Aviva Insurance Company of Canada v. Royal & Sunalliance Insurance Company, 2008 CanLII 41817 (ON S.C.)

COURT FILE NO.: 08-CV-346482 PD3
DATE: 20080825

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AVIVA INSURANCE COMPANY OF CANADA, Applicant

A N D:

ROYAL & SUNALLIANCE INSURANCE COMPANY, Respondent

COURT FILE NO.: 08-CV-353594 PD2

AND RE: ROYAL & SUNALLIANCE INSURANCE COMPANY, Applicant

AND:

AVIVA INSURANCE COMPANY OF CANADA, Respondent

APPLICATIONS UNDER SECTION 45 OF THE Arbitration Act, 1991

AND IN THE MATTER OF THE INSURANCE ACT, R.S.P. 1990 c. 8, S. 275 and Regulation 664, S.9

BEFORE: MESBUR J.

COUNSEL: Harry Brown, for Aviva Insurance Company of Canada.

S. C. Tessis and J.W. Singh, for Royal & Sunalliance Insurance Company

HEARD: August 6, 2008

ENDORSEMENT

[1] These are two appeals arising from an arbitration under the loss transfer provisions of section 275 of the *Insurance Act.* Arbitrator Jones conducted the arbitration, rendered a decision, and both parties appeal aspects of that decision. I will deal with both appeals in one endorsement, but will begin with the Royal & Sunalliance appeal, since it encompasses more issues.

[2] The arbitration arose as a result of an accident that occurred just north of Highway 401, on County Road 46. A seventeen year old young man, Tim Wry, was working at a Cango gas station finishing off his night shift as a gas bar attendant at about 6:30 in the morning of December 16, 2001. He had worked at the station for only about a week or so. Cango Inc. the owner of the gas station was Mr. Wry's employer. A fuel truck owned by Cango Transport Inc. driven by one of its employees, Barry Norman, and insured by Royal, had just finished delivering fuel and needed to exit the station. In order to do so, it had to back up onto County Road 46. The driver asked Mr. Wry to help him. In the course of doing so, Mr. Wry made his way onto the southbound lanes of the road, where he was struck by a car driven by Mr. Menon. Shortly after, while he was lying injured on the road, he was struck by a southbound car driven by Jean Jenkins. He suffered personal injuries and applied for accident benefits.

[3] Mr. Wry was insured under a motor vehicle motor liability policy with Aviva, which has paid statutory accident benefits to him as a result of his injuries. Aviva invoked the loss transfer provisions of the *Insurance Act* in order to have part of the costs they had paid transferred to Royal as the insurer of a heavy commercial vehicle, namely the Cango fuel truck. Since the insurance companies were not able to reach agreement, the issue went to arbitration before arbitrator Jones.

[4] The arbitrator heard oral evidence, and also had the benefit of reviewing statements made by various witnesses at the time of the accident. The arbitrator concluded that Mr. Wry was 50% at fault for the accident, the two drivers who struck him had no liability at all, Mr. Norman, as the operator of the Cango tractor-trailer was 30% responsible for the accident, while Cango Inc, the owner of the gas station and Mr. Wry's employer, bore the balance of the responsibility for the accidents. As a result of these findings of fault, the arbitrator held that Royal was responsible to pay 30% of the accident benefits Aviva had paid to Mr. Wry.

[5] Royal appeals the arbitrator's finding that neither driver of the cars that struck Mr. Wry had any liability for the accident, and also appeals his finding that the fuel truck operated by Mr. Norman was actually "involved" in the accident. It also takes the position that the arbitrator failed to apply the law correctly, stating that he did not apply the "reverse onus" provisions of the *Highway Traffic Act* to this accident.

[6] Aviva appeals the arbitrator's allocation of any fault to Cango Inc, since it was not insured under a policy of automobile insurance. It takes the position that on a loss transfer arbitration, the arbitrator is limited to finding and allocating fault only among the insurers providing automobile insurance in relation to the accident.

The standard of review:

[7] The Supreme Court of Canada has outlined the appropriate standard of review for appellate review. [1] First, on a question of law, the standard is one of correctness. Second, on a question of fact, the decision below can only be set aside on the basis of an overriding and palpable error. Last, on a question of mixed fact and law, the standard is one of reasonableness.

[8] The Ontario Court of Appeal has also commented [2] that on a question of mixed fact and law, where the decision is highly dependent on a factual finding, the standard is more akin to "overriding and palpable error." It is noteworthy that this case also dealt with an appeal from an arbitrator's decision under the provisions of the *Insurance Act.* The court commented that arbitrators have a special expertise "in evaluating facts for determination of dependency for statutory accident benefits entitlement", and unless the arbitrator was unreasonable, he is entitled to deference. I infer arbitrators have similar special expertise in determining issues of loss transfer, and thus their conclusions should be equally afforded deference.

The legislative framework:

[9] The loss transfer provisions of the *Insurance Act* are found in section 275, the relevant portions of which read:

> 275(1) **Indemnification in certain cases –** 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 so 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) **Idem –** 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 ...
>
> (4) **Arbitration** – 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.*

[10] The fault determination rules referred to in subsection 275(2) are found in Ontario regulation 668, made under the *Insurance Act.* That regulation sets out degrees of fault for drivers in certain accident circumstances. Section 5 of the Regulation provides that if an incident is not described in any of the rules, "the degree of fault of the insured shall be determined in accordance with the ordinary rules of law." The parties agree, and the arbitrator properly held, that the fault determination rules did not apply to the particular circumstances of this accident, and thus the ordinary rules of law apply.

[11] The loss transfer rules, or provisions for "Indemnification for Statutory Accident Benefits" are found in Regulation 780. Simply put, under section 9(3) of the Regulation, a second party insurer of a heavy commercial vehicle must indemnify a first party insurer regarding the statutory benefits it has paid unless the person receiving statutory accident benefits was him or herself claiming under a policy that also insured a heavy commercial vehicle.

[12] Here, since the fuel truck was a heavy commercial vehicle, Mr. Wry's insurer, Aviva, claims indemnification from the fuel truck's insurer, Royal.

The arbitrator's decision:

[13] The arbitrator decided that Royal, as insurer of the heavy commercial vehicle, is responsible to pay 30% of the accident benefits paid to or on behalf of Timothy Wry, subject to any claim by Royal that the amount paid was not reasonable. He based this decision on his overall findings of fault, namely that Mr. Wry was 50% responsible for the accident, Cango Inc. as Mr. Wry's employer was 20% responsible, and Mr. Norman (and thus Cango Transport Inc.) was 30% responsible. He found that neither of the drivers who actually struck Mr. Wry was liable at all.

[14] The arbitrator based his decision primarily on various factual findings. No one quarrels with the findings concerning Mr. Wry's fault. Rather, Royal objects to the arbitrator's findings concerning the two drivers who struck Mr. Wry. Royal also suggests the arbitrator was wrong in coming to the legal conclusion, based on the facts as he found them, that the fuel truck was involved in the accident.

[15] The arbitrator found that it was very dark at the time of the accident, light precipitation was falling, there was no overhead lighting within 300 meters of the accident, and the only lighting there was were the lights of the door to the Cango station and over the gas pumps. These were partially obscured by a snow drift.

[16] The arbitrator also found the Mr. Wry was clad almost entirely in black or

nearly black clothing, was wearing no reflective vest or other safety device, carried only a tiny penlight flashlight, and had his back to Mr. Menen's car at the time he was struck the first time.

[17] The arbitrator went on to find that when Ms. Jenkins struck Mr. Wry he was lying on the pavement, and could not be seen until she actually hit him. Mr. Brenner, an independent witness at the hearing gave very similar evidence to Ms. Jenkins, saying "I was just about on top of him before I actually saw there was someone lying on the road."

[18] I turn now to consider the two appeals here.

The Royal appeal:

[19] Royal advances three grounds of appeal. First, it suggests that the arbitrator misapprehended the facts, and ignored others, so that the evidence does not support his finding that the two drivers who hit Mr. Wry were not negligent. Second, it says that in the alternative, the arbitrator failed to apply the "reverse onus" in pedestrian cases to this case, and thus did not find the drivers had discharged their onus. If this ground succeeds, it suggests the issue be referred back to the arbitrator for a determination of this issue properly. Third, it says the arbitrator erred in finding Mr. Norman (and thus Cango Transport Inc.) negligent, since it takes the position the Cango fuel truck was not "involved" in the accident, and thus section 275(1) cannot apply at all.

Misapprehension of the facts

[20] Royal says the arbitrator ignored various facts, and misapplied others in coming to the conclusions he did, particularly his finding there was no negligence on the part of the two drivers who struck Mr. Wry. I cannot give effect to this ground of appeal.

[21] On the basis of the entire evidentiary record before the arbitrator, including somewhat contradictory statements made by some of the witnesses in their statements to the police, and then at the hearing, there was ample evidence for him to come to the conclusions he did about the level of lighting, the road conditions, and the complete inability of the drivers to see Mr. Wry, and avoid hitting him, that led him to describe the facts in the way that he did. His findings are entitled to significant deference. I can find no overriding or palpable error in his factual findings, and therefore the appeal in relation to the findings of negligence against the two drivers must fail.

The reverse onus

[22] This leads me to Royal's next ground of appeal, namely that the arbitrator failed to consider what is often called the "reverse onus" in pedestrian cases. Section 193 (1) of the *Highway Traffic Act* ***[3]*** says "When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or

operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle".

[23] Because of this section, Royal takes the position that the two drivers who struck Mr. Wry have the onus of disproving they were negligent. The arbitrator did not allude specifically to this section, and did not mention the onus being on the two drivers to disprove negligence. He found, however, that neither driver was, in fact, negligent. He was obviously satisfied of this on the basis of the facts as he found them. The facts amply support his coming to this conclusion. This must be the same as determining that the onus had been met. The arbitrator's conclusion was correct, and thus this ground of appeal must also fail.

Was the Cango fuel truck "involved" in the incident?

[24] Royal also appeals on the basis that there can be no liability concerning the Cango fuel truck since it takes the position the vehicle was not "involved" in the incident. It points to the provisions of section 275(1) of the *Insurance Act* that deal with loss transfer "from such class or classes of automobiles ... involved in the incident from which the responsibility to pay the statutory accident benefits arose." They reason that since the fuel truck did not strike Mr. Wry, and the arbitrator's findings of negligence against the driver were not related to his operation of the vehicle, it cannot be found to be "involved" in the incident, and there can be no loss transfer from Aviva to Royal.

[25] In determining the question of what "involved in the incident" means, the parties were only able to point to one decision that dealt with the issue.[4] There, the arbitrator correctly held that "involved in the incident" is broader than the term "in collision with", which would require contact between the vehicle in question and another vehicle.

[26] In *Dominion,* the arbitrator set out a number of criteria he considered useful in coming to the determination of whether the vehicle was involved in the incident. He outlined the following:

(a) whether there was any contact between the vehicles;

(b) they physical proximity of the vehicles;

(c) the time interval between the relevant actions of the two vehicles;

(d) the possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and

(e) whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

[27] Here, of course, the incident did not involve a collision between two vehicles; rather, it was a case of a pedestrian being struck by two separate vehicles. The question becomes whether the fuel truck was involved in the incident. As the arbitrator

concluded, I also would conclude that it was.

[28] Mr. Norman's actions in deciding he needed to back up his tractor trailer into the road, requesting the assistance of Mr. Wry, giving him the useless pen light, beginning to back the truck onto the roadway, failing to suggest to Mr. Wry he use a reflective vest when he could see the young man was clad almost entirely in black or nearly black clothing in pitch black conditions, all suggest to me the Cango truck was an integral part of the entire incident, and must be found to be "involved" in it. Mr. Norman's request for help and starting to back up was the starting point of the events that quickly unfolded and resulted in the accident. But for the Cango truck and the negligent actions of its driver, there would have been no accident.

[29] As a result, I agree with the arbitrator and find his application of the law to the fuel truck driver's involvement in the accident was correct. This aspect of the Royal appeal must also fail.

The Aviva appeal:

[30] The arbitrator allocated 20% of the fault for the accident on Cango Inc., Mr. Wry's employer. He found that they had failed to train him in the procedures to use in assisting delivery trucks in leaving the station, and also failed to provide adequate personal safety equipment for him such as fluorescent vests, lights and the like.

[31] Aviva suggests that the arbitrator is limited to assessing fault against or amongst only those who are insured pursuant to motor vehicle policies of insurance. They reason that since Cango Inc. as the owner of the gas station, was not insured as an owner of a motor vehicle, no fault should be apportioned against them when the arbitrator is determining the extent of the loss transfer between Aviva and Royal.

[32] Before arbitrator Jones decided this case, there were two conflicting arbitral decisions on this issue. In one,[5] the arbitrator held that section 275 precluded him on a loss transfer arbitration from considering the potential negligence of the Ministry of Transportation and Communications, or the non use of a safety helmet or violation of a city bylaw as contributors to the accident in question. He found he was precluded from doing so by section 275 of the *Insurance Act*. In the other[6], arbitrator Jones concluded that he could take into account the fault of vehicles not covered by the loss transfer when allocating the overall fault for the accident. He came to the same result here, finding that nothing in section 275 of the *Insurance Act* or section 5 of the Fault Determination Rules would preclude a determination of Cango Inc.'s fault.

[33] I agree with arbitrator Jones' reasoning both in the *Liberty Mutual* case and in this case. He relied on the decision of the Court of Appeal in *Jevco Insurance Company v. York Fire Casualty Company**[7]*** to come to his decision. In *Jevco*, the Court of Appeal upheld a finding that in a loss transfer arbitration, a passenger's failure to wear a seat belt was irrelevant under the fault determination rules, since that action had nothing to do with the cause of the accident but rather only with the damages suffered. The court held that the determination of fault under the Fault Determination Rules "must be intended to refer

to the degree of responsibility for the accident itself."

[34] If Cango Inc. bears some responsibility for the accident itself, then it stands to reason that their degree of responsibility must be taken into account when considering the loss transfer. As the arbitrator pointed out in his reasons here, "under loss transfer, the party seeking loss transfer can only recover in accordance with the percentage fault of those vehicles covered by loss transfer, but that does not preclude other persons or companies from being considered when determining the overall fault for the accident." I agree with this conclusion. As a result, the Aviva appeal must fail.

Disposition:

[35] For all these reasons, both appeals are dismissed. The Aviva appeal was secondary, and consumed very little of the time spent on the appeals. Aviva is to have its costs of the Royal appeal, fixed at $5,000, and Royal is to have its costs of the Aviva appeal, fixed at $1,000.

MESBUR J.

Released: 20080825

[1] *Housen v. Nikolaisen* 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235
[2] *Oxford Mutual Insurance Company v. Co-operators General Insurance Company,* 2006 CanLII 37956 (ON C.A.), 2006 CanLII 37956 (Ont. C.A.), at page 5
[3] R.S.O. 1990, c. H.8, as amended
[4] *The Dominion of Canada General Insurance Company and Kingsway Insurance Company,* arbitral decision of arbitrator Lee Samis, August 23, 1999, affirmed by Sachs, J January 11, 2000, action # 99-CV-176780
[5] *Pilot Insurance Company v. Lombard Canada* (Arbitrator Malach, decision released April 8, 2006)
[6] *Liberty Mutual Insurance Company v. Zurich Insurance Company of Canada* (Arbitrator Jones, declsion released September 2000)
[7] 1995 CanLII 594 (ON C.A.), (1996) 27 O.R. (3d) 483