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, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELAIR DIRECT INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Rohit Sethi for the Applicant

Ashu Ismail for the Respondent

Introduction

The parties to this dispute are automobile insurers carrying on business in the province of Ontario. In accordance with the provisions under Part 6 of the *Insurance Act*, automobile insurers have obligations to pay Statutory Accident Benefits with respect to individuals who have suffered injuries in an automobile accident.

Pursuant to section 275 of the *Act*, insurers have the right to recoup payments from other automobile insurers in circumstances specified in the regulations.

For the purpose of determining whether or not reimbursement is required, the “loss transfer” regime calls for findings of liability to be made in accordance with “Fault Determination Rules” that are also prescribed by regulation under the *Insurance Act*.

Loss transfer disputes are not uncommon in Ontario and there is significant history of these cases being arbitrated. It is well understood that application of the “Fault Determination Rules” is critical to assignment of liability and hence to determination of reimbursement rights. These rules are similar to common expectations of liability for ordinary road accident situations but

specifically aim to promote efficiency and expediency by applying predetermined liability apportionments based on the fact pattern of particular events.

In this particular instance there is a factual dispute about the circumstances that gave rise to the claim. Hence the parties dispute which rule under the "Fault Determination Rules" applies to this case.

In accordance with the statute and the regulations the dispute of this nature is to be submitted to arbitration In accordance with the *Arbitrations Act, 1991*. This is what the parties have done in this instance. The parties have submitted an arbitration agreement which was marked as Exhibit 1 to the arbitration proceeding.

We had an arbitration hearing with oral testimony from five witnesses. In addition, parties have submitted documents to form part of the consideration of liability. Those documents have been filed as parts of Exhibits 2 and 3 to this proceeding.

The key question in this case revolves around the accident circumstances and the impact that this has on the ability of the applicant to assert a claim for loss transfer.

The Accident Location

The location of the accident is material to understanding the issues to be resolved.

There is a useful diagram in the police report at Tab A of Exhibit 2. There are a number of photos that show parts of the location. These can be seen at Tab D of Exhibit 2.

The accident happened on McCowan Road in Scarborough, Ontario. That street has several lanes going in each direction. It appears that there are three lanes southbound. For reference purposes, I will refer to these as lanes one, two, and three representing the position of the lane starting at the point nearest the centre of the roadway. This is the same numbering system which was used by the investigating police officer. The northbound traffic and southbound traffic are separated by some sort of median and there are three northbound lanes as well.

At the accident scene is a ramp to take traffic to Highway 401 westbound. The configuration of this ramp which can be seen from the police report is that it represents a widening of the three southbound lanes into what amounts to four parallel lanes of traffic for a short distance. For southbound traffic the lane furthest to the right, to the right of lane number three, is forced to exit to highway 401. At the intersection associated with the ramp there is a traffic light which controls the movement of southbound traffic. It appears that there may be another ramp on the east side of McCowan Road that also utilizes the traffic signal control.

As is illustrated by the diagram of the investigating police officer, the southbound access ramp towards Highway 401 curves to the west, separating from lane three southbound. The result is that for southbound traffic on McCowan Road three lanes are able to continue straight through the intersection without impediment but any traffic in the fourth lane, the 401 access ramp, is either compelled to go onto the 401 or, must execute a lane change to the left into lane number three in order to continue southbound on McCowan.

The Involvement of the Vehicles

The vehicle operated by Thangarajah R.[1] was a small private passenger vehicle, a Toyota Corolla. That vehicle was insured by the applicant, Belair.

The second vehicle operated by Leonard B., and owned by a business, is a heavy commercial vehicle, a dump truck. The Leonard B. vehicle was insured by the respondent, Economical.

With respect to Statutory Accident Benefits payable to persons in the Belair vehicle, Belair is advancing a claim for loss transfer against Economical. In accordance with the loss transfer rules and Fault Determination Rules, Belair claims that it should be indemnified.

The precise actions of the drivers and their vehicles that preceded this incident is a matter of controversy. A general understanding of the circumstances is helpful. For all practical purposes the involved vehicles were proceeding southbound on McCowan Road in Toronto as this incident occurred. It is clear that the driver of the Belair insured vehicle had the intention of continuing southbound on McCowan to some point further south than this intersection. Similarly, the heavy commercial vehicle was proceeding southbound, apparently in lane three, with the intention of proceeding through the approaching intersection.

The evidence of Leonard B. is to the effect that he was proceeding southbound on McCowan Road at a normal pace approaching intersection which had a green light. There was no obstruction ahead of him. His evidence suggests that the Thangarajah R. vehicle must have come from the 401 ramp at the right, in front of him and into his path of travel.

The evidence of Thangarajah R. is to the effect that he was proceeding southbound in lane number 3, and that the dump truck rear-ended his vehicle.

The Loss Transfer Rules

The critical task for me is to address the possibility of indemnification based on the available evidence and the loss transfer rules including the Fault Determination Rules.

The loss transfer rules require us to consider whether or not the accident circumstances are depicted in one of the illustrated rules under the regulation which assigns percentages of liability based on generalized representations of the accident circumstances.

If the accident is not one which is depicted in one of the prescribed generalized rules, then liability can be determined in accordance with the ordinary rules of law.

Belair argues that this accident circumstance is governed by Rule 6 which provides as follows:

> **(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 in the driver of automobile "B" is 100 per cent at fault for the incident.**

[1] In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

Rule 10 of the Fault Determination Rules deals with lane change type collisions. That rule provides:

> **Rules for Automobiles Travelling in the Same Direction in Adjacent Lane**
>
> **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.**
>
> **…**
>
> **(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.**

Rule five of the Fault Determination Rules provides the recourse to ordinary law:

> **5. (1) if an incident is not described in any of these rules, the degree of fault of the insured shall be determined in accordance with the ordinary rules of law.**

Hence, if I conclude that the accident is within the description of Rule 6, I should award 100% reimbursement. If I conclude that Rule 10(4) applies I should award no reimbursement. If I find that no rule describes this incident I should determine fault in accordance with the ordinary rules of law.

The Documentary Evidence

The parties filed documents as part of the record in Exhibits 2 and 3.

We have the information of the investigating police officer as noted in his report and he also testified before me. During his testimony he readily acknowledged that he is not an expert in accident reconstruction. Accordingly, I do not place any weight on his testimony as to an opinion as to how the accident happened. However, he was a person at the scene of the accident and his evidence as to the things he observed at that time, the vehicles, the damage to the vehicles, and the site of the accident and placement of two poles is all helpful to understanding how this accident occurred.

In addition, at Tab E of Exhibit 2, are a series of photographs showing the damage to the Belair vehicle. Those photographs show some damage to the right front corner of the car, some damage to the rear of the car slightly right of the centre, and extensive damage to the driver's door area. As to the latter area of damage it is clear that the vehicle has impacted something at considerable height since there is an impact at roof level.

At Tab D of Exhibit 2 there are number of photographs put in the record that depict the scene of the accident and show the damage, such as it is, to the respondents insured vehicle -- the dump truck.

The drivers' reports to the investigating police officer are found at Tab B of Exhibit 2, and, most helpfully, a transcribed version of the notes of the driver's reports is found at Tab C.

With respect to Thangarajah R.'s version, I understand that this report may have been given through an interpreter. The notes indicate a report of driving on McCowan, on the right side -- which I take to be a reference to the rightmost lane of traffic which at most points would be lane 3. Then the note is "hit at the back, looked in the rearview and saw truck. Though(t?) truck coming fast." Thangarajah R. agreed that the traffic was moving and that the light ahead was green. Importantly, he was not sure if he had touched the brakes.

He did deny any intention to go westbound on 401. His intention was to go eastbound which I gather would require him to go through the intersection rather than turn off before the intersection.

With respect to Leonard B.'s version, the notes indicate that he acknowledges being southbound in lane three on McCowan, north of the on-ramp in question. He indicated that he had no intent to change lanes or enter onto the on-ramp. The traffic signal facing southbound traffic was green. Leonard B. was moving with the flow of traffic. He had no recollection of having previously seen the Thangarajah R. vehicle travelling in front of him. His first notice of something amiss was a large cloud of snow and when he saw a vehicle spun out. He made this observation in his right side mirror.

He was unsure initially if he was involved. He brought his truck to a stop. He then did a circle inspection of his truck. It was noted that the bumper at the right front of the truck was pushed in. The police officer reported prying the bumper off the tire after the officer's arrival on the scene. The bumper was bent in a way which would have interfered with the operation of the truck. It is clear that this damage must have happened in this incident. It is clear to me that there was contact made with the right front of the Leonard B. vehicle.

At Tab E of Exhibit 2 there is an appraisal report of the damage to the truck. The inventory of Damages notes the need for a right front tire, and there is an explanation "Tread Cut From Bumper". The tread cut can be seen in the photos at page 10 and page 12 of that report.

The Oral Testimony of Hearing Witnesses

Evidence of Thangarajah R.

Thangarajah R. gave his evidence before me with the assistance of a Tamil interpreter.

He testified that he was involved in this motor vehicle accident which occurred January 2, 2013. He was the operator of a Toyota Corolla automobile, his own vehicle, at the time of the incident. His wife was a passenger in the front passenger seat. His daughter was a passenger in the rear seat.

He testified that the accident happened on McCowan Road between highway 401 east and 401 west. I understood this to be a reference to the access ramps for 401 east and west. He was southbound on McCowan Road and intended to go eastbound on Highway 401. He was on his way to "Pathways" on Neilson Road. It was his intention to take 401 eastbound to Neilson.

He described himself as being in a lane to the right and said he was always in "lane one". He described this as being a lane furthest to the right. However, he denied being on the ramp for westbound 401 until after the impact occurred.

He was presented with the police report that depicts him as having executed in lane change from the right lane to the left lane immediately before the accident. He says that the police report is incorrect. He denies that he had made any such lane change.

On cross-examination he gave more details. He gave some description of his sense of the impacts involved in the collision. He testified that he felt the first impact at the rear right of his vehicle and he indicated that this was between his license plate and the driver side. This evidence seemed confused to me.

He then indicated that there was a second impact and his car was hit at least twice. He suggested that after the first impact he applied his brakes, stopped, and was hit a second time by the truck. He indicated that he was then pushed and hit the poles which I take to be a reference to the light standards at the right of the travelled portion of lane number three. He indicated that on the second impact his car went to the right and then his vehicle spun. He denied hitting anything else. Then he testified that he hit two poles or the same pole. He did indicate that his car was damaged by a pole. In his version of events the second pole impact damaged the right front passenger side of his car.

He acknowledged that at the time of the accident the traffic signal ahead was green. He also acknowledged that there was no traffic ahead which would have caused him to slow down.

The Evidence of Suhiralatha R.

Suhiralatha R., the previous witness's daughter, also testified. She was not the driver of the vehicle. She acknowledged that her father was the driver. Both her father and mother were in the car with her at the time of the accident. Her mother was in the front passenger seat. She was seated behind her mother.

She described the location of the accident as McCowan Road. It was her impression that this road was two lanes southbound. Importantly, she purported not to remember which lane they were travelling in at the time of the accident. She testified that she "thinks" that the other vehicle involved in the accident was a truck but wasn't sure and apparently didn't see it. Nonetheless she testified that she knew how the accident had happened.

Essentially her description is that the car she was in was moving, and it was rear-ended. She felt the impact on the father's side of the car which would be the driver side.

She was asked directly how the accident happened and responded "I don't know". She was asked whether they had changed lanes and she answered "no".

I found this witness's testimony to be of absolutely minimal value. There was much uncertainty with what she said. She seemed to be an extremely poor historian. When asked relatively straightforward questions she appeared to answer different questions. She was either not listening, or not understanding the questions, or was indifferent. However the witness did indicate that she had certain health issues and that she did not have a good memory

Under cross-examination she admitted that she was supposed to be at her destination by 8:30 a.m. She thought that they had left home at 8:00 or 8:30 a.m. The accident seems to have occurred at about 8:53 a.m. according to the police report record. The witness was unhelpful as to whether or not she was late for her attendance at the time of the accident.

The Evidence of Indhirany T.

Indhirany T. also testified before me. She is the spouse of Thangarajah R. and was a passenger in the front seat of the car driven by him as they drove with their daughter on the morning of the accident.

She testified that she recalled the accident. She described the general route they were taking that morning. She indicated that it would have been their plan to take a right turn. She indicated that, while waiting, a truck behind hit their vehicle. She was unable to say what street they were on at the time that this happened.

She testified that their vehicle was stopped at the time of the accident. She indicated they were stopped for a light. She indicated that while stopping they were hit from behind. Confusingly, she indicated that the colour of the light was green at the time of this accident.

She identified for the record her statement that she had given subsequent to the accident. This was marked as Exhibit 3 in the proceeding.

Her testimony under cross-examination was difficult. The witness was reluctant or unable to acknowledge basic facts about the accident, the weather conditions, the circumstances of the statement, what she was doing at the time of the collision. She gave a version of the impacts that indicated that the first impact was where the doors are “first hit on the door side went to the ramp and spun around”. She seemed to believe that the car was first hit on the driver’s door. But it seems that she understands that to be after the car was hit on the back.

Evidence of Leonard B.

Leonard B. testified on behalf of Economical. He acknowledged that he was the driver of a Peterbilt tri-axle dump truck involved in this event. This was a vehicle he was operating the course of his employment. He had been employed with this current employer for 14 years. He has been licensed for 43 years for five different firms. He has driven everywhere in Ontario.

His normal day starts with work at 5:30 in the morning with the circle check of his vehicle. On this occasion he did the circle check and then it seems he went to a gravel pit to pick up a load. He was fully loaded with stone which is estimated to be about 22,500 kg. He picked this up at Central Sand and Gravel. He thought that he left there at about 7:00 a.m. It was his estimate that the accident happened between 8:30 a.m. and 9:00 a.m.

Indicated that this was a route that he drove frequently and in fact he was familiar with the area because he formerly resided in the vicinity. He described the location of the accident and in relation to the exit ramp indicated that it was right on the “bullnose”.

He estimated that his speed would have been 50 km/hr. He judged this to be just below the speed limit. He didn’t think traffic was too bad. He had no specific recollection of anything around him.

He confirmed that the traffic light ahead was green as he approached, but he indicated that he slowed his vehicle somewhat in case the light turned to red. He described himself as being in the curb lane which I took to be a reference to lane number three. But he seems to believe that after the bullnose that there were just two lanes. In any event he described his position as

being right next to the bullnose. He said he usually drove in the slower lane as his is a slower vehicle.

He was questioned about the circumstances at the moment of the incident. He was asked whether there was anything in front of him and indicated that there was nothing that would cause one to stop. He thought there were no vehicles in front. His first indication that there was anything happening was that there was snow everywhere and he heard some noise. He got his wipers on. He saw a vehicle then on the 401 on-ramp. He did not see exactly where the snow came from. It covered the windshield and side of his truck. He became aware of something in his right mirror. He heard something which he presumed was snow. He brought his vehicle to a stop and he estimated that it took about 50 feet to do so.

He says he did not feel any sense of any impact at any point. When he heard a noise he saw snow but he had no idea what had happened. After he stopped his vehicle he walked back to the scene. He saw the damaged car and waited until the police officer got to the scene. The witness did take some pictures and he identified those pictures in his testimony.

He adamantly stated that he did not see a vehicle ahead of him prior to this incident.

He gave some useful testimony about the physical nature of the hitch on the front of his vehicle. This tow hitch was 22 inches up from the ground and sticks out about 6 inches. He indicated that if that item had contacted another vehicle it would have done major damage.

He was asked about the line of sight for somebody sitting in the driver seat of this large dump truck. He confirmed that he cannot see a vehicle to his right until it is in front of him.

On cross-examination he admitted that he didn't see the other involved (R.) vehicle until after the event. He didn't know specifically when or how impact occurred.

He was questioned further about the area of restricted visibility to his right. He estimated that the zone of vision restriction in that direction was about 6 feet. However, he confirmed that he could see any vehicle that was directly in front of his truck.

He indicated that he had not paid any particular attention to any particulars of traffic on his right prior to the incident.

Evidence of Police Constable Burnett

The investigating police officer was called as a witness on the second day of this hearing. Police Constable Burnett is an officer with the 42 division of the Metropolitan Toronto police. He is in his 11th year of service.

He is not an expert accident "reconstructionist". He has no expert classification. Nonetheless, I found the evidence of this witness to be helpful in several important respects.

The witness identified the police report which has been filed by the parties as part of Exhibit #2. Often an investigating police officer at the scene of an incident can be helpful with many aspects of the physical evidence. In particular it is quite often useful to know something about the exact point of impact between the vehicles in relation to the roadway etc. Constable Barnett regards the area of impact in this case to be unknown. In part this is due to the fact that there was

considerable delay before Officer Burnett arrived at the scene of this collision. It was his evidence that he arrived at the scene just under one hour after the accident occurred.

He offered helpful evidence about the time of the accident by reporting that the call reporting the accident came into the dispatch at about 8:53 a.m.

On his arrival, the Corolla had already been moved from the scene of the accident to a nearby plaza. The dump truck was further south on McCowan than is indicated on the police report but it was in the curb lane.

The road conditions at the time of his arrival were mainly dry with no snow, no rain, and no fog. Nonetheless the officer indicated that he could not find any skid marks. There were no gouge marks on the road. There was no actual physical evidence to indicate whether there had been a lane change or not.

Officer Burnett described the information that he was provided by the drivers during the course of interviews. The notes for this have been submitted as part of the record of these proceedings. Interestingly, Officer Burnett reported that he was contacted by Thangarajah R. two months after the accident asking him to change his report about the accident.

My Evaluation of the Viva Voce Evidence

I heard from four witnesses who were involved in the accident. Three were occupants of the car insured by Belair and one was the driver of the vehicle Insured by Economical.

Overwhelmingly, I prefer the evidence of Leonard B. to the evidence of the other witnesses. I found his evidence to be given in a forthright manner, with candor, without evasiveness. I believe him to be an honest person who is being careful to give his evidence as accurately as possible. I do not find any reason to doubt his veracity or to challenge in any substantial way his version of how this accident occurred.

The evidence of the three Belair witnesses must be seriously discounted, in my view. All of these witnesses seem to have tailored their evidence to tell a story rather than to relay their actual observations of the true events. In several respects these witnesses contradicted each other. There were inconsistencies about movement of the vehicle, and about impacts. The statements which they made in their testimony frequently seemed to be rehearsed. At times it appeared that the witnesses were indifferent to the questions posed, but only were proffering some scripted version of events. At a few points, some of their testimony even seemed evasive although this might be explained by language difficulties or other factors.

The Physical Evidence

In the photos and other documents we have a record of some physical evidence that is useful in understanding how this accident occurred.

The evidence about the cloud of snow is of interest. The scene photographs show that there was ample snow in the vicinity of the accident but that the road surface was generally clear. It seems, therefore, that the cloud of snow must have been associated with the displacement of piled snow, probably from the areas depicted in photograph number 3 at Tab D. It is also of

interest to see from photograph 6 that the dump truck vehicle was largely free of snow accumulation but photographs 5, 6, 7, 8, and 9 depict some snow resting on the right front of the vehicle.

The physical evidence is clear that the front right corner of the dump truck was involved in the collision. Based on the evidence before me, including the versions of the witnesses and the photographs, I agree that the most likely explanation for the physical damage is that the right front area of the dump truck contacted the rear of the Corolla and that the Corolla was propelled into the snow covered area between the off-ramp and lane 3, coming into contact with one or both of the poles that are visible in photo three at Tab D. It does seem likely that the right front of the Corolla would have been directed towards the first pole which would have had the effect of causing the Corolla to rotate in direction such that the driver's door would contact the second pole. I also note that photograph 3 does seem to indicate markings of a vehicle having moved over the piled snow, notably in the forward area.

The front of the Leonard B. truck is distinctive in that there is a hitch on the front of the dump truck bumper, clearly visible above the license plate in photo 6 of Tab D of Exhibit 2. Clearly this feature is in a position to be prominently impacted in a collision with a vehicle that is in front of the truck. Tellingly, the damage that is noted at the back of the Corolla does not have characteristics which suggest the truck has squarely struck the rear of the vehicle. There is no distinctive damage that coincides with the hitch size. The vertical extend of damage at the rear of the Corolla seems to be considerably greater than the size of the hitch. It seems more likely that the main area of damage at the rear of the Corolla (depicted in the 5th photo at Tab E of Exhibit #2.) arose from contact with the right front bumper of the truck.

I also note that the hitch at the front of the truck, as shown in photo 6 at Tab D of Exhibit 2 seems to be discoloured by a coat of oxidization. This oxidization doesn't seem to be significantly scrapped off or otherwise marked as one would expect in collision contact. Nor is any such oxidization/colouring evident as transferred to the rear of the Corolla.

Other aspects of physical evidence tend to indicate that this is not a direct rear end collision. In a direct rear end collision one would expect the forces to propel the car ahead directly forward in roughly a straight line. Of course, if this had been such a direct rear end collision, there would be no explanation for the severe damage to the driver's door. This damage is best understood as having resulted from the rotation of the Corolla vehicle from application of force unevenly with the result that the vehicle is propelled off at an angle.

All of the physical evidence in this case points to this accident not being a straightforward rear end collision and is consistent with the theory that the Corolla vehicle had moved from the right, into the path of the dump truck vehicle.

Analysis

This does not appear to be a straightforward rear end collision. Aside from the witness evidence to this effect, the photographic evidence of the physical damage helps me understand the likely dynamics of the collision.

The damage to the vehicles is consistent with a collision occurring as the Corolla moved into lane 3, in the path of Leonard B. The damage to the dump truck is to the right front corner. The damage to the Corolla is to the right side of center of the rear of the vehicle.

According to Leonard B. there was no vehicle ahead of him. But he did testify to seeing commotion to his right. Thangarajah R. and his passengers have the improbable story that they were travelling in lane 3, were rear ended, and pushed to the right.

Both drivers acknowledge that the light for southbound traffic was green. That southbound traffic would have been moving apace. Yet the forces involved in creating the depicted damage seem to be quite significant. There must have been a significant speed differential between the vehicles to cause this damage. This is hard to understand in the absence of some reason for the vehicle ahead to abruptly decelerate. I agree with the observation made in evidence that there is no explanation for why a rear end collision would occur if vehicles were simply moving along at a common pace, towards a green light.

As previously noted, I prefer the evidence of Leonard B. to the evidence of the occupants of the Belair insured Corolla.

It is my finding that it is more probable than not that this collision occurred when the Corolla vehicle operated by Thangarajah R. moved from the 401 westbound exit ramp (right of lane 3) to its left, into lane 3, in the path of the dump truck. It is easy enough to understand how this happened as Thangarajah R. found himself trapped in a lane committed to turning west, when his route required him to go southbound, then east. He had to get into the southbound lane to his left in order to continue that route. Evidently Thangarajah R. found himself with insufficient time and space to execute that lane change safely as the opportunity to make that maneuver contracted. At some point in the sequence Thangarajah R.'s vehicle went through the piled snow separating the ramp from lane 3. In my view it is likely that Thangarajah R. attempted to move abruptly from the exit ramp into lane 3, and thus was attempting to execute a lane change.

The evidence also would support a conclusion that Thangarajah R. was in a hurry to get to his destination as his daughter was late. This might offer a reason for Thangarajah R. to have deliberately attempted to overtake southbound traffic by using the 401 westbound ramp, and would be a reason for Thangarajah R. to endeavor to get ahead of Leondar B. who was admittedly operating a slower, heavy, vehicle.

As can be seen my findings are influenced by looking at the damage to the vehicle and other circumstances in which this incident occurred. Rule 3 of the Fault Determination Rules says:

> **"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) location on the insured's automobile of the point of contact with any other automobile involved in the incident."**

A careful reading of this provision will confuse those who are not aware that these rules were originally constructed solely to deal with claims by insured persons against their insurance company. Only later were these rules adopted for use in disputes between two insurers, where such disputes hinge on determining the role of two or more motorists. Hence the reference to "the insured's automobile" as if there would only be one such vehicle in any transaction. But in a loss transfer dispute there are two automobiles that are insured, or more. Since these rules

were subsequently adopted for loss transfer we must read them in a way which makes the most sense in this new application.

Frankly, I am challenged to find any sensible interpretation of Rule 3 that gives literal, unrestricted, meaning to its words. Surely application of all of the Fault Determination, Rules 6 to 20, requires an understanding of the "circumstances in which the incident occurs". Precluding reference to the "circumstances in which the incident occurs", read broadly, would make it impossible to select an applicable Rule for a case. I interpret the regulation in a manner to give effect to the intention of the loss transfer scheme and use of Fault Determination Rules.

We need to understand this process to have two steps. First we determine which Rule applies, second we assign liability taking into account Rule 3 restrictions. Indeed, the only sensible interpretation of Rule 3 is that when we find that one of the rules assigns a percentage of liability, that "degree of fault" is not to be adjusted for the factors mentioned in rule 3.

There is no doubt that it will be necessary to consider factors such as those mentioned in Rule 3 in order to consider whether an incident is described in one of the rules which assigns percentages of responsibility. Hence, I do so in this case. To otherwise would fail to give effect to the legislative intent.

I do so bearing in mind the directions of the Supreme Court in Rizzo[2], adopting a passage from Driedger, Construction of Statutes (2nd e. 1983):

> **Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.**

As was the case in Rizzo, the approach that I adopt is also mandated by s. 64 of the *Legislation Act*[3], (as formerly found in s. 10 of the *Interpretation Act*) :

> **Rule of liberal interpretation**
> **64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.**

If we cannot consider the circumstances in which the incident occurs, we cannot correctly assign the applicable Fault Determination Rule and attainment objects of the scheme will be stymied.

It is beyond question at this stage, after decades of cases, that the loss transfer scheme is to provide expedient and summary dispositions. Application of the prescribed rules is critical and should not be negated.

In the 2015 case of State Farm v. Old Republic[4], the Court of Appeal has reiterated this fundamental policy objective:

> **(4) Applying the FDRs**
> **[49] This court has held that the loss transfer regime is meant to provide an "expedient and summary method" of reimbursement. As such, fault is to be determined strictly in**

[2] Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC)
[3] Legislation Act, 2006, S.O. 2006, c. 21, Sched. F
[4] State Farm Mutual Automobile Insurance Company v., 2015 ONCA 699 (CanLII)

accordance with the FDRs. As Griffiths J.A. explained in Jevco Insurance Co. v. Canadian General Insurance Co., (1993), 1993 CanLII 8451 (ON CA), 14 O.R. (3d) 545, at p. 545:

> **The scheme of the legislation, under s. 275 of the Insurance Act and companion regulations, 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 the accident. The fault of the insured is to be determined strictly in accordance with the fault determination rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.**

[50] Similarly, in Jevco Insurance Co. v. York Fire & Casualty Co., (1996), 1996 CanLII 11780 (ON CA), 27 O.R. (3d) 483, at p. 486, this court held that 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." And in Jevco Insurance Co. v. Halifax Insurance Co.,(1994), 27 C.C.L.I. (2d) 64 (C.J.) at para. 7, Matlow J. observed that the FDRs are meant to facilitate indemnification and that they allocate fault in a manner that is usually, but not always, consistent with actual fault:

> **[The Fault Determination Rules] set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, <u>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.</u> [Emphasis added.]**

In any event, if I were to disregard the above evidence about the "circumstances in which the incident occurred" and the information about points of contacts between the vehicles, this would become a case in which there is "insufficient information concerning an incident to determine the degree of fault…" leading to the same result in accordance with Rule 5 (2). In accordance with the ordinary rules of law the plaintiff bears the onus of proof of showing how an accident happened. That burden might be discharged by offering evidence that suggests negligence on the part of the defendant and might, in some circumstances, call for the trier of fact to expect some explanation to negate an inference of negligence.

Here Belair is unable to cross the hurdle of showing how this accident happened in a way that establishes negligence on the part of the operator of the Economical vehicle. There is no evidence that I accept about how this accident happened that is consistent with the physical evidence. Any inference which may be taken from the physical evidence suggests that indeed the Corolla was moved into the path of the dump truck as part of a manoeuvre of changing lanes at a point where it was unwise to do so.

It is entirely possible that the operator of the Corolla was unaware that he was executing a lane change but that seems unlikely and is certainly in itself a reason to find that operator responsible for this incident.

Therefore, in accordance with the ordinary rules of law, I would not find that there has been a case made out for loss transfer recovery against the respondent.

I turn to Rule 10(4) which I repeat here:

> **Rules for Automobiles Travelling in the Same Direction in Adjacent Lane**
>
> **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.**
>
> **…**

(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 percent at fault for the incident.

In my view, the evidence in this case establishes that rule 10(4) applies. I find more probable than not that this incident occurred when the two vehicles were travelling in the same direction in adjacent lanes and that R. operating the Corolla insured by Belair was changing lanes.

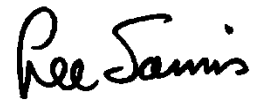
I specifically find that this lane change was not completed to the extent that this accident can be regarded as a rear end collision. The position of the Corolla was not established in lane three of southbound traffic.

Conclusion

It is my finding that the incident here occurred when Leonard B. and Thangarajah R. were proceeding southbound in adjacent lanes when Thangarajah R. changed lanes, coming into contact with the vehicle operated by Leonard B. This is not a case where the intended lane change was completed, far from it. I find that Rule 10(4) applies. For the purposes of loss transfer under section 275 of the *Insurance Act*, the operator of the Belair insured vehicle is 100 percent at fault for the incident.

If the parties wish to make submissions about costs, or require any other aspects to be addressed, I will look forward to hearing from you within the next thirty days.

Dated at Toronto this 2nd day of January, 2018.



LEE SAMIS
Arbitrator