

**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*, 1991
S.O. 1991, c.17;**

AND IN THE MATTER of an Arbitration

B E T W E E N :

STATE FARM INSURANCE COMPANY

Applicant

- and -

FARMERS' MUTUAL INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Daniel Strigberger and Brian Horrigan (student-at-law)

Counsel for the Applicant, State Farm Insurance Company ("State Farm")

Linda Matthews and Laura Hodgins

Counsel for the Respondent, Farmers' Mutual Insurance Company ("Farmers' ")

ISSUES:

1. State Farm seeks indemnification by way of loss transfer dispute in relation to statutory accident benefits that it paid to its insured, Kenneth Humphreys, arising from a two vehicle accident which occurred at approximately 4:15 pm on Sunday, September 26, 2004. The issue, broadly stated, is which of the Fault Determination Rules ("FDR"), if any, contained in Regulation 668 of the *Insurance Act* apply to this accident. Pursuant to

the terms of the Arbitration Agreement signed by counsel, on behalf of the parties, the issues are set out as follows:

- (a) What is the respective degree of fault of the motorists insured by the parties for the purpose of Section 275(2) of the *Insurance Act*?
- (b) If it is determined that there is fault on the part of Farmers' insured, what is the amount that is due from Farmers' to State Farm?
- (c) If there is an amount due from Farmers' to State Farm, is there interest due to State Farm and, if so, what is the quantum of that interest?

HEARING:

2. The Arbitration hearing took place on Friday, March 2 and Thursday, March 8, 2012 in the City of Toronto, Ontario before me, Vance H. Cooper, Arbitrator.

FACTS:

3. The accident occurred at approximately 4:15 pm on Sunday, September 26, 2004 on County Road 30 and County Road 26 in Brighton, Ontario. For the purposes of the Arbitration and this Award, County Road 30 runs in a north-south direction (though, in reality, the road curves in a fairly pronounced manner in a west or north western direction to the north of the area of the accident). County Road 26 runs in an east-west direction and, at the western end, terminates in a T-intersection subject to a stop sign when it reaches County Road 30. There is a gas bar located on the west side of County Road 30 at or just south of the intersection with County Road 26. There are two driveways from which motorists can enter or exit the gas bar (one located at the northern end of the property and other located at the southern end of the property).

4. At the time of the accident, the speed limit governing travel on County Road 30 was 70 kph. In the area of the accident, traffic on County Road 30 is governed by a double solid line. For southbound traffic, the road curves to the right approaching the area of the accident. For northbound traffic, the road curves to the left to the south of and approaching the area of the accident. County Road 30 consists of two lanes (one in each direction) though, as northbound traffic approaches the intersection with County Road 26, a second lane is created to allow for northbound traffic to turn right and travel east on County Road 26.

5. Kenneth Humphreys, insured by State Farm, was operating a motorcycle travelling southbound on County Road 30, just north of the area of the accident.

6. Ruth Weyrich, insured by Farmers', was operating a 2000 Honda vehicle. She had been at the gas bar and was exiting from the northern driveway of the property with the intention to cross the southbound and then the northbound lanes of County Road 30 and proceed in an easterly direction on County Road 26. There were no traffic signals or signs affecting or governing her travel in this fashion. Similarly, there were no traffic signals or signs governing the movement of Humphreys, as a southbound motorist, on County Road 30 at or in the vicinity of the accident.

7. I heard oral evidence from two witnesses – Matthew Pope (who was a passenger in a vehicle operated by John Bell which was travelling in a northerly direction some distance to the south of the area of the accident) and Officer Kevin McAllister (a member of the Northumberland Detachment of the OPP who was involved in investigating the accident).

8. In addition, the parties filed comprehensive document briefs which included several engineering reports commissioned by the parties to what was then Mr.

Humphreys' tort action (settled before the time of the arbitration), the complete notes and records of the officers involved in the investigation of the accident (including statements taken involved parties and witnesses), statements taken from insurance companies and insurance adjusters, the transcripts of examinations for discovery held in the tort action of Mr. Humphreys and Ms. Weyrich and photographs which depict the general area of the accident. I have reviewed and considered all of the foregoing in connection with discharging my responsibilities as Arbitrator. I will review only those portions of the evidence necessary to give context to this Award or as necessary to come to my decision.

9. The accident occurred when Ms. Weyrich was exiting the parking lot of a private gas bar on the west side of County Road 30 at or near County Road 26. When Ms. Weyrich was at or near the centre of County Road 30, a southbound motorcycle operated by Mr. Humphreys, collided with the front fender of Ms. Weyrich's vehicle (at or behind the front driver's wheel and at or near the driver's door). Mr. Humphrey's was thrown from his motorcycle and came to rest on the east side of County Road 30 south of its intersection with County Road 26.

10. At the time of the incident, the weather was reported to be clear and the roads were reported to be dry. County Road 30 is described to be an asphalt road in good repair with clear road markings then present.

11. There can be and there is no doubt that Mr. Humphreys passed at least one vehicle and perhaps as many as three vehicles while approaching or in the midst of what was, from his perspective, a curve in the road to the right (north of the area of the accident). Similarly, there is no doubt that when he executed his passing manoeuvre, he did so contrary to the double solid line which directed him not to do so. Similarly, while

passing one or more vehicles, he was travelling at a significant rate of speed (estimated to be as great as 140 kph or as great as 90 mph according to some of the evidence (to be discussed further)).

12. According to Officer McAllister, he did not try to take a statement from Mr. Humphreys at the scene of the accident as Mr. Humphreys' level of consciousness was variable and Officer McAllister was more concerned about Mr. Humphreys' health than securing a statement from him. As a result, he indicated Mr. Humphreys' speed to be unknown when he completed the police report.

13. The OPP obtained a statement from Paul Heley. According to this statement, Heley was operating a vehicle travelling south on County Road 30 at approximately 80 kph. There were three southbound vehicles ahead of Heley. The motorcycle passed Heley, along with the other three vehicles, at a very high rate of speed and was continuing to accelerate and kept going. The motorcycle disappeared for a short time and, when Heley came around the corner, he saw the motorcycle lying on the roadway. Heley estimates that from the point that the motorcycle passed him until he saw the motorcycle on the roadway, under a minute elapsed.

14. As an aside, I note that a vehicle travelling at 80 kph travels at 22.22 meters per second. Consequently, on the evidence of Mr. Heley, he could have been as much as approximately 1.3 kilometres north of the area of the accident when the motorcycle overtook his vehicle.

15. Ms. Weyrich was interviewed by the OPP According to her statement, she was pulling out of the gas bar to drive directly across County Road 30 and continue eastbound on County Road 26. Before entering County Road 30, she stopped and looked both to her left and to her right on two occasions. She saw no vehicles in sight in

either direction. She never saw the motorcycle at any time; rather, she saw her windshield break and something struck her left arm.

16. The OPP received a letter from Donna Levac dated October 7, 2004. Ms. Levac and her husband were travelling south on County Road 30 north of the area of the accident. Their vehicle was overtaken by a motorcycle which passed the Levac vehicle on a double yellow line as the Levac vehicle approached a bend in the road. According to Ms. Levac, it seemed only seconds later that her husband exclaimed "Oh no. The poor guy". Ms. Levac saw the motorcycle lying in the middle of the road and the motorcyclist lying face down on the east side of the road.

17. Officer J. Diminie is a member of the Northumberland Detachment of OPP and worked with Officer McAllister in relation to the investigation of this accident. According to his notes, there were no skid marks at the scene. A fruit stand is located on the east side of County Road 30 approximately 200 meters north of the area of the accident. According to the notes, his police cruiser was positioned in the gas bar (presumably at a place consistent with the officer's belief as to where Ms. Weyrich's vehicle had originated). The officer notes "plenty of distance to view oncoming traffic southbound and northbound even though it's on a bend". Officer Diminie's notes include a drawing of the scene of the accident which depicts, *inter alia*, the motorcycle at rest in the centre of County Road 30 to the east of the gas bar. The notes also indicate "impact location occurred just inside centre line in southbound lane". This is consistent with the diagram of the accident as depicted in the motor vehicle accident report prepared by Officer McAllister. Finally, Officer Diminie's notes indicate an awareness of another witness (Matthew Pope) but challenges or difficulties meeting with Mr. Pope and obtaining a statement from him.

18. Officer McAllister gave oral evidence as follows. He has been a member of the OPP for almost 12 years. He was on duty and investigated this accident with Officer Diminie. He arrived at the scene at 4:17 p.m. and there were several witnesses present. One of the witnesses was Karen Hubbard (then his common law spouse and now his wife). According to Officer McAllister's notes, several witnesses at the scene stated that the motorcycle was travelling at a "very high rate of speed passing other vehicles". Officer McAllister's notes indicate that he spoke with Karen Hubbard who had been at the fruit stand north of the accident scene. Ms. Hubbard observed the motorcycle travelling south at a very high rate of speed estimated to be 120 to 150 kph. While the accident was not observed, Ms. Hubbard heard the collision seconds after the motorcycle passed the fruit stand. Ms. Hubbard appears to have given no information to Officer McAllister as to whether other vehicles were observed, whether the motorcycle was in the process of passing other vehicles or the motorcycle's lane of travel when she observed it. That said, Ms. Hubbard was obviously and utterly unimpressed by the driving actions of the motorcyclist.

19. In his direct examination, Officer McAllister admitted that the diagrams prepared by he and his fellow officer may not accurately depict the positioning of the vehicles when the accident occurred. At the time of the diagrams were prepared, neither officer had the benefit of Matthew Pope's information/evidence. Officer McAllister testified that this was a bad intersection and that there had been numerous collisions in the area. He described the curve to the north of the area of the accident (through which Mr. Humphreys travelled) as a "blind corner". Officer McAllister exits from the gas bar at least 1 – 2 times per day and described the manoeuvre as a "very tough turn". Since the accident, the speed limit on County Road 30 has been reduced from 70 kph to 60 kph.

He thought that from Ms. Weyrich's perspective, exiting the gas bar, she would have a view of approximately 200 meters when looking to her left to the north.

20. Ms. Weyrich provided a statement dated October 14, 2004 (presumably to an insurance adjuster). Once again, she confirmed that as she was exiting from the gas bar, she brought her vehicle to a stop prior to entering the travelled portion of County Road 30. She looked right, then left and checked twice for vehicles approaching on County Road 30 from either the north (her left) or the south (her right) yet saw nothing in the way of vehicular traffic. She proceeded forward and was apparently looking to the left yet she did not see the motorcycle strike her vehicle but, rather, noticed the windshield of her vehicle to be shattered.

21. Stanley Weyrich, husband of Ruth Weyrich, gave a statement dated October 14, 2004. In the statement, he confirms that Ms. Weyrich was exiting from the gas bar and brought her vehicle to a stop before entering the travelled portion of County Road 30. He saw his wife check for oncoming traffic twice in each direction. He also looked to the north and south and saw no traffic before his wife began to proceed on to County Road 30 whereupon he heard an impact. The windshield shattered and something flew by or over the car.

22. Matthew Pope was initially interviewed by the OPP and gave a signed statement on July 14, 2005. In the statement, Mr. Pope indicates that he was travelling in a northerly direction on County Road 30 approaching County Road 26. A car was crossing County Road 30 [from west to east] and a motorcycle was "travelling south at a high rate of speed in the northbound lane and passing three vehicles (two pick-up trucks and a car)". As the car was halfway across County Road 30, the motorcycle hit the car just in front of the driver's door. He described the character of the road as a long sloped curve.

Mr. Pope thought that the motorcycle was passing these vehicles north of the gas bar while on the curve in the road. He described the motorcycle as “going real fast, just like lightning”.

23. Mr. Pope would have attempted the same manoeuvre as that attempted by Ms. Weyrich. He thought she had sufficient time to cross County Road 30 in relation to the vehicles that were being passed by the motorcycle. He thought that the Ms. Weyrich’s view of the motorcycle may have been obscured by one or more of the vehicles which the motorcycle was in the process of passing.

24. Mr. Pope gave a further statement to an insurance adjuster or investigator on July 14, 2006. According to this statement, Mr. Pope indicates that he was a couple hundred feet south of the accident. When Mr. Humphreys came to rest and when the vehicle within which Mr. Pope was riding came to a stop, the two were separated by 50 – 60 feet. The driver, John Bell, apparently saw nothing in relation to the events preceding and giving rise to the accident. Mr. Pope told Mr. Bell to stop as he anticipated that the motorcycle was going to hit the car. Mr. Pope began his observations when he was 150 to 200 yards from the area of the accident. He observed the motorcycle passing a car and two pick-up trucks.

25. At another point in the statement, Mr. Pope indicates that he would have had something in the order of 4,000 to 5,000 feet of visibility (i.e. he could see almost one mile or something in the order of 1.2 to 1.5 kilometres from his vantage point to the point where the road curves to the left, from his perspective, and his view of County Road 30 ends). Mr. Pope thought that the vehicles which were being passed were probably going a little more than the speed limit which he recalled to be 70 kph. He believes that the motorcyclist, having overtaken the vehicles which he described, was in the process of

returning to the southbound lane (possibly because Ms. Weyrich's vehicle was moving through the southbound lane and into the northbound lane).

26. Mr. Pope stated that Ms. Weyrich's vehicle was starting to cross the double solid line as Mr. Humphreys' motorcycle was in the process of returning to the southbound lane. The motorcycle struck the automobile just in front of the driver's front door. When the motorcycle came to rest, it was partially in the southbound and partially in the northbound lane. Mr. Pope estimates Mr. Humphreys' speed at 80 – 90 mph (approximately 130 to 145 kph). Mr. Pope confirms that Mr. Bell saw nothing, to the knowledge of Mr. Pope, and only reduced his speed and stopped because Mr. Pope advised him to do so.

27. At the hearing, Mr. Pope gave oral evidence. In direct examination, he testified that he was a passenger in a vehicle driven by John Bell. When this vehicle was some 200 to 400 feet south of the south driveway of the gas bar, he observed the Humphreys motorcycle in the process of overtaking 3 – 4 vehicles. It was travelling in a southerly direction in the northbound lane at 80 to 90 mph and was "several thousand feet away". Mr. Pope never took his eye off of the motorcycle thereafter as he had concerns that the motorcycle would hit the Bell vehicle.

28. Mr. Pope testified that the Weyrich vehicle had crossed the centre of the road (so that some portion of it had entered the northbound lane). The Humphreys motorcycle struck the area where the front driver's door hinges would be located. The Humphreys' motorcycle was "cutting in when he hit her". Mr. Pope was "80% sure" that the Humphreys motorcycle was still in the northbound lane when the collision occurred. Mr. Pope thought that it would have been safe for Ms. Weyrich to pull out from the driveway of the gas bar but for the actions of the Humphreys motorcycle.

29. In cross examination, Mr. Pope testified that he was approximately one half mile [approximately 880 meters] from the area of the accident when he began to make observations relevant to the matters in issue. At that point, the Humphreys' motorcycle was observed travelling in a southerly direction in the northbound lane in the vicinity of the curve to the north of the gas bar. At the same time, Mr. Pope observed the Weyrich vehicle in motion.

30. Mr. Pope admitted that his view of the motorcycle was restricted to something in the order of 2 – 3 seconds. He agreed that it would be difficult to appreciate the speed of the motorcycle but maintained that the motorcycle was travelling well over the speed limit, very quickly, and maintained his estimate of 80 – 90 mph.

31. Mr. Pope confirmed that he believed the motorcycle was in the process of returning to the southbound lane at the time of the collision. Despite the interposition of the Weyrich vehicle between Pope and the motorcycle, Mr. Pope maintained that he was able to see the motorcycle actually make contact with the driver's side of the Weyrich vehicle.

32. Mr. Pope testified that Mr. Bell did not have to slam on his brakes; rather, he came to a gradual stop in response to the advice and instruction given by Mr. Pope. The Bell vehicle came to rest several hundred feet to the south of the area of the accident. Mr. Pope rejected the suggestion put to him in cross-examination that the collision occurred with Humphreys' motorcycle in the southbound lane; rather, he would place the point of impact in the northbound lane (albeit quite close to the centre of the road).

33. Mr. Pope further testified in cross-examination that since he could see the Weyrich vehicle, she could and should have seen the Bell vehicle (in which Pope was riding). He testified that if Ms. Weyrich indicated that she saw nothing when she looked

to her right (to the south) for northbound traffic, she nonetheless should have seen the Bell vehicle. Mr. Pope also conceded that since the motorcycle was in the process of returning to the southbound lane, it had overtaken the last of the vehicles which was being passed and should have been visible to a motorist in the position of Ms. Weyrich.

34. In re-examination, Mr. Pope testified that he thought he was some 3000 to 5000 feet (approximately 0.6 to one mile or approximately one to 1.6 kilometres) from the vehicles which were being passed by the Humphreys' motorcycle.

35. A statement was obtained by an insurance adjuster or investigator from Karen Hubbard dated August 9, 2006. Ms. Hubbard was with her sister at the fruit stand (described above). She heard the sound of the motorcycle approaching which drew her attention to the roadway. She saw the motorcycle pass (from what would be her right to left) and estimates its speed at 120 kph. Ms. Hubbard and her sister proceeded to the fruit stand. Within 2 minutes of hearing and seeing the motorcycle (and exclaiming to her sister that the motorcyclist was going to kill somebody or himself), she heard a loud crash and ultimately saw the motorcyclist lying on the road. She called Officer McAllister (though he had already been dispatched to the scene). When Ms. Hubbard first saw the motorcycle, it was southbound in the southbound lane. She did not observe any other traffic in the vicinity of the motorcycle. It remained in the southbound lane, to the extent that she observed it. The impact was some 200 meters to the south of the fruit stand.

36. There is a transcribed interview report dated August 9, 2006 and obtained by an insurance adjuster or investigator from Julie Ann Hubbard. Julie Ann Hubbard indicates that she heard the motorcycle approach. As it got closer, she glanced up and saw the motorcycle and said to Karen Hubbard "if he doesn't slow down, you know, he could cause an accident". Within a few minutes, she heard the big bang of the collision. Julie

Ann Hubbard was uncertain as to whether the speed limit was 50 kph or 60 kph but, in either event, believed the motorcycle was going a lot faster than that. Julie Ann Hubbard confirms that she did not see the collision itself.

RELEVANT PROVISIONS:

37. The applicable legislative and regulatory provisions are set out below:

Section 275 of the *Insurance Act* provides:

- (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.
- (3) No indemnity is available under subsection (2) in respect of the first \$2,000.00 of statutory accident benefits paid in respect of a person described in that subsection.
- (4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Subsection 9(2) of Ontario Reg. 664/90 under the *Insurance Act* provides a first party insurer with a right to claim indemnification from a second party insurer where the first party insurer insures a motorcycle. For the sake of completeness, subsections 9(1) and 9(2) are reproduced in their entirety.

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;

“heavy commercial vehicle” means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

“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*;

“motorized snow vehicle” means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

“off-road vehicle” means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

“second party insurer” means an insurer required under section 275 of the Act to indemnify the first party insurer. 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 incidence 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.

38. Indemnification is determined in accordance with the Fault Determination Rules contained in Regulation 668 made under the *Insurance Act*. The relevant rules are 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. R.R.O. 1990, Reg. 668, s. 2(1).
- (2) The diagrams in this Regulation are merely illustrative of the situations described in these rules. R.R.O. 1990, Reg. 668, s. 2(2)
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. R.R.O. 1990, Reg. 668, s.3.
4. (1) If more than one rule applies with respect to the insured, the rule that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies in the circumstances. R.R.O. 1990, Reg.668, s. 4(1).
- (2) Despite subsection (1), if two rules apply with respect to an incident involving two automobiles and if under one rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 4(2).
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. R.R.O. 1990, Reg. 668, s. 5(1).
- (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. R.R.O. 1990, Reg. 668, s. 5(2).
7. (1) This section applies when automobile "A" collides with automobile "B" while automobile "B" is entering a road from a parking place, private road or driveway. R.R.O. 1990, Reg. 668, s. 7(1).
- (2) If the incident occurs when automobile "B" is leaving a parking place and automobile "A" is passing the parking place, the driver of automobile "A" is not at fault and the driver of automobile "B." is 100 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 7(2).
- (3) If the incident occurs when automobile "B" is entering a road from a private road or a driveway and automobile "A" is passing the private road or driveway and, if there are no traffic signals or

signs, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 7(3).

ANALYSIS:

39. Section 275 of the *Insurance Act* creates a scheme for loss transfer payments where an insurer who pays statutory accident benefits may be repaid (i.e. indemnified by another insurer under certain circumstances).

40. Under subsection 275(2) of the *Insurance Act*, indemnification shall be made to the respective degree of fault of each insured as determined under the Fault Determination Rules.

41. The parties are in general agreement with respect to what I would characterize as the "motherhood principles" as to how the Fault Determination Rules are to be construed and applied.

42. The Fault Determination Rules are to liberally construed and applied and in accordance with their own factors and not those which would apply under the ordinary rules of tort law.¹

43. Fault under the Fault Determination Rules shall be assessed without reference to the circumstances in which the incident occurs or the location on the insured's automobile of the point of contact with any other automobile involved in the incident.²

44. The scheme of the legislation, under Section 275 of the *Insurance Act* and the companion regulations, is to provide for an expedient and summary method of reimbursing the first party insurer for payment of statutory accident benefits from the

¹ Co-Operator's General Insurance Co. v Canadian General Insurance Co. [1998] O.J. No. 2578 (Gen. Div.) at para. 4.

² Fault Determination Rules, R.R.O. 1990, Reg. 668, s. 3

second party insurer (whose insured was fully or partially at fault for the accident). The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by Regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.³

45. The Fault Determination Rules set out a series of general types of accidents. To facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of a particular accident in a manner that, in most cases, would probably (but not necessarily) correspond with actual fault.⁴

46. The purpose of the loss transfer scheme is spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.⁵

47. The task for the Arbitrator in a loss transfer matter is to determine the facts. Specifically, to determine what was “the incident” and, second, to determine if that incident was described in any of the Fault Determination Rules. Thereafter, the Arbitrator is charged with the responsibility to determine if the rule “applies with respect to the insured”. Third, if the incident, as found by the Arbitrator, is described in any other rules, then the Arbitrator’s function is to apply that rule or rules (regardless as to whether such application may be viewed as arbitrary or expedient). Finally, if the incident is not described in any of the Fault Determination Rules, then the Arbitrator’s task is to determine the degree of fault of the insured in accordance with the ordinary rules of law.⁶

³ Jevco Insurance Co. v. Canadian General Insurance Co. (1993), 14 O.R. (3d) 545 (Ont. Court of Appeal).

⁴ Jevco Insurance Co. v. Halifax Insurance Co., [1994] O.J. No. 3024 (Gen Div.) at para 8.

⁵ Jevco Insurance Co. v. York Fire & Casualty Co., 1995 Can LII 594 (Ont. Court of Appeal) at 6.

⁶ ING Insurance Company of Canada v. Farmers’ Mutual Insurance Company (Lindsay), 2007 Can LII 20107 (Ont. Sup. Ct) para. 33

48. Later in *ING v Farmers*, Justice Perell notes that application of the Fault Determination Rules is rough and ready and favours expediency over accuracy in determining fault. Justice Perell directs an Arbitrator to determine whether the facts of a case do or do not fall within the interpretation of a given Fault Determination Rule. It is not the function of an Arbitrator to determine whether the facts should or should not be captured by a given rule.

49. Counsel for Farmers' relies on *Lombard Canada Co. v. AXA Assurance Inc.*, [2007] O.J. No. 601 paras. 23 – 25 to the following effect. Fault Determination Rule 3 must be considered carefully. In essence, it provides that the degree of fault is to be determined without reference to "the circumstances in which the incident occurs" including weather conditions, etc. Rule 3 does not direct that only a part of the incident is to be taken into account.

50. When I distil the submissions of the parties to their essence, the question for me to decide is whether Fault Determination Rule 7(3) applies to the incident (as urged upon me by State Farm) or whether it does not (either because the Humphreys motorcycle was not "**passing** the driveway" or because the incident as properly appreciated and characterized, is not merely a motorcycle colliding with an automobile exiting from a private driveway but involves a motorcycle being operated at high speeds and passing one or multiple vehicles on a curve against a solid double line).

ANALYSIS OF THE EVIDENCE AND FINDINGS OF FACT:

51. I find that the Humphreys motorcycle was being operated at a high rate of speed and significantly in excess of the then governing speed limit. All evidence available to me

supports this finding. For purposes of the Arbitration, I need not and do not make a finding as to the Humphreys motorcycle's actual speed since Humphreys was not charged with a "driving offence" as that term is used in Fault Determination Rule 20(e) (where a driver is charged with exceeding the speed limit by 16 or more kilometres per hour).

52. I also find that the Humphreys motorcycle had passed a number of vehicles in contravention of a double solid line governing its movements. This manoeuvre took place some distance to the north of the accident/incident from which responsibility to pay statutory accident benefits to Humphreys arose. This finding is supported by the evidence of Paul Heley and, by inference, from the evidence of Karen Hubbard and Julie Ann Hubbard (both of whom were in a position to observe the motorcycle passing vehicles if indeed the passing occurred in the vicinity of the fruit stand which was located some 200 meters to the north of the area of the accident). In addition, this finding is supported by the evidence of Ruth Weyrich and her husband, Stanley Weyrich (who saw no vehicular traffic when they looked to their left (to the north) as they saw no southbound traffic whatsoever approaching the area of the accident. Finally, this finding is supported by the evidence of Matthew Pope. While Mr. Pope's statement to the OPP dated July 14, 2005 suggests Ms. Weyrich's view of the motorcycle may have been obscured by one or more of the vehicles which the motorcycle was in the process of passing, his statement dated July 14, 2006 indicates that the motorcyclist had already overtaken the vehicles and was in the process of returning to the southbound lane immediately prior to the accident. His evidence at the hearing was in conformity with his statement dated July 14, 2006.

53. I find as a fact that, at the moment of the accident, the Humphreys motorcycle was travelling predominantly in a southerly direction (though, from the perspective of Humphreys, it was moving from left to right). At the time of the accident, the Humphreys motorcycle was positioned on or about the center of the road (that is, in the area of the double solid line separating the northbound and southbound lanes). To the extent that Matthew Pope's evidence at the hearing would place the Humphreys motorcycle travelling in a southerly direction in the northbound lane, I reject such evidence for several reasons. Firstly, the interposition of the Weyrich vehicle between the motorcycle and Pope's vantage point must have obscured Pope's view. Moreover, both vehicles were in motion. Indeed, Mr. Pope described the motorcycle as moving from right to left, from Mr. Pope's perspective, as the motorcycle appeared to be re-entering the southbound lane. Finally, Mr. Pope made his observation from a considerable distance to the south of the area of the accident. Mr. Bell, the driver of the vehicle in which Mr. Pope was riding, apparently saw nothing of these events, was alerted to them by Mr. Pope, braked his vehicle in a gradual fashion and came to a stop some distance to the south of the position where Mr. Humphreys came to rest (which was some distance to the south of where the Humphreys motorcycle came to rest on the roadway).

54. I find as a fact that Ms. Weyrich could and should have seen the Humphreys motorcycle when she looked to her left to the north before putting her vehicle in motion in a generally easterly direction before exiting the driveway of the gas bar property.

APPLICATION OF THE FAULT DETERMINATION RULES:

55. The parties are in agreement to the extent that if a Fault Determination Rule applies, it can only be Rule 7(3). Counsel for Farmers' submits that Rule 7(3) does not apply, that the incident is not described in any of the Rules and that the degree of fault, if

any, on the part of Farmers' insured is to be determined in accordance with the ordinary rules of law.

56. I need not reiterate the "motherhood principles" which I have set forth, above (see paragraphs 41 through 46 herein). The Fault Determination Rules allocate fault according to the type of a particular accident in a manner that, in most cases, corresponds with actual fault (though not necessarily so).

57. Rule 7(1) applies, on the facts of this matter, when the Humphreys motorcycle collided with the Weyrich automobile while the Weyrich automobile was entering a road from a "parking place, private road or driveway". Rule 7(3) applies by virtue of the fact that the Weyrich automobile was entering a road from a private road or a driveway and the Humphreys motorcycle was **passing the private road or driveway** (emphasis added).

58. There is nothing in the Fault Determination Rules that directs me, as an Arbitrator, to determine the lane of travel of the Humphreys motorcycle. While other rules focus on lanes of travel or may distinguish between a vehicle travelling or in motion and a stationary vehicle, Rule 7(3) is silent in this regard. Thus, I find Rule 7(3) applies to the incident which gives rise to this Arbitration and, as a result, State Farm is entitled to recover 100% of the amounts properly due to State Farm from Farmers' by way of reimbursement pursuant to loss transfer.

59. I further find that to the extent I may be in error in relation to the positioning of the Humphreys motorcycle at the time of the accident (that is, if Humphreys motorcycle was travelling in a southerly direction in some portion of the northbound lane of County Road 30), this matters not to the application of Rule 7(3). The Humphreys motorcycle was still

“passing the private road or driveway” and the Weyrich automobile was still “entering a road from a private road or a driveway”.

60. One must also bear in mind that pursuant to Rule 2, the determination of fault focuses on the degree of fault of an insured. In this case, the focus is on Ms. Weyrich to the extent that a Fault Determination Rule applies to her driving conduct. Thus, Rule 7(1) and Rule 7(3) are directly applicable. Indeed, there is no other rule that applies to her driving conduct.

61. I am directed by Rule 3 to determine the degree of fault of Ms. Weyrich without reference to “the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or the location on Ms. Weyrich’s automobile of the point of contact with any other automobile involved in the incident”.

62. Rule 4 directs me to apply the rule that attributes the least degree of fault to Ms. Weyrich to the extent that more than one rule applies. The parties agree that there can only be one rule applicable to the driving conduct of Ms. Weyrich, namely, Rule 7(3) (though, as previously discussed, counsel for Farmers’ takes the position that Rule 7(3) does not apply (which submission I have rejected for the reasons set out herein)).

APPLICATION OF THE ORDINARY RULES OF LAW:

63. In the event that I am found to be in error in relation to my appreciation of the evidence, findings of fact and application of the Fault Determination Rules to the evidence and the facts, I find that both Mr. Humphreys and Ms. Weyrich were negligent. Mr. Humphreys was driving at a high rate of speed and may not have returned to his proper lane of travel as he moved south from the area of the fruit stand to the area of the

accident. However, his negligence in this regard is less than that of Ms. Weyrich. Ms. Weyrich was exiting from a private driveway and was attempting to cross two lanes of travel on County Road 30 before travelling in an easterly direction on County Road 26. Despite the evidence that she looked both to her left and to her right on two separate occasions, she failed to see any vehicular traffic in either direction. The Humphreys motorcycle was there to be seen (as was the Bell vehicle in which Mr. Pope was riding as a passenger). Ms. Weyrich saw neither. She failed to keep a proper lookout and was negligent when she attempted to move from a servient position (in relation to vehicular traffic on County Road 30 which held the dominant position).

64. If I was to be required to apply the ordinary rules of law to the facts, as I have found them, I would apportion 65% of the fault to Ms. Weyrich and 35% of the fault to Mr. Humphreys.

ORDER:

65. I hereby order that Farmers' Mutual Insurance Company reimburse State Farm Insurance Company for those sums which are properly the subject of loss transfer indemnification. I remain seised of this matter in the event that issues arise between the parties in relation to the quantum of such indemnification payable to State Farm Insurance Company by Farmers' Mutual Insurance Company. If the hearing needs to be resumed for this purpose, then arrangements should be made to schedule a pre-arbitration teleconference so that we can work through the issues remaining in that regard and schedule a hearing for such purposes.

66. On the assumption that the parties are able to resolve the issue of quantum of indemnification without a further hearing, I am prepared to receive submissions as to the quantum of costs. Subject to receiving and considering such submissions and in light of

State Farm's success on the issue arbitrated before me, State Farm is entitled to its costs of the Arbitration in accordance with the terms of the Arbitration Agreement and Farmers' is responsible for the costs of the Arbitration (my fees and the expenses associated with the conduct of the Arbitration).

67. I am indebted to counsel for their cooperation through the Arbitration process, their comprehensive and thoughtful submissions in advance of and at the hearing and their thoroughly professional advocacy at the hearing.

Dated at Toronto, this day of March, 2012.

Vance H. Cooper, Arbitrator