

**IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 and Ontario
Regulation 664;**

**AND IN THE MATTER OF an Arbitration under the *Arbitration Act*, S.O.
1991, c.17**

B E T W E E N:

PRIMUM INSURANCE COMPANY

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY

Respondent

AWARD

Appearances:

Mr. Derek Greenside
Primum Insurance Company

John J. Alkins
Royal & SunAlliance Insurance Company

ISSUES:

1. Does Rule 5 or Rule 14(2) of the Fault Determination Rules, Ontario Regulation 668 apply to the facts of the within case.
2. Is lack of consent a defence under either Rule 5 or Rule 14(2) of the Fault Determination Rules Ontario Regulation 668.

3. Is the breach of Statutory Condition 4(1) of the Ontario Automobile policy by a second party insurer's Insured a defence to a loss transfer claim.

RESULT:

1. Rule 14(2) of the Fault Determination Rules Ontario Regulation 668 applies to the within facts.
2. Lack of consent is not a defence under Rule 14(2) of the Fault Determination Rules, Ontario Regulation 668.
3. The breach of Statutory Condition 4(1) of the Ontario Automobile Policy by a second party insurer's insured is not a defence to a loss transfer claim.

ARBITRATION:

This matter came up for hearing before me, Bruce R. Robinson, Arbitrator, in the City of Toronto, in the Province of Ontario, on Tuesday August 31, 2004.

EVIDENCE:

The parties did not call any witnesses to give evidence. Mr. Greenside, on behalf of the applicant, filed a brief of documents of Primmum Insurance Company which was used by both parties at the hearing.

The matter proceeded on an agreed set of facts, agreed to solely for the purposes of the within arbitration.

BACKGROUND FACTS:

On June 23rd 2001, Primmum Insurance Company insured a motorcycle owned and operated by Mr. James Paden and a second motorcycle owned and operated by Barbara Paden.

Royal & SunAlliance Insurance Company insured a Toyota Corolla motor vehicle owned by Toyota Credit and leased by Xui Quing Zhang which vehicle was operated by her brother Yong Yi Zhang on June 23rd 2001.

The accidents occurred when the Zhang vehicle, travelling northbound, entered an intersection while the two motorcycles were approaching in a westbound direction. Mr. Zhang proceeded into the intersection without stopping at the stop sign for his direction of travel. Mr. Zhang struck James Paden's motorcycle and thereafter the Zhang vehicle was struck by Barbara Paden's motorcycle.

As a result of the accidents James Paden, his daughter Shelby Paden, his wife Barbara Paden were injured and sought statutory accident benefits from Primmum Insurance Company. Primmum Insurance Company is

seeking a repayment of said accident benefits subject to the statutory deductible of \$2,000.

Royal & SunAlliance Insurance Company takes the position that their named insured Xui Quing Zhang did not give permission to her brother Yong Yi Zhang to operate her motor vehicle on June 23rd 2001. Royal Sun Alliance Insurance Company therefore denies its liability to reimburse Primum Insurance Company under Section 275 of the *Insurance Act*, R.S.O., 1990 c.l.8

LAW:

Section 275 of the *Insurance Act*, R.S.O., 1990 c.l.8 at Section 275 sets out the rules for indemnification between first and second insurers 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.

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 Arbitrations Act, R.S.O. 1990, c.1.8, s.275 (4)

S.234 of the Insurance Act.

234 (1) Statutory conditions – The conditions prescribed by the regulations made under paragraph 15.1 of subsection 121(1) are statutory conditions and shall be deemed to be part of every contract to which they apply and shall be printed in English or French in every policy to which they apply with the heading "Statutory Conditions" or "Conditions légales", as may be appropriate.

(2) Variation – no variation or omission of or addition to a statutory condition is binding on the insured.

(3) Exceptions – Except as otherwise provided in the contract, the statutory conditions referred to in subsection (1) do not apply to the insurance required by the section 265 or 268.

Section 9 of the *Insurance Act* deals with indemnification for statutory accident benefits as follows:

Automobile Insurance R.R.O. 1990, Reg, 664
Amended to O. Reg. 459/03

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;

"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;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.

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;

The Ontario Insurance Act in Section 224 sets out various definitions as follows:

224. (1) In this Part,

"excluded driver" means a person named as an excluded driver in an endorsement under section 249; ("conducteur exclu")

"fault determination rules" means the rules prescribed under paragraph 21 of subsection 121 (1); ("règles de détermination de la responsabilité")

"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: ("assuré")

The Fault Determination Rules, Ontario Regulation 668 set forward the following sections which were referred to at the hearing:

Section 2.

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

(2) The diagrams in this Regulation are merely illustrative of the situations described in these rules.

Section 5.

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.

Section 14.

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 percent at fault for the incident.

STATUTORY CONDITIONS-AUTOMOBILE INSURANCE

Authority to Drive

4.(1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

FINDINGS:

I find based on the agreed facts, that for the purposes of this arbitration, the driver of the Royal & SunAlliance Insurance Company vehicle failed to stop at a stop sign thereby coming into contact with the two motorcycles. I further find that the actions of Mr. Zhang resulted in two separate and distinct collisions, or incidents, the first with Mr. James Paden and the second one with Mrs. Barbara Paden. The Zhang vehicle was the sole vehicle to strike these motorcycles one after the other.

I have previously reviewed the law and the philosophy surrounding the issue of loss transfer, in my decision of *Jevco Insurance Company v. AXA Insurance Company* dated November 5th, 2001. This decision was upheld on appeal by Mr. Justice Wilkins on March 26th 2002. In that case, Mr. Fish, who was insured with Jevco Insurance Company, was struck by a truck which was insured by Axa Insurance Company. Mr. Fish was a pedestrian at that time. The operator of the truck had stolen the motor vehicle and there was no consent given by the owner, Brenda Evans. Following a review of the law I found that the insurer of the truck, Action Insurance Company, was required to reimburse Jevco Insurance Company.

I followed the decision of Justice Speigel in *Jevco Insurance Company v. Wawanesa Insurance Company* 42 O.R (3rd) 276. In this decision a motorcycle operated by David Sampara, and insured by Jevco Insurance Company, came into collision with a motor vehicle owned by Rachelle Martel and driven by Danny Landry. The Martel vehicle was insured with Wawanesa

Insurance Company. Mr. Landry, however, did not have consent to operate the Martel vehicle at the time of the accident. Arbitrator Ayers in the first instance found that Jevco Insurance Company was not entitled to indemnity. This was reversed by Justice Speigel after a very thorough review of the law and the purposes behind the principles of loss transfer. I concurred with Justice Speigel in my prior decision and the same comments apply to the within action. I again quote from pages 6 and 7 of that decision as follows:

In my view, the second party insurer's obligation to indemnify derives from it having a policy in force on a class or automobile specified by the regulations that was involved in the incident from which the responsibility to pay SABs arose. The wording of s.275(1) focuses on the "insurers" of automobiles. Section 9(2) of Reg. 664 says that a second party insurer "under a policy insuring any class of automobile...is obligated to indemnify a first party insurer". This supports the conclusion that if the second party insurer's policy insures the automobile in the circumstances described in s.275(1), the second party insurer has an obligation for loss transfer indemnity. There is nothing in s.275(1) or the regulation to suggest that the second party insurer's obligation is dependent on the existence of enforceable third-party liability coverage in its policy.

Section 275 creates a statutory obligation, imposed on one insurer to indemnify another that has nothing to do with the obligation of an insurer to indemnify its own insured for third-party liability. Third party liability is liability imposed by law on an insured. Loss transfer indemnity is liability imposed by law on an insurer. The fact that the FDR are used in some situations to determine fault for the purpose of establishing liability does not justify the conclusion that they deal only with third-party liability. This erroneous conclusion led the learned arbitrator to the third party liability portion of the standard motor vehicle liability policy and then to s.239(1) of the Act. He felt that s. 239(1) provided the only definition of "insured" for "motor vehicle liability policies" and, therefore, the meaning which must be given to the word "insured" in ss.2 to 5 of the FDR.

In my opinion, the learned arbitrator placed undue emphasis on the fact that the word "insured" is used in the FDR in ss. 2 to 5. As counsel for Jevco points out, the word "driver" is used in subsequent sections, which he submits envisages a determination of fault of a driver who is not necessarily an insured. On balance, I do not think that the use of the word "insured" in some sections of the FDR and the use of the word "driver" in others is of assistance in interpreting s. 275. In my view, s. 275(2) incorporates the FDR solely as a mechanism for determining the monetary extent of the obligation imposed on the second party insurer by s.275(1). This does not make the obligation for loss transfer conditional on the fault of an insured whom the second party insurer insures against third-party liability.

Justice Speigel found that the person who was driving the motor vehicle without the consent of the named insured, was an insured for the purposes of the loss transfer claim as I did in my subsequent decision. Speigel J, states at page 8,

"The loss transfer indemnity scheme set out in s. 275 is meant to shift those costs in some circumstances from the first party insurer to the second party insurer. In my view, the legislature has not demonstrated an intention to limit those circumstances to cases where the second party insurer is responsible to indemnify the driver of its automobile against third party liability. Having regard for the purpose of the legislation, I see no compelling reason why it should be so limited."

I therefore find that lack of consent by the insured of the Royal & SunAlliance Insurance Company is not a defence under a loss transfer application brought pursuant to either Rule 5 or Rule 14(4). I find there is no correlation whatsoever between an insurer's obligation to insure, (i.e.) defend and indemnify, and an insurer's obligation to provide statutory accident benefits. The Legislature has made an insurer's obligation to pay statutory accident benefits one which is independent of any issue of consent. I find that Yong Yi Zhang was "insured" for

the purposes of s.275 of the *Insurance Act* with Royal & SunAlliance Insurance Company irrespective of the consent issue.

I find no correlation between Statutory Condition 4(1) and the requirement to provide statutory accident benefits. The legislature in its wisdom has made insurers obligated to pay statutory accident benefits independent of any statutory conditions as set forward in S.234 of the *Insurance Act*.

Loss transfer in these situations relates only to the reimbursement for statutory accident benefits.

As I stated in my decision of *Jevco Insurance Company* and *Axa Insurance Company* at page 11,

"It is necessary to look at the purpose of the *Insurance Act* and the loss transfer provisions. They were to provide a fast and efficient manner of dealing with loss transfers between various classes of vehicles in an efficient and cost saving manner. In Bulletin 11-94 and Bulletin 9-92 from the Ontario Insurance Commission, I find that S.275 can be interpreted as a method to deal with "specific and limited situations involving loss transfer". This is both a plausible interpretation of the statute and it is also one which promotes the purposes of the legislative intent in dealing with these claims expeditiously."

I find that Rule 14(2) applies to the facts presented to me.

I find the lack of consent or the breach of Statutory Condition 4(1) is not a defence for loss transfer application under the aforementioned legislation.

I further find that Royal & SunAlliance Insurance Company is responsible to pay statutory accident benefits to the Paden family arising out of the accidents of June 23, 2001.

COSTS:

The parties have agreed that the costs in this matter will follow the event.

ORDER:

1. It is ordered that Royal & SunAlliance Insurance Company pay to Primmum Insurance Company indemnity for amounts paid pursuant to S.275 of the *Insurance Act* to or on behalf of James Paden, Shelby Paden and Barbara Paden arising out of a motor vehicle accident of June 23rd 2001.
2. Royal & SunAlliance Insurance Company will pay to the applicant Primmum Insurance Company its costs of the arbitration throughout.

DATED at Toronto this 22 day of September 2004.



Bruce R. Robinson, Arbitrator