



# Loss Transfer: Principles and Best Practices

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# Publication Note

- This Presentation was done in 2010

# The Origin of Loss Transfer

- Introduction of 'no fault' insurance caused shift in responsibility to handle accident benefits
- Recognition of inequity between insurers of different classes of vehicles based upon the potential for causing loss, and accident benefits paid

# Spreading the Load

- Loss transfer created as a statutory scheme
- Reallocates losses between heavy loss causers and vulnerable loss sufferers

# Principle #1

“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 Insurance Co. v. York Fire & Casualty Co.*  
[1996] O.J. No. 646 (C.A.)

# When Loss Transfer is Available

- Section 275(1) of the *Insurance Act*
- Insurer responsible to pay accident benefits entitled to indemnification of **benefits** paid, from the insurer of such **classes** of automobiles as named in the regulations, to the extent the second insurer's driver is **at fault** for the accident

# Naming Names

- Ontario Regulation 664
- Describes classes of insurers between which loss transfer is available:
  1. Insurer of motorcycle *from* insurer of any other class of vehicle
  2. Insurer of any other class of vehicle *from* insurer of heavy commercial vehicle

# Best Practice #1

- Identify the classes of vehicles insured under the policy *that is issuing statutory accident benefits* to the injured third party
- *Always* request a copy of the declaration page



# What's in a Name

Heavy + Commercial + Vehicle

# “Heavy”

- “Heavy” = gross vehicle weight of 4,500kg or more
- “Gross Vehicle Weight” = actual weight of vehicle, including its load, at a given time
- “Load” = cargo being hauled, fuel, driver, what driver ate for lunch, etc.

# “Commercial”

- “Commercial” = used primarily to transport materials, goods, tools or equipment in connection with occupation

# “Commercial”

## Includes:

- Police Dept. vehicle
- Fire Dept. vehicle
- Driver training vehicle
- Construction or maintenance vehicles
- Vehicle rented for 30-days or less

## Excludes:

- Ambulance
- Bus
- Funeral vehicle
- Limousine
- Taxi

# Best Practice #2

- Identify the gross vehicle weight of the insured and third party vehicles at the time of the accident, including any cargo, passengers, fuel, etc.
- Identify the purpose of the vehicles
- Obtain bills of lading to assist in determining weight of cargo

# Excluded Drivers

- A loss transfer claim *is not* available against an insurer whose vehicle was operated by an excluded driver at the time of the accident

*Jevco Insurance Co. v. Wawanesa Insurance Co.*  
[1998] 42 O.R. (3d) 276 (Ont. Ct. Gen. Div.)

# Unauthorized Drivers

- A loss transfer claim *is* available against an insurer whose vehicle was operated by an unauthorized driver at the time of the accident

*Jevco Insurance Co. v. Wawanesa Insurance Co.*  
[1998] 42 O.R. (3d) 276 (Ont. Ct. Gen. Div.)

*Axa Insurance v. Jevco Insurance.*  
(Nov 5, 2001), Arbitrator B. Robinson

# Best Practice #3

- Confirm whether or not the insured driver was excluded from the policy, generally by means of an OPCF 28 endorsement at the time of the accident



# Determination of Fault

- Loss transfer only available to the extent the second party insurer's driver is at fault
- Fault determined in accordance with the Fault Determination Rules ("FDRs")

# Principle #2

“The Fault Determination Rules set out a series of general types of accidents and 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”

*Jevco Insurance Co. v. York Fire & Casualty Co.*  
[1996] O.J. No. 646 (C.A.)

# Principle #3

“Fault is to be determined strictly in accordance with the Fault Determination Rules”

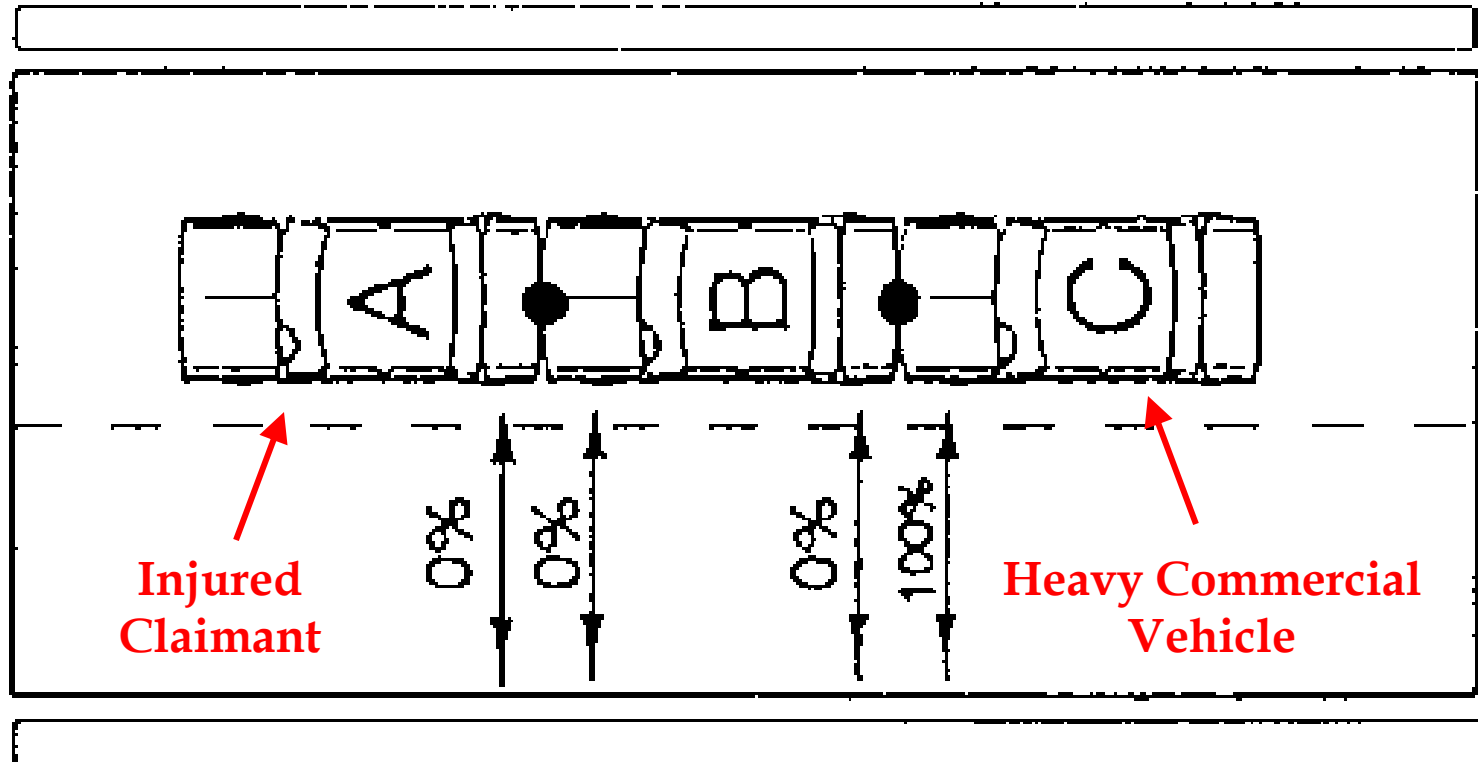
*Jevco Insurance Co. v. York Fire & Casualty Co.*

[1996] O.J. No. 646 (C.A.)

*Jevco Insurance Co. v. Canadian General Insurance Co.*

[1993] O.J. No. 1774

# “Strictly In Accordance with the FDRs”



*GAN General v. State Farm* [1999] O.J. No 4465 – FDR s.9(4)

# Principle #4

“The purpose of loss transfer and the FDRs is to provide for an expedient and summary method of reimbursement. The FDRs are to be liberally construed and applied.”

*Co-operators General Insurance Co. v. Canadian General Ins. Co.*

[1999] O.J. No. 2578

*Jevco Insurance Co. v. York Fire & Casualty Co.*

[1996] O.J. No. 646 (C.A.)

# “Liberally Construed & Applied”

- “At an intersection” means “near an intersection” in Rule 14(2)

*Jevco Insurance Co. v. State Farm Insurance* (July 25, 1995), Arbitrator Ayers

- A heavy commercial vehicle which loses its load into oncoming traffic has ‘crossed the centre line’, even though both tractor and trailer never leave own lane of travel

*Liberty Mutual Insurance Company v. A.I. Transport* (May 26, 2004), Arbitrator Robinson

# Ordinary Rules of Law

- Section 5(1) of the Fault Determination Rules
- If an incident is not described in any of the rules, degree of fault shall be determined in accordance with the ordinary rules of law

# Joint or Several?

- In the case of 'ordinary rules of law' liability is *several* and not joint

*Motors Insurance Corp. v. Old Republic Insurance Co.*  
[2009] (Ont. S.C.J.)

*Aviva Ins. Co. of Can. v. Royal & Sunalliance Ins. Co.*  
[2008] (Ont. S.C.J.)



# Best Practice #4

- If determining liability under 'ordinary rules of law', identify as many entities as possible that may bear some responsibility for the accident, even if not involved in the loss transfer dispute

# Principle #5

“A common sense approach is to be used when considering the Fault Determination Rules and the diagrams in the regulation”

*Royal & SunAlliance Insurance Co. v. Axa Insurance Co.*  
(November 21, 2003), Arbitrator B. Robinson

# Scope of Indemnification

- Generally speaking, ‘benefits paid to the insured person’ are recoverable by the first party insurer
- Lump sum settlements have been found to be ‘benefits’
- Benefit payments must have been reasonable

# Not Subject to Indemnification

- Administrative expenses
- Loss control measures
- Insurer's Examinations
- Overpayments
- Payments beyond the scope of the policy

# Is it Subject to Indemnification?

- Designated Assessment Centre fees
- Interest

# Best Practice #5

- Identify payments which are, or may be, items not recoverable under loss transfer
- Don't assume what a payment is for – ask for clarification, further evidence, documentation or information

# The Limitation Period

- What's not in dispute:
  - Applicable limitation period governed by *Limitations Act*
  - As of January 1, 2004 = 2 years
  - 'Rolling' in nature

# The Limitation Period

- What is in dispute:
  - When does the period start?
  - When does the period ‘roll’?



# The Limitation Period

## *Primum v. Lloyds*

Arbitrator Robinson

October, 2010

- Starts with each benefit payment
- Rolls with each benefit payment

## *Federation v. Kingsway*

Arbitrator Densem

December, 2010

- Starts day after RFI delivered to insurer
- Rolls with each subsequent RFI presented

# Best Practice #6...for now

- For benefit payments made on or after January 1, 2004:
  - Deduct sum of benefit payments made more than **2 years** prior to the date Notice of Arbitration received from indemnification owed
- For benefit payments prior to January 1, 2004:
  - Deduct sum of benefit payments made more than **6 years** prior to the date Notice of Arbitration received from indemnification owed

# What to do about WSIAT?

- Loss transfer applies until first party insurer relieved of duty to pay
- Pending WSIAT determination *does not* relieve duty to pay
- Loss transfer disputes will not be stayed until a WSIAT determination made

# What to do about WSIAT?

- Lack of an executed Assignment of Workplace, Safety and Insurance Benefits may *delay* duty to pay loss transfer
- May be raised as a quantum issue

# Best Practice #7

- Conduct an investigation & assess if first party claimant barred from receiving benefits due to WSIB entitlement
- Advise the first party insurer of your concerns as soon as possible
- Request a copy of the executed and approved Assignment as soon as possible

# Priority in Loss Transfer

- Situations involving rental vehicles, potential for coverage on driver and on vehicle
- Which insurer is liable for loss transfer?

# Priority in Loss Transfer

- Overall focus of loss transfer is fault of drivers
- Bill 18 also states coverage follows the driver, rather than the vehicle
- heavy and/or commercial exclusions in s. 2.2.4 of the OAP1 policy result in Bill 18 priority of coverage amendments being nullified

# Thank You

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