

**IN THE MATTER** of the *Insurance Act*, R.S.O. 1990, c.I.8,  
S.275 and Regulation 664/90 thereunder;

**AND IN THE MATTER** of the *Arbitration Act*, 1991, S.O. 1991, c.17;

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

ALLSTATE INSURANCE CO. OF CANADA

Applicant

- and -

ROYAL SUN ALLIANCE

Respondent

**DECISION**

**COUNSEL:**

Sandi Smith – Gilbert, Kirby, Stringer  
for the Applicant Allstate Insurance Co. of Canada  
(hereinafter referred to as “Allstate”)

Derek Greenside – Kostyniuk & Greenside  
for the Respondent Royal Sun Alliance  
(hereinafter referred to as “RSA”)

**BACKGROUND:**

On December 4, 2008, Vincenzo Marotta (“Marotta”) was involved in a motor vehicle accident while travelling westbound on Highway 401 west of the Guelph Line in the Regional Municipality of Halton.

At the time of the accident, Marotta, who was 51 years of age, was operating a 2008 Pontiac G6 sedan when there was contact between his vehicle and a 2000 Freightliner Fld. tractor trailer operated by 30 year old Lakhwinder Singh Jhajj (“Jhajj”).

At the time of the accident the Marotta vehicle was insured under a standard automobile policy of insurance issued by Allstate, which was in full force and effect at the time of the accident..

At the time of the accident the Jhajj vehicle, which is acknowledged to be a "heavy commercial vehicle" as defined in s. 275(9)(1) of the Ontario *Insurance Act*, was insured by RSA, under a policy which was in full force and effect at the time of the accident.

Following the accident, Mr. Marotta submitted an application for Statutory Accident Benefits to Allstate, which then proceeded to pay statutory accident benefits to him.

Allstate submitted a Notification of Loss Transfer to RSA, dated July 25, 2012, and subsequently submitted numerous Loss Transfer Requests for Indemnification forms to RSA. RSA has denied the request for indemnity.

The parties have agreed to submit all matters and claims in dispute between them to a confidential and binding arbitration before me pursuant to the terms of a Revised Arbitration Agreement dated February 15, 2018, and in accordance with the *Arbitration Act*, 1991 S.O. 1991, Section 275 of the *Insurance Act*, R.S.O. 1990, c.1.8, as amended and Ontario Regulation 664/90.

The applicant commenced this arbitration hearing in September of 2013. A number of legal issues were raised as the matter proceeded, one being the issue of laches or whether a limitation defence could be maintained by Royal Sun Alliance. The parties became aware of other cases pending in the Ontario Court of Appeal in which the same or similar issues were being raised. They agreed that the most efficient approach would be to hold this matter in abeyance on consent, and await the determination of the Court of Appeal in those cases. In mid-2016 the law on those issues became settled and this matter resumed with further productions and the scheduling of the arbitration hearing.

The parties agreed at the outset that they wished to limit this arbitration to the question of which fault determination rule was applicable. If necessary, they will proceed to a separate phase of the arbitration to determine the amount of indemnity.

### **ISSUES:**

- (a) Is Royal Sun Alliance responsible, pursuant to the loss transfer provisions as set out in s. 275 of the *Insurance Act*, to repay the amounts Allstate has paid to the claimant, Vincent Marotta, as Statutory Accident Benefits?
- (b) If the answer to (a) is yes, what is the appropriate indemnity amount to be reimbursed to the Applicant?
- (c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing?
- (d) The determination of the cost of the Arbitration and the burden of payment of same.

**APPLICABLE LEGISLATION:**

**s. 275(1) of the Ontario *Insurance Act* states:**

275(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

**Regulation 668 under the Ontario *Insurance Act* (the fault determination rules) states:**

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

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

3. The degree of fault of an insured is determined without reference to,

(a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or

(b) the location of the insured's automobile at the point of contact with any other automobile involved in the incident.

4.(1) If more than one rule applies with respect to the insured, the rule that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies in the circumstances.

(2) Despite subsection (1), if two rules apply with respect to an incident involving two automobiles and if under one rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident.

.....

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 per cent at fault for the incident.

.....

10(1) This section applies when automobile "A" collides with automobile "B", and both automobiles are travelling in the same direction and in adjacent lanes.

(2) If neither automobile "A" or automobile "B" changes lanes, and both automobiles are on or over the centre line when the incident (a "sideswipe") occurs, the driver of each automobile is 50 per cent at fault for the incident.

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

(4) If the incident occurs when automobile "B" is changing lanes, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

#### **EVIDENCE AND FACTUAL FINDINGS:**

Counsel for RSA acknowledged that there is no dispute that the RSA insured vehicle was a "heavy commercial vehicle" as defined in s. 275.9(1) of the Ontario *Insurance Act*.

Four witnesses testified during the course of a two day arbitration hearing which took place on February 15 and 16, 2018. Two document briefs, which included the police report, investigator's notes, witness statements, medical records and transcripts of both driver's examinations for discovery in the tort action, were submitted as exhibits on consent. Also filed on consent was a two page document providing interpretations for the codes shown on the standard Ontario police report.

There is a divergence of evidence as to how this accident occurred, although all parties who appeared and gave evidence at this arbitration agreed that the accident happened on December 4, 2008, on Highway 401 westbound just west of the Guelph Line, and that both vehicles involved in the accident were proceeding westbound at the time of the accident.

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**EVIDENCE OF VINCENZO MAROTTA:**

Mr. Marotta was 57 years old at the time of the subject accident, and was first licensed to drive in Ontario in 1977. He had spent the night prior to the accident at his son's home in Milton. At the time of the accident he lived in Wasaga Beach but worked in Kitchener, so it had been his practice for approximately three years to stay overnight at his son's home from Monday through Thursday, as this considerably shortened the distance he had to travel to work. In accordance with his usual practice, he left his son's home in Milton at 6:00 a.m. as his workday in Kitchener commenced at 7:00 a.m. and the trip usually took about 45 minutes. He entered Highway 401 at its intersection with Highway 25, and proceeded westbound in the shoulder or slow lane. He described the roadway as a little bit wet but the temperature at above freezing. He set his cruise control at 95 kph. Approximately 10 - 15 minutes after entering Highway 401 he came upon a tractor-trailer in the shoulder lane which was going slower than his vehicle. He tapped the brake to release the cruise control, and entered the centre lane in order to pass the tractor-trailer. It was his evidence that he passed the tractor-trailer, did a shoulder check and determined it was safe to re-enter the shoulder lane, and moved into the shoulder lane. He was safely in the shoulder lane for a short period of time when his vehicle was struck from behind and sent out of control. As he lost consciousness, he does not recall the exact path of travel after impact.

Mr. Marotta acknowledged that he took approximately seven medications each day for a variety of health problems including cholesterol, diabetes, gout, high blood pressure and water retention, but denied that he had ever experienced any side effects from these medications.

Following the accident Mr. Marotta was taken by ambulance to Guelph General Hospital, at which time he gave a history which was recorded as follows:

"There was a truck in front of him with the blinkers on. He went into the middle lane to pass him and then back into the right lane. He was driving at about 95 km/hour."

At his examination for discovery in the tort action, which took place on May 17, 2010, Mr. Marotta gave evidence that he had passed the Jhajj tractor-trailer and had moved back into the shoulder lane for "at least five seconds" and was concentrating on the road ahead when the impact occurred. He denied that he applied his brakes after moving into the shoulder lane and prior to the impact from behind.

Mr. Marotta underwent an insurer's neurological examination on March 25, 2011, at which time the assessing neurologist, Dr. Rudolph, stated that "He passed (a) truck which was in the middle lane, moved back into the middle lane in front of the truck, and got hit from behind." At arbitration, Mr. Marotta denied that he told the assessing neurologist that the initial impact happened in the centre lane.

**EVIDENCE OF XIAOMOU XUE:**

Mr. Xue is a somewhat elderly gentleman who gave evidence in English, although his first language is Mandarin. It was his evidence that he witnessed the subject accident while on his way to work on December 4, 2008, and that after the accident he pulled his vehicle over to the shoulder and called 911.

Mr. Xue left home in Mississauga at 6:00 a.m. on the date of the accident, and travelled west on Highway 401 toward his employment at Venmar which started at 7:00 a.m. He entered Highway 401 at Highway 410, and moved into the centre lane, which was his normal practice. He described traffic as "not that much", and described the roadway as wet, but "no snow". He described Highway 401 as having "a little bit of a hill" just prior to the point where the accident occurred. As he neared the area where the accident occurred he was in the centre lane. He became aware of two trucks and the Marotta vehicle, which he described as a dark coloured sedan, in the shoulder lane. One truck was in front of the Marotta vehicle and one behind it. He was not aware of the flashers on the rear truck being engaged, nor did he see any signal lights engage on any of the three vehicles in the shoulder lane. At that point he was at or near a position adjacent to the Marotta vehicle. He became aware that the truck which was slightly behind his vehicle was speeding up, and thought that it might be getting ready to pass the Marotta vehicle, so he slowed down in the event that the truck wanted to move into the centre lane, but the truck remained in the shoulder lane. There was no traffic in the centre lane in front of the Xue vehicle at that point. He became aware of the lights on the truck becoming "so bright", and then saw the truck strike the rear of the dark sedan.

Mr. Xue estimated that at the time of impact the front of his vehicle was approximately adjacent to the rear third of the Jhaji tractor trailer. He did not see any change in the brake lights of the Marotta vehicle before the impact occurred. Following the impact the Marotta vehicle veered left in front of his (the Xue) vehicle and proceeded across the centre and passing lanes, hitting the guardrail adjacent to the passing lane and bouncing back towards the centre lane.

In his statement to the investigating officer immediately after the accident, the information provided by Mr. Xue was essentially consistent with his evidence at arbitration. Specifically, Mr. Xue stated that he did not observe the truck or the car involved in the accident change lanes prior to impact, stating, "All three vehicles were in third lane. That truck was beside me. I thought that truck is so close, might be changing lanes, but I didn't see a signal." And later, "I think the truck was so close to the car. The car was close to front truck too. I don't think the car had any choice (because) it was between the two trucks."

**EVIDENCE OF LAKHWINDER SINGH JHAJJ:**

Mr. Jhaji is 38 years of age and was aged 30 at the time of the subject accident. On December 4, 2008 he was operating a tractor trailer, which was insured by RSA, westbound on Highway 401. At that time he had been licensed to operate tractor trailers since 2002 and had been doing so since becoming licensed. On the date of the

accident he was an independent operator, hauling a trailer full of waste to a landfill in Chatham, Ontario. He had left home at 4:30 a.m. and proceeded to a yard at Trafalgar Road and Steeles Avenue where he picked up the trailer which had already been loaded. He estimated the gross weight of the tractor and full trailer at between 112,000 and 120,000 lbs. After leaving the yard Mr. Jhaji proceeded along Trafalgar Road to Highway 401, where he entered the westbound shoulder lane. He stated that at that time it was still dark, the weather conditions were rainy/snowy and he had his windshield wipers and his lights on. He described traffic conditions as moderate. He estimated that he entered Highway 401 approximately a half hour before reaching the point where the subject accident occurred. When he entered Highway 401 his speed was 80 kph, but explained that his speed after entering the highway varied from a low of 40-50 kph. to 80 kph. depending on the landscape. Because he was hauling a full load, his speed would reduce to the lower estimate when proceeding up hills and would increase going down hill or on level parts of the highway.

Mr. Jhaji estimated that he was approximately two tractor trailer lengths behind another tractor trailer as he approached the point where the accident occurred. There were other tractor trailers behind him in the shoulder lane, and he was aware of other vehicles in the other two lanes. He had just come up a hill during which time he had his 4-way flashers on for "most of the hill", a period of five to ten minutes. At that point a car "came into my lane". This vehicle had been in the centre lane when he first saw it, and it then "came into my lane very, very quickly." He described this as a fast maneuver, and stated that he felt that the driver of the vehicle had lost control. At that point there were no vehicles directly in front of the tractor trailer he was operating. The damage on his vehicle was to the left side of the front bumper. He is not aware of where the damage was on the Marotta vehicle. When asked if the Marotta vehicle was fully in the shoulder lane when the impact occurred, he stated "I don't think so." He then stated that it was "so quick that I can't tell how far ..." the Marotta vehicle had entered into the shoulder lane. When asked if the Marotta vehicle was straddling the lanes when the impact occurred, he agreed it was. He was shown photocopies of photographs taken of the front of his truck after the accident and stated that the impact to his vehicle was just to the left of a winch hook in the centre of the front bumper of his truck.

Mr. Jhaji acknowledged that he had arrived at the top of a hill just prior to the accident, and was accelerating at the time of impact. He acknowledged that there was sufficient space between his tractor trailer and the one ahead for a vehicle to enter the shoulder lane between them. He stated that when he first became aware of the Marotta vehicle, it was to the left and a little bit behind him. He acknowledged that it is not uncommon for a vehicle to change lanes in front of him with the result that he would be required to reduce the speed of his tractor trailer. Mr. Jhaji did not know what may have caused the Marotta vehicle to lose control, but described the road conditions in the area where the accident occurred as slippery, and stated that it was snowing at that time. He then stated that the Marotta vehicle came from the centre lane and hit his tractor trailer on the left side. He denied having any problems operating his tractor trailer in the area where the accident occurred and stated that he did not see any other accidents on Highway 401 that morning.



Following the impact the Marotta vehicle went to the left and hit the guardrail adjacent to the fast lane. Mr. Jhajj stopped his tractor trailer and noticed that other drivers had also stopped their vehicles. Someone had called 911 and the ambulance and police arrived shortly thereafter. He gave a statement to the police and stated that the accident happened very quickly, "In the blink of an eye, he hit me." He was familiar with the route he was travelling and estimated his speed at 60-70 kph. when the impact occurred.

#### **EVIDENCE OF AMARPREET SINGH KAHLON:**

Mr. Kahlon is now 46 years of age and is a truck owner engaged in the business of hauling trailers owned by others. He has an Ontario AZ license and has been in the haulage business for 15 years. He gave evidence that he has had his AZ license for "over 30 years" (although given his stated age of 46 that is unlikely).

Mr. Kahlon was driving his tractor trailer behind the Jhajj tractor trailer at the time of this accident. He stated that on the date of the accident he arose at 4:00 a.m. and drove his truck to a yard located at Dixie Road and Derry Road in Mississauga, where he picked up a trailer load of waste destined for a location in the United States. After leaving the yard he proceeded east to Highway 410 and south to Highway 401 westbound. He described weather conditions as cold with "little flurries". Highway 401 "looked slippery" as the roadway was wet. Visibility was good. He stated that while driving westbound on Highway 401 he experienced occasional increases in his engine's RPM, which indicated a reduction of traction. He estimated the gross weight of his tractor and trailer at 58 – 61 tons. Traffic was light and he had his headlights, marker lights and fog lights on.

Mr. Kahlon gave evidence that the Marotta vehicle was in the centre lane of Highway 401 westbound when he first saw it. He stated that it skidded to the right towards the Jhajj tractor trailer and then to the left, striking the guardrail adjacent to the westbound passing lane. He estimated the time from the point when he first saw the Marotta vehicle to the time it hit the guardrail as 15 – 20 seconds. It appeared to him that the Marotta vehicle turned into the Jhajj tractor trailer. He did not see any signal lights engaged on the Marotta vehicle before it turned to the right. He was not certain, but thought he was using his windshield wipers at the time of the accident. Following the accident Mr. Jhajj contacted him on his CB radio and told him that someone had hit him, so he stopped and waited for the police to arrive. At no time did he see the Jhajj tractor trailer move towards or into the centre lane and in his opinion there was nothing that Mr. Jhajj could have done to avoid the accident.

On cross examination Mr. Kahlon stated that he was 150 – 200 feet behind the Jhajj tractor trailer in the shoulder lane and that the Marotta vehicle was already skidding towards the Jhajj tractor trailer when he first noticed it. He acknowledged that from his position he could not see in front of the Jhajj tractor trailer. He initially denied that a vehicle driving in the middle lane alongside the Jhajj tractor trailer would have a better view of the accident than he, some distance back and driving in the shoulder lane, would have. He explained that he felt he had a better view because he was higher, but

then stated that “if he is in the middle lane, yes.” He acknowledged that he did not see the actual impact and had “no idea” whether the car hit the tractor trailer or the tractor trailer hit the car. He stated that he did not have any problem operating his tractor trailer in the area where the accident occurred. He did not see the Xue vehicle at all. He denied knowing Mr. Jhajj. He relied on the statement he gave to the police at the scene.

### **THE LAW:**

The loss transfer regime is meant to provide an “expedient and summary method” of reimbursement in accordance with the fault determination rules and “any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.” *Jevco Insurance Co. v. Canadian General Insurance Co.*, (1993) 14 O.R. (3d) 545; *State Farm Mutual Automobile Insurance Company and Old Republic Insurance Company of Canada*, 2015 ONCA 699.

The fault determination rules are meant to facilitate indemnification and 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. (See *Jevco Insurance Co. v. Halifax Insurance Co.*, (1994), 27 C.C.L.I. (2d) 64 (C.J.), *Jevco Insurance Co. v. York Fire & Casualty Co.*, [1995] O.J. No. 1352; *State Farm Mutual Automobile Insurance Company and Old Republic Insurance Company of Canada*, 2015 ONCA 699)

In *Co-operators General Insurance Company v. Canadian General Ins. Co.* [1999] O.J. 2578, the court held:

“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 law.”

### **ARGUMENTS AND ANALYSIS:**

Counsel for Allstate argues that s. 6(2) of the fault determination applies, as the preponderance of evidence establishes that the Marotta vehicle and the Jhajj tractor trailer were both in the shoulder lane when the incident occurred, and travelling in the same direction, when the Jhajj tractor trailer struck the Marotta vehicle from the rear. Counsel for Allstate relies on the evidence of Mr. Marotta and Mr. Xui, and documentation contained in the document briefs filed which supports that conclusion.

Counsel for RSA argues that based on the evidence of Mr. Jhajj and Mr. Kahlon, the incident occurred when the Marotta vehicle was either attempting to change lanes from the centre lane to the shoulder lane, or its operator lost control, with the result that the impact between the vehicles was a “sideswipe”, and accordingly s. 10(4) of the fault determination rules applies.

Both counsel made submissions with respect to s. 4 of the fault determination rules in the event that I find that more than one rule applies.

Mr. Marotta gave his evidence in a generally clear and concise manner, and consistent with his statement to the investigating officers, his statement when admitted to Guelph General Hospital following the accident, and his evidence on his examination for discovery in the tort action. I do not feel he can be held responsible for the statement made in the neurological assessment report dated March 25, 2011, where Dr. Rudolph reported that the truck Mr. Marotta passed prior to the accident was in the centre lane. This is Dr. Rudolph's interpretation of a history given by Mr. Marotta, and I assign it little weight given the evidence of all witnesses at arbitration that the Jhajj tractor trailer was at all material times in the shoulder lane.

As between the independent witnesses, I preferred the evidence of Mr. Xue, who, while he had some difficulty with the English language at times, was clearly in the best position to observe the actions of the vehicles involved in the accident. Mr. Xue was adamant that the Marotta vehicle had fully occupied the westbound shoulder lane in front of the Jhajj tractor trailer prior to the accident occurring. Mr. Kahlon, in his testimony, eventually agreed that Mr. Xue was in a better position than he to observe the movement of the Marotta vehicle prior to the accident.

In his evidence at arbitration, Mr. Jhajj stated that the Marotta vehicle, which had been travelling in the centre lane of the 401 westbound, was out of control when he first became aware of it, but he had difficulty recalling specific details of the impact, and seemed to imply that the Marotta vehicle had struck the cab of his tractor trailer on the side. This notwithstanding his acknowledgement that the impact to his vehicle was on the front bumper slightly to the left of the winch hook which is located in the centre of the front bumper. As well, in his statement to the investigating officers following the accident, Mr. Jhajj stated:

“He came in front of me and bang, there was no space.”

and later

“Q. How long was the car in lane #3?”

“A. Just came, skid in front of me, bang and all the way back. Maybe a second or three seconds.”

At his examination for discovery in the tort action, taken April 11, 2011, Mr. Jhajj stated (at question 227):

“I was going in the right lane and my four ways were on, going 80, 85 kilometres an hour. And this vehicle in the left lane came so all of a sudden in **the right lane in front of me** and spun and it struck the truck in the front.” (emphasis mine)

The police report diagram has the Marotta vehicle fully in the shoulder lane in front of the Jhajj tractor trailer at the time of impact. There is no reference to a "sideswipe" in the police report or the notes of the investigating officers.

Counsel for RSA argues that using the police report interpretation chart, it shows that in section 33 of the police report the investigating officers have indicated that the Marotta vehicle made an improper lane change. Even if I accept this as a proper description of the movement of the Marotta vehicle, it would not change my ultimate decision. In accordance with the decisions noted above, I am not to concern myself as to the manner in which the Marotta vehicle came to occupy the shoulder lane if I am satisfied by the evidence that it was travelling in the same lane and in the same direction in front of the Jhajj tractor trailer at the time of the accident.

As Arbitrator Bialkowski noted in the decision of *Jevco Insurance Company and Liberty Mutual Insurance Company* dated December 29, 2014,

"Simply stated the result in any civil trial may well be different than any finding based on the Fault Determination Rules which result in fault determination in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude. Many factors relevant to a civil liability finding are irrelevant to a determination as to whether a Fault Determination Rule applies."


In the result, it is my finding that fault determination rule 6(2) applies and the Jhajj tractor trailer is 100 per cent responsible for the accident.

### **ORDER**

In accordance with the findings above, I hereby order that Royal Sun Alliance indemnify Allstate for statutory accident benefits paid to and on behalf of Vincenzo Marotta on a 100% basis, together with interest calculated pursuant to the Courts of Justice Act. I further order that Royal Sun Alliance pay to Allstate the costs of this arbitration proceeding on a partial indemnity basis, and that Royal Sun Alliance pay the Arbitrator's costs.

I remain available in the event the parties cannot come to an agreement between themselves as to the issues of quantum, interest and costs.

March 28, 2018

  
ROBERT A. ROBINSON  
Arbitrator