must be to some degree at fault in the accident.

In this particular case, the parties agreed that the vehicle insured by Progressive was 100% responsible. *Jevco the first party insurer insured the motorcycle on which the original claimants Roger Bergeron and Valerie Bergeron were the operator and passenger respectively.* It then sought reimbursement for a portion of those payments from Progressive.

Progressive, in satisfying the Roger Bergeron claim, paid out an amount of money to which it applied the deductible of \$2,000.00 as provided for, in the statutory provisions of the *Insurance Act*. However, it paid out the full claim of the passenger Valerie Bergeron. *It subsequently sought from the arbitrator reimbursement of \$2,000.00 of the latter payment on the grounds that the deductible should have applied to her claim as well as the claim of Roger Bergeron.* There is no dispute that the deductible claimed made against the payment on behalf of Roger Bergeron was properly made.

The right to loss transfer payments is created in section 275 of the *Insurance Act*, R.S.O. 1990 Chapter 1-8. Subsections (1), (2) and (3) of that section are of particular importance here and read as follows:

275(1): The insurer responsible under 268(2) for the payment of no-fault 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 no-fault 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 no-fault determination rules.
- (3) No indemnity is available under subsection (2) in respect of the first \$2,000.00 of no-fault benefits paid in respect of a person described in that subsection.

The position taken by the appellant Progressive is that under the definition section both Roger Bergeron and Richard Bergeron were "the insurer's insured" and that a deductible should have been applied to the reimbursement sought for each of their claims. In effect, it says there were two separate claims made by two separate insureds and each should be subject to the deductible. The arbitrator, while agreeing that the passenger was an "insured person," came to the conclusion that the wording of the subsections of s. 275, to which I have referred, and in particular (1), (2) and (3), did not provide for the application of the deductible to any and all the insurers but [page352] rather "to the person described in that subsection, "(i.e., (2).)" Subsection (2) in its wording appears to limit its scope to a single person in that it speaks of the "fault" of the insured from which one would conclude that it was intended by the drafter that subsection (3) by linking itself to subsection (2) was limited in its scope to that one person. In dealing with that, the arbitrator said page three of his reasons:

It would have been simple for the person drafting subsection (3) of s. 275 to provide that no indemnity is available in respect of the first \$2,000.00 of no-fault benefits paid in respect an "insured person" instead of "in respect of person described in subsection (2)" if that is was intended. In that event, the deductible would have applied to both the owner and the passenger (occupant). But that is not what was done and linking the deductible to "a person described subsection (2)," (i.e., "the insurer's insurer") the drafters must have intended that the deductible only applied to the named insured.

Counsel for the appellant argues that subsection (2) is intended to provide merely a mechanism for determining the apportionment to be applied to any deductible repayment claim. I have concluded that I cannot accept that submission. I am not persuaded having considered the reasoning of the arbitrator that he was wrong in his decision. I go further in saying that in my view the arbitrator was correct and, therefore, it follows that in my view this appeal must be dismissed.

[12] In the arbitration decision under appeal, Arbitrator Samis states:



It is readily apparent why there is a dispute between these insurers about the applicability of the deductible. At the outset, this is the predictable result of the perspective of the parties. Northbridge in this instance is the insurer of one "insured" whose actions have given rise to a number of claims. Economical on the other hand, is the insurer of a number of persons who have a number of claims for indemnity based on the singular conduct of Northbridge's insured.

Looked at differently, one could argue that the deductible should be applied per event, rather than per claimant. Certainly either approach would be consistent with the custom in the insurance community. Deductibles of both sorts are commonplace.

At the outset, it's important to understand why insurers find it useful to have deductibles when dealing with claims situations. Below a certain threshold, here \$2,000.00, it is deemed inappropriate for insurers to have to deal with the transaction costs and potential friction for the purpose of reallocating the losses between insurers. The entire statutory scheme only has impact for insurers and has no impact for insured persons. *Hence it makes very good sense that the loss transfer scheme would be designed in a way to avoid engaging the entire process for relatively minor cases.*

Clearly the pragmatic avoidance of identifying, investigating, negotiating and arbitrating small loss transfer claims is a benefit equally to the insurer seeking recovery as it is to the target of loss transfer.

The approach of applying a single deductible to multiple claimants greatly dilutes that pragmatic cost avoidance. In fact, it may add greatly to the cost in any particular case as insurers will have to understand and calculate the [page353] combined value of a number of claims in order to realize that there is a potential loss transfer in excess of the deductible. No longer can an insurer look at a single claim and evaluate it in order to determine whether loss transfer is feasible. *The insurer will be obliged to value each claim as part of a pool of claims that somehow are to share a deductible.*

This challenge is exponentially more difficult when the various persons making SABS claims are presenting those claims to different insurers. In this particular case it appears that all of the SABS claims have been made to a single insurer. But there is no particular reason why that would be the case generally. The statutory scheme requires injured persons to make claims against their own insurer, not necessarily the insurer of the vehicle in which they are an occupant. *Accordingly, multiple claimants with injuries in one single accident often are presenting SABS claims to different insurers. A theory that a single deductible applies to loss transfer in those circumstances would need to take into account how that deductible would be distributed across the various claims for reimbursement. Yet another complexity is injected into a process that has its goal as simplicity.*

Further, we need to bear in mind that where there are multiple SABS claims arising out of a single accident, the individual claimants may be in different positions with respect to "fault" and determination of fault under the regulations. That does not appear to be the case before me. But in many accident circumstances the various victims could be in disparate liability positions depending on the events leading up to the injuries. *The loss transfer scheme requires loss transfer to be evaluated according to the respective degree of fault of "each*

*insurer's insured" not by determining the fault of one insurer's insured. Necessarily, the loss transfer scheme applies differently depending on the circumstances of each claimant. The entitlement to loss transfer does not stand alone on the circumstances of the insured of the targeted insurer. Loss transfer needs to be determined by taking into account the circumstances of the claiming insured person as well.*

And the relevant circumstances are not limited to questions of fault. Under Section 9 of Ontario Regulation 664, the entitlement to loss transfer will be affected by the insurance coverage of the person receiving the Statutory Accident Benefits. Subsection 2 of Section 9 of Regulation 664 puts specific conditions, applicable only to the claimant, on the access to the loss transfer indemnity.

In my view, the statutory scheme and the regulations thereunder create loss transfer with different rules applicable to each individual claimant. *The loss transfer entitlement, if any, will be affected by that claimant's responsibility in the accident circumstances and will be affected by the character of that claimant's insurance policy.*

Loss transfer is claimant-centric.

It is against this background that I read Section 275(3) and the application of the deductible "in respect of a person". The reference to Subsection 2 of 275, in my view, does not compel some other approach. Each insurer advancing a claim for loss transfer with respect to an insured is only entitled to indemnity in accordance with their respective degree of fault of the particular insured vis-à-vis the loss transferee's insured's fault.

*In my view, deductibles should be applied for each injured claimant. This is consistent with the usages of trade in the business of insurance. It furthers the goal of simplicity. It introduces proportionality to the loss transfer [page354] disputes by removing the smaller disputes. It is consistent with the claimant-centric features of the loss transfer legislation and regulations. It is the easiest rule to administer.*

Not surprisingly, the applicant strongly relies on the decision of the Superior Court in the case of *Progressive Casualty v. Jevco*. The decision is now more than 20 years old. It is a decision on appeal from the Honourable R.E. Holland who was well known as an experienced jurist with a lengthy history of dealing with personal injury matters albeit in an era before loss transfer and "no fault".

In that decision, Justice Somers has addressed this very point of the multiple deductibles and has concluded that only a single deductible should be applied. It does not appear that many of the foregoing considerations were brought to the attention of Justice Somers and *there does not seem to have been any realization that multiple insured claimants would commonly mean loss transfer claims via different insurers*. There was no discussion in the reasons of the claimant-centric insurance policy requirements for the possibility of divergent liability situations for different claimants.

Nonetheless, the decision of Justice Somers is a decision of the Superior Court on appeal from an arbitrator in a loss transfer matter. It deals with the issue directly before me. In the circumstances I respect that decision and defer. . . .

Conclusion

Therefore, as I consider myself bound by the decision of Justice Somers in *Progressive v. Jevco*, I conclude that only one deductible is to be applied. Were it not for the *Progressive v. Jevco* decision, I would have ordered to the contrary.  
Interest on the amounts due should be paid in accordance with the principles in the *Courts of Justice Act*.

(Emphasis added)

## Analysis

### *Standard of review*

[13] This sole issue on this appeal is whether the \$2,000 deductible under s. 275(3) of the *Insurance Act* for loss transfer indemnity applies to every claim for statutory accident benefits paid by a first party insurer or whether the deductible only applies to a claim for statutory accident benefits that is has paid to its named insured.

[14] In *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)*,<sup>3</sup> the standard of correctness was applied by the Ontario Court of Appeal in interpreting the proper meaning of another phrase found in s. 275 of the *Insurance Act*. In my view, the [page355] question of law raises by this appeal must be determined applying a standard of correctness.

### *Principles of statutory interpretation*

[15] In *Wawanesa*, the Ontario Court of Appeal stated that that a purposive approach is to be applied when interpreting legislation. It stated [at paras. 33-35]:

As Driedger explains, at p. 87 of his *Construction of Statutes*, 2d ed., (Toronto: Butterworths, 1983):

[T]he words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the provision is located within; and (3) it must consider whether the proposed interpretation produces a just and reasonable result. The factors comprising the "entire context" include the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue . . . A just and reasonable result promotes applications of the Act that advance its purpose and avoids applications that are foolish and pointless.

(Citation references omitted)

*Does the \$2,000 Deductible Under Section 275(3) of the Insurance Act Only Apply to Claims for Indemnity of Statutory Accident Benefits Paid to a Named Insured?*

[16] I now turn to consider this question applying the above principles of statutory interpretation.

*Entire context of the provision*

[17] The loss transfer provisions under s. 275 of the *Insurance Act* were explained by the former Ontario Insurance Commission, in part, as follows:

*Loss Transfer permits insurers that pay accident benefits (the "first party insurer") to be indemnified by another insurer (the "second party insurer") for all or part of the accident benefits paid to an insured person, under certain circumstances.*

Loss Transfer was introduced in order to balance the cost of providing accident benefits between specified classes of vehicles.

*Loss transfer operates between insurers of classes of automobiles specified in the Regulation . . . and applies only when the insured of the second party insurer was partly or entirely at fault in the accident. . . .* [page356]

Loss transfer was introduced in June, 1990, in order to address the cost implications of moving away from tort-based compensation and to a first party accident benefits provided on a no-fault basis.

*Since June, 1990, insureds look to their own insurers for accident benefits instead of seeking compensation from third parties. Certain types of vehicles that might have been less likely to experience bodily injury claims under a tort-based compensation system are more likely to require accident benefits payments for such claims under a no-fault system. Loss Transfer balances the cost of providing compensation on a first party basis between these specified classes of vehicles. For example, loss transfer shifts costs from insurers insuring motorcycles to insurers of other classes of automobiles under certain circumstances. Loss transfer also shifts costs to insurers of heavy commercial vehicles from other classes of automobiles in certain circumstances.<sup>4</sup>*

(Emphasis added)

[18] The Ontario Court of Appeal in *State Farm Mutual Automobile Insurance Co. v. Aviva Canada Inc.*<sup>5</sup> further explained the loss transfer scheme as follows [at paras. 49-56]:

Under the Act, Ontario has a partial no-fault system. Since June 1990, regardless of fault, insureds look to their own insurers for the payment of statutory accident benefits, rather than seeking compensation from third parties (and their insurers). The Ontario legislature introduced the loss transfer scheme to address the cost implications for insurers of moving to this partial no-fault system: Ontario Insurance Commission (now the Financial Services Commission of Ontario), Interpretation Bulletin No. A-11/94, "Loss Transfer: Standardized Forms and Procedures" (6 June 1994).

Section 268 of the Act requires an insurer to pay statutory accident benefits to its insured, in certain circumstances. A motorcyclist is covered by this provision. An insurer who pays such benefits to its insured is known as the "first party insurer".

Section 275 of the Act establishes the process by which the first party insurer can claim indemnification from another insurer.

Section 275(1) allows the first party insurer, in certain situations, to claim indemnification from the insurer of the other driver involved in the accident. In this situation, the other driver's insurer is known as the "second party insurer". It is the indemnification of the first party insurer by the second party insurer which is known as "loss transfer".

Section 275(2) of the Act requires that indemnification be made "according to the respective degree of fault of each insurer's insured as determined under the [FDRs]." [page357]

The FDRs consist of twenty rules. The first five rules are general provisions. Those provisions are discussed below. Rules 6 through 19 contain a series of general types of incidents and specify the fault to be attributed to each driver in each incident. Fault is not a nuanced determination in rules 6 through 19: it is typically assigned as 50% or 100%. Rule 20 provides the rules for fault determination when a driver involved in an incident is charged with a driving offence.

If, as in this case, the first party and second party insurers cannot agree on indemnification under s. 275, s. 275(4) of the Act requires them to resolve the matter through arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17.

The legislation which creates the loss transfer scheme consists of the relevant provisions of the Act together with the FDRs. *The purpose of the loss transfer scheme is to provide for an expedient and summary method of spreading the cost of statutory accident benefits among insurers, in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude: Jevco Insurance Co. v. York Fire & Casualty Co. (1996), 27 O.R. (3d) 483, 1996 CanLII 11780 (C.A.), at paras. 8-9.*

(Emphasis added)

[19] I agree with the arbitrator that the interests of both the first party insurer and the second party insurer to avoid transaction costs for small claims is served if the deductible is applied in respect of each SAB claimant. In my view, the application of the \$2,000 deductible in respect of each SAB claimant promotes the "expediency and economy" objectives of the loss transfer provisions.

#### *Ordinary and grammatical meaning of the words*

[20] I agree with Arbitrator Holland's observation that it "would have been simple for the persons drafting subsection (3) of section 275 to provide that no indemnity is available in respect of the first \$2,000 of no-fault benefits paid in respect of an insured person', instead of in respect of a person described in subsection (2)'. In that event, the deductible would have applied to both the owner and the passenger (occupant)." Nevertheless, it is my view that the words used lead to the same result.

[21] I respectfully disagree with his conclusion that ". . . the drafters must have intended that the deductible only apply to the named insured" for several reasons.

Economical Mutual Insurance Company v. Northbridge Commercial Insurance Company [Indexed as:  
Economical Mutual Insurance Co. v. Northbridge Commercial Insurance Co....

- Subsection 275(3) does not refer to the "named insured" nor does it state that the deductible only applies to "the first \$2,000 paid to the named insured". Had that been the drafter's intention, then s. 275(3) could have simply stated "No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid to the named insured". [page358]
- To apply a deductible only for a statutory automobile benefits claim made by a named insured would thwart the objective of the deductible, if the named insured was not injured in an automobile accident but a claim for benefits was advanced by an occupant.
- Rather than referring to the "named insured", the deductible applies to "the first \$2,000 of statutory accident benefits paid in respect of a person described in subsection (2)" which in turn references "the degree of fault of each insurer's insured as determined under the fault determination rules". Both Economical and Northbridge agree that, given the fault determination rules under Regulation 668 [*Fault Determination Rules*, R.R.O. 1990, Reg. 668], the person referenced in subsection (2) is the operator of the automobile. As noted by the Ontario Court of Appeal in *State Farm*, Reg. 668 specifies the degree of fault to be attributed to each driver of an automobile in numerous types of automobile accidents.
- Finally, the scope of the words "in respect of" were not considered in arriving at the conclusion that "linking the deductible to a person described in subsection (2) (i.e., the insurer's insured) the drafters must have intended that the deductible only applied to the named insured".

[22] The words "in respect of" have the "widest possible scope" and import meaning such as "in relation to", "with reference to" or "in connection with". It is intended to convey "some link" or "some connection" between two subject matters.<sup>6</sup> These principles are equally applicable where the phrase "in respect of" is used in the *Insurance Act*.<sup>7</sup>

[23] Applying this framework, the two subject matters in s. 275(3) are

-- "statutory accident benefits paid"; and

- "a person described in subsection (2)" which, in my view, refers to the driver of an automobile to some degree at fault for an automobile accident from which the responsibility to pay statutory accident benefits arose. [page359]

[24] Accordingly, the \$2,000 deductible found in s. 275(3) applies to each person who is paid statutory accident benefits and is not limited only to a claim for statutory accident benefits made by a named insured, as found in *Jevco*, or made by the operator of an automobile (who may not be the named insured), as submitted by Economical. This interpretation applied in *Jevco* and advanced by Economical would place the narrowest, rather than the widest, scope on the meaning of "in respect of" by limiting the deductible to only one person's claim for statutory accident benefits when there may be other claims.

*Does the proposed interpretation produce a just and reasonable result?*

[25] Economical submits that the application of a \$2,000 deductible to a claim for indemnity by a first party insurer for each person to whom it has paid statutory accident benefits rather than only to a claim for statutory accident benefits that it has paid to its named insured would undermine the objective of the loss transfer provisions to balance the costs of providing accident benefit specified class of automobiles. However, there is no evidence of the actual prejudice that would result if the \$2,000 deductible was applied to a claim for indemnity for each person to whom it has paid statutory accident benefits. In my view, as Arbitrator Samis noted, it makes little financial sense for first party insurers to pursue, and second party insurers to respond to, small loss transfer claims given the transactional costs for each claim. I am not satisfied that the application of a \$2,000 deductible in the manner advocated by Northbridge would have the consequences suggested by Economical.

[26] Economical also submits that the fact that the legislature has not amended s. 275(3) of the *Insurance Act* in the 20 years since this court's decision in *Jevco* suggests that this decision accords with the legislature's suggests that the decision accords with the legislative intention. I do not accept this suggestion. While a legislature may amend a statute in response to a judicial or tribunal interpretation of that statute, I know of no principle of statutory interpretation which suggests that if a legislature has not amended a statutory provision that has been judicially considered, then it is to be assumed that such judicial interpretation reflects the drafter's intentions.

[27] For the reasons described earlier, including the avoidance of transaction costs for small loss transfer claims, it is my view that interpreting the deductible provided by s. 275(3) of the *Insurance Act* to apply to each claim of indemnification for [page360] statutory accident benefits paid to each person involved in an automobile accident is a just and reasonable result.

### *Conclusions*

[28] For the reasons given, I allow Northbridge's appeal. The answer to the questions found in para. 2(A) of the arbitration agreement is no.

[29] I encourage the parties to resolve the issue of costs, failing which I direct that Northbridge deliver its costs submissions within ten days of today's date and that Economical deliver its submissions within 17 days of today's date. Costs submissions shall be a maximum of three pages long exclusive of an outline of costs.

*Appeal allowed.*

### Notes

Economical Mutual Insurance Company v. NorthbridgeCommercial Insurance Company[Index as:  
Economical Mutual Insurance Co. v.Northbridge Commercial Insurance Co....

- 2 [1994] O.J. No. 3152, 27 C.C.L.I. (2d) 234 (Gen. Div.).
- 3 (2012), 112 O.R. (3d) 354, [2012] O.J. No. 4196, 2012 ONCA 592, para. 32.
- 4 Ontario Insurance Commission (now the Financial Services Commission of Ontario), Interpretation Bulletin No. A-11/94, "Loss Transfer: Standardized Forms and Procedures" (June 6, 1994), pp. 1 and 2.
- 5 (2015), 128 O.R. (3d) 321, [2015] O.J. No. 6852, 2015 ONCA 920; Also see *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)*, *supra*, paras. 6-9.
- 6 *R. v. Nowegijick*, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, at 39 S.C.R.; *Markevich v. Canada*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, at para. 26.
- 7 *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 57 O.R. (3d) 625, [2002] O.J. No. 4 (C.A.), at para. 17.

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