IN THE MATTER OF THE INSURANCE ACT,
R.S.O. 1990, C. I.8, S. 275, AS AMENDED

AND IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991,
CHAPTER 17, AS AMENDED

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

-and-

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

A W A R D

COUNSEL

Andrew A. Evangelista, Esq.
Counsel for the Applicant

Derek Greenside, Esq.
Counsel for the Respondent

This matter arises out of a motor vehicle accident which occurred on May 24, 1994. Thomas Dempsey (hereinafter referred to as "Dempsey") was the driver of a vehicle which was rear-ended by a tractor-trailer unit insured by Royal & SunAlliance. It has been admitted that the tractor-trailer unit was completely at fault for the accident. The tractor trailer unit was a heavy commercial vehicle such that Royal & SunAlliance was responsible to

indemnify Dominion of Canada by reason of the so-called Loss Transfer provisions of s. 275(1) of the *Insurance Act*, R.S.O. 1990, C. I.8.

Dominion of Canada paid various benefits to Dempsey under the SABS. Royal was properly put on notice of the Loss Transfer and Dominion forwarded to Royal a number of Loss Transfer Requests for Indemnification. Dominion responded by paying the various amounts requested.

Actually, Dominion forwarded seven separate Requests for Indemnification, all of which were paid by Royal. Those Requests were submitted in September 1994, January and October 1995, January, May and October 1996 and April 1997. It appears that Royal reimbursed Dominion by paying approximately $127,000.00, covering the seven Requests.

The dispute which is the subject of this Arbitration arose when Dominion of Canada paid over a lump sum of $200,000.00 to Dempsey as a result of a settlement entered into in late April 1997.

Royal now questions the reasonableness of the settlement in this Arbitration.

BENEFITS PAID TO DEMPSEY PRIOR TO THE FINAL LUMP-SUM SETTLEMENT

In the initial Request for Indemnification, Dominion noted payments totalling $13,398.44. Approximately $10,000.00 of that sum involved payment of Income Replacement Benefits. Dempsey was being paid at the rate of $536.56 weekly.

In the second Request for Indemnification dated January 10, 1995, Dominion outlined payments of $11,472.12. That included 14 weeks of Income Replacement Benefits, as well as payments for rehabilitation expense, dental expense, physiotherapy, transportation and prescriptions.

In the third Request for Indemnification dated October 13, 1995, Dominion requested reimbursement in the sum of $32,863.64. That included payment of Income Replacement Benefits for 37 weeks, expense for TMJ treatment, rehabilitation expense, expense for an MRI, the expense of transporting Dempsey to Toronto to a clinic, as well as transportation expenses. It was noted at the time of that Request that the condition of Dempsey was deteriorating and that Dominion had sent him to the Lockwood Clinic in Toronto. The Request referenced psychological treatment by Dr. Gelmych.

The fourth Request for Indemnification was dated January 30, 1996. Dominion sought reimbursement for $16,248.55. Details provided included references to dental treatment and psychological treatment. The Request noted that Dempsey had been sent to the Sudbury Acquired Brain Injury Clinic for assessment.

The fifth Request for Indemnification was undated, in the sum of $14,668.95. Details provided on the form indicated reference to continued psychological therapy.

The sixth Request for Indemnification was dated October 2, 1996 in the sum of $18,595.27. The form indicated that Dominion was awaiting receipt of a neurological report.

The seventh Request for Indemnification was dated April 16, 1997 in the sum of $21,904.91. Reference was made to a neuropsychological assessment.

The last Request for Indemnification is dated April 23, 1997 and it simply requested payment of the $200,000.00 paid as a lump sum to finally settle the matter with Dempsey.

COMMUNICATION BETWEEN DOMINION AND ROYAL

I have already made reference to the fact that Royal was provided with an initial Notification of Loss Transfer. That form was dated August 12, 1994. The notice was provided within approximately two and one-half months of the accident of May 24, 1994.

The first Request for Indemnification was dated September 22, 1994, at a point approximately four months post-accident. That Request should have made it clear to Royal that the Income Replacement Benefit being paid was at a rate of $536.56 weekly. It was noted on that Request that the expectation was that benefits would be paid until November 1994. It is not unusual that an insurer will be optimistic that benefits will not be of long duration. It appears that Dominion was of that view when completing the form dated September 22, 1994.

When the second Request for Indemnification was completed on January 10, 1995, Dominion indicated that the duration of the claim was unknown as there had to be a determination as to whether there was a closed head injury. Dominion indicated that tentatively that would be done late in 1995. As at January 10, 1995, Royal ought to have noted that payment of IRB's was into the eighth month and that claims were being advanced for physiotherapy, for rehabilitation, dental injuries, transportation expense and prescription expense. There was no indication at that point that Royal was requesting further information from Dominion. The Request at January 10, 1995 for payment of $11,472.12 was honoured almost immediately by Royal by cheque dated January 17, 1995.

There seemed to be a long delay by Dominion making the third Request for Indemnification. The form is dated October 13, 1995 and covers payments over a period of approximately eight and one-half months. The Request was for Royal to reimburse Dominion for payments totalling $32,863.64. On the form dated October 13, 1995, Dominion indicated

uncertainty as to the duration of claim. It was noted that Dempsey was deteriorating. By reason of what Dominion called an inadequate diagnosis, Dempsey was being sent to The Lockwood Clinic in Toronto for investigation and the indication was that a report had not yet been received. At that point, Royal should have noted that IRB's were continuing at the rate of $536.56 weekly at a point 16 months post-accident. Payment details revealed payments for psychological treatment, TMJ treatment, orthopaedic consultation, an MRI, and travel to Toronto. Royal responded to the Request of October 13, 1995 by telephone contact to Dominion on November 16, 1995. It appears that the Royal adjuster was questioning whether there could be a cash-out to Dempsey. Dominion apparently replied by advising that that may be possible after a file review.

In the Dominion memo to file dated November 20, 1995 as to the contact by the adjuster from Royal Insurance, there is a notation that payment of IRB's to the two year mark would mean an additional payment for IRB's of $13,950.56. The memo reveals a note as to possible cash-out at a $20,000.00 figure. It appears that that was arrived at by allowing Medical and Rehabilitation Expense of $6,049.44. It would appear that that sum was arrived at by deducting from $20,000.00, projected payment of IRB's for 26 weeks, for a total of $13,950.56. There are no details in the memorandum as to how the figure of $6,049.44 was otherwise arrived at.

As at November 20, 1995, no documents have been provided and no evidence has been led as to any request by Royal for production of medical reports or other supporting documents. Furthermore, there is no reference to any suggestions from Royal as to the handling of the claim for benefits under the SABS by Dempsey. I am not suggesting that Royal ought to have made such requests. I am simply reviewing the evidence and noting that

Royal took no steps to request further documents and to make suggestions as to the handling of the claim by Dempsey as at November 20, 1995.

The next Request for Indemnification is dated January 30, 1996. Dominion noted that the duration of the claim was unknown and that Dominion was awaiting an assessment from the Acquired Brain Injury Service at Laurentian Hospital in Sudbury. There is a note that the physiotherapist advised that Dempsey's hands were improving. Dominion was looking for a Release before the two year mark. Yet, a request was being made for payment of an additional sum of $16,248.55. That included 14 weeks of IRB's and numerous other payments for Medical and Rehabilitation Expense.

It appears from a further memo of Dominion dated April 10, 1996 that the adjuster for Royal Insurance again called and advised that Royal had received a Statement of Claim in the tort action. It does not appear that there was a discussion then as to a possible full and final settlement.

There is an undated Request for Indemnification covering the period ending May 3, 1996. The form is undated and likely was sent out prior to mid-May 1996. The form indicates that Dr. Shamess indicated that Dempsey could return to work.

The next Request for Indemnification dated October 2, 1996 requests payment of $18,595.27. At this point, both insurers should have recognized that the claim was at a point 2.5 years post-accident. Yet, Income Replacement Benefits were still being paid at the full rate. There is no reference to an LEC offer on the Request form dated October 2, 1996. Dominion has noted that they were awaiting receipt of a neurological report and that they were awaiting a call from the lawyer, presumably, Dempsey's lawyer, in order to negotiate a full

and final settlement. Further, in the four month period covered by the form, Medical and Rehabilitation Expenses totalled approximately $6,000.00.

In the Request for Indemnification dated April 16, 1997, Dominion requested payment of $21,904.91 from Royal. The form indicates that Dominion was negotiating a full and final settlement. The Request dated April 16, 1997 shows that Income Replacement Benefits were continuing at the full rate. The form notes payment of $2,000.00 for a neuropsychologist's report.

A note in the Dominion file dated April 18, 1997 notes contact from the adjuster at Royal. The note indicates that Dominion will be cashing out for a full and final settlement. The note gives no particulars as to any further discussions between the adjuster at Dominion and the adjuster at Royal Insurance.

As at April 18, 1997, I have no further documentation or evidence as to discussions between representatives of the two insurers as to the possible quantum of the cash-out. The only reference to the quantum of a cash-out was back in the memo of November 20, 1995, when it appears that there were discussions about a possible cash-out at $20,000.00. Of course, subsequent to that date, Royal had reimbursed Dominion for approximately $50,000.00 prior to the Request of April 16, 1997 and a claim for further reimbursement of $21,904.91 was made then. It appears that that request was made at about the time of the cash-out or shortly before it.

At this Arbitration, it was suggested that Royal was contemplating that the full and final settlement amount would approximate $20,000.00. It is difficult to accept that Royal believed that when subsequent to November 20, 1995, Royal paid out more than $70,000.00 in reimbursement.

It appears that there were never discussions between the two insurers prior to the final negotiations as to the possible quantum of the lump sum to be paid. Dominion never approached Royal to discuss the possible quantum and Royal never approached Dominion to discuss that quantum.

If Royal was concerned about the quantum of the final lump sum to be paid, or if Royal did not trust Dominion to negotiate a proper and reasonable settlement, one would have thought that Royal would have requested more documentation and supporting documents for the payments that had been made and would have approached Dominion with a view to discussing the possible quantum before any settlement agreement was entered into between Dominion and Dempsey.

On the other hand, if Dominion was contemplating paying a large sum to Dempsey, mindful of the fact that there was a Loss Transfer, one would have thought that Dominion might have approached Royal with some particulars as to what Dominion intended to do.

At a point just prior to the final settlement negotiations between Dominion and Dempsey, on the face of the documents, Dominion appeared to be handling the claim itself properly. Sufficient details were obviously provided such that Royal was comfortable with reimbursing Dominion for approximately $127,000.00 in payments, without the need to ask more questions and to obtain more documentation.

THE FULL AND FINAL SETTLEMENT

Dominion paid to Dempsey the sum of $200,000.00 for a Full and Final Release in late April 1997.

On or about August 11, 1997, a representative of Royal contacted Dominion as to the request for reimbursement by Dominion in the sum of $200,000.00. Royal requested information as to how the $200,000.00 figure was arrived at and wondered what had happened to the suggestion that the claim could be settled for $20,000.00, back in November 1995.

On August 22, 1997, Royal again requested information as to how the settlement was arrived at. Royal requested a breakdown and copies of medical reports and assessments and clarification as to the inability of Dempsey to return to work.

By letter dated August 28, 1997, the Dominion Claims Representative wrote to the Royal Representative and provided Royal with the report of Dr. M.A. Persinger, a Clinical Neuropsychologist. Dominion then pointed out that if Dempsey was paid Income Replacement Benefits to age 65, benefits of $310,321.84 would have been paid. Dominion advised that settlement at $200,000.00 could be broken down as follows:

Weekly Benefits	$139,505.60
Pain Program	12,810.00
Medications	11,122.20
Travel expenses	8,341.65
Home Maintenance – summer	11,122.20
Home Maintenance – winter	8,897.76
Future Attendant Care	8,200.00
Total	$200,000.00 (actually $199,999.41)

There was then delay on the part of Royal and the next letter from Royal to Dominion was dated April 28, 1998. Royal noted that Royal already had reimbursed

Dominion in the sum of $127,151.88. Royal noted that if the additional sum of $200,000.00 was paid, the total amount would grow to $327,151.88. Royal again requested clarification as to how the amounts were determined. Royal then requested a copy of the complete file of Dominion and an explanation of the medical information used to arrive at the settlement amounts.

Dominion wrote back to Royal by letter dated September 11, 1998. Dominion indicated that the IRB figure was arrived at by allowing benefits for a period of five years, i.e. 260 weeks at $536.56 weekly for an allowance for IRB's of $139,505.60.

Dominion quotes an allowance of $12,810.00 for a pain management program which was to be held at Chedoke Hospital in Hamilton, Ontario.

Dominion noted an allowance for medication of $1,000.00 a year to age 65, present valued, at $11,122.20.

Dominion noted an allowance for travel of $750.00 per year to age 65, present valued at $8,341.65.

Dominion noted an allowance for summer home maintenance for five months annually at $200.00 monthly, present valued at $11,122.20.

Dominion noted an allowance for winter home maintenance allowed for four months annually at $200.00 monthly, present valued at $8,897.76.

Dominion noted an allowance for Attendant Care including further therapy to make up the balance of $200.000.00.

Following the commencement of this Arbitration, there was correspondence between counsel for the two insurers and there were requests for production of other documents and there were various questions asked and responses provided.

LUMP SUM SETTLEMENTS OF CLAIMS FOR FUTURE BENEFITS UNDER THE SABS

It is common practice for insurers to pay lump sums to those claiming benefits under the SABS. When doing so, negotiations take place between injured persons and their solicitors and claims representatives and solicitors representing accident benefit insurers. Demands are put forward on behalf of the injured person and negotiations ensue until a final sum is arrived at through negotiations. The sums paid are often rounded off. By reason of the need to provide a Written Notice, commuted values and details as to amounts available, the amounts paid are broken down into the various heads of possible benefits under the SABS.

In a Bill 164 claim, such as this one, an insurer considers the quantum of Income Replacement Benefit being paid, the opinions of treatment providers and medical and psychological experts, the opinions of vocational experts and what a Court or Arbitrator would likely conclude as to the ability of the insured person to return to work. If the insured person is unable to return to his or her occupation at the time of the accident, consideration has to be given as to the job, if any, that the Applicant might be able to perform and as to the wage that could probably be earned. Often, in perhaps an over-simplification, an insurer will agree to pay continued Weekly Benefits for one year or three years or five years. There are cases in which precise calculations are made as to Residual Earning Capacity and often quotations are obtained as to the cost of an Annuity to fund the entitlement to a Loss of Earning Capacity Benefit.

When negotiating a lump sum payment, consideration is given to the annual expense to be incurred by an Applicant for Medical Expense and Rehabilitation Expense and Housekeeping or Home Maintenance.

When an attempt is being made to negotiate payment of a lump sum in lieu of future entitlement, each side does calculations to come up with an initial view, on each side, of what ought to be paid. The negotiations go on from that point. It is not an easy task to predict future entitlement. It is also not an exact science. If one side goes into the negotiations with a particular sum in mind, often, the figure will have to be adjusted. If such a settlement is to be negotiated, both sides must compromise to reach a palatable figure for settlement.

THE POSITION OF ROYAL RE THE LUMP SUM SETTLEMENT

The adjuster for Royal Insurance handling the matter initially did make contact with Dominion in November 1995. At that point, Royal had already reimbursed Dominion for approximately $57,734.00 in benefits paid to Dempsey. In the discussion between the two claims representatives on or about November 16, 1995, there was a discussion about a possible cash-out at the $20,000.00 sum. It appears that that same Royal claims representative was still on the file as at April 10, 1996 and that representative contacted Dominion to advise that Royal had received the Statement of Claim in the tort action. It also appears that the same claims representative was still on the file as at April 18, 1997 and there was further telephone contact with Dominion.

When Royal first replied to the request for reimbursement of the sum of $200,000.00 on August 11, 1997, a different claims person at Royal contacted Dominion. That same person at Royal advised Dominion on August 22, 1997 that the person at Royal who had been handling the matter was on maternity leave. In a letter dated April 28, 1998, the original

claims representative at Royal was back on the file. She advised the representative of Dominion that she had been on maternity leave when the letter from Dominion dated August 28, 1997 had been received at Royal.

Accordingly, the file at Royal Insurance would likely have been documented with a notation of a possible cash-out at a $20,000.00 sum in November 1995. The original claims representative handling the matter at Royal was still handling the file as at April 18, 1997. By that time, she had processed over $100,000.00 in payments to Dominion. It appears that she likely also processed the payment in April of $21,904.91 in addition.

Naturally, when the Royal Claims Representative was on maternity leave and when Royal received the request for $200,000.00 representing the final payment by Dominion to Dempsey, someone at Royal likely reviewed the file and read that it appeared that the matter could settle for about $20,000.00 additional in November 1995. Small wonder the shock when a request was made for $200,000.00 in or about April or May 1997.

Royal initially questions the payment of Income Replacement Benefits or LEC Benefits at a rate of $536.56 weekly for a period of five years, i.e. 260 weeks. The total allocation in the final lump sum payment for such benefits is $139,505.60. Royal initially takes the position that even if benefits were paid covering a five year period, the benefits ought to have been present valued. On Royal's assessment, Residual Earning Capacity ought to have been considered by Dominion. Royal points out that there was no LECB offer and there was no REC DAC. Royal is of the view that Dempsey was fit to perform some work at or about the time of the settlement. They point to a Transferable Skills Analysis in which they claim that Dempsey qualified to perform 33 different transferable jobs without additional training. Royal points to the report of Back In Motion dated May 17, 1996 in which Back In Motion concludes

that Dempsey was not fit to perform his pre-accident job demands but could be suitable for a sedentary light occupation, such as a security guard, so long as he was not on his feet more than 50 percent of the working day. They point to the Labour Market Survey which notes the availability immediately of a security guard job at a level which would have reduced any LEC payment by $200.00 weekly. Royal contends that the allocation in the final lump sum payment for IRB's or LECB's ought to have approximated $81,750.00 rather than $139,505.60. Royal points out that that analysis could well result in an even lower allocation once one considers the issue of causation of the injuries and whether the continuing problems of Dempsey were accident-related.

Royal questions the allocation of $12,810.00 for the cost of a future pain management program for Dempsey. Royal alleges that Dempsey previously failed to attend a pain management program arranged for him. They allege that he showed up only one time to be assessed and never did attend the program. They question this allocation in its entirety.

Royal does not question the allocation of $11,122.20 for future medication except on the grounds of causation.

Royal questions the allowance of $8,341.65 for transportation. They feel that the allowance of $750.00 annually leading to that allowance is too generous. While they appreciate that the driver's licence of Dempsey was under suspension prior to and at the time of the settlement, they did a search in the year 2000 which disclosed that Dempsey was licensed effective September 21, 2000.

Royal questions the allowance of $11,122.20 for summer home maintenance and the allowance of $8,897.76 for winter home maintenance. They contend that there were never payments made for home maintenance prior to the time of the lump sum settlement. They

argue that the need for assistance with home maintenance was not addressed in any of the medical reports and that Dempsey did not qualify for such expense.

Royal questions the allowance of $8,200.00 under the Attendant Care heading. They argue that that category should not be expanded to include future therapy, notwithstanding that there is no allowance for future therapy under any of the other heads. They claim that Dempsey never required Attendant Care and that there is no reasonable basis for the allowance of $8,200.00.

Royal contends that the settlement of future claims under the SABS at the sum of $200,000.00 was an improvident settlement. Royal takes the position that a $20,000.00 sum was contemplated back in November 1995. They contend that there was never a communication to Royal that any amount approaching $200,000.00 was ever going to be paid.

It is contended on behalf of Royal that Dominion accepted the findings of neuropsychologist Persinger, a neuropsychologist retained by the solicitor for Dempsey. Royal contends that Dr. Persinger's opinions were based on wrong assumptions as to the abilities of Dempsey pre-accident. Royal contends that Dempsey was not very successful in his employment pre-accident. Royal led evidence from Greg May, owner and manager of Precision Edge Surgical Products Co. that Dempsey had numerous problems at work between the fall of 1993 and the date of loss. Dempsey was unable to perform the jobs assigned to him. His attendance was terrible as he would often not show up for work and would fail to call in to advise as to why he was not in attendance. When shown how to do various tasks, he was unable to recall those tasks and could not recall things told to him hours before. In the estimation of Mr. May, Dempsey was not trainable and was not an asset to the company. He could not do bench work. When assigned various tasks, he became quite nervous and would

tell his employer that he could not do the job. It was the intention of Mr. May to dismiss Dempsey.

Royal contends that Dr. Persinger was of the view that Dempsey adequately did his job pre-accident.

Royal contends that Dominion did not properly assess the Back In Motion report which concluded that Dempsey could return to sedentary light work, such as a security guard.

Royal contends that Dominion did not give appropriate weight to the Transferable Skills Analysis or to the Labour Market Survey.

It is the position of Royal that Dempsey was on a 30 percent disability pension by reason of his service in Vietnam, prior to the accident. Royal faults Dominion for failing to send to Dr. Persinger information available as to the pre-accident state of Dempsey.

It was the view of Royal that Dr. Persinger did not say that Dempsey could not work. Dr. Persinger concluded that Dempsey would have enhanced tiredness towards the end of the work shift.

It was the position of Royal that Dominion misread the case. Dominion pointed to the report of Dr. G. Turrall, commissioned by Rehabilitation Services of Canada, a company retained by Dominion. Dr. Turrall, a Clinical Psychologist, concluded that "from a neuropsychological point of view, (Dempsey) was not judged to be impaired to the degree that he is unable to return to work". Dr. Turrall questioned the motivation of Dempsey. He noted that Dempsey continued to complain of significant physical symptoms affecting his hands and feet. He did not question the fact that Dempsey experienced the physical pain, but he set out in his report that the causality of the pain remained illusive. He attributed the continuing discomfort which Dempsey had to personality functioning, low motivation and emotional

difficulties associated with his failed marriages and his Vietnam combat experiences. He did recommend continued psychotherapeutic assistance for a time limited period.

Royal took the position that Dominion overlooked the conclusions of Dr. Turrall while accepting the findings of Dr. Persinger.

Royal also pointed to a report of Dr. Anthony D. Graham, a physiatrist. Dr. Graham expressed the view that Dempsey's problems were not brain injury related but reflected underlying emotional disturbances. Dr. Graham concluded that Dempsey reacted abnormally to the stress of the motor vehicle accident.

Royal advanced the position that Dominion would have done more investigation and would not have settled the matter, but for the fact, that Dominion realized that the loss would be transferred to Royal. That is a very serious allegation.

In the final analysis, leaving aside the issue of causation, Royal was prepared to concede that a payment of approximately $93,000.00 would have been in order.

In summary, Royal contends that the settlement was unreasonable. Royal points to a lack of communication between the insurers at about the time of the settlement. It is alleged that Dominion over-assessed their exposure and paid benefits not warranted.

THE RESPONDING POSITION OF DOMINION

In a letter of September 11, 1998 from Dominion to Royal, Dominion provided the basis for the settlement at the $200,000.00 sum. Dominion set out that the IRB issue was settled by paying full benefits for a period of five years, without present valuing. The allowance for pain management covered an initial assessment, and in-patient treatment for a period of four weeks. The allowance for medication was based on an allowance of $1,000.00 annually to age 65. The transportation allocation was based on $750.00 annually, present

valued. Summer home maintenance was allowed at $1,000.00 annually, present valued. Winter home maintenance was assessed at $800.00 annually, present valued. An $8,200.00 allowance was to cover possible future Attendant Care, as well as future therapy. Dominion noted that if IRB or LECB Benefits were paid to Dempsey to age 65, a present value of $310,321.84 would be arrived at.

Dominion produced a copy of an internal memorandum dated April 15, 1997. That memorandum noted that Dempsey had prior injuries, specifically a post-traumatic stress disorder suffered by reason of duty in Vietnam. The memorandum set out that Dempsey's initial problems of neck and back pain gradually developed such that he suffered from peripheral problems with his hands and feet which became more disabling with time and were diagnosed as Reflex Sympathetic Dystrophy.

The analysis noted that Dempsey had fairly active RSD which made him unable to meet pre-accident job demands. He was suitable for sedentary light occupation, such as a security guard, so long as he was not on his feet more than 50 percent of the day. He could not do repetitive gripping or holding or lifting or any job requiring fine manual dexterity.

The memorandum noted that Dempsey had lost his licence and that he had failed attempts to re-obtain that licence twice.

Reference was made to the report of Dr. Persinger. Dr. Persinger concluded that there was brain trauma and that Dempsey demonstrated mild to moderate neuropsychological impairment. Reference was made to the fact that Dempsey would have enhanced tiredness towards the end of the work shift. It was recommended that he be assessed monthly by a rheumatologist. Reference was made to the fact that Dempsey and his wife might require assistance of a psychologist in respect of marital advice.

The memorandum noted that the family doctor of Dempsey recommended that Dempsey attend a pain clinic such as Chedoke-McMaster.

The memorandum noted that Dempsey had pre-existing problems but was working three jobs at the time of the accident.

The memorandum noted that payment of IRB's for three years would total $83,703.36, while payment of such benefits for five years would total $139,505.60.

There was reference in the memorandum to similar figures as were set out in the letter from Dominion to Royal dated September 11, 1998.

The memorandum noted discussions with the solicitor for Dempsey who was demanding $250,000.00 to settle. The memorandum concluded that Dominion was looking at a settlement in the $160,000.00 to $200,000.00 range.

The memorandum noted that if the matter did not resolve, that the pain program would likely begin and there would likely be a REC DAC.

The Claims Supervisor at Dominion reviewed the memorandum of April 15, 1997 and authorized settlement for no more than $200,000.00.

It was contended on behalf of Dominion that when considering reasonableness, one had to make that consideration as at the time of the settlement. Dominion took the position that it is easy to criticize in retrospect.

Dominion took the position that if Royal had wanted more input into the matter, they could have asked more questions and could have taken a more active part. It was the position of Dominion that Royal took a "hands-off" approach throughout the course of the matter, until after the settlement had been entered into.

When responding in respect of the issue of the IRB or LECB portion of the lump sum settlement, it was the position of Dominion that Dempsey was working three jobs prior to the accident. Dominion relied upon the Employer's Confirmation of Income form. That form, made no reference to Dempsey having problems at work prior to the subject accident. The form did not indicate that Dempsey had taken extended time off work pre-accident. The form confirmed that Dempsey was a shopworker/machinist and that he operated equipment involved in manufacturing. It did not state that Dempsey was unable to do his job, as was stated in the oral evidence of Greg May. Dominion accepted the contents of the Confirmation of Income form.

According to the analysis of Dominion, the condition of Dempsey was deteriorating at or about the time of the settlement discussions.

Dominion takes the position that at the time of the settlement, Dempsey was still receiving IRB's after the 104 week mark. Dominion contends that that indicated that Dempsey met the two year mark test.

Dominion appreciates that the settlement was prior to any REC DAC or determination of LECB exposure and that it was prior to additional assessments that might have been done. Dominion points out that Royal would have faced the expense of further IE's or LECB DAC's or REC DAC's, had the matter not settled.

Dominion contends that Royal had the opportunity to make enquiries if they had wished to do so. There was contact between the Royal and Dominion adjusters.

However, there is no evidence that there was any ongoing discussion as to the possible quantum of any cash-out.

Dominion points to a report of Dr. A. Gelmych, a psychologist, dated January 10, 1996. In that report, Dr. Gelmych notes the deterioration in Dempsey. Dr. Gelmych refers to Dempsey losing the use of his hands and toes and the difficulty that Dempsey was having with walking. Dr. Gelmych noted that Dempsey appeared to be in pain when Dr. Gelmych attempted to shake the hand of Dempsey.

Dominion points to a report of Dr. W.J. McMullen dated January 24, 1997 in which Dr. McMullen recommends treating Dempsey at a Tertiary Pain Clinic.

Dominion points to the report of Dr. M.A. Persinger dated January 14, 1997. Dr. Persinger concluded that Dempsey sustained brain trauma and was displaying mild to moderate neuropsychological impairment. Reference is made in the report to Dempsey's problem with reflex sympathetic dystrophy. The report concludes that Dempsey could not perform any occupation if he needed manual dexterity, holding or gripping or lifting.

The report of Dr. Persinger was critical of the analysis by Dr. Turrall.

Dominion takes the position that the report of Back In Motion dated May 17, 1996 confirmed that Dempsey had fairly active reflex sympathetic dystrophy and confirmed the impairment of Dempsey.

Dominion also points to other reports supporting the theory that Dempsey required brain injury rehabilitation, case management, neuropsychological testing, and a driving assessment.

Dominion contends that Dempsey lived outside Sault Ste. Marie and did not have a driver's licence and had failed a driving test for the fourth time. Dominion concluded that an allowance of $750.00 annually for travel was proper.

In allowing a sum of $8,200.00 for Attendant Care and therapy, Dominion was of the view that that allowance was appropriate.

In allowing amounts for home maintenance, Dominion felt that they were being reasonable in the context of the deteriorating condition of Dempsey. They felt that Dempsey was getting worse.

PRIOR DECISIONS

In the case of *Jevco Insurance Company v. Guardian Insurance Company of Canada* (August 28, 2000), a prior Decision of mine, I concluded that "the primary insurer is expected to provide supporting documents for benefits paid to prove that benefits have been paid. Once that has been done, the onus rests with the second party insurer to prove the payments made were not reasonable, or that the primary insurer acted in bad faith and grossly mishandled the processing of claims."

In that same case, I concluded that "an amount paid in a lump sum, to settle past, present and future claims under the SABS, may be the subject of a Loss Transfer under S. 275(1) of the *Insurance Act*".

Back on July 6, 1992, the then Commissioner of the Financial Services Commission of Ontario issued Bulletin A-9/92 clarifying the Loss Transfer mechanism for no-fault benefits. In that Bulletin, the Commissioner set out as follows:

> "The mechanism does not allow the second-party insurer to intervene in the payment of benefits between the first-party insurer and its policyholder. Any dispute over the responsibility of the second-party insurer to provide an indemnity may be disputed with the first-party insurer."

In a further Bulletin, former Commissioner D. Blair Tully, in a Bulletin dated June 6, 1994 further clarified the situation. The Bulletin set out:

> "However, it is the responsibility of the first-party insurer to ensure that benefits are paid correctly and promptly. The second-party insurer should not be in a position to dictate claims handling decisions in respect of a claim where Loss Transfer applies."

Over the ensuing years, there have been a number of Decisions to the effect that the second-party insurer may not second-guess the handling of the file by the first-party insurer and that all that can be contested by the second-party insurer is the reasonableness of the payments and whether the first-party insurer acted reasonably and responsibly in the circumstances of the case. Those cases included the following:

a) *Jevco Insurance* v. *Loyalist Insurance*, (Robert Montgomery, Q.C.) dated June 30, 1995;

b) *Jevco Insurance* v. *Prudential of America Insurance Company*, (Edward A. Ayers, Q.C.) dated January 31, 1997;

c) *Progressive Casualty Insurance Company* v. *Markel Insurance Company of Canada* (Stephen M. Malach, Q.C.) dated May 13, 1997;

d) *Commercial Union Assurance Company of Canada* v. *Boreal Property & Casualty Company* (Philippa G. Samworth) dated December 21, 1998.

In the *Commercial Union Assurance Company of Canada* case, Ms. Samworth concluded that indemnity must follow unless the primary insurer acted in bad faith or grossly mishandled the processing of the claim for benefits under the SABS.

In the case of *Progressive Casualty Insurance Company* v. *Markel Insurance Company of Canada*, dated May 13, 1997, I also dealt with the issue of reasonableness of payments made by the primary insurer. In that case, I pointed out that it was the responsibility

of the primary insurer to pay benefits under the SABS to an insured person. "That insurer must respond to claims made under the SABS on a timely basis as required by the SABS". In processing such claims for benefits, "the primary insurer must make decisions as to whether or not various claims for expenses are reasonable expenses resulting from an accident. The insurer has the discretion to allow or disallow claims and, in making decisions, there are certainly some "grey" areas. There is an obligation on the part of the primary insurer to treat an insured in a fair manner and to assist the insured in rehabilitating himself from the effects of injuries sustained in an accident". If the system is to work, one must assume that the primary insurer will process the claims in good faith.

As set out in the *Progressive Casualty Insurance Company v. Markel Insurance Company of Canada* decision, once the second-party insurer is put on notice, there is nothing to prevent that insurer from discussing the claim with the first-party insurer when discussing payments being made. There is nothing to prevent the two insurers from having a continuing dialogue.

I concluded in the *Progressive Casualty* case, that "unless it is established that the primary insurer acted in bad faith or grossly mishandled the processing of claims for benefits under the SABS, the insurer responsible to indemnify the primary insurer must indemnify the primary insurer for benefits paid to an insured person".

CONCLUSIONS

1. Royal was put on notice of the subject claim within less than three months following the subject accident.

2. Royal indemnified Dominion for more than $127,000.00 in benefits prior to the time of the lump sum settlement with Dempsey.

3. The Requests for Indemnification detailed continued payment of Income Replacement Benefits at a point almost three years post-accident. The same Requests detailed payment of large sums for Medical and Rehabilitation Expense.

4. Although it appeared that Dominion contemplated settling the matter for a sum of approximately $20,000.00 as at November 1995, it should have been obvious to Royal that that was not going to happen. Royal had paid out more than $55,000.00 covering payment of benefits, by mid-October 1995. Royal then made a further payment of $16,248.55 in or about February 1996, a further payment of $14,668.95 in or about May 1996 and payment of an additional sum of $18,595.27 in or about October 1996. Accordingly, by the end of 1996, Royal had paid out more than $100,000.00 in indemnity payments to Dominion in relation to the subject claim. Accordingly, I find it difficult to accept that Royal thought that the lump sum settlement would approximate $20,000.00 when the matter was ultimately settled in April of 1997.

5. I see no evidence of any continued dialogue between the insurers as to the particulars of any possible lump sum settlement. The Bulletins from the various Commissioners encourage insurers to enter into a dialogue and to keep up the same. Royal received and responded to the various requests for Indemnification and paid the amounts requested until Dominion requested reimbursement for the amount paid, in a lump sum, to settle future claims under the SABS. Problems arise in Loss Transfer cases when there is no continuing dialogue between insurers as to the negotiation of a lump sum settlement. In some cases, the second-party insurer is not provided with frequent Requests for Indemnification and is surprised to receive a Request for a large sum of money paid out to finally settle a claim. In other cases, second-party insurers have no interest in finally settling out claims and make that

known to the first-party insurer. In this case, Royal had made numerous payments to Dominion and was aware of the history of payments, the nature of the payments and the quantum of the same from time to time. It probably would have been wise for Dominion to discuss the matter with Royal before negotiating the final settlement. However, there is no obligation on Dominion to do so.

6. It appears from the file that the original claims adjuster at Royal Insurance was on top of the matter. She paid the various Requests for Indemnification and, early on, suggested to Dominion that the case should be settled for a lump sum covering future entitlement under the SABS. Unfortunately, when the final Request for Indemnification was made, the adjuster at Royal Insurance was on maternity leave. The original adjuster may have been familiar enough with the file, by reason of details on the Requests for Indemnification, that she may not have questioned the final lump sum, had she been active on the file at the time of the lump sum settlement. When she was away, another claims representative at Royal, reading notes in the file, did question the lump sum settlement and that led to this Arbitration, in my view.

7. The cases which have been previously decided, all stand for the proposition that the second-party insurer may not second-guess the first-party insurer. The second-party insurer is unable to dictate claims handling decisions to the first-party insurer and may not intervene in the payment of benefits between the first-party insurer and the policyholder.

8. Notwithstanding the fact that the second-party insurer may not intervene and may not interfere and may not simply take over handling of the claim, the second-party insurer can question the reasonableness of the settlement.

9. This system of Loss Transfer is a reimbursement system. It is based on the premise that the first-party insurer has a relationship with the insured person and must treat that person fairly. The first-party insurer must handle claims under the SABS reasonably and properly and must comply with the time-lines set out in the SABS. The first-party insurer owes a duty to the insured person to act in good faith. First-party claims are different than third-party claims. When considering a Loss Transfer claim, one must assume that the first-party insurer has acted reasonably and properly throughout the process. Yet, the system allows the second-party insurer to question the "reasonableness" of the handling of the matter by the first-party insurer, when that insurer seeks indemnity from the second-party insurer. The second-party insurer will review the claim and assess payments made by the first-party insurer. It is easy for the second-party insurer to overlook the unique relationship between the first-party insurer and its insured.

10. Largely because of the unique relationship between the first-party insurer and an insured person in claims under the SABS, I conclude that there is a very high onus on the second-party insurer to demonstrate that any settlement was not reasonable. The unique relationship between the first-party insurer and the insured person is recognized in the various Bulletins clarifying the Loss Transfer mechanism. If the second-party insurer is not to intervene, and is not to interfere, and may not dictate claims handling decisions and should not second guess, then that second-party insurer must prove that any settlement entered into is clearly and grossly unreasonable or that there was gross mismanagement or gross negligence in the handling of the claim.

11. The subject claim did not proceed to an Arbitration or to Court. The settlement was not arrived at through a trial. Surely, it was not intended that every such settlement would

be tried before an Arbitrator whenever there is a Loss Transfer. Only in rare cases should a second-party insurer question the reasonableness of a full and final settlement of claims under the SABS. Ordinarily, insurers should have a continuing dialogue and should cooperate with one another in these Loss Transfer situations.

12. In the subject case, the claim for income-related benefits was settled based on the calculation of benefits covering a period of five years. It is common-place in settling out claims under the SABS for insurers to pay benefits for one year, three years or five years. In the subject case, there were reports detailing deterioration of the condition of Dempsey. The evidence led at the Arbitration from one of the employers of Dempsey at the time of the accident, documented poor performance on that job pre-accident. That appeared not to be known to Dominion. Yet, it does underline the difficulty which Dempsey would have had in attempting work post-accident, with the injuries from which he was suffering. Royal argued that the benefits covering the period of five years ought to have been present valued. Royal argued that a residual earning capacity (REC) for Dempsey ought to have been considered. Of course, if one worked out the REC for Dempsey and calculated an LECB figure for him, arguably, that amount would have had to have been paid to Dempsey to age 65. Furthermore, the benefit ought to have been indexed. Accordingly, in my view, having considered all of the reports and the materials submitted, I am of the view that the payment of income-related benefits to Dempsey covering a period of five years only, was a reasonable settlement.

13. Having considered all of the reports and all of the material, payment to Dempsey of total benefits for Medical and Rehabilitation Expense and Housekeeping and Home Maintenance of an amount approximating $60,500.00 was also reasonable. One could nit-pick and attack various items for which allocations were made but, overall, based on all of

the materials, I am not convinced that the overall settlement was unreasonable, much less grossly unreasonable.

14. I am concerned about the allegation by Royal that Dominion was, in effect, not acting in good faith. I find no evidence of that. I find no support for the allegation that had there been no Loss Transfer, that Dominion would not have settled the case for this same amount.

15. The way in which the subject case was settled and the considerations taken into account by Dominion in this case, are similar to the factors considered in lump sum settlements of claims under the SABS.

16. Settlement of claims under the SABS covering future entitlement is not an exact science. Amounts are generally rounded off, hence, the settlement at the sum of $200,000.00.

17. One can understand some of the frustration of Royal in having to reimburse Dominion by making a payment of $200,000.00, without taking part in the negotiations. Wise insurance companies should consult one another more than was done in this case. If Royal had questioned Dominion as to the analysis by Dominion prior to the final settlement negotiations, Royal would have been provided with more data by Dominion. If Royal had another analysis, Dominion might well have considered it. However, in this case, Royal did not make those additional enquiries.

18. Although second-party insurers may question the reasonableness of settlements, such cases should be rare. Insurers must operate under the premise that every insurer will act in good faith to properly settle a claim. In this case, Dominion is the first-party insurer and Royal is the second-party insurer. In the next case, the positions of the insurers may well be reversed. If that happens, Dominion must assume that Royal has acted in good faith and has

properly handled the claim. To protect themselves, insurers must keep on top of claims and request information as to file analysis before the fact of a settlement, rather than after.

19. In the result, I find that the settlement, in this case, was reasonable.

20. I order that Royal & SunAlliance Insurance Company, reimburse The Dominion of Canada General Insurance Company in the sum of $200,000.00.

21. I further order that Royal pay to Dominion interest calculated at five percent per annum on the sum of $200,000.00. Interest should commence September 15, 1998, about the time that Royal would have received full particulars from Dominion. (Letter dated September 15, 1998).

22. I award the costs of the Arbitration to Dominion, to be agreed upon or to be assessed by me. I further order that Royal pay the fees and disbursements of the Arbitrator.

DATED this 20th day of August, 2001.

Stephen M. Malach, Q.C.
Arbitrator