

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8 as amended, Section 275 and Section 9 of Regulation 664;
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, S.O. 1991
AND IN THE MATTER OF AN ARBITRATION**

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

AWARD

COUNSEL

Joseph W. L. Griffiths
Counsel for the Applicant, Aviva Insurance Company of Canada

Derek Greenside
Counsel for the Respondent, Royal & SunAlliance Insurance Company of Canada

PRELIMINARY ISSUE

This Arbitration involves a loss transfer claim pursuant to Section 275 of the *Insurance Act* advanced by Aviva Insurance Company of Canada (hereinafter referred to as "Aviva"), as against Royal & SunAlliance Insurance Company of Canada (hereinafter referred to as "RSA"), arising out of a motor vehicle collision which occurred on September 17, 2002. A disabled truck insured by RSA was struck from the rear by an automobile insured by Aviva. At impact, the truck insured by RSA was partially on the travelled portion of the road and partially on the paved shoulder. The preliminary issue to be determined is whether a particular Fault Determination Rule applies to the fact situation at hand, or whether the ordinary rules of negligence would apply. The Applicant Aviva takes the position that no particular Fault Chart Rule applies and that oral evidence will have to be heard with a determination of fault to be made based on the ordinary rules of negligence. The Respondent RSA takes the position that Rule 6 (2) and/or Rule 17 (1) of the Fault Determination Rules are applicable.

AGREED STATEMENT OF FACTS

1. About 600 metres south of the collision location, northbound Allen Road is a three lane road. The right-hand lane proceeds into an exit ramp to Hwy 401 along with an

additional exit lane to the right. This two lane ramp continues north for about 200 metres at which point these two lanes separate. The right-hand lane feeds into the eastbound lanes of Hwy 401 and the left-hand lane feeds into the westbound lanes of Hwy 401.

2. Documentation by the experts retained by the parties and by the police takes place at about the painted bullnose for this lane division point.

3. The travel distance from the tip of the bullnose to the point of impact is about 245 m. Proceeding north from the tip of the bullnose, the ramp proceeds straight for about 50 m and then begins to curve to the right. Here, the northbound ramp is posted with an advisory speed of 60 km/h. Also at about this point, lane markings for a new lane on the right begin. In another 25 m, the new right-hand lane is about wide enough to accommodate a car. From this point, the area of impact is about 100 m to the north with an approximately straight and level approach.

4. The area of impact takes place under a highway ramp overpass and about 12 m north of an overhead electronic sign. Here, the right-hand paved shoulder is about 2.5 m wide and bordered by a raised concrete curb on the east edge and a white fog line on the west edge. Immediately south of the area of impact is the end of a steel guard rail that runs along the edge of the right-hand shoulder. Both driving lanes are each about 3.5 m wide and divided by an intermittent white line. The left-hand paved shoulder is narrow, only about 0.6 m wide, and bordered by a solid yellow line on its east side and a raised curb and steel guard rail on its west side.

5. Using a drag sled, the police measured a coefficient of friction of about 0.83 for the roadway in the area of the impact. This number is an indication of how easily a locked tire slides on the pavement and is utilized in speed calculations.

6. The collision occurred at approximately 6:00 p.m. on September 17, 2002. The collision occurred during daylight hours. The asphalt road service was described by police to be dry and in good condition.

7. For the purposes of the arbitral hearing in this matter, there were two key vehicles involved in the collision. The Thate vehicle insured by Aviva and the Jones vehicle insured by Royal and Sun Alliance.

8. The Thate vehicle was a 1993 Golf CL 4-dr hatchback. Its vehicle identification number was 3VWEN01 H5PM002679. It was equipped with a 5-speed manual transmission.

9. The Jones vehicle was a 1982 Western Star 496 tri-axle dump truck. It was carrying a load of garbage.

10. The arbitral claim for loss transfer results from the payment of accident benefits by Aviva to Monica MacDougall, a passenger in the Thate vehicle who suffered injuries as a result of the collision between the Thate and Jones vehicle.

11. At approximately 4:00 pm, the driver of the Jones vehicle heard abnormal noises coming from the truck as he was rounding the right hand curve on the northbound Allen Road. He decided to pull over on to the right shoulder and stop to check out his vehicle. In the course of examining the problem it was determined that the bearing end cap on the flange yolk assembly of the universal joint was damaged and when the driver tugged on the

drive shaft, the drive shaft became detached, completely disabling the truck. Mr. Jones contacted his employer to arrange for a tow truck and was waiting for the tow truck when the collision occurred.

12. The Jones vehicle was found straddling the right travel lane and shoulder. It was predominately in the right-hand lane blocking about half the lane. The inboard side of its right wheels were just on the east side of the white fog line.

13. There was no indication of movement of the dump truck after impact. Tire skid marks, gouge marks, and debris clearly identified the point of impact.

14. The Thate vehicle generated skid marks which veered slightly to the left and ended at the left rear corner of the Jones truck. The longest skid mark up to the point of impact was about 9.5 m. The Thate vehicle then spun clockwise about 80 degrees and came to rest in the left-hand travel lane beside the rear of the dump truck.

15. The Thate vehicle sustained a severe offset frontal impact. A distinct impression and black smearing about the Golf's right headlamp assembly resulted from impact with the left outboard tire of the dump truck. A rubber smear from the dump truck's inboard wheel assembly was evident at the left corner of the front bumper.

16. The right side of the Golf was crushed rearward by about 85 cm, but the left side was not shortened. Intrusion into the front passenger occupant area was exacerbated as a result of the dump box of the truck coming into contact with the right side windshield post (A pillar) and forcing it rearward.

17. The left rear outboard dual wheel assembly and the lower left rear corner of the dump box had been struck by the Thate vehicle. The outboard tire was deflated as a result of the impact and its wheel rim was damaged as well.

ANALYSIS AND FINDINGS

The Respondent RSA takes the position that Rule 6 (2) applies to the facts of this case. The Rule states:

"Rules for Automobiles Travelling in the Same Direction and Lane"

6 (1) This section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are travelling in the same direction and in the same lane.

(2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the incident."

I find that Rule 6 (2) is inapplicable to the facts of this case. Clearly, vehicle "A" (the RSA truck) was not in forward motion at the time of the collision. I further find that it was not "stopped" at the time of the collision. In order to reach this finding, I am satisfied that the Fault Determination Rules distinguish between "stopped" vehicles and "parked" vehicles. The Fault Determination Rules do not define the terms "stopped" or "parked", but they use these

different terms in the Rules. Rule 6, for example, uses the word "stopped", whereas Rule 17 uses the word "parked".

I accept the reasoning of Arbitrator Jones in *Liberty Mutual Insurance Company v. Zurich Insurance Company* (August 23, 2005) and *Co-operators Insurance Company v. Zurich Insurance Company of Canada* (September 27, 2005), wherein he distinguishes between a "stopped" vehicle and a "parked" vehicle.

In *Liberty Mutual Insurance Company v. Zurich Insurance Company*, Arbitrator Jones states as follows:

"The term "parked" is not defined in the Fault Determination Rules or the Insurance Act. Section 1 of the Highway Traffic Act defines the following terms: "parked" or "parking" when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of or while actually engaged in loading or unloading merchandise or passengers; "standing" or "stand" when prohibited, means the halting of a vehicle, whether occupied or not, except for the purpose of and while actually engaged in receiving or discharging passengers. "Stopped" or "stopping" when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except where necessary to avoid conflict with other traffic or compliance with the direction of a police officer or via traffic control or sign or signal.

The Oxford dictionary defines "park" to mean "leave (a vehicle) usually temporarily, in a car park, by the side of the road, etc..

*The Ontario Court of Appeal in *Speer, et al. v. Griffin, et al.* [1939] O.R. 552, concluded that the word "park" involved more than a momentary stop. In that case, the driver of a truck drove his vehicle off private property and through an open gate. He then stopped the truck, parking partially on the highway, in order to allow a passenger to get out and close the gate. After closing the gate, the passenger was approaching the truck when it was struck by another motor vehicle. The Court of Appeal held that the word "park" or "leave standing" as found in Section 40 (1) of the Highway Traffic Act did not apply to this situation, as the word "park" involves more than a momentary stopping and the words "leave standing" are not satisfied by the mere stopping of the vehicle, the driver remaining in his place and intending to proceed directly.*

From the case law and definitions above, I think that one must look at the duration of the stopping, the method of stopping and the intent of the person, when determining if the person was parked or stopped."

A similar analysis was accepted in *Co-operators Insurance Company v. Zurich Insurance Company of Canada*.

I agree that in order to determine whether a vehicle is "stopped" or "parked", one must look at the duration of the stopping, the method of stopping and the intent of the person, when

determining if the person was parked or stopped. Applying this criteria to the present fact situation, I am led to the conclusion that the RSA truck was "parked". Although it may have been the intention of the driver initially only to come to a momentary stop to check out his vehicle, the damage determined clearly demonstrated that the vehicle was completely disabled and that the stopping would not be momentary. The operator of the RSA truck had contacted his employer to arrange for a tow truck and was waiting for the tow truck when the collision occurred. At the time of the collision, the RSA truck is best characterized as being "parked".

In the alternative, the Respondent RSA takes the position that Rule 17 (1) applies to the present fact situation. Rule 17 states:

"Rules for Other Circumstances"

17 (1) If automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the incident.

(2) If automobile "A" is illegally parked, stopped or standing when it is struck by automobile "B" and if the incident occurs outside of a city, town or village, the driver of automobile "A" is 100% at fault and the driver of automobile "B" is not at fault for the incident."

The Applicant Aviva takes the position that the RSA truck was an "illegally parked" vehicle and that as a result, Section 17 (1) would not apply. The Applicant Aviva argues that Rule 17 distinguishes between "illegally parked" vehicles and "legally parked" vehicles. I find that Section 17 (1) is not restricted to "legally parked" vehicles and that in any event, the evidence before me does not establish that the RSA truck was "illegally parked". I am of the view that Rule 17 (1) creates a general rule subject to the exception as set out in Rule 17 (2), where the non-moving vehicle was illegally parked, stopped or standing when struck outside a city, town or village. The reference to "parked" in Rule 17 (1) would include both vehicles legally and illegally parked. To find that Rule 17 (1) is restricted to only "legally parked" vehicles, would lead to absurd results. It would not apply in a situation where a parked vehicle was rear-ended seconds after a parking meter had expired. In my view, this makes no sense. I therefore conclude that Rule 17 (1) is applicable to vehicles both "legally parked" and "illegally parked", subject to the exceptions as set out in Rule 17 (2).

In any event, I am satisfied that the RSA truck was not "illegally parked". The Applicant Aviva argues that the RSA truck was "illegally parked" by reason of the fact that it was in breach of several sections of the *Highway Traffic Act*, namely Section 151 (5), Section 170 (1) and Section 170 (12).

Section 151 (5) of the *Highway Traffic Act* states:

151 (5) "No person shall drive on the paved shoulder of any part of the King's Highway except in accordance with this section and a regulation made under it".

I do not find Section 151 (5) of the *Highway Traffic Act* applicable to the present fact situation. At the time of this collision, the RSA truck was not driving on a paved shoulder. It was a parked, disabled vehicle.

The Applicant Aviva takes the position that the RSA truck was an "illegally parked" vehicle by reason of a breach of Section 170 (1) and/or Section 170 (12) of the *Highway Traffic Act*. The relevant provisions of Section 170 of the *Highway Traffic Act* are as follows:

170 (1) Parking on roadway – No person shall park, stand or stop a vehicle on a roadway,

(a) when it is practicable to park, stand or stop the vehicle off the roadway; or

(b) when it is not practicable to park, stand or stop the vehicle off the roadway unless a clear view of the vehicle and of the roadway for at least 125 metres beyond the vehicle may be obtained from a distance of at least 125 metres from the vehicle in each direction upon the highway.

(2) Where subs. (1) does not apply – Subsection (1) does not apply to that portion of a roadway within city, town or village.

(3) Idem – Subsection (1) does not apply to that portion of a roadway within a township, county or police village in respect of which there is a by-law prohibiting or regulating parking, standing and stopping.

(8) Disabled Vehicle – The provisions of this section do not apply to the driver or operator of a vehicle that is so disabled while on a highway that it is impossible to avoid temporarily a contravention of the provisions.

(12) Vehicles Interfering with traffic – Despite the other provisions of this section, no person shall park or stand a vehicle on a highway in such a manner as to interfere with the movement of traffic or the clearing of snow from the highway.

(13) Application of subs. (12) where by-law in force – The provisions of subsection (12) with respect to parking or standing in such a manner as to interfere with the movement of traffic or with the clearing of snow from the highway do not apply to a portion of the highway in respect of which a municipal by-law prohibiting or regulating parking or standing in such a manner as to interfere with traffic or with the clearing of snow from the highway, as the case may be, is in force.

It would appear to me that Section 170 (1) of the *Highway Traffic Act* is designed to govern situations taking place outside of a city, town or village not governed by any local parking by-laws. Clearly subsection 2 indicates that Section 170 (1) does not apply to that portion of a roadway within a city, town or village. The subject accident occurred within the municipality of metropolitan Toronto, therefore Section 170 (1) is inapplicable.

The Applicant Aviva argues that Section 170 (12) is applicable and that the RSA truck was "illegally parked" because it was parked on a highway in such a manner as to interfere with the movement of traffic. There was no evidence before me with regard to the applicability of

a municipal by-law regulating parking at this location, so that the restrictions of Section 170 (13) would not apply.

I am of the view that although Section 170 (12) might well apply in ordinary circumstances, it does not apply in the case of a disabled vehicle. I find on the facts before me that the RSA truck was a disabled vehicle, so as to fall within the exception created by Section 170 (8) of the *Highway Traffic Act* which makes it clear the provisions of Section 170 do not apply to the driver or operator of a vehicle that is so disabled while on a highway that it is impossible to avoid temporarily a contravention of the provision. Although there appears to be some conflict between subsections (8) and (12), I am satisfied that in the case of a disabled vehicle, the entire provisions of Section 170 are inapplicable, by reason of subsection (8). On reading Section 170 as a whole, I conclude that the intention was to create an exception for parking on a roadway or highway for disabled vehicles. I characterize the RSA truck as a disabled vehicle legally parked partially on the travelled portion of the roadway.

By way of summary, I am of the view that Rule 17 (1) of the Fault Determination Rules applies to both "legally parked" and "illegally parked" vehicles. In any event, I find that the RSA truck was a "legally parked" vehicle, by reason of the exception set out in Section 170 (8) of the *Highway Traffic Act*.

There is simply insufficient evidence before me to conclude that the RSA truck was illegally parked at the time of this collision.

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**

Applying these principles, keeping in mind that the purpose of the legislation is to spread the load among insurers in a gross and some arbitrary fashion, favouring expedition and economy over finite exactitude, I cannot help but find that Rule 17 (1) of the Fault Determination Rules applies to this situation of a disabled vehicle parked partially on the travelled portion of the roadway and rear-ended in broad daylight by an automobile, so as to make the operator of the automobile fully at fault for the incident.

ORDER

On the basis of the aforesaid, I find that Rule 17 (1) of the Fault Determination Rules applicable and that the driver of the Aviva vehicle 100% at fault for the incident.

It is ordered that Aviva's loss transfer application hereby be dismissed.

It is ordered that Aviva pay to the solicitor for RSA his costs with respect to this loss transfer dispute on a partial indemnity basis.

It is ordered that the Applicant Aviva pay the Arbitrator's fees and disbursements.

DATED at TORONTO this 19th
day of February, 2009.

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KENNETH J. BIALKOWSKI
Arbitrator