IN THE MATTER of the *Insurance Act,* R.S.O. 1990,
c.I.8, s. 275 (as amended) and Regulation R.R.O, 1990, Reg. 668;

AND IN THE MATTER of the *Arbitration Act,1991,*
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and –

INTACT INSURANCE COMPANY

Respondent

A W A R D

Counsel:

Daniel Strigberger
Counsel for the Applicant, Economical Mutual Insurance Company ("Economical")

Mark K. Donaldson
Counsel for the Respondent, Intact Insurance Company of Canada ("Intact")

ISSUE:

Economical seeks indemnification by way of loss transfer dispute in relation to statutory accident benefits that it paid to its insured, Darrin McC.[1] ("Darrin) and certain members of his family arising from a motor vehicle accident which occurred on November 14, 2016. The primary issue is what is the respective degree of fault of the motorists insured by the parties for the purposes of Section 275(2) of the *Insurance Act*? If it is determined that there is fault on the part of Economical's insured, what is the amount that is due from Intact to Economical? If there is an amount due from Intact to Economical, is there

[1] By reason of privacy concerns, the surnames of Economical's insured and Intact's insured's driver are not reflected in these Reasons.

interest due to Economical and, if so, what is the quantum of that interest? There are ancillary issues regarding costs as between the parties and the costs of the Arbitration itself.

EVIDENCE:

The following documents were "marked" as exhibits at the hearing which proceeded on a written record only before me by way of Zoom on Wednesday, January 27, 2021.

Exhibit 1 – Arbitration Agreement

Exhibit 2 – Document Brief (consisting of 9 tabs and running from pages 14 through 484 of a PDF which included Economical's factum and book of authorities)

I did not receive any evidence apart from the documents filed.

FACTS:

While the facts which give rise to the within Arbitration are generally not in dispute, there are some factual issues in dispute for which I must make findings. Additionally, I am required to interpret and apply the Fault Determination Rules ("FDR"), being R.R.O. 1990, Reg. 668.

The basic facts which serve as a back drop to the dispute are as follows:

The accident took place on November 14, 2016 at approximately 11:36 PM. Economical's insured, Darrin, was operating a 2016 Toyota Corolla travelling in an easterly direction on Highway 401 west of Reynolds Road. Intact's insured's driver, Sebastian L. ("Sebastian") was the driver of a tractor trailer similarly travelling eastbound on Highway 401.It is acknowledged and agreed by Intact that its insured vehicle was a "heavy commercial vehicle".

This portion of Highway 401 is divided with two lanes in each direction. According to the police report, the accident location was within the Township of Leeds and the Thousand Islands. According to documentation found within the OPP reconstruction investigation, this section of Highway 401 runs through what appears to be a heavily forested area. There are no overhead lights or other artificial lighting. There are paved shoulders on

both sides of Highway 401 though the shoulder on the south side of the highway is somewhat narrow by reason of a guardrail on the south edge of the shoulder and a rock cut to the south of the guard rail.

By all accounts, Darrin had been driving in an easterly direction in the right or southern most eastbound lane. Darrin sustained catastrophic injuries from the accident, including a brain injury, and has no recollection of the events leading up to the accident. His last memory is of attending a job interview in Windsor that morning and having lunch with his mother-in-law in Windsor. He determined, after the accident, that he made a stop at the Pacific Mall north of Toronto as he reviewed his phone records which demonstrate that he must have spoken with his daughter shortly before 8:00 pm.

Darrin was a Type 1 diabetic first diagnosed in 1989. In 2000, he obtained an insulin pump such that he was no longer required to administer injections. The pump is connected to Darrin 24/7. It measures his insulin levels. Darrin can make adjustments to the pump based on readings and/or he can ingest food to help with his sugar levels.

There is evidence within the OPP reconstruction investigation that witnesses described Darrin's driving as erratic as he was unable to maintain positioning within his lane. Ultimately, Darrin brought his vehicle to a full stop in the right or southern most eastbound lane of Highway 401. The black box respecting Darrin's vehicle demonstrates that it was stopped for at least the 5 seconds preceding the accident. There is also evidence available from the OPP investigation that the transmission of Darrin's vehicle was in the "park" position at the time of the crash.

Sebastian was travelling in an easterly direction in the southern most eastbound lane moving through a curve to his right. There was a rock cut to the south of the southern guard rail. According to Sebastian, he saw Darrin's vehicle which had its headlights and running lights activated (but not its four-way flashers). Sebastian described another tractor trailer in the lane to his left such that he was unable to steer to his left. He applied his brakes but a collision could not be avoided. When the accident occurred, both vehicles were in the same lane travelling in the same direction.

Sebastian gave evidence on his examination for discovery in the companion tort action (such evidence being used for this proceeding) of his perception of Darrin's vehicle being stopped on the highway with headlights and rear running lights activated.

Sebastian gave further evidence of his efforts to brake under emergency conditions. This evidence is confirmed by data recording devices within Sebastian's vehicle and confirmed in the OPP investigation.

All evidence points to Darrin suffering some form of medical condition or emergency which caused him to stop his vehicle in the roadway. The police reconstruction report concluded that the collision was a result of a medical condition. The police report codes Darrin's condition as "medical or physical disability" and his vehicle manoeuvre as "stopped". There are further indications in the OPP investigation to the effect that Darrin was received at hospital with low blood sugar levels. One of the investigating officers referenced information gathered that Darrin had low blood sugars which medical staff described as having a similar effect to "drunk driving". The police determined the collision was, from Darrin's perspective, the result of diabetic/medical condition.

At the time of the accident, Darrin's driver's license was not restricted in any fashion by reason of his longstanding diabetic condition. Indeed, Darrin was working temporarily as a taxi driver in the one year or so before the accident following his return from the United States and his efforts to obtain work in his field of engineering.

The police did not lay any charges, under the Highway Traffic Act ("HTA") or otherwise, as against either Darrin or Sebastian by reason of their involvement in this accident.

THE LAW:

Loss transfer recovery is statutory relief, permitted in only certain circumstances as set out in Section 275 of the *Insurance Act* and Ontario Regulations 664 and 668 thereunder. Indemnification for accident benefits paid "shall" be determined "according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules".

Rule 2(1) of the FDR requires an insurer to determine the degree of fault of their insured in accordance with the FDR. Rule 4(1) and 4(2) of the FDR require that if more than one rule applies when attributing fault to an insured, the insurer must apply the rule which attributes the "least degree of fault to the insured". However, if two rules apply to an accident involving two vehicles and if, under one rule, the insured is completely at fault

and, under the other, the insured is not at fault, the insured shall be deemed to be 50% at fault for the incident.

There is no dispute between the parties that Rule 6(2) applies. This is acknowledged and admitted by Intact. For the sake of completeness, the applicable portions of Rule 6 are reproduced below:

> Rules for Automobiles Travelling in the Same Direction and Lane
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> 6. (1) This section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are travelling in the same direction and in the same lane.
>
> (2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

I find that Economical is the insurer responsible for paying accident benefits to Darrin under a personal policy of automobile insurance and Sebastian's vehicle qualified as a "heavy commercial vehicle". Both vehicles were travelling in the same direction in the same lane when Sebastian drove directly into the rear of Darrin's automobile. Darrin's vehicle was stopped. Accordingly, Rule 6 (2) applies and, if I find this to be the only applicable rule, Economical would be entitled to 100% indemnification in accordance with this rule and the provisions of the *Insurance Act*, previously described.

However, Intact takes the position that Rule 17 (2) also applies to the facts of this accident. The applicable portions of Rule 17 are reproduced below:

> Rules for Other Circumstances
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> 17. (1) If automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
>
> (2) If automobile "A" is illegally parked, stopped or standing when it is struck by automobile "B" and if the incident occurs outside a city, town or village, the driver

> of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for the incident.

If both Rules 6 (2) and 17 (2) apply, the net result would be for Intact to indemnify Economical at the rate of 50%. This result is dictated by Rule 4 (2).

At this juncture, it is appropriate to reference well-established law in this area. Establishing fault under the loss transfer scheme does not require scientific precision. When considering the purpose of the loss transfer scheme, the Ontario Court of Appeal has stated as follows:

> The scheme of the legislation, under s. 275 of the Insurance Act and companion regulations, is to provide for an expedient and summary method of reimbursing the first-party insurer for payment of no-fault benefits from the second-party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the fault determination rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.[2]

The Court has also stated that the scheme aims to "spread the load among insurers in a gross and somewhat arbitrary fashion favouring expedition and economy over finite exactitude".[3]

While Arbitrator Robinson suggests that common sense is to be used when considering the Fault Determination Rules (see his unreported decision of November 21, 2003 in *Royal & Alliance Insurance Company v. AXA Insurance Company*), Justice Perell criticized Arbitrator Jones by taking what he characterized as a normative approach by determining whether or not a rule ought to apply. "Either the Rule applies or it does not apply, and asking whether the Rule ought to apply is to ask the wrong question".[4]

My task, when determining a loss transfer dispute, is to first determine the facts; namely, to determine what was the "incident" and, second, to determine if that incident is described in any of the FDR. I must determine if the rule "applies with respect to the

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[2] Jevco Insurance Co. v. Canadian General Insurance Co., 14 O.R. (3d) 545; [1993] O.J. No. 1774
[3] Jevco Insurance Co. v. York Fire & Casualty Co., 27 O.R. (3d) 483; [1996] O.J. No. 646
[4] ING Insurance Company of Canada v Farmers Mutual Insurance Company (Lindsay), unreported decision of the Honourable Justice Perell dated May 31, 2007

insured". Third, if the incident, as I find it to be, is described in any of the FDR, then my task is to apply that rule or rules. Fourth and finally, if the incident was not described in any of the rules, then I am to determine the degree of fault of the insured in accordance with the ordinary rules of law. [5]

Intact seeks to prove that Rule 17 (2) applies. Consequently, Intact has the onus or burden of proof of establishing three constituent elements:

(a) that the incident occurred outside of a city, town or village;

(b) that Darrin's vehicle was parked, stopped or standing; and

(c) that the parking, stopping or standing was illegal.

On the first criterion, Rule 17(2) does not apply to incidents which occur within a city, town or village. These terms are not defined under the FDR or the *Municipal Act*, 2001. All incorporated municipalities are classified as either lower tier, single tier or upper tier. Section 455(1) of the *Municipal Act*, 2001, provides as follows:

> 455 (1) Every city, town, township and village that existed and formed part of a county, a regional or district municipality or the County of Oxford for municipal purposes on December 31, 2002,
>
> (a) is continued with the same name; and
>
> (b) has the status of a lower-tier municipality which stands in the place of the city, town, township or village, as the case may be, for all purposes.

According to the police report and the OPP investigation, the accident occurred within the Township of Leeds and Thousand Islands, a lower tier municipality. I cannot find that the incident occurred outside of a city, town or village. Consequently, Intact fails to meet its burden in relation to this criterion.

I hasten to add that the aerial photograph and photographs of the scene of the accident depict an area that bears no resemblance to an urban area, be that a city, town or village as described in Rule 17(2). However, I cannot take a normative approach; rather, I must

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[5] supra, note 4

strictly apply the FDR, providing the parties with an expedient and somewhat arbitrary result which may or may not resemble or reflect the result in a contested tort action or the result if I were to find that the incident is not described in any of the rules such that I would be required to determine fault in accordance with the ordinary rules of law (Rule 5 of the FDR).

In the event I am in error and for the sake of completeness, I move to the next criterion which requires me to determine whether Darrin's vehicle was parked, stopped or standing when struck by Sebastian's vehicle. There is no evidence that Darrin intended to park his vehicle. Rather, I find as a fact, on all of the evidence, that Darrin was confronted with a medical emergency. Perhaps ill-advised or perhaps unexplained, Darrin brought his vehicle to a stop in a live lane of traffic. Darrin was in the midst of a medical crisis. His vehicle was stopped for at least 5 seconds but there is no evidence before me of it being stopped for any greater duration. The police investigation determined the vehicle to be stopped and not parked. I find that Darrin's vehicle was stopped by reason of a medical emergency.

Additionally, I should point out that Intact, having accepted that Rule 6 (2) applies, has conceded by application of this rule that Darrin's vehicle is either stopped or in forward motion. I have found as a fact that the vehicle was stopped.

If I am mistaken in relation to the location of the incident, discussed above, I need to determine whether Darrin's vehicle was "illegally ...stopped" pursuant to Rule 17(2) of the FDR. As noted above, neither Darrin nor Sebastian were charged with any driving offence

The word "illegally" is not defined in the FDR. "Illegal" is not defined in the FDR, Highway Traffic Act or Insurance Act. According to the Merriam-Webster online dictionary, illegal is defined to mean, "not according to or authorized by law; unlawful, illicit."

Indeed, the concept of legality or illegality is noticeably and conspicuously absent from the FDR with two exceptions.

The first requires a finding of automobile "A" being illegally parked, stopped or standing under Rule 17(2) which is the issue before me.

The only other consideration of legality or illegality found in the FDR is Rule 20. Under Rule 20, if the driver of automobile "A" involved in the incident is charged with a driving offence, the balance of the Fault Determination Rules are ousted and the degree of fault of the insured must be determined in accordance with ordinary rules of law (Rule 5) and not in accordance with the other Fault Determination Rules. A driving offence is defined in Rule 20(1) if the driver of automobile "A" is, as a result of the incident, charged with impaired driving, blood alcohol level exceeding the limits permitted by law, an indictable offence related to the operation of the automobile, failing or refusing to provide a breath sample or the driver of automobile "A" is charged with exceeding the speed limit by 16 or more kph.

Under Rule 20, all that need occur is for the police to lay a charge. It matters not whether there is a conviction or a valid legal defence. The charge triggers the application of Rule 20 and, in turn, the ordinary rules of law pursuant to Rule 5 and ousts the other Fault Determination Rules that might ordinarily apply.

Section 17(2) requires Intact to prove and for me to find that Darrin was **illegally** parked, stopped or standing [emphasis added]. A finding of illegality must be more than merely a finding that a driver was charged with a driving offence as that term is used in Rule 20.

I have already found that Darrin's vehicle was stopped. Intact relies on Section 170(12) of the *Highway Traffic Act*, R.S.O. 1990, c. H8, which provides that:

> "Despite the other provisions of this section, no person shall park or stand a vehicle on a highway in such manner as to interfere with the movement of traffic or the clearing of snow from the highway."

Intact asserts that once the underlying facts of the incident have been assessed as coming within the wording of Rule 17(2) of the FDR, other potential causes relating to the loss need not be considered. Such other contributing factors would only be considered if Rule 17 did not apply but, rather, the ordinary rules of law were applicable (Rule 5).

I cannot accept this argument for the following reasons. Firstly, I have found that Darrin's vehicle was stopped on the highway. It was not parked nor was it standing. This appears to eliminate the applicability of s. 170(12) of the HTA. Secondly, Intact has

acknowledged the applicability of Rule 6(2) which applies to the extent that Darrin's vehicle was stopped or in forward motion. All of the evidence points to the fact that the vehicle was stopped rather than in motion. Once again, this finding would move Darrin's conduct outside of s. 170(12) of the HTA. Finally, if Darrin were to have been charged with an offence under the Highway Traffic Act, be that s.170 (12) or otherwise, Darrin would have been entitled to mount a defence by reason of the medical emergency that unfortunately befell him shortly before or at the time of the incident which gives rise to this proceeding. Darrin would be entitled to demonstrate his due diligence in relation to his medical and personal care and treatment for this diabetic condition. Consequently, I cannot find Darrin's conduct (be that parking, stopping or standing) to be illegal.

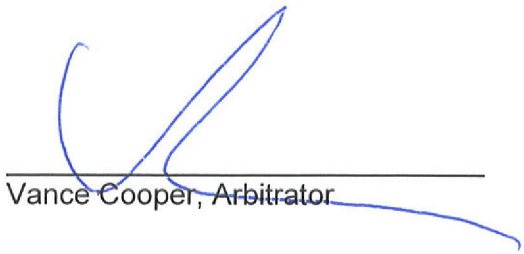
For the reasons given, Rule 6(2) of the FDR applies to Intact's insured, being Sebastian, and Rule 17(2) does not apply to Economical's insured, Darrin, such that Economical is entitled to 100% loss transfer indemnification.

I remain seized of this matter to address any issues in relation to quantum of indemnification, interest and legal costs (taking into account the success of the parties, any offers to settle, the conduct of the proceeding and the principles generally applicable in litigation before the Courts of Ontario). I will wait to her from counsel whether I will be required to address any of the foregoing.

In addition, I must determine who bears the cost of the arbitration pursuant to Sections 3 and 4 of the arbitration agreement.

I am most appreciative of the efforts, expertise and civility of counsel for their courtesy and cooperation extended to me and to each other from the inception of the Arbitration through to its conclusion. This matter proceeded efficiently from the time of the first pre-arbitration teleconference in January 2020 through to its hearing. I wish to thank counsel for their thoughtful, comprehensive and intelligent submissions both in writing and at the oral hearing.

Dated at Toronto, this 5th day of February, 2021.



Vance Cooper, Arbitrator