IN THE MATTER OF THE INSURANCE ACT
R.S.O. 1990, C.I.8, AND REGULATION 664 AS AMENDED

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant

- and -

REPWEST INSURANCE

Respondent

AWARD

Counsel Appearing:

Hooman Zadegan: Counsel for the Applicant, Aviva Insurance Company of Canada, (hereinafter called Aviva)

C. Michael J. Kealy and Faith Reid: Counsel for the Respondent, Repwest Insurance, (hereinafter called Repwest)

Background:

This matter comes before me by way of a loss transfer dispute pursuant to Section 275 of the *Insurance Act* R.S.O. 1990, C.I.8, as amended and more specifically Regulation 664.

By way of background, this dispute arises because of a motor vehicle accident that occurred on December 8, 2020. The Accident was a single-vehicle collision involving a U-Haul. The U-Haul was insured with Repwest on the date of the accident. A passenger in that vehicle was injured. The passenger was insured by Aviva and he applied to Aviva for Statutory Accident Benefits. Aviva claims it is entitled to loss transfer from Repwest and it is this claim that results in the Arbitration before me.

Issues in Dispute:

According to the Arbitration Agreement dated February 9, 2023, the following is the question for the Arbitrator:

(a) Whether the loss transfer scheme provided for by s. 275 of the Insurance Act applies when a heavy commercial vehicle is involved in a single vehicle accident where there are two underlying policies

Fundamental to the determination of this issue is whether Ontario's loss transfer regime applies to single-vehicle accidents rather than an accident involving two or more vehicles.

Proceedings:

The Arbitration proceeded by way of both written and oral submissions. An Agreed Statement of Facts, Factums, and Books of Authority were filed. Oral submissions were made on February 14, 2023 and May 30, 2023.

Facts

On December 8, 2020 at approximately 3:50 p.m. a U-Haul insured by Repwest was involved in a single-vehicle accident on Manitoba Street in Bracebridge, Ontario. The U-Haul left the roadway and struck a tree.

The U-Haul had been rented by the claimant, RP (hereinafter called the claimant), who was a passenger in the vehicle. The driver had a suspended driver's license at the time of the accident.

The claimant was insured by Aviva through a policy held by his spouse. He was also listed on the policy as a named insured. This policy did not insure a heavy commercial vehicle.

It is agreed that on the date of loss that the U-Haul weighed in excess of 4500 kg, and, therefore, qualified as a heavy commercial vehicle as defined under Section 9(1) of the *Insurance Act* R.S.O. 1990, Regulation 664.

The claimant applied to Aviva for Statutory Accident Benefits. He submitted an OCF-1 on February 1, 2021.

Aviva took the position that as the Repwest vehicle was a heavy commercial vehicle that loss transfer applied. Aviva sent Repwest a Notification for loss transfer initially on April 19, 2021. Aviva has paid to the claimant attendant care benefits, medical benefits and rehabilitation benefits.

For the purposes of this proceeding there is no issue with respect to liability.

Repwest has denied Aviva's loss transfer request by taking the position that the loss transfer scheme provided for under Section 275 of the *Insurance Act* does not apply when the heavy commercial vehicle is involved in a single-vehicle accident.

Analysis and Findings:

Position of Repwest

Repwest acknowledges that there is case law on the issue before me that is determinative of the issue in dispute. Repwest acknowledges that I am bound by this line of case law and also acknowledges that it is contrary to their position. Repwest asked me to consider this issue independently of that case law and provide my own analysis while acknowledging that whatever that analysis may be at the end, I must follow the law as it has been found to date.

Aviva agrees that I am bound by the decision in *Co-operators Insurance Company & AXA Insurance Company Canada* (Decision of Arbitrator Bialkowski) September 16, 2008, upheld on Appeal to Superior Court, Justice Jane Kelly, December 19, 2008 and Leave to Appeal to the Court of Appeal dismissed December 17, 2009. There is no dispute that this decision clearly confirms that the loss transfer regime for Accident Benefits established under the *Insurance Act* and its applicable Regulations does apply to single-vehicle accidents.

However, Repwest has asked me to look at this with fresh eyes and based on their submissions, I will take the time to outline their position as to why they say the line of cases confirming that loss transfer applies to single-vehicle collisions is wrong.

The starting point in this analysis is the relevant statutory authority. Set out below is Section 275(1) and (2) of the *Insurance Act*, which provides as follows:

> 275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.
>
> (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

Regulation 664 9(1) is also set out below:

> "first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits; "second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.
>
> (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.

Also relevant to Repwest's position is Regulation 668 the "Fault Determination Rules" Sections 2-5 which are also set out below:

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

Repwest submits that the inappropriate statutory interpretation concerning loss transfer where there is a single-vehicle collision began with the 1997 decision of Arbitrator Griffiths in *Allstate Insurance Company of Canada v Old Republic Insurance Company* May 1, 1997.

In that case, the Claimant was a passenger in a heavy commercial when it was involved in a single-vehicle accident resulting in the death of the claimant. Old Republic who was the Respondent in that case took the position that the loss transfer provisions did not apply to single-vehicle provisions. Arbitrator Griffiths made the following findings:

1. There was nothing in the language of the Legislation or Regulations to suggest that the right of the first party insurer to advance a claim for loss transfer was limited to multiple vehicle accidents. Section 275(2) of the *Act* refers to the fault of each insured without reference to the number of vehicles involved.

2. While the Fault Determination Rules show various schematic drawings, none of which show single-vehicle collisions, and all of which show two or more vehicles, Section 2(2) Regulation 668 specifically provides that the diagrams are merely illustrative of situations described in these Rules. In addition, Section 5(1) provides that if an incident is not described in any of these Rules then the degree of fault of the insured is to be determined in accordance with the ordinary rules of law.
3. The wording of Section 275 of the *Insurance Act* and related Regulations contemplates the involvement of <u>two insurers</u> in determining loss transfer and the degree of fault, not necessarily two or more motor vehicles.
4. The language of Section 275 is clear and unambiguous and giving that Section a reasonable construction dos not require proof of multiple vehicle involvement before the loss transfer provisions can be invoked.

Repwest submits that Justice Griffiths was wrong and all the case law that has followed subsequent to that does not stand up to proper scrutiny. Repwest submits a proper statutory interpretation leads to the conclusion that more than one vehicle is required to initiate loss transfer. Repwest submits that Section 275(2) together with the corresponding Fault Determination Rules make it clear that it is a precondition before loss transfer can apply that there be at least 2 vehicles involved.

Repwest starts out by submitting that one must review the 1989 Kruger Commission Report, which reviewed no-fault systems of privately delivered automobile insurance. According to the Kruger report, the concern with commercial vehicles was that the heavier commercial vehicles were “loss causers”. This was because they were bigger and heavier and caused more damage to small vehicles and their occupants. The report identified a concern that when a motor vehicle involved more than one vehicle one of which was a heavy commercial vehicle that the other vehicle involved its occupants would sustain more injury and therefore consideration should be given for a loss transfer system that more fairly apportioned risk based on liability to the heavy commercial insurer. This was the background to Section 275 of the *Insurance Act*. Repwest notes that the report assumes two or more vehicles are involved in the incident.

Repwest acknowledges that Section 275 of the *Insurance Act* does provide for indemnification in relation to “such benefits paid by it from <u>the insurers of</u> such class or classes of automobiles as may be named under the Regulation”. In other words, Repwest acknowledges that Section 275(1) speaks to one insurer having the right to seek indemnity from another class of insurer and does not reference motor vehicles. However, Repwest submits that there is a pre-condition set out in Section 275(2) which must be in place prior to the loss transfer provisions being activated. That pre-condition is that there must be at least two or more automobiles as Section 275(2) speaks to the “respective degree of fault of each insurer’s insured as determined under the Fault Determination Rules”.

Repwest submits that there cannot be a determination of fault between each insurers' insured unless there are at least two or more vehicles. Repwest submits that this section was not properly interpreted by Arbitrator Griffiths and that he was therefore wrong in concluding that proof of multiple vehicle involvement was not required before the loss transfer provisions could be invoked.

Repwest submits that their interpretation is consistent with other case law such as the decision of Justice Nordheimer in *Jevco Insurance Co. v. Pilot Insurance Co.*, 2000 CanLII 22402 (ON SC).

In that case, the claimant was injured in a single-vehicle accident that was entirely his fault. He was insured under a policy of insurance that insured a motorcycle but the vehicle he was operating on the date of loss was insured by his girlfriend under a regular motor vehicle liability policy. He applied to his motorcycle policy for Accident Benefits and Jevco claimed loss transfer as against the vehicle that the claimant was operating on the date of loss.

Repwest relies on Justice Nordheimer's comments at paragraph 13 where he states

> "I have concluded that the appropriate interpretation to be given to s. 275(2) is the one which is implicit in the decision of the arbitrator, as urged upon him by the respondent, that there must be two individuals whose respective fault contributed to the accident, before resort can be had to the indemnity granted by the section. In my view, this interpretation is the one that is the most appropriate considering the criteria set out above. First, it is plausible in that it complies with the legislative test. It strikes me as inherent in s. 275(2) that there are to be two separate and distinct insureds whose respective degrees of fault are to be used to determine the respective contributions of their insurers. I consider the interpretation for which the applicant contends, by which the same individual would fill the role of both insureds, to place a strained interpretation of the language used in the section".

Repwest does acknowledge that Justice Nordheimer does not expressly comment on whether or not more than one vehicle has to be involved to engage in loss transfer but submits that in determining while loss transfer did not apply in the circumstances of that case Repwest suggests that Justice Nordheimer would support Repwest's interpretation of Section 275(2) as a pre-condition to the activation of the loss transfer. It is important to point out that in the case before Justice Nordheimer the claimant was injured in a single-vehicle collision that was entirely his fault. That is very different from the circumstances of the case where a passenger in a heavy commercial vehicle is injured due to fault of the driver.

Repwest also relies on a brief comment (orbiter) from Justice Gillese in *State Farm Mutual Automobile Insurance Co. v. Aviva Canada Inc.*, 2015 ONCA 920 (CanLII) at paragraph 53. In that statement from Justice Gillese she makes reference to "the other driver involved in the accident". Repwest suggests that reference is sufficient to support their argument that there must be more

than one automobile involved in loss transfer. It is important to look at the full statement of Justice Gillese as I do not see it going as far as Repwest suggests. It is reproduced below:

> "Section 275(1) allows the first party insurer, in certain situations, to claim indemnification from the insurer of the other driver involved in the accident. In this situation, the other driver's insurer is known as the "second party insurer". It is the indemnification of the first party insurer by the second party insurer which is known as "loss transfer".".

Repwest also argues as was argued before Arbitrator Griffiths that it makes no sense to have liability determined under the loss transfer provisions by referencing a fault determination set of rules which do not contemplate anywhere an accident that involves a single vehicle collision.

Finally, Repwest submits that the reasoning of Arbitrator Griffiths disregards the policy reasons behind loss transfer payments. Repwest submits that loss transfer payments are to balance the costs of Accident benefits between different classes of vehicles so that the loss transfer will run from the insurer of a small vehicle to the insurer of the heavy commercial vehicle involved in the accident. This purpose is not served, submits Repwest, by loss transfer involving a single-vehicle collision in which a heavy commercial vehicle did not cause any damage to another party.

Position of Aviva

Aviva takes the position that this is a question that has already been the subject matter of a number of Arbitration and Appellate decisions the latter which of course bind me. Aviva submits that there is nothing wrong with the analysis of Arbitrator Griffiths or the cases that followed and that it is settled law that the loss transfer provisions apply to single-vehicle collisions. While I am clearly bound by the Appellate decision in *Co-operators General Insurance & AXA Insurance* (supra) I also agree with Aviva. I do not find anything wrong with the analysis of Arbitrator Griffiths with respect to the interpretation of Section 275(1) and 275(2) of the *Insurance Act*. I agree with Arbitrator Griffiths and the decisions that followed that what triggers the loss transfer is the involvement the insurer of a heavy commercial vehicle and the involvement of a second insurer that does not insure a heavy commercial vehicle. In my view, that is the essence of the loss transfer as intended and outlined by Justice Kruger in his original recommendations. It was to arrange a way of shifting responsibility between various insurer's heavy commercial vehicles that would clearly cause more significant damage to property and people than smaller vehicles would. As always with automobile insurance, sometimes the applicability of a provision can seem somewhat arbitrary. As noted by Justice Carthy in the decision of *Jevco Insurance Company v. York Fire & Casualty Company* [1996] 133 DLR (4^{th}) 592 and I quote:

> "The purpose of this legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion favouring expedition and economy over finite exactitude".

I agree with Aviva that the loss transfer scheme is designed to equalize an imbalance between insurers of motorcycles and smaller automobiles vs. heavy commercial vehicles to equalize the imbalance in the payment of Statutory Accident Benefits relative to the premiums collected and that this scheme does so on the concept of fault.

Considering that I have been asked to look at this loss transfer issue with a new look, it is important to at least briefly review not only the case law that I am bound by but also other relevant cases on point.

The key decision is *Co-operators General Insurance & AXA*. This case was first heard by Arbitrator Bialkowski and he rendered his decision on September 16, 2008. In that case the claimant Leanne Casselman was a passenger in a tractor trailer which was a heavy commercial vehicle insured by AXA. The driver of the vehicle was unable to maintain control of the tractor trailer unit as he attempted to negotiate a curve and the trailer rolled off to the right side of the road. Leanne sustained various injuries. She applied to her own insurer, Co-operators, who insured her parents under a standard automobile policy. Co-operators claimed loss transfer from AXA. AXA claimed that Section 275 did not apply unless there were two or more vehicles involved and was not designed to provide indemnity where the claimant was a passenger in a single-vehicle accident. Arbitrator Bialkowski did not agree with AXA and concluded that Section 275 of the *Insurance Act* requires that there be two insurer's involved in the loss transfer and not necessarily two motorists for there to be loss transfer entitlement. He pointed out Section 275 used the words insurer and does not reference a motor vehicle.

It was also argued before Arbitrator Bialkowski that the application of the Fault Determination Rules suggested that there had to be two or more vehicles and he rejected that argument. He recognized there was some awkwardness in the wording but that was only because the Fault Determination Rules had been introduced not only for use in loss transfer claims but also to be used to determine liability for direct compensation in property damage claims of insureds (see Section 263 of the *Insurance Act*).

Arbitrator Bialkowski expressed the view that allowing loss transfer claims in situations involving passengers, pedestrians, or bicyclists might not always satisfy the attempt to redress the financial imbalance of the loss transfer scheme that but he concluded that the odd inequity cannot be avoided. He therefore concluded that the loss transfer provision applied to single-vehicle collisions.

Arbitrator Bialkowski's decision was appealed by AXA and heard before Justice Jane Kelly on December 19, 2008. Justice Kelly agreed with Co-operators that there was nothing in the language of the legislation or Regulation to suggest that the right of the first party insurer to pursue claims in loss transfer was limited to claims involving multiple vehicle accidents. She concluded at paragraph 21 and I quote:

> "in my view, the language of Section 275 is clear and unambiguous in providing for indemnity by the second party insurer according to the respective degrees of fault of each insured involved in the accident. Loss transfer cannot be restricted to those situations where there are 2 (or more) vehicles involved in the accident".

She therefore dismissed the appeal.

AXA sought Leave to Appeal to the Court of Appeal and that was dismissed on December 17, 2009. Clearly I am bound by this decision but I also agree with the analysis of both Arbitrator Bialkowski and Justice Kelly.

There are also other cases which have held that loss transfer applies to single vehicle collisions. I note the following:

1. *ING Insurance Company v. Zurich North America Canada*, Arbitrator Shari Novick, July 2009. In this decision Arbitrator Novick concluded that where a claimant was a pedestrian and struck by a heavy commercial vehicle that loss transfer applied.
2. *Allstate Insurance Company of Canada v. Old Republic Insurance Company*, Arbitrator Hon. W. David Griffiths (Supra).

I therefore conclude independently based on a fresh look at old case law that Section 275 of the *Insurance Act* and the relevant Regulations contemplate that loss transfer will apply to single vehicle collisions as long as there are two insurers, one insuring a heavy commercial vehicle and the other not insuring a heavy commercial vehicle. Even if I had found to the contrary I would have of course been bound by the appellate decisions in *Co-operators & AXA* (Supra).

Award:

I therefore find that the loss transfer scheme provided for by Section 275 of the *Insurance Act* applies when a heavy commercial vehicle is involved in a single-vehicle accident where there are two policies and accordingly, Repwest is obliged to indemnify Aviva for Statutory Accident Benefits paid to the claimant subject to any arguments with respect to the quantum of those payments.

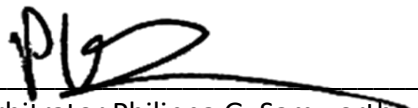
Costs:

According to paragraph 11 of the Arbitration Agreement, the costs of the Arbitration including the Arbitrator's fees, expenses, and disbursements shall be borne by the unsuccessful party. Repwest was unsuccessful in this matter and accordingly is responsible for the Arbitration fees.

Paragraph 11 also provides that the successful party shall be awarded party and party costs. Therefore, Aviva is awarded its party and party costs of this Arbitration. If the parties cannot

agree on costs they can contact me to schedule a further pre-hearing so we can discuss the matter and set up a costs hearing if required.

DATED THIS 13th day of July, 2023 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP