

2017 CarswellOnt 20137
Ontario Arbitration (Insurance Act)

Economical Insurance and Zurich Insurance Co., Re

2017 CarswellOnt 20137

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8 as amended, Section 275 AND REGULATIONS 664
and 668 as amended, UNDER THE INSURANCE ACT, supra**

IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c.17 as amended

IN THE MATTER OF AN ARBITRATION

ECONOMICAL INSURANCE (Applicant) and ZURICH INSURANCE COMPANY
LTD. and OLD REPUBLIC INSURANCE COMPANY OF CANADA (Respondents)

Kenneth J. Bialkowski Member

Judgment: November 30, 2017

Docket: None given.

Counsel: Matthew Duffy, Sonia Fabiano, for Applicant, Economical Insurance
Kaili Toome, for Respondent, Zurich Insurance Company Ltd.
Anthony Gatensby, Catherine Korte, for Respondent, Old Republic Insurance Company of Canada

Headnote

Insurance --- Claims — Payment of insurance proceeds — General principles
Insurance --- Claims — Payment of insurance proceeds — Recovery of expenses

Kenneth J. Bialkowski Member:

ISSUE - LOSS TRANSFER LIABILITY DETERMINATION PURSUANT TO RULE 5

1 In the context of a loss transfer dispute pursuant to *s. 275 of the Insurance Act, R.S.O. 1990, c. I.8*, with respect to a motor vehicle accident which occurred on October 5, 2013 and accident benefits paid to three claimants, the issues before me are to determine:

- a. Whether the Respondents, either of them or both of them, are required to indemnify the Applicant for Statutory Accident Benefits paid to or on behalf of Robert McGuigan, Adriana McGuigan and Mathew McGuigan;
- b. The indemnity amount to be paid by the Respondent(s) to the Applicant;
- c.. The amount of interest owing by the Respondent(s) to the Applicant on such indemnity as may be found owing; and,
- d. A determination of the costs of these proceedings herein and the burden of payment of same.

PROCEEDINGS

2 The matter proceeded on the basis of document briefs, Books of Authority and written submissions. The document briefs included among other things, the full police file, Examination for Discovery transcripts and witness statements.

BACKGROUND

3 This matter involves a loss transfer dispute between the Applicant, Economical Insurance Group ("Economical") and the Respondents, Zurich Insurance Company Ltd. ("Zurich") and Old Republic Insurance Company of Canada ("Old Republic") and arising out of a motor vehicle/pedestrian incident that occurred on October 5, 2013, in which one, Robert McGuigan, pedestrian, perished.

4 At the time of the accident, Economical insured Robert McGuigan and his spouse, Adriana McGuigan. Zurich insured a tractor-trailer operated by Rajwinder Singh Chath. Old Republic insured a tractor-trailer operated by David Armstrong.

5 Economical claims loss transfer indemnification from Zurich and/or Old Republic for Statutory Accident Benefits paid to Robert McGuigan, Adriana McGuigan and Mathew McGuigan.

6 Robert McGuigan was involved in a fatal motor vehicle accident on October 5, 2013. Robert McGuigan is survived by his spouse, Adriana McGuigan and his son, Mathew McGuigan.

7 At all material times, Robert McGuigan was insured by Economical pursuant to a motor vehicle liability policy, which did not insure a heavy commercial vehicle.

8 As a result of the death of Robert McGuigan, Economical, as the Statutory Accident Benefits carrier, paid Statutory Accident Benefits for funeral expenses and death benefits. Economical also paid medical and rehabilitation benefits, cost of examinations and income replacement benefits to Adriana McGuigan as a result of psychological impairment arising from the death of her husband and medical and rehabilitation benefits to Mathew McGuigan as a result of psychological impairment arising from the death of his father.

9 To date, Economical has paid a total of \$135,465.65. Robert McGuigan's claim is capped. Adriana McGuigan's claim has been resolved on a full and final basis. The claim of Mathew McGuigan remains open.

SYNOPSIS

10 On the date in question, Rajwinder Singh Chath was driving a 2007 Kenworth tractor-trailer unit owned by Hind Transport (hereinafter referred to as the "Chath tractor-trailer"), insured by Zurich, westbound on Highway 401 near Graham Road in West Elgin, in the Province of Ontario.

11 The Chath tractor-trailer overturned onto the highway, obstructing the north lane of Highway 401 westbound of the two westbound lanes and partially obstructing the south lane. Approaching westbound would then be facing the undercarriage of the Chath tractor-trailer while it lay on its side on the roadway. Chath and his co-driver, Manpreet Singh Chahal exited the overturned vehicle and proceeded to the north shoulder.

12 The Claimant, Robert McGuigan, was a passenger of a 2007 Lexus sedan, operated by Antonio Acampora, travelling westbound on Highway 401 near Graham Road in West Elgin, which came upon the overturned Chath tractor-trailer.

13 Antonio Acampora stopped the 2007 Lexus sedan on the north shoulder of Highway 401. Robert McGuigan exited the 2007 Lexus sedan to provide assistance.

14 Another passerby, Donna Kay Davis, stopped at the scene of the overturned Chath tractor-trailer, as did a vehicle operated by Ronald Roy Thomson.

15 Donna Kay Davis was the driver of a 2012 Kenworth tractor-trailer, travelling westbound on the 401. When she came upon the Chatha tractor-trailer, she slowed down and went around the Chatha-tractor-trailer onto the shoulder.

16 There were at least three vehicles parked near the overturned Chath tractor-trailer with their four-way flashers illuminated.

17 Another passerby, Adrian Ogelsby, was driving a Mack Model 600 tractor-trailer, originally in the right lane of Highway 401. When he came upon the overturned Chatha tractor-trailer, he slowed down and swerved around the Chatha tractor-trailer. His front right mirror clipped the Chatha trailer.

18 Donna Kay Davis had flares in her vehicle, which she brought to the scene. Robert McGuigan assisted Donna Kay Davis in setting up the flares.

19 As this was occurring, David Armstrong was driving a 2007 Peterbilt tractor-trailer unit owned by Patco Transport (hereinafter referred to as the "Armstrong tractor-trailer"), insured by Old Republic, westbound on Highway 401 near Graham Road in West Elgin.

20 The Armstrong tractor-trailer collided with the overturned Chath tractor-trailer. In the aftermath of the collision between the Armstrong tractor-trailer and the Chath tractor-trailer, Robert McGuigan was struck and killed.

21 Rajwinder Singh Chath and David Armstrong were each operating heavy commercial vehicles.

FACTS AS CONTAINED IN DOCUMENT BRIEF WITH DOCUMENT REFERENCE

22

POLICE FILE Tab 3

Synopsis of Yussef Mohamed, dated October 5, 2013 - Tab 3A of the Applicant's Document Brief

1. Rajwinder Singh Chath was operating a 2007 Kenworth commercial vehicle, hauling a 2013 trailer carrying 40,000 pounds of metal parts.¹

2. Mr. Chath's advice to the police is that he was cut off by a white pickup. This caused him to jerk his tractor-trailer but his trailer then pushed him into the ditch.²

3. David Andrew Armstrong was operating a 2007 Peterbilt tractor, hauling a 2013 Hyundai trailer loaded with 30,000 pounds of dry material.³

4. His tractor-trailer struck the Chath trailer.⁴

5. Robert McGuigan had been attempting to assist in the lighting of flares in an effort to alert oncoming vehicles and drivers and was "possibly struck" by David Andrew Armstrong.⁵

Witness Statement to the Police of Rajwinder Singh Chath, dated October 4, 2013 (should be October 5th) - Tab 3B of the Applicant's Document Brief

6. He was operating westbound on the 401 when he was cut off by a pickup. Accordingly, he moved to the left lane suddenly but, because of his speed (102 km/h), the trailer pushed the truck into the ditch.

Witness Statement of David Andrew Armstrong, dated October 5, 2013 - Tab 3C of the Applicant's Document Brief

7. He came through a thick cloud of fog and when he came out of it, 20 feet in front of him, there was a tractor-trailer on its side. He struck it. He had been going 95 to 100 kilometers an hour.

Witness Statement of Adrian Oglesby, dated October 4, 2013 (should be October 5th) - Tab 3D of the Applicant's Document Brief

8. He was travelling westbound on the 401. He saw trucks parked eastbound with their 4 ways going. He looked forward and came upon the Chath vehicle totally blocking the right lane and partially blocking the left lane. He saw the tires and undercarriage. He swerved into the left shoulder, slowed and braked. His mirror clipped part of the Chath truck that was sticking out but the transport truck he was operating remained upright.

Witness Statement of Antonio Acampora, dated October 5, 2013 - Tab 3E of the Applicant's Document Brief

9. Before the accident, he saw a transport one kilometer ahead weaving all over the road. After the accident, he stopped and he and the deceased were trying to light flares. A truck came along and struck the overturned trailer and hit Robert McGuigan as well.

Jennifer Acampora's Statement, dated October 5, 2013 - Tab 3F of the Applicant's Document Brief

10. She was a passenger in the Antonio Acampora vehicle. They were heading west from London.

11. She saw a transport weaving across the road. It put on its signal and started to pass traffic so she lost sight of it. They then came upon it again and the driver had flipped his truck. Another transport then struck the back end of that trailer.

12. Robert McGuigan and a female truck driver started to light flares; another truck came along and she knew it was going to hit the truck on the road. The backend of the trailer that was on the road was completely across the driving lane and partially across the passing lane.

Kimberly Lynn Acampora Witness Statement, dated October 5, 2013 - Tab 3G of the Applicant's Document Brief

13. She was another passenger in the Acampora vehicle.

14. The second transport truck clipped the Chath transport truck.

15. Robert McGuigan ran the wrong way.

16. She had seen a transport truck weaving on the road. She did not know if it was the Chath transport truck. It passed another transport. They lost sight of it for a few seconds. They stayed behind this transport truck because they did not want to get hit.

17. It could have been the same truck that ended up in the ditch, and more than likely was, but she did not want to get the truck driver in trouble if it was not.

18. If it had been the same truck, she wished she had called 911. It was all over the road, it was in the middle of the road for 10 kilometres and then it moved back over. She indicated that it might not be the same guy; it would be a big coincidence if it was not.

Witness Statement of Michael Collicutte, dated October 5, 2013 - Tab 3H of the Applicant's Document Brief

19. He observed the Chath transport truck on its side and a couple of trucks went around it.

Witness Statement of Donna Kay Davis, dated October 4, 2013 (should be October 5th) - Tab 3I of the Applicant's Document Brief

20. Ms. Davis was westbound on the 401. She came out of the rest area when she saw the "Robair truck" and a 4 wheeler with their flashers on. She got down to about 20 miles per hour. She went around on the shoulder, parked, got out of her car and put her vest on. She had flares and got them out. A Chrysler truck came and barely hit the Chath tractor-trailer. A second truck hit it and kept going. The Chrysler truck hit the trailer first, then another truck that left, then the Patco tractor-trailer. The Patco truck hit hard and caused it to move and the debris to fly.

21. Robert McGuigan was standing beside her and she heard a bang and she said "run". Mr. McGuigan ran towards the road and she ran in the ditch. She was hit and knocked down. The Oglesby vehicle had hit the Chath trailer first but the Armstrong tractor hit it very hard. Mr. McGuigan ran the wrong way.

Witness Statement of Adam Gardner, dated October 5, 2013 - Tab 3J of the Applicant's Document Brief

22. Nobody could see the truck on its side.

23. One after the other, big trucks sideswiped the side of the trailer and the fourth truck hit the trailer head-on. He might have been braking for 15 to 20 meters prior to impact.

Witness Statement of Lauren Marie Dobbelaar, dated October 5, 2013 - Tab 3K of the Applicant's Document Brief

24. She had been standing on the side and the tractor-trailer hit the trailer and then hit their vehicle and pushed it into the ditch. This was the Armstrong tractor-trailer.

Witness Statement of Ronald Roy Thomson, dated October 5, 2013 - Tab 3L of the Applicant's Document Brief

25. The Chath transport truck had its backend across one lane and part of the second lane. Two transports barely clipped the Chath vehicle and then the Armstrong transport truck caught the backend. They had to jump out of the way.

Police Officer's Notes

Brad Derrough - Tab 3M of the Applicant's Document Brief

26. Robert McGuigan was believed to have been struck by the second transport truck.⁶

Y. (Joe) Mohamed - Tab 3N of the Applicant's Document Brief

27. Robert McGuigan was assisting Donna Kay Davis in alerting other traffic of the flipped transport by lighting flares when he was struck by a second transport truck or was hit by the Armstrong transport.⁷

Edward Phillipo - Tab 3O of the Applicant's Document Brief

28. The Chath transport truck hit the south shoulder and overcorrected to the north shoulder. A second transport truck hit the Chath motor vehicle and then hit Robert McGuigan, who was putting out flares.

Investigative Summary Report of Cory Rowsell, dated June 10, 2014 - Tab 3P of the Applicant's Document Brief

29. The Chath transport truck lost control and flipped on its side, partially blocking one of the westbound lanes. At least two other transport trucks slightly struck the Chath tractor-trailer unit. Then David Andrew Armstrong directly hit the Chath trailer in the through lane. The Armstrong and Chath trailers hit Robert McGuigan.⁸

30. The Chath vehicle veered off the westbound lanes and then the driver overcorrected to the right. The vehicle veered back into the live lanes of traffic and flipped onto the driver's side. It came to rest blocking the right lane and a portion of the left lane with the undercarriage of the transport truck facing oncoming traffic. There were no lights or reflectors on the undercarriage.⁹

31. Two passenger vehicles stopped to render assistance and at least two transport trucks made contact with the overturned unit and finally the Armstrong truck directly struck the undercarriage of the trailer. The Armstrong truck smashed through and struck Robert McGuigan, who was knocked down and carried 60 to 70 meters.¹⁰

Transcript of Rajwinder Singh Chath taken June 19, 2017 - Tab 4 of the Applicant's Document Brief

32. He was born March 26, 1992. ¹¹
33. Before heading out, he inspected the truck and trailer, not the load. ¹²
34. Some auto parts were loaded into the trailer. ¹³
35. The way the parts were secured they were not prevented from shifting from side to side. ¹⁴
36. They could move. ¹⁵
37. He told them that it was not a proper way to load the trailer. ¹⁶
38. He told them it was not secure. ¹⁷
39. This improper loading had happened on a prior occasion and his employer had told him to ask them to secure the load with some cardboard on the side or something. ¹⁸
40. Other companies have specific trailers for the product but at Hind, they just had a basic trailer with a load bar, regardless of what was going to be picked up. ¹⁹
41. The second time (this occasion) he picked up the trailer, he encountered the same problem with the load. ²⁰
42. He had an argument with the loader that it was not properly secured. ²¹
43. The loader said "too bad", there was nothing he was going to do to help him. ²²
44. He had no option other than to bring it back. ²³
45. The only other option would have been to leave the trailer, to unlock the trailer from the cab and drive back. ²⁴
46. If he did that, he would have been fired. ²⁵
47. He had told his co-driver that the load was not really secure. ²⁶
48. He was concerned that the load could move over and flip the trailer. ²⁷
49. The load could shift and the trailer could flip. ²⁸
50. In Brampton, they were told to take the load to Windsor. ²⁹
51. While in Brampton, there was no way he could add some securement to the load. ³⁰
52. It needed some big installment to prevent it from shifting. ³¹
53. There was nothing available at that time of night to secure it. ³²
54. He adjusted for the fog by driving 100. ³³

55. The fog was after London. ³⁴
56. He saw a white pickup truck in the left lane driving fast. The pickup moved just in front of him and he put his brakes on. Mr. Chath could not control the truck so it flipped over on the right and was covering one quarter of the right lane on a two-way highway. ³⁵
57. He had been going 100 kilometers an hour. ³⁶
58. The pickup truck had his high beams on. ³⁷
59. The fog was flashing in his eyes. ³⁸
60. The pickup driver was going 100-115 but he came ahead of him and stopped. ³⁹
61. He was weaving. ⁴⁰
62. He left his lane and came into Chath's lane. ⁴¹
63. He pulled right in front of Chath, three or four meters, ⁴²
64. without signaling, ⁴³
65. Chath immediately applied his brakes and lost control on the tractor. ⁴⁴
66. He was afraid he would hit the pickup truck who was right ahead of him. ⁴⁵
67. He tried to move to the left lane. ⁴⁶
68. At the same time as he was braking, he was trying to move to the left lane and the trailer flipped. ⁴⁷
69. It was an emergency move. ⁴⁸
70. Probably the load shifted or maybe the swerve caused the trailer to tip. ⁴⁹
71. The unsecured load maybe moved over to the side and caused the trailer to flip. ⁵⁰
72. The tractor and trailer flipped over on the driver's side and the trailer covered one quarter of the right lane of the highway. ⁵¹
73. The left lane was wide open. ⁵²
74. The tractor was sitting on the driver's side. ⁵³
75. He does not think the airbrake braked properly. ⁵⁴
76. He thinks the brakes did not work the way they should have. ⁵⁵
77. He did not think the ABS system worked properly. That made it flip over. ⁵⁶

78. He ran away from the trailer. He was afraid it might catch fire.⁵⁷
79. The four-way flashers were not on.⁵⁸
80. They needed to prevent someone from hitting the trailer.⁵⁹
81. He did not go to his vehicle to get his flashlight.⁶⁰
82. His truck was flipped over on the side that contained the compartment with the reflective triangles so they could not be reached.⁶¹
83. No other reflecting devices or lights or anything were put out.⁶²
84. Another truck passed in the left lane and did not hit the trailer.⁶³
85. Another tractor from Conway Trucking hit a small portion of the trailer.⁶⁴
86. The Conway vehicle stopped 500 meters.⁶⁵
87. The pickup was a white Ford and a man was driving it.⁶⁶
88. Another professional truck driver, named Muhammad, last name and company he works for unknown, said that he saw the pickup truck driver. He gave a statement to the police which Chath heard but did not see. Chath has not seen Muhammad since.⁶⁷
89. An old guy was coming to help them but another truck came and hit him. This gentleman ended up being deceased. He was with a lady around his age, who Chath presumed was his wife.⁶⁸
90. A truck from Patco Transport, going 105, did not see the trailer in the right lane, boomed into it, hit the black car and then hit the old man coming to them.⁶⁹
91. He did not see the impact.⁷⁰
92. The tractor came, their attention was directed right, he did not see anything. The old guy was looking at the truck.⁷¹
93. The investigating officer was named Youssef Mohamed and Chath admits that he probably, maybe, was confusing the name of the truck driver with this officer.⁷²
94. He then remembered that the officer was Mohamed.⁷³
95. But there was two separate people named Mohamed.⁷⁴
96. He disagreed with the police description that he drifted off the roadway.⁷⁵
97. The adjuster for Zurich spoke with a person named Abdul Malik on July 23, 2014 who advised that he was on the highway behind the Hind transport tractor-trailer (Chath) and the Chath vehicle suddenly lost control and rolled. Malik did not know what caused the driver to lose control.⁷⁶

98. Chath was instructed by his employer after his first complaint, that, if he had safety concerns about the safety of the load, he should call his employer to get direction. He should not just start driving the vehicle if he had concerns about the safety of the load.⁷⁷

99. He had called his employer and they told him.... The loader told him that they had been doing this for years. They had been loading the trucks for years.⁷⁸

100. The first time that he complained, he was told he did the right thing to express concern about the safety of the load and not take it if he had concerns.⁷⁹

101. The second time he had the very same concern.⁸⁰

102. They told him to bring it home.⁸¹

103. The AB system of his brakes was not running smooth.⁸²

104. He did not feel the brakes grab.⁸³

105. It did not stop to the point like it used to stop.⁸⁴

106. His vehicle did not slow because of his braking.⁸⁵

107. He braked for a few seconds.⁸⁶

108. Mr. Chath was standing beside the OPP officer when the witness, Muhammad, give his statement. Mr. Chath's counsel does not have a statement from someone named Muhammad.⁸⁷

109. Neither counsel on the examination had read anything in the material about an independent witness corroborating Mr. Chath's evidence about the white pickup truck.⁸⁸

Transcript of the Examination for Discovery of David Andrew Armstrong, taken September 28, 2016 - Tab 5 of the Applicant's Document Brief

110. Mr. Armstrong was born July 4, 1970.⁸⁹

111. He was heading westbound on the 401.⁹⁰

112. Weather conditions were pretty good from Ayr to London and from London to the accident; there were five or six little patches of fog.⁹¹

113. The fog was little clumps here and there.⁹²

114. He would be right through it in a couple of seconds.⁹³

115. He was driving 90 to 95.⁹⁴

116. When he hit the first fog patch, he turned the cruise control off and slowed down a little bit.⁹⁵

117. The fog did not make it difficult to drive. He could see cars and lights and whatnot.⁹⁶

118. It would impede him from seeing something black in the middle of the road.⁹⁷

119. At times he could only see 80 feet ahead of him.⁹⁸

120. Weather conditions were not such that he felt the need to pull over.⁹⁹

121. or that it was unsafe for him to continue to drive.¹⁰⁰

122. He has no memory of being passed by a pickup truck that may have been travelling at fairly high speeds,¹⁰¹

123. in the 140 km an hour range with high beams on.¹⁰²

124. He did not encounter such a vehicle.¹⁰³

125. He was passed by a couple of cars but nothing whizzing past him.¹⁰⁴

126. At the time of the collision, or in the moments before the collision, he was going 90-95 kilometers an hour.¹⁰⁵

127. Prior to that, he had his cruise set at 105.¹⁰⁶

128. The police report identified his speed at 102 kilometers an hour and Mr. Armstrong believed he told them that.¹⁰⁷

129. The last patch of fog lasted two seconds.¹⁰⁸

130. It was a dense enough that you could see taillights but you could not see a dog run across.¹⁰⁹

131. He was in the right hand lane.¹¹⁰

132. Within a few seconds he saw an overturned trailer,¹¹¹

133. two seconds,¹¹²

134. he saw the underside of the trailer.¹¹³

135. It was not illuminated in any way.¹¹⁴

136. There were no lights emanating from the cab or anything, he just saw the bottom of the trailer.¹¹⁵

137. When he was 50 feet away, he tried to brake.¹¹⁶

138. He veered to the left.¹¹⁷

139. Most of his truck had moved to the left hand lane but the back of his trailer would still be hanging right.¹¹⁸

140. The disabled transport was blocking the whole highway,¹¹⁹

141. right across both lanes.¹²⁰

142. He was trying not to hit it by moving as far over to the left to get onto the shoulder.¹²¹

143. He hit the bottom of the trailer with the wheels facing out with the passenger side of his tractor. ¹²²
144. The trailer was right across both lanes. ¹²³
145. He observed a big piece of metal coming at his face. ¹²⁴
146. He did not see any lights, just the bottom of the trailer. ¹²⁵
147. He would have used the description of clumps of thick fog. He also would have said that, intermittently, for a couple of seconds, there was low visibility and then it would be good. ¹²⁶
148. The statement that he gave to the police was consistent with what he remembered telling the police officer. ¹²⁷
149. He described the fog as a thick cloud. There would be clumps of thick and then nothing or light. The final patch was a thick patch. ¹²⁸
150. He told the police officer he was going between 95 and 100 kilometers an hour. ¹²⁹

ANALYSIS AND FINDINGS

23 In the context of a loss transfer dispute pursuant to s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, Economical seeks indemnity from Zurich and Old Republic for the statutory accident benefits it has paid to or on behalf of the claimants herein.

24 Loss transfer is a creature of statute created in 1990 at a time when there was an expansion of the availability of statutory accident benefits and a restriction to compensation available in tort with the introduction of a verbal threshold and deductible. This shift of compensation towards first party or no-fault benefits and away from the fault based tort system created an imbalance of payment with respect to insurers providing coverage to certain classes of vehicles, such as motorcycles and heavy commercial vehicles. For example, the occupant of a motorcycle was more likely to sustain significant personal injury, whereas a heavy commercial vehicle was more likely to cause significant personal injury when involved in a collision. The loss transfer legislation created a scheme to balance or re-allocate the obligation to pay statutory accident benefits. It essentially enabled insurers of motorcycles to seek indemnity from a second party automobile insurer to the extent of liability on the part of the operator of the automobile, as determined by application of the Fault Determination Rules [Ontario Regulation 283/95](#). It essentially enabled automobile insurers, like Economical here which did not insure a heavy commercial vehicle, to seek indemnity from a second party insurer of a heavy commercial vehicle to the extent of liability on the part of the operator of the heavy commercial vehicle, as determined by application of the [Fault Determination Rules](#). The obvious purpose of this legislation was to re-allocate the losses between insurers of certain classes of vehicles so that the losses sustained by the insurers were similar to the losses that would have been paid by the insurers in a traditional tort system and in the absence of statutory accident benefits.

25 Loss transfer legislation was created with the enactment of Section 275(1) of the *Insurance Act* R.S.O. 1990 c.I.8 (the "*Act*"), which provides that the Insurer responsible under subsection 268(2) for the payment of statutory accident benefits is entitled to indemnification from the "insurers of such class ...of automobiles as may be named in the regulations involved in the incident from which responsibility to pay the statutory accident benefits arose...".

26 Section 275(1) specifically states:

Indemnification in certain cases

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

classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

27 The Regulation identifying the class of vehicles to be subject to loss transfer was Ontario Regulation 664. Section 9 of the Regulation provides as follows:

INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits; ("assureur de première part")

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms; ("véhicule utilitaire lourd")

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*; ("motocyclette")

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*; ("motoneige")

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*; ("véhicule tout terrain")

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer. ("assureur de deuxième part") R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s. 9 (3); O. Reg. 780/93, s. 1.

28 Indemnification under subsection 275(1) of the *Insurance Act* shall be made according to the respective degree of fault of each insurer's insured as determined under the [Fault Determination Rules](#), as set out in Ontario Regulation 668/90 under the *Insurance Act* ("[Fault Determination Rules](#)" or "FDR").

29 Subsection 275(2) of the *Insurance Act* provides as follows:

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

30 If no particular Rule applies, then the "ordinary rules of law" are to be applied to determine fault. [Rule 5 of the FDR](#) states as follows:

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.

(2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

31 If the insurers are unable to agree with respect to indemnification under s.275 of the *Insurance Act*, the dispute shall be resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, Chap 17.

32 Subsection 275(3) of the *Insurance Act* provides as follows:

275(3) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitration Act*.

33 So in the case before me, Economical, which did not insure a heavy commercial vehicle, would be entitled to indemnity from the insurers of the heavy commercial vehicles, Zurich and Old Republic, to the extent of liability found on the operator of the heavy commercial vehicle that it insured.

34 On a review of the evidence I am satisfied none of the [Fault Determination Rules](#) apply to the facts on this case and that the liability determination must be decided by the application of the "ordinary rules of law" as per [s.5 of the FDR](#) set out above. However, in order to determine liability by application of the ordinary rule of law, it is also necessary to consider the impact of [Rule 3 of the Fault Determination Rules](#) on the analysis.

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

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

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

35 [Rules 3 and 5 of the FDR](#) were recently addressed by the Court of Appeal in *State Farm Mutual Automobile Insurance Co. v. Aviva Canada Inc.*, [2015] O.J. No. 6852 (Ont. C.A.). The Court of Appeal made it clear that the "ordinary rules of law" did not mean "the ordinary rules of tort law" stating that if it this was the legislative intent then it would have included the word "tort". The Court stated:

A determination of fault in tort law is often a lengthy, detailed and nuanced process, which requires findings of fact on the very circumstances excluded from consideration by [rule 3](#). By precluding a pure tort law approach to fault determination, [rule 3](#) acts in harmony with the purpose of the legislative scheme because it promotes a more summary approach for determining fault.

A determination of fault based on tort law rules would necessarily engage a consideration of the circumstances that the legislature purposefully excluded from consideration by [rule 3](#). Furthermore, as already discussed, resort to pure tort law, for the determination of fault, would run contrary to the purpose of the loss transfer scheme, which is to provide an expedient and summary way of resolving indemnification claims.

36 Essentially the Court of Appeal stated that the words, "*the ordinary rules of law*", must be interpreted having regard to the purpose and scheme of loss transfer - which is to provide for an expedient and summary method of spreading the cost of statutory accident benefits amongst insurers, in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude and that Rule 3 applies to all determinations of fault made under the FDR, including those made under Rule 5. Therefore in completing my analysis, I have not considered the circumstances in which the incident occurred, including weather conditions, road conditions, visibility or the action of pedestrians, nor the location of the insured's automobile of the point of contact with any other vehicle involved in the incident.

37 I am of the view that the FDR were clearly meant to cover incidents involving pedestrians. There was no opposition by the parties to this contention and all agreed that liability be determined by application of the "ordinary rules of law" as set out in s.5 of the FDR with consideration of the limitations imposed by s.3 of the FDR.

38 Upon these principles, I cannot help but find that liability for the subject incident rests with both the operator of the Chath tractor-trailer insured by Zurich and the operator of the Armstrong tractor-trailer insured by Old Republic, with the more difficult issue being the comparative fault as between the two operators. I am of the view that Chath was negligent in losing control of his vehicle, thereby creating a hazardous situation to others using the highway and that Armstrong was negligent for striking a stopped vehicle on the roadway when, with proper lookout and reasonable driver reaction, could have been avoided. I find each driver equally at fault.

39 I find that neither driver can disprove that the incident occurred without negligence on their part as required by the reverse onus provisions of s.193(1) of the *Highway Traffic Act* applicable to accidents involving pedestrians like Mr. McGuigan which states:

Onus of disproving negligence

"When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle."

40 I am satisfied on the evidence that the entire incident was precipitated by Chath's loss of control, which left his vehicle resting on its side blocking the full north lane of westbound 401 and partially blocking the south lane of westbound 401. Not only was it blocking those parts of the roadway, but it was situated in a fashion that approaching traffic was facing the undercarriage of the vehicle and not parts of the vehicle ordinarily illuminated or covered with reflective coverings. There is no doubt that this was a hazard for approaching motorists like Armstrong which contributed to the ultimate collision between their respective vehicles.

41 Chath has claimed that his loss of control was precipitated by the movement of an unidentified vehicle, being a white pickup truck that overtook his tractor-trailer, then moved into his lane without a signal. There was no corroboration by anyone of the involvement of such a vehicle. The evidence of the occupants of the Acampora vehicle make reference to the movements of the Chath tractor-trailer some distance ahead but do not mention any white pickup truck making a sudden lane change as alleged. Furthermore, the alleged reaction of Chath to the alleged movement of the white pickup truck as set out in his statement to police does not make sense. He claims to have been passed at high speed yet he claims that once the pickup cut in front of his tractor-trailer he moved to the left in order to save the pickup. If the pickup up was travelling at such a high speed, there would not have been any reason to make any movement. There is no mention in the police statement of the pickup truck slowing or stopping in front of the Chath vehicle. It is only on his Examination for Discovery some time later that he claims the pickup came ahead of him and stopped. This would have been an extremely unusual manoeuvre by the unidentified motorist and difficult to accept. Why would any motorist make a sudden lane change then stop suddenly in front of a heavy tractor-trailer travelling at highway speeds? To do so would be putting their life at risk. This is simply too difficult to accept. In the same discovery, Chath also puts blame on the unsecured load and the fact that his airbrakes did not work the way they should have.

42 Chath's explanation of involvement with an unidentified white pickup for his loss of control does not in my view carry the ring of truth and certainly does not satisfy the onus upon the operator of a vehicle which loses control to rebut the presumption of negligence. The decisions of *McIntosh v. Insurance Corp. of British Columbia*, 2003 BCSC 775 (B.C. S.C.) and *Redlack v. Vekved*, [1996] B.C.J. No. 3040 (B.C. C.A.), deal with this well established presumption. More likely, I find that the loss of control was caused by the speed and movement of his vehicle travelling with an unsecured load and the difficulties created by it. He chose to drive with an unsecured load and the difficulties it would create in controlling the movement of his vehicle. On his Examination for Discovery, he stated that he was aware that an unsecured load was subject to shifting. The evidence is simply insufficient to prove that it was the movement of an unidentified vehicle that caused Chath's loss of control and the dangerous position it left his vehicle when it came to rest.

43 The finding of negligence on the part of Chath is established without having to consider the rescuer doctrine urged upon me by Economical and Old Republic in their submissions. Such doctrine is more akin to a tort analysis.

44 I do not find that Chath breached s.170 of the *Highway Traffic Act* dealing with the requirement to set out flares when a vehicle becomes disabled on a highway. Firstly, I find that he did not have access to the flares stored in his vehicle as they were stored in a compartment on the side of his truck which was lying on the ground. He simply did not have access to that compartment. Secondly, I do not believe in the circumstances he had the opportunity to arrange for others to complete such task with flares in their possession. I am satisfied on the evidence that all involved, including those coming onto the scene, were doing the best they could to get flares in place but the subject collision took place before they could get the task completed. I am satisfied that Chath has met the statutory exception to the rule as set out in s. 170(8) of the *Act*.

45 Although the Chath tractor-trailer was a hazard on the road in the position it was in, I am nevertheless satisfied that with proper lookout and a reasonable reduction in speed on the part of Armstrong, a collision could have been avoided by slowing to a stop or slowly making its way around the disabled vehicle with use of the remaining portion of the westbound passing lane. When reviewed carefully, the report of the expert retained by Old Republic, that being the report of Mark Fabbioni dated October 30, 2017, supports such a conclusion. The analysis of this forensic engineer found that the Armstrong tractor-trailer was travelling at between 93 and 105 km/h just after it impacted the Chath tractor-trailer *and really had not slowed much prior to impact*. This is consistent with the statement provided by Armstrong to the police wherein he indicated that he was travelling at 95-100 km/h. The evidence supports a finding that Armstrong had not significantly reduced his speed prior to impact, despite what was there to be seen in front of him as he travelled westbound on the 401.

46 In addition and most importantly, the forensic engineering report, as well as the contents of the police file, outline the various vehicles in the vicinity of the disabled Chath tractor-trailer when Armstrong approached that ought to have alerted Armstrong to a situation that would cause one to proceed with great caution and resultant reduction in speed. There were vehicles stopped on both sides of the highway. There were stopped vehicles on the shoulders of both the westbound and eastbound lanes. Eastbound trucks were stopped on the south shoulder of the eastbound lanes with 4 way flashers activated and several vehicles were stopped on the north shoulder several with 4 way flashers activated.

47 Piecing the chronology together from the police file, it would appear that the automobiles operated by Thomson and Acampora first came upon the disabled Chath tractor-trailer lying on its side and came to a stop on the north shoulder. There is no indication that either driver had to take any evasive action to avoid the Chath tractor-trailer. Then the tractor-trailer operated by Davis came upon the scene. By that time, she noticed two tractor-trailers parked with 4 way flashers activated, slowed to a speed of about 20 mph and managed to get around the disabled Chath tractor-trailer without contact. She then parked on the shoulder and activated the 4 way flashers of her tractor-trailer. The tractor-trailer operated by Ogelsby then came upon the scene. He had been proceeding westbound in the right lane the same lane later approached by Armstrong. On approach, Ogelsby noticed the trucks parked on the eastbound side of the highway with 4 way flashers activated. Ogelsby slowed and swerved toward the left shoulder where the mirror of his truck clipped the disabled Chath vehicle. He then came to a stop on the shoulder. This minor contact between Ogelsby and Chath was observed by Davis and the occupants of the Acampora vehicle from their position on the shoulder. A second truck came along making minor contact with Chath and simply continued westbound. By the time Armstrong approached there was a lot more to be seen than that observed by the drivers of the automobiles first arriving

on the scene who managed to avoid any contact or Ogelsby and the other unidentified tractor-trailer operator who managed to avoid serious impact with Chath. By the time Armstrong arrived, there were 4 way flashers to be seen on both sides of the highway. Clearly a professional driver like Armstrong, if keeping a proper lookout, ought to have observed all or some of this, like the operators of three tractor-trailer operators travelling westbound (Ms. Davis, Ogelsby and the unidentified operator that continued on) did and slowed to a speed that would have allowed him to avoid the serious contact which ensued.

48 On the basis of the aforesaid, I find both Chath and Armstrong equally at fault for the collision between their two vehicles which led to the death of Mr. McGuigan and the accident benefits claims which are the subject matter of this loss transfer dispute. Chath for creating the hazardous situation in the first place and Armstrong for improper lookout and a failure to reduce speed to avoid a significant impact as other westbound motorists had been able to do prior to his arrival on the scene.

ORDER

49 I hereby order:

1. That Zurich and Old Republic equally indemnify Economical, subject to applicable deductibles, for benefits reasonably paid to the claimants to date as well as indemnifying Economical for future benefits reasonably paid to Mathew McGuigan together with interest calculated pursuant to the *Courts of Justice Act*.
2. That Zurich and Old Republic equally pay the legal costs of Economical with respect to this arbitration on a partial indemnity basis.
3. That Zurich and Old Republic equally pay the costs of the Arbitrator.

50 If the parties are unable to work out the indemnity, interest or costs issues I will reactivate my file and deal with those issues.

51 I have made the findings with respect to costs on the basis that there were no formal offers to settle made prior to the arbitration. If offers to settle were made pursuant to s.54 of the Arbitration Act, 1991, C. 17, S.O. 1991, I will reconsider the costs orders made and would appreciate being advised immediately followed by submissions with respect to costs in writing within ten days of the release of this decision.

Footnotes

- 1 Synopsis of Yussef Mohamed, dated October 5, 2013 pages 1 & 2 at Tab 3A of the Applicant's Document Brief
- 2 Ibid at page 2
- 3 Ibid
- 4 Ibid
- 5 Ibid at page 3
- 6 Officer Brad Derrough's Notes page 3 at Tab 3M of the Applicant's Document Brief
- 7 Officer Y. (Joe) Mohamed's Notes pages 8 & 9 at Tab 3N of the Applicant's Document Brief
- 8 Investigative Summary Report of Cory Rowsell dated June 10, 2014 page 5 at Tab 3P of the Applicant's Document Brief
- 9 Ibid at page 6
- 10 Ibid
- 11 Question 7

- 12 Question 108
- 13 Question 232
- 14 Question 240
- 15 Question 241
- 16 Question 249
- 17 Question 250
- 18 Question 260
- 19 Questions 266-271
- 20 Question 272
- 21 Question 273
- 22 Question 275
- 23 Question 276
- 24 Question 278
- 25 Question 281
- 26 Question 284
- 27 Question 285
- 28 Questions 286-287
- 29 Question 299
- 30 Question 330
- 31 Question 331
- 32 Question 332
- 33 Question 343
- 34 Question 345
- 35 Question 362
- 36 Question 367
- 37 Question 369
- 38 Question 374
- 39 Question 381

40	Question 384
41	Questions 385 & 386
42	Question 389
43	Question 390
44	Question 391
45	Question 392
46	Question 396
47	Questions 395-397
48	Question 399
49	Question 406
50	Question 408
51	Question 409
52	Question 411
53	Question 414
54	Question 426
55	Question 427
56	Question 433
57	Questions 450-454
58	Question 461
59	Question 472
60	Question 473
61	Question 478
62	Questions 484-485
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66	Question 495
67	Questions 496-511

- 68 Question 524-531
- 69 Question 535
- 70 Question 549
- 71 Question 552
- 72 Question 659
- 73 Question 660
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- 75 Questions 680-681
- 76 Question 704
- 77 Questions 750-751
- 78 Question 752
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- 86 Question 835
- 87 Question 885
- 88 Question 886
- 89 Question 2
- 90 Question 133
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- 92 Question 201
- 93 Question 202
- 94 Question 203
- 95 Question 204

96	Question 210
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99	Question 220
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107	Questions 264-266
108	Question 292
109	Question 294
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- 124 Question 334
- 125 Question 344
- 126 Question 417
- 127 Question 436
- 128 Questions 439-440
- 129 Question 441