IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. 1990, c.I.8,

AND IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

GORE MUTUAL INSURANCE COMPANY

Applicant

and

THE CO-OPERATORS

Respondent

AWARD

INTRODUCTION

The parties have brought this Arbitration before me pursuant to the provisions of the *Arbitration Act* 1991 and the *Insurance Act*.

Each of the parties are automobile insurers carrying on business in the Province of Ontario. In respect of the matters, which give rise to this dispute, each of the insurers has issued a policy of automobile insurance. The insurers have a dispute as to which insurer is obliged to pay Statutory Accident Benefits in the circumstances of this case. In accordance with the statute, the regulations, and the agreement to the parties this issue has been put before me to determine.

The parties submitted various documents to me including an agreed statement of facts which form the record of these proceedings.

LEGAL FRAMEWORK

The insurers have a dispute in this case because each of them has a potential obligation to pay Statutory Accident Benefits with respect to injuries sustained by one Rebecca Luk. Those Statutory Accident Benefits are part of an extensive scheme of no-fault, first party, benefits that are available to persons who are injured in motor vehicle accidents in the Province of Ontario. As a result of the provisions of the *Insurance Act*, all automobile motor vehicle liability policies issued in the Province of Ontario are deemed to include these elaborate Statutory Accident Benefits. Those benefits are described under regulation 403/96 under the *Insurance Act* as amended. Importantly, subsection 3(2) of that regulation provides as follows:

> **"The benefits set out in this regulation shall be provided in respect of accidents that occur in Canada or the United States of America or on a vessel plying between ports of Canada or the United States of America."**

For the purpose of making the no-fault accident benefits broadly available to people who are injured in car accidents, the regulations widely define the individuals who may be entitled to benefits from any one insurer. An insurer has obligations with respect to accident benefits to it's named insured, a spouse of a named insured, a dependant of a named insured, or an occupant of a vehicle that is insured, or a person involved in an accident with a vehicle that is insured by the insurer. This very broad approach to making available these benefits necessarily means that any individuals injured in a car accident might have the status of being an "insured person" under more than one contract of insurance, if the accident happens in the Province of Ontario.

Under section 268 of the *Insurance Act* the statute sets out a priority of the obligations of the involved insurers. The priority scheme is intended to sort out the various obligations so that insurers can have some certainty about their responsibilities, and injured accident victims can be clear about which insurer should be approached for the necessary benefits. The priorities set out in section 268 of the act indicate that if a person should claim benefits first from the insurer of a policy where the person is the named insured, the spouse of the named insured or a dependant of the named insured or a spouse. If there is no recourse to coverage under such a policy then the individual should claim benefits from the insurer of the vehicle in which he or she was an occupant.

In this case, however, we need to address the issue of whether or not Rebecca Luk is obliged to claim the benefits from the insurer of the vehicle in which she was an occupant (Gore Mutual) or her personal insurer (The Co-operators). This question would be easily answered if it were not for the fact that the accident in question occurred in the State of New York. Under Ontario law, it is clear that Co-operators would have the obligation to pay the Statutory Accident Benefits.

The parties have executed an Arbitration Agreement for the purpose of having this dispute determined by me, in accordance with the procedures agreed upon, or as ordered by me. That Arbitration Agreement was marked as Exhibit 1 to the proceedings.

FACTUAL BACKGROUND

Rebecca Luk was injured in a motor vehicle accident on July 23, 2003[1]. The accident occurred in the State of New York. At the time of the accident Rebecca Luk was an occupant of the vehicle insured by Gore Mutual. At the time of the accident Rebecca Luk was also the named insured under a policy issued by the Co-operators.

The statutory scheme that applies under the Ontario *Insurance Act* differs from the scheme in place in the State of New York. The parties asked me to determine whether the New York scheme or the Ontario scheme should apply to determine the obligation of the insurers.

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[1] The materials are inconsistent about the date of the accident.

THE ISSUE

Pursuant to the Arbitration Agreement I am asked to answer the following question: which of the Co-operators and Gore Mutual Insurance Company bears primary responsibility for funding the claim for Statutory Accident Benefits payable to one Rebecca Luk arising out of her involvement in a motor vehicle accident that occurred on July 23, 2003 in New York State?

THE RECORD

The record in this matter consists of :

1. The Arbitration Agreement dated August 31, 2004;
2. An Agreed Statement of Facts dated November 4, 2004 and marked as Exhibit 2 to the proceedings;
3. A document marked as Exhibit 3 to the proceedings which sets out the New York insurance law and the obligations of motor vehicle liability insurers with respect to first party benefits; and
4. The parties submitted to me a correspondence brief of Gore Mutual Insurance Company which was marked as Exhibit 4 to the proceedings consisting of various communications between the parties relevant to these proceedings.

No witnesses were called to testify at the hearing in this matter. The parties made written and oral submissions.

THE EVIDENCE IN THIS PROCEEDING

Agreed Fact

An Agreed Statement of Facts was prepared by the parties and submitted as Exhibit 2 to the proceeding. The Agreed Statement of Facts was as follows:

1. Rebecca Luk ("Luk") was involved in a motor vehicle accident on July 21, 2003.
2. At the time of the accident, Luk was an occupant of a vehicle owned by George Mak and Helena Wong, insured under a policy of insurance issued by Gore Mutual Insurance Company in accordance with the standard automobile policy for the Province of Ontario.
3. The accident was a single vehicle collision which took place in the Town of Sullivan, in the State of New York, in the United States of America.
4. At the time of the motor vehicle accident, Luk was a named insured under a policy of automobile insurance issued by The Co-operators in accordance with the standard automobile insurance policy in the Province of Ontario.
5. Luk submitted a claim for accident benefits to The Co-operators following the motor vehicle accident.
6. In this arbitration, Gore Mutual Insurance Company seeks a determination of the question of which insurer is responsible for the payment of accident benefits to Luk in accordance with the provisions of s. 268(2)1.i. of the Schedule, and s. 268(5) of the Schedule.

Analysis

Each of the parties presented extensive written materials in support of the legal position advocated. The written argument was supplemented by oral submission.

The parties are satisfied that if Ontario law applies to determine the priority of coverage between the insurers, then Co-operators is the insurer that has an obligation to pay the benefits. The issue in this arbitration stems from the differing concepts applied in Ontario and New York with respect to no-fault benefits as a result of automobile accidents. Both jurisdictions provide, by statute, for payment of such first party benefits by insurers. It is observed that the insurers are primarily involved as liability insurers, protecting their policy holders against the liability that might be imposed upon them by law as a result of the use or operation of their automobiles. As an adjunct to this protection, the statutory schemes require the insurers to provide additional first party benefits which provide compensation regardless of fault to the insured and occupants of the insured vehicle.

The Ontario scheme is designed to have the benefits "follow the individual". An insured person who is involved in a car accident in Ontario will claim the no-fault benefits from his or her own insurance company regardless of the accident circumstances. The person will claim those benefits from that company whether or not they are an occupant of the insured vehicle, struck by the insured vehicle, or injured in an accident that does not even involve the insured vehicle. In all of those circumstances the statute requires that the injured individual received the benefits from the policy where they are a named insured or a spouse of a named insured or a dependant of a named insured. The coverage follows the individuals and not a vehicle.

According to the documentation submitted by the parties, the circumstances in New York are the opposite. The parties referred to the New York insurance law as evidence by Exhibit 3 to the proceedings. Paragraph 5103 of that statute provides as follows:

> **"Entitlement to first party benefits; additional financial security required:**
>
> **(a) Every owners policy of liability insurance issued on a motor vehicle in satisfaction of the requirements of article 6 or 8 of the Vehicle and Traffic Law shall also provide for; every owner who maintains another form of financial security on a motor vehicle in satisfaction of the requirement of such articles shall be liable for; and every owner of a motor vehicle required to be subject to the provisions of this article by subdivision 2 of section 321 of the Vehicle and Traffic Law shall be liable for; the payment of first party benefits to:**
>
> **i. Persons, other than occupants of another motor vehicle or a motorcycle, for loss arising out of the use or operation in this state of such motor vehicle."**

This provision contrasts with the Ontario provisions found in part VI of the *Ontario Insurance Act*. Subsection 268(1) provides as follows:

> **"Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the statutory accident benefits schedule**

is made or amended, shall be deemed to provide for the Statutory Accident Benefits set out in the schedule and any amendments to the schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that schedule."

Subsection 2 of section 268 sets out the priority rules for determining which insurer is obliged to pay as follows:

"1. In respect of an occupant of an automobile,

- **i.** **the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,**
- **ii.** **if recovery is unavailable under subparagraph I, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,**
- **iii.** **If recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
- **iv.** **If recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.**

2. In respect of non-occupants,

- **i.** **the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,**
- **ii.** **if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,**
- **iii.** **if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
- **iv.** **if recovery is unavailable under subparagraphs i, ii, or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund."**

Subsections (4), (5), (5.1), and (5.2) refine the priorities somewhat to make it clear that an injured person who is a named insured under a policy of insurance must claim the benefits from his own insurer, and not from the insurer of the vehicle in which he or she was an occupant.

Hence the parties present this case to me as a conflict of laws case. If New York law applies to set out the respective obligations of the insurer, it is submitted that the obligation to pay the benefits falls on Gore Mutual. If Ontario law applies, then the obligation to pay benefits falls on The Co-operators.

It is to be observed that the issue in this case is not to determine the benefit scheme applicable. It is clear that the Ontario benefits scheme defining the nature and extent of compensation available to Ms. Luk is applicable. As defined in the Ontario Regulation those benefits extend to accidents which occur throughout Canada and the United States. Hence Ms. Luk clearly has an entitlement to benefits as described under the Ontario regulation from one of the two insurers involved.

The parties have put a number of cases before me and have referred me to various scholarly works on conflict of laws. Not surprisingly, there is no case directly on point to this specific situation.

Co-operators places reliance on the *Tolofson v. Jenson* decision in the Supreme Court of Canada. [2] The Tolofson case involved two claims which found their way to the Supreme Court of Canada. Tolofson was a twelve year old injured individual as a result of an accident which occurred in Saskatchewan. The car involved was registered in British Columbia. The action was brought against Mr. Jenson who was a resident of Saskatchewan. The plaintiff brought an action in British Columbia. Under Saskatchewan law the action would have been prohibited by the limitation period and liability would have been more difficult as Saskatchewan law did not permit a gratuitous passenger to make recovery based on simple negligence.

In the companion case, *Lucas v. Gagnon*, Gagnon brought an action for injuries suffered in a Quebec car accident against her husband and a Mr. Lavoie. Lavoie was a resident of Quebec. The Gagnons were residents of Ontario. The Gagnons instituted their action in Ontario as Quebec's automobile insurance law precluded bringing an action for damages in Quebec.

The Tolofson case offered the Supreme Court of Canada an opportunity to clear the air with conflicts of laws arising out of tort cases. At paragraph 42 Mr. Justice La Forest held as follows:

> **"From the general principal that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, ie., the lex loci delicti. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or inter-provincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have traveled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other, Saskatchewan, and the resulting injury occurred there as well. That being so, it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in Phillips v. Eyre, Supra, at page 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences."**
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> **I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach response to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation isn't ordinarily shared by other states and**

[2] [1994] S.C.J. 110

> **by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principal of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well-grounded legal expectations must be respected. Many activities within one state necessarily have an impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided."**

The Tolofson decision has been applied on many occasions. However, it is clearly a decision dealing with the appropriate law to determine tort liability. As observed, tort liability is to be measured against the rules of the place where the wrong has alleged to have occurred. If those rules are different then the same facts may give rise to a different outcome for liability in tort.

The question that comes before me in this arbitration is not a question of tort liability. It is a question of the respective responsibilities of the two Ontario insurers with respect to an Ontario scheme of benefits payable to an Ontario resident.

Interestingly, in a tort case where a motor vehicle accident occurred in the State of Minnesota, Ontario courts did not apply the *lex loci delicti* rule. The parties were residents in Ontario, the insurance was issued in Ontario, the consequences to members of the injured plaintiff's family were felt in Ontario and the Ontario courts concluded that Ontario law should be applied where the *lex loci delicti* would work an injustice.[3] Counsel for Gore, in his submissions, has put forward a number of cases from other jurisdictions where the *lex loci delicti* has not been applied, where it would cause an injustice to occur. I am not satisfied that there is any particular injustice which would occur in the case before me. Typically the "injustice" faced by litigants arguing in favour of the *lex fori* is a missed limitation period or some kind of statutory reduction or elimination of tort compensation. That is certainly not the case at hand.

In deed I do not regard the issues raised in this arbitration as issues of applying conflict of law principals to a tort claim. This is not a tort claim. This is a dispute between two insurers pursuant to a statutory scheme. The statutory obligations are set out in the *Ontario Insurance Act*. The procedures invoked are set out by regulations under that act. The benefits paid to Rebecca Luk, which give rise to the dispute between the insurers are regulations also set out by an Ontario regulation.

Truly the obligations of Gore and Co-operators are statutory obligations that arise out of their contractual relationships absent and affected insurance contract, there is no obligation on either insurer. But where a motor vehicle liability contract is entered into there is a statutory obligation to provide the extensive benefits prescribed pursuant to subsection 268 (1) of the *Insurance Act*. In these peculiar circumstances the obligation of both of the parties is an obligation created by contract and statute. It is not tort based. The policy considerations that require us to look closely to the *lex loci delicti* are not applicable on the facts before me.

[3] Hanlan v. Sernesky [1998] 38 O.R. (3d) 479

Viewing the issue as one of conflicts as applicable to contractual obligations, I have found guidance in the work of Professor Castel in Canadian Conflicts of Laws fourth edition. At section 452 of that work Professor Castel offers the following:

> **"Where the parties have not expressed a choice as to the proper law and no such choice can be inferred, the proper law of their contract is the system of law with which the transaction has the closest and most real connection. In such a case the court does not seek to find some presumed or fictitious intention of the parties, but rather holds the contract to be governed by the system of law with which it is most closely and really connected, for that is what is presumed that the reasonable business persons would have decided.**
>
> **In determining with which system of law the transaction is most closely and really connected, the courts should look at all of the circumstances. Whilst firm rules cannot be laid down, it is clear that the court will look at such factors as the place of contracting, the place of performance, the place of residence or business of the parties, and the nature and the subject matter of the contract. When the place of contracting is the same as the place of performance, the court may find it practically impossible to apply any other law to the contract. In that case it seems obvious that the state or province where these two events have occurred is most interested in having a system of law applied to the issues arising under the contract."**

If this were a question of the interpretation of the contract issued by either of the insurers, I would consider the question of conflict of law absolutely concluded by the operation of section 123 of the *Ontario Insurance Act*, which provides as follows:

> **"Where the subject matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or any carrier, messenger or agent to be delivered or handed over to the insured or the insureds assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada."**

Without doubt, this provision requires these contracts of insurance to be construed according to the law of Ontario.

That in itself is not a complete answer to the issue of conflict of laws. The law of Ontario would deem Co-operators to be the insurer obliged to pay the benefits. However, that specific obligation arises not from the contract wording, but arises from the statute that requires each of the insurers policies to include Statutory Accident Benefits. In my view this is sufficiently close to being a contract provision that we should apply the same contract interpretation rule. The priority rules are clearly ancillary and necessary to determining the contractual obligations of insurers and the entitlements of policyholders. The fact that these obligations are set out by statute as contrasted with a set out by regulation incorporated into the contract, makes no material difference when addressing the conflict of law questions. For these purposes, it makes good sense to apply Ontario law in such circumstances.

Looking at the analysis differently, and considering the connection between the transactions and the Province of Ontario I find the following:

1. Both insurers are carrying on business and are licensed in the Province of Ontario;

2. Rebecca Luk is a resident of Ontario;

3. Both insurers issued Ontario standard form policies to Ontario policy holders in Ontario; and

4. Both policies included the Ontario scheme of benefits.

In my view, the transactions at issue have the most direct and substantial connection with Ontario and have almost no corresponding connection with the State of New York.

Indeed, in this particular dispute between the two insurers neither of the disputants has any connection outside of Ontario. It happens that their mutual insured was injured outside of Ontario but all of the involvement of these two disputing insurance companies arises from their activities in Ontario.

Accordingly, in my view, the correct law to be applied to determining the priority issue between Gore Mutual and The Co-operators is the law of Ontario.

CONCLUSION

The issued was put before me as follows:

> "Which of The Co-operators and Gore Mutual Insurance Company bares primary responsibility for funding the claim for Statutory Accident Benefits payable to one Rebecca Luk arising out of her involvement in a motor vehicle accident that occurred on July 23, 2003 in New York State?"
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> Answer:
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> The Co-operators has the obligation for funding the claim for Statutory Accident Benefits payable to Rebecca Luk arising out of the accident of July 2003 in New York State.

The parties have in their Arbitration Agreement reserved the issues of quantum, interest, and costs. If the parties wish to put these issues before me for consideration they should do so within 30 days of this award.

Dated at Toronto this 28th day of August, 2006

Lee Samis