

HOT LOSS TRANSFER ISSUES

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INTRODUCTION

- LIMITATION PERIOD / *LACHES*
- QUANTUM OF INDEMNITY
- MULTIPLE DEDUCTIBLES PERMITTED
- FAULT DETERMINATION RULE 9(4)
- ORDINARY RULES OF LAW

LOSS TRANSFER LIMITATION PERIOD/ *LACHES*

- Rolling limitation period initiated by deemed denied claim
- 2 years from day after indemnity claim made [*STATE FARM v. DOMINION* (2005) O.J. No.4642]
- *Laches* does not apply to loss transfer [*INTACT v. LOMBARD* 2015 ONCA 764] (subject to possible appeal to Supreme Court of Canada)
- Indefinite extension of time limits, controllable by claimant with no equitable remedy
- Intended by legislature?

LOSS TRANSFER LIMITATION PERIOD/ *LACHES*

- **IMPLICATIONS:**
 - Potential presentation of overlooked indemnity claims dating back 25 years
 - Pre-emptive denials of indemnity claims?
 - No certainty for second party insurers (exposure on policies, reserves, loss history, premiums)
 - Commercial insurers and trucking companies beware
 - Application of limitation period initiated by denied claim for other contractual claims (i.e. uninsured/underinsured)
 - Legislative changes?

QUANTUM OF INDEMNITY

- **Loss control measures [*WAWANESA V. AXA* 2012 ONCA 592]**
- **Reasonableness ... affirmation of duty of good faith owed**
- **Administration costs**
- **Overpayments**
- **Legal Costs**

QUANTUM OF INDEMNITY

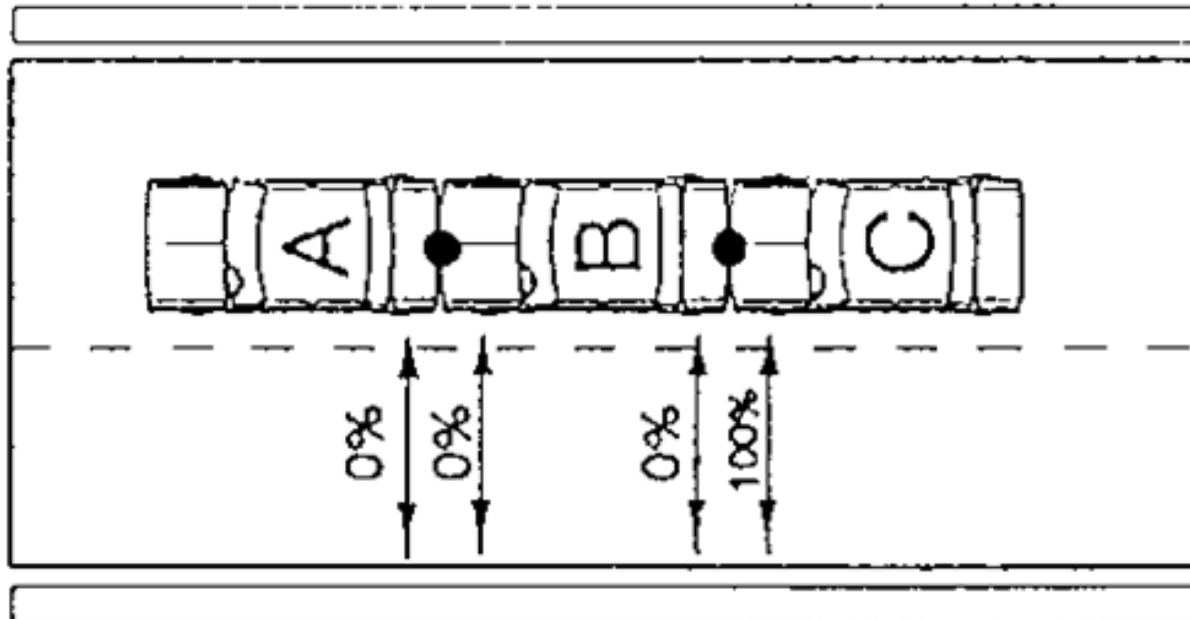
- **IMPLICATIONS:**
 - More demands for full documentary productions
 - More challenges based on “reasonableness” of payments/defences not advanced
 - More scrutiny of file handling (basis for payments and compliance with SABS)

MULTIPLE DEDUCTIBLES PERMITTED

- Deductible (\$2,000) applies to indemnity claims advanced for each claimant regardless of “insured” status
[*ECONOMICAL V. NORTHBRIDGE* 2016 ONSC 458]
- IMPLICATIONS:
 - Still technically divided caselaw
 - Fewer small claims advanced?
 - Multiple deductibles applicable in multi-claimant indemnity demands

FAULT DETERMINATION RULE 9(4)

- No fault on initiating vehicle in chain-reaction rear-end collision [*STATE FARM V. OLD REPUBLIC* 2015 ONCA 699]



FAULT DETERMINATION RULE 9(4)

- **IMPLICATIONS:**
 - **Costs payable to commercial insurers in disputes awaiting this decision**
 - **Closer scrutiny of FDRs and strict interpretation of language**

ORDINARY RULES OF LAW

- Loss transfer “ordinary rules” are not the same as tort “ordinary rules” [*STATE FARM V. AVIVA* 2015 ONCA 920]
- Must not take into consideration certain circumstances (weather, road, visibility, pedestrians, point of contact with other vehicle)
- More expedient and summary resolution taking into consideration *HTA*, caselaw and potential outcomes under FDRs

ORDINARY RULES OF LAW

- **IMPLICATIONS:**
 - No more reliance on tort trial or liability agreement
 - Development of new arbitral caselaw to guide the application of the “ordinary rules of law” in loss transfer
 - Only 0%, 50% or 100%?
 - Pedestrian cases?

QUESTIONS?

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