

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.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:

INTACT INSURANCE COMPANY

Applicant

- and -

ECONOMICAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

Omar Sewdat and Rohit Sethi

Counsel for the Applicant, Intact Insurance Company ("Intact")

Hermína Nuric

Counsel for the Respondent, Economical Insurance Company ("Economical") (now known as
Definity Insurance Company)

ISSUES:

Intact seeks indemnification by way of loss transfer dispute in relation to statutory accident
benefits that it paid to its insured, James T. For privacy reasons, James' full name will not be

used but he will be referenced as James throughout these reasons. Similarly, the driver of the Economical tractor trailer will be referenced as Khushkaran throughout these reasons.

The claim arises from a motor vehicle accident which occurred in the City of Toronto on January 31, 2018. There is no dispute in relation to the heavy commercial vehicle status of the Economical vehicle. The dispute centres upon determination of fault and the application of the fault determination rules, being Ontario Regulation 668 but referenced here as the FDRs. Thus, 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 Economical to Intact? Depending on the outcome of this issue, there may be ancillary issues in relation to quantum, costs, etc.

The following documents were "marked" as exhibits at the hearing which proceeded by way of Zoom on July 26, 2022.

Exhibit 1 - arbitration agreement

Exhibit 2 – affidavit of James T. sworn March 18, 2022

Exhibit 3 - affidavit of Khushkaran C. sworn May 25, 2022

The procedure agreed upon between the parties, as a result of a somewhat fractious process involving a series of pre-arbitration teleconferences, was that affidavits would be delivered and that the deponents would be produced for cross examination before me at the hearing which occurred. In advance of the hearing, I received a factum delivered on behalf of Intact, a responding factum delivered on behalf of Economical and a reply factum delivered on behalf of Intact. This led to counsel for Economical challenging the appropriateness of the content of the reply factum. I ordered that I would consider the reply factum but grant Economical the right to deliver sur-reply which counsel for Economical did. I have reviewed and considered all such documents, with attachments and tabs, when coming to this decision.

The facts are not particularly controversial. The accident occurred on January 31, 2018. There is some dispute regarding the time of day of the accident which will be addressed later in this

decision. The accident occurred at the intersection of Munham Gate and Kennedy Road in Scarborough. Munham Gate runs in a generally east west direction and, at its western end, terminates at Kennedy Road though there is a commercial property on the west side of Kennedy Rd. This intersection is governed by automatic traffic signals. Munham Gate is acknowledged and agreed to be a single lane in each direction though the lanes are described as being double wide.

James deposed that he was traveling west on Munham Gate approaching Kennedy Road. There was a tractor trailer which we now understand to be the Economical vehicle stopped on the left or southern side of the lane. James did not observe a right turn signal activated from the tractor trailer. The traffic light was red. There were two passenger automobiles stopped immediately to the north of the tractor trailer and immediately to the south of the north curb on Munham Gate. James activated his right turn signal and brought his vehicle to a stop behind the second vehicle and approximately halfway along the side of the trailer of the Economical vehicle.

When the light governing westbound traffic turned green, the two vehicles ahead of his vehicle proceeded to make a right turn. His vehicle remained stationary. The tractor trailer began to turn right, encroaching on his side of the westbound lane. His vehicle remained stopped at all times and he began honking his horn. The trailer struck the left or driver's side front quarter panel and mirror of his vehicle.

It should be noted that there was a passenger in James' vehicle. This was a co-worker he had known for some six months. This individual was not identified other than by his first name, Mark, and neither of the parties to the arbitration called Mark as a witness. James acknowledges that he did speak with Mark at work on the day after the accident.

On cross examination, James acknowledged that he was familiar with this intersection. Road markings were clear and visible. There was one lane of travel in each direction though each lane was "double wide". He described the Economical tractor trailer as stopped closer to the centre line than to the curb. Thus, the Economical vehicle was stopped at the intersection as the Intact vehicle was approaching and ultimately stopped in the position described, above.

There was sufficient room for passenger vehicles to move between the right or passenger side of the tractor trailer and the curb. James never saw a right turn signal activated on the part of the tractor trailer. He is not sure as to whether he saw a left turn signal activated on the part of the tractor trailer. He assumed that the tractor trailer would be turning left by reason of it being stopped closer to the centre of the road. By the same token, he was generally aware that a tractor trailer would need more room to make a turn. He inferred, based on the stopped position of the tractor trailer and the absence of a right turn signal, that it was going to turn left.

Exhibit D to the affidavit of James consists of a colour photograph depicting his vehicle and the Economical vehicle after the collision. James' vehicle is slightly to the east of its position at the point of the collision. The Economical vehicle is partway through what would be described as a wide right turn, given that it is a tractor trailer. James' vehicle appears to be stopped within one or perhaps 1.5 car lengths of the pedestrian crossing on the east side of Kennedy Rd.

On cross examination, James testified that the first vehicle ahead of him made a right hand turn from Munham Gate on to Kennedy before the light turned green. This was followed by the second vehicle ahead of him and his vehicle moved forward somewhat while in the same general position on Munham Gate. James maintains that his vehicle was stationary as he observed the Economical vehicle turning into him. He was unable to reverse his vehicle as there were one or more vehicles behind him. None of these vehicles were identified and none of the drivers were summonsed to give evidence before me nor was I made aware of any statements from or information attributable to these potential witnesses. The same can be said about James' co-worker, Mark.

James testified that motorists, including himself, treat Munham Gate as consisting of two lanes in each direction though he acknowledges that he now understands this is incorrect.

James was cross-examined on the discrepancy between his self-reporting collision report, which describes the accident as occurring at 5:30 PM, and his affidavit which describes the accident as occurring at 3:30 PM. Given the time of year and the photograph taken at the scene of the accident in daylight, I find that the accident occurred at 3:30 PM. Nothing turns on the discrepancy between his affidavit and the self-reporting collision report. Similarly, the self-reporting collision report references James waiting behind three cars. His affidavit and his evidence before me references two cars. Nothing material turns on this discrepancy.

Khushkaran deposed that he provided an incident report to his employer on January 31, 2018. Similarly, he completed a self-reporting collision report on January 31, 2018.

In the incident report, he described making a right turn from Munham Gate on to Kennedy Rd on a green light. He described Munham Gate as consisting of a single lane. He was already in the middle of the intersection while making a wide turn and looked back to see if his trailer tires were clearing the curb. At that point, he noticed the Intact vehicle in contact with his rear trailer tires. Khushkaran exited his vehicle to see if the driver of the Intact vehicle was okay. At this point, the driver, who we now know to be James, reversed his vehicle a short distance, got out of his vehicle and they proceeded to exchange information.

In the self-reporting collision report, Khushkaran stated that the light had just turned green. He began to make a right turn onto Kennedy Rd from Munham Gate. The statement reads verbatim "at that point while turning the other vehicle had struck my trailer tires. Heading west on Munham Gate, turning right to Kennedy Rd north".

On cross-examination, Khushkaran testified that there were no vehicles parked or stopped to the right of his vehicle when he approached the intersection and came to a stop. There were no vehicles parked or stopped to the right of his vehicle when he commenced his wide right turn. He admits that the rear passenger side trailer tires came into contact with the front left or driver's side of the Intact vehicle but contends that James drove into him rather than vice versa. He rejects the assertion that one or more vehicles turned right from westbound Munham Gate to northbound Kennedy Rd while he was stopped waiting to make his right turn or while he started into his right turn.

Khushkaran further testified on cross-examination that the space to the north of his tractor trailer, while the tractor trailer was stopped to make the right turn, was not occupied by any vehicle including the Intact vehicle. Khushkaran testified that he checked this space, and it was clear as he began his right turn. Thus, he testified as to his belief that James struck him rather than vice versa.

Counsel for Intact, in his factum, made what can best be described as creative arguments. That said, these arguments cannot be given any serious consideration by me, having regard for the

significant and evolving body of law governing loss transfer disputes generally and the interpretation and application of the FDRs. This challenge was remedied in the factum delivered by way of reply and further refined in oral submissions made at the conclusion of the hearing.

In essence, the argument advanced on behalf of Intact is that rule 5 should apply to my determination of fault and that a consideration of rule 10 (2) and rule 10 (1) should inform my understanding and application of rule 5 to the facts of the case. It seems to be acknowledged that the specific facts of this accident configuration are not dealt with directly by the FDRs.

In response, counsel for Economical suggests that rule 6 (3) applies to the facts and, if not, rule 6 should inform my analysis of and application of rule 5.

There are certain principles of general application to loss transfer disputes which are not contentious. Loss transfer disputes are governed by the FDRs which provide 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 rules, and any determination of fault between the injured plaintiff and the alleged tortfeasor is irrelevant." *Jevco Ins. Co. v. Canadian General Ins. Co.* (1993) 14 O.R. (3d) 545 (Ont. C.A.)

The purpose of the legislation is to spread the load among insurers in a "gross and somewhat arbitrary fashion", favouring expedition and economy over finite exactitude. *Jevco Ins. Co. v. York Fire Casualty* (1996), 27 O.R. (3d) 483 (Ont. C.A.)

FDRs allocate fault according to the type of accident, and not necessarily in accordance with actual fault. *Economical Mutual Insurance Co v. Royal & Sun Alliance Insurance Co. of Canada*, 2011 Carswell Ontario 19153 (arbitral award of Lee Samis made Aug 11, 2011)

The phrase "the ordinary rules of law" as it appears in rule 5(1) of the FDRs does not mean "the ordinary rules of tort law". It would have been a simple matter for the Legislature or those responsible for drafting and promulgating the regulations to have included the word "tort" in rule 5(1) if that was their intention. While "rules of law" is not defined in the FDRs, an arbitrator may reference other portions of the FDRs as part of the exercise of applying the

rules of law. The other rules may provide persuasive guidance for fault termination under rule 5(1). *State Farm Mutual Automobile Insurance Co. v. Aviva Canada Inc*, 2015 ONCA 920 (Ont. C.A.)

Intact argues that rule 10 should apply to the facts or should inform my understanding of the facts in my application of rule 5. Rule 10 applies only when both automobiles are traveling in the same direction and in adjacent lanes. There were no adjacent lanes on Munham Gate. There was what is described as a double wide single lane in each direction. This does not allow for direct application but may inform my application of rule 5.

Economical submits the rule 6 deals with rear end type of collisions between two vehicles. It applies when three requirements are met:

- i. both vehicles are traveling in the same direction;
- ii. both vehicles are traveling in the same lane; and
- iii. the lead vehicle is "struck from the rear"

Economical submits that this rule can still apply, despite the fact that the Economical vehicle is in the process of making a turn. Counsel argues that rule 6 (3) does account for a turning vehicle. This rule provides as follows:

If automobile "A" is turning, either to the right or to the left, in order to enter a side road, private road or driveway, 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 do not find this rule to be directly applicable to the facts of the case. If I characterize the Economical vehicle as automobile "A", it was not turning to enter a side road, private road, or driveway. Rather, it was attempting to execute a wide right turn at an intersection governed by automatic traffic signals. Given the nature of a tractor trailer, it was necessary to initiate the turn from the extreme south side of a wide lane and move forward in a westerly direction before turning to the north. This would cause the trailer to move through the northern portion of this wide westbound lane.

I have reproduced the relevant and applicable sections of the FDRs at the end of the decision for the convenience of anyone who might read this decision.

Counsel for Economical submits that the term "traveling" has been interpreted to refer to the direction of travel of the vehicle as opposed to the fact of motion. The meaning of the words "struck from the rear" refers to the manner in which automobile "B" collides with automobile "A". In other words, struck from the rear refers to the approach of the colliding vehicle in relation to the vehicle with which it collides. The exact point of contact between the vehicles is not relevant, as long as the lead vehicle is struck from a rear approaching vehicle. The lead vehicle can be rear-ended even if it is the side of its body that is impacted by the other vehicle approaching the rear.

While I agree with all of these submissions as correct statements of law, I am unable to reconcile what I consider to be fundamental discrepancies on very important facts. James acknowledges that the Economical tractor trailer was in stopped position at the intersection before James arrived at the intersection. James subsequently came to a stop. The sum and substance of Khushkaran's evidence is that he never saw James' vehicle at any point prior to his appreciation that there had already been a collision. James maintains that his vehicle was stopped when struck by the moving trailer pulled by the Economical vehicle. Khushkaran maintains that it was James' vehicle which struck his trailer. Given that Khushkaran did not see James' vehicle before the crash, it does not lie in his mouth to assert that James' vehicle was in motion and collided with the passenger side of the trailer. Consequently, I find that the Intact vehicle was stationary when the collision occurred. Consequently, it cannot be said that it struck the Economical vehicle from the rear.

I find that neither rule 6 nor rule 10 apply to the facts of this case. I find that James was familiar with this intersection and the need for a tractor trailer to make what is colloquially known as a wide right turn. When James approached the intersection, the Economical tractor trailer was already stopped at the extreme south side of the westbound lane. James cannot recall seeing a left turn signal. He testified that he did not see a right turn signal. It was highly unlikely that this tractor trailer was going to travel to the commercial premises on the west side of the road. At minimum, James should have been concerned about the intentions of the Economical tractor trailer. However, he brought his vehicle to a stop sandwiched between the passenger side of the Economical trailer and the curb on the north side of Munham Gate. I find that James came to a

stop prior to Khushkaran commencing his wide right turn. Stopping in this position made it difficult for the driver of the Economical vehicle to see the Intact vehicle.

At the same time, I find that Khushkaran, as a professional driver and as someone familiar with this area and the intersection, was obliged to check his mirrors and ensure that there were no vehicles who could reasonably be affected by his driving maneuver before he commenced this maneuver. Given that I have found that James came to a stop before Khushkaran commenced his turn, Khushkaran should have been able to see James' vehicle before he commenced his turn and should have appreciated that by commencing his turn in the manner in which he did, there was potential for contact between the vehicles to occur.

I should add that I found each of James and Khushkaran to be equally credible. Each was doing their best to recall the details of an accident that occurred more than 4.5 years before they were summonsed by their insurers to give evidence on a loss transfer dispute between insurers. Each of the witnesses was forthcoming and attempted to be forthright and candid. If there were discrepancies between documents which they completed contemporaneous with the circumstances of the accident and the evidence which they offered either through their affidavits or through cross examination, I find those discrepancies to be due to the passage of time and the frailties of memory. There was no attempt to deceive me or counsel.

Given that I have found that neither rule 6 nor rule 10 apply, I cannot resort to rule 4 (1) and apply the rule which attributes the least degree of fault to the insured. I cannot resort to rule 4 (2) and deem each insured to be 50% at fault. I am left to apply rule 5 and determine the degree of fault of the insureds in accordance with ordinary rules of law.

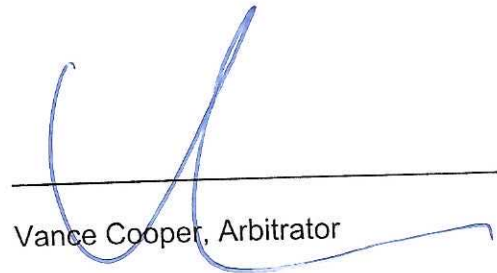
I do not think that there is a lot to choose from in terms of finding fault in the part of James or fault on the part of Khushkaran. James should not have brought his vehicle to a stop in the place I have described. This was a single lane. In essence, he was attempting to overtake a stationary vehicle to the right of such stationary vehicle. He made it difficult for the driver of the tractor trailer to observe him and made it difficult for the trailer, pulled by the tractor, to avoid him as the tractor trailer made what was, of necessity, a wide right turn. Khushkaran should have checked or better checked his passenger side mirrors and verified that the space to the north of his vehicle and to the south of the curb was vacant and would not be affected by his wide right

turn. No turn should be commenced unless it can be made in safety. The collision between the vehicles establishes that the turn could not be made in safety.

I find each of James and Khushkaran to be 50% responsible for the happening of the collision. As a result, Intact is entitled to a 50% recovery by way of loss transfer indemnification from Economical.

I remain seized of this matter to address any issues in relation to the quantum of indemnification, interest, if any, 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 to litigation before the courts of Ontario). I will wait to hear from counsel whether I will be required to address any of the foregoing.

Dated at Toronto, this 14th day of October 2022



Vance Cooper, Arbitrator

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Insurance Act, R.R.O. 1990, REGULATION 668 known as the FAULT DETERMINATION 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.
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.

(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.

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.

Rules for Automobiles Travelling in the Same Direction and Lane

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.

(3) If automobile "A" is turning, either to the right or to the left, in order to enter a side road, private road or driveway, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

(4) If automobile "A" is in forward motion and is entering a parking place on either the right or the left side of the road, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

Rules for Automobiles Travelling in the Same Direction in Adjacent Lane

10. (1) This section applies when automobile "A" collides with automobile "B", and both automobiles are travelling in the same direction and in adjacent lanes.

(2) If neither automobile "A" nor automobile "B" changes lanes, and both automobiles are on or over the centre line when the incident (a "sideswipe") occurs, the driver of each automobile is 50 per cent at fault for the incident.

(3) If the location on the road of automobiles "A" and "B" when the incident (a "sideswipe") occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.

(4) If the incident occurs when automobile "B" is changing lanes, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

(5) If the incident occurs when automobile "A" is turning left at an intersection and automobile "B" is overtaking automobile "A" to pass it, the driver of automobile "A" is 25 per cent at fault and the driver of automobile "B" is 75 per cent at fault for the incident.

(6) If the incident occurs when automobile "A" is turning left at a private road or a driveway and automobile "B" is overtaking automobile "A" to pass it, the driver of each automobile is 50 per cent at fault for the incident.

(7) If the incident occurs when automobile "A" is turning left at a private road or a driveway and automobile "B" is passing one or more automobiles stopped behind automobile "A", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.