IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 275 and ONTARIO REGULATION 668

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

OLD REPUBLIC INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Kadey B.J. Schultz for the Respondent

ISSUE:

1. Can the first party insurer of a passenger vehicle (State Farm) seek indemnification from the insurer of a "heavy commercial vehicle" (Old Republic) under section 275 of the *Insurance Act* when the driver of the heavy commercial vehicle is determined to be 100% at fault for the chain reaction collision under Rule 9 of the Fault Determination Rules, but the two vehicles have not collided ?

RESULT:

1. Yes. As the driver of the "heavy commercial vehicle" is 100% at fault for the incident, State Farm can seek indemnification pursuant to section 275 of the *Insurance Act* from Old Republic.

BACKGROUND:

Vimalambigai Mahalingasivam ("the Claimant") was injured when the vehicle she was driving was involved in a multi-vehicle accident on November 8, 2007, at the intersection of Eglinton Avenue and Mavis Road in Mississauga. A truck owned by the Pepsi Bottling Company and insured by Old Republic Insurance Company ("Old Republic") rear-ended a Dodge vehicle, which caused that vehicle to strike the Claimant's Nissan from the rear. The Claimant's car was insured by State Farm Mutual Insurance Company ("State Farm").

The parties agree that both the Dodge and the Claimant's Nissan were stopped when the truck hit the middle vehicle, and that there was no contact between the truck and the Claimant's vehicle.

The Claimant submitted an application for payment of accident benefits to State Farm, and they have paid benefits to the Claimant. The claim has now been resolved on a full and final basis. State Farm seeks indemnification from Old Republic under the loss transfer provisions of the *Insurance Act* for 100% of the benefits it has paid out (subject to the applicable deductible), on the basis that Rule 9 of the *Fault Determination Rules* dictates that the truck that caused the initial collision that then resulted in the second collision between the two cars, is 100 % at fault for the accident.

EVIDENCE:

The case was argued on the basis of an Agreed Statement of Facts filed by counsel. The facts of the accident are summarised above. All vehicles were travelling in the same direction and in the same lane when the collisions occurred. The Claimant's vehicle was the 'lead vehicle' in the line, followed by a Dodge driven by Pupinderpal Litt, which was in turn followed by the Pepsi truck. As stated above, the Litt vehicle and the Nissan driven by the Claimant were stopped when the Pepsi truck rear-ended the Litt vehicle. As a result of the force of that impact, the Litt vehicle then struck the Claimant's vehicle from the rear. There was no impact between the Pepsi truck and the Claimant's vehicle.

The parties agree that the Pepsi truck was a "heavy commercial vehicle" and that Old Republic is a "second party insurer" under section 9 of *Regulation 664* to the *Insurance Act.*

There was a further second collision involving the truck and another vehicle, but the parties agree that this has no bearing on the issue I am called on to determine.

The parties agree that Rule 9 of the *Fault Determination Rules*, known as the "chain reaction rule", applies. The question raised by State Farm is whether the insurer of the truck that caused the initial collision is required to indemnify the insurer of the lead vehicle in the line of cars, when there was no direct impact between those two vehicles.

In the case of *GAN General Insurance Co. v. State Farm* [1999] O.J. No. 4467, Justice Pitt determined that an insurer in State Farm's position in this case could not seek indemnification under the loss transfer provisions from an insurer in Old Republic's position. Counsel for State Farm asserts that this case was wrongly decided, and that Rule 9(4) does not bar its loss transfer claim against Old Republic.

RELEVANT PROVISIONS:

Insurance Act – section 275

> (1) 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 to 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) 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.

Regulation 668 –

1. (1) An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.

9. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in the same lane (a "chain reaction").

(2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile.

(3) If all automobiles involved in the incident are in motion and automobile "A" is the leading vehicle, automobile "B" is second and automobile "C" is the third vehicle,

> (a) in the collision between automobiles "A" and "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 50 per cent at fault for the incident;
>
> (b) in the collision between automobiles "B" and "C", the driver of automobile "B" is not at fault and the driver of automobile "C" is 100 per cent at fault for the incident.

(4) If only automobile "C" is in motion when the incident occurs,

> (a) in the collision between automobiles "A" and "B", neither driver is at fault for the incident; and
>
> (b) in the collision between automobiles "B" and "C", the driver of automobile "B" is not at fault and the driver of automobile "C" is 100 per cent at fault for the incident.

ARGUMENTS & ANALYSIS:

The parties made oral submissions at a hearing held in April 2012. A few months after the hearing was concluded, but before I started to write the decision, counsel for State Farm contacted opposing counsel and myself and advised that he had become aware of a recent appeal decision (determined after our matter was heard) that was relevant to the issue raised. He forwarded both the arbitrator's decision in a case involving *AXA Insurance (Canada) v. Royal and SunAlliance Insurance* (Arbitrator Robinson, July 27, 2011), as well as the court's ruling on the appeal (2012 ONSC 3095). I solicited counsels' submissions on the court's decision. I have read both the arbitration award and appeal decision of Justice Chapnik closely, and have carefully considered counsels' supplemental submissions on the decision and its impact on this case.

The starting point for the analysis is Justice Pitt's decision in *GAN v. State Farm, supra,* and this was the sole focus of the parties' arguments at the hearing. The arbitrator in that case was presented with facts similar to those here, and determined that Rule 9(4) of the *Fault Determination Rules* does not apportion fault between the lead vehicle and the rear vehicle in a chain reaction collision. Having found that the matter was not described by Rule 9, he found that Rule 5 applied and that the issue should be determined in accordance with the ordinary rules of law. Applying that analysis, he concluded that the heavy commercial vehicle insured by GAN was 100% liable for the accident. He then determined that GAN was required to fully indemnify State Farm, the insurer of the passenger vehicle in the "lead" of the three vehicles, pursuant to the loss transfer provisions, even though there had not been any contact between those two vehicles.

GAN appealed the arbitrator's decision. Justice Pitt heard the matter, and ruled that the arbitrator had erred in law and that Rule 9 did apply to the facts presented. He essentially stated that Rule 9(2) indicates the drafters' intention that there should not be any apportionment of liability between cars that do not collide. He states – (at paras. 18 & 19)

> *Section 9(2) means simply that in determining the degree of fault between two colliding automobiles, i.e. "A" and "B" or "B" and "C", no attention is to be given to the role of car "C" in the former case or car "A" in the latter case. Put another way, the formula established for apportioning fault between the directly colliding cars has no application to cars which are involved in the same chain collision but did not collide with each other. In the result, as between car "C" and "A", which have not collided with each other, the Legislature has decided that no apportionment of liability is to be made as between these two cars.*
>
> *Due to the combined effect of section 9(4) and (2) ...there is simply no apportionment between car C and A...and no transfer of liability is required under the Fault Determination Rules.*

Mr. Strigberger, counsel for State Farm in this case, acknowledges that this decision is a binding precedent that I am mandated to follow, but contends that it was wrongly decided. He submits that Justice Pitt's reasoning fails to consider the words of section 275(2) of the Act, which direct arbitrators to determine the respective degree of fault for each insurer's insured. He also contends that the result reached by the judge goes against the overall purpose of the loss transfer scheme, which is to redistribute the cost of losses between insurers in recognition of the fact that heavy commercial vehicles cause more damage or injury than do regular passenger vehicles. He argued that if a driver of a heavy commercial vehicle is found to be wholly liable for a collision, and his or her act has caused damage and injury, the system should operate in a way that requires that vehicle's insurer to indemnify the first party insurer for the amounts it has paid out.

Ms. Schultz, counsel for Old Republic in this case, cited the Court of Appeal's comment in *Jevco v. York Fire & Casualty* (1996) O.J. No. 646 (Ont. C.A.) that the purpose of the loss transfer provisions is to "spread the load among insurers in gross and somewhat

arbitrary fashion, favouring expedition and economy over finite exactitude". She also referred to the statement in *Jevco v. Canadian General Insurance* [1993] O.J. No. 1774 that the degree of fault of an insured is to be strictly determined in accordance with the Fault Determination Rules. She submitted that these cases requires arbitrators and judges hearing these matters to adopt a "rough justice" approach, and that the system of loss transfer indemnification is premised upon efficiency and predictability. She also submitted that the Court of Appeal has sent a clear message in its *Kingsway v. West Wawanosh* (2002 CanLii 14202) decision that clarity and certainty of application of the governing rules are or primary concern.

Ms. Schultz noted that Rule 9(4) does not state that vehicle C (the rear vehicle in a chain reaction collision) is 100% liable for the whole accident, but rather only for the collision between its vehicle and vehicle B, or the middle vehicle in the "chain". In response to Mr. Strigberger's comment that section 275 requires a determination of respective degree of fault for each insured, she submitted that as no collision occurred between the Pepsi truck insured by Old Republic and the Claimant's vehicle, there was no "respective degree of fault" to be determined in accordance with the Fault Determination Rules.

Finally, Ms. Schultz emphasized that Rule 9(2) cannot be ignored, and that a plain reading of the words of that section clearly requires a direct collision to have occurred between two vehicles, in order for degrees of fault to be determined.

Had the *AXA v. RSA, supra,* decision not been issued, I would have had to find in favour of Old Republic in this case. The *GAN* decision is clearly on point, and is therefore a precedent from the court that I am bound to follow. The parties agree that there are no distinguishing facts in this case that take the circumstances that we are dealing with here outside of its ambit. However, Justice Chapnik has reached a different conclusion on the this question in *AXA v. RSA*, and has made some important statements on the issue that differ substantially from the views expressed by Justice Pitt in the *GAN* case. This has "levelled the playing field" in regard to this question, and requires me to analyse each approach carefully.

The *AXA v. RSA* arbitration arose from a multi-vehicle collision in the southbound lanes of Highway 400 on a foggy winter morning, involving approximately two-hundred vehicles. AXA insured a car driven by Cheryl Rigby. Ms. Rigby was stopped on the roadway as was the car behind her, driven by Bronwen Jones. While conflicting evidence was presented at the hearing, Arbitrator Robinson determined that a truck (whom all parties agreed met the definition of "heavy commercial vehicle" in the regulation) insured by RSA collided with the Jones vehicle, which caused that vehicle to rear-end the Rigby vehicle insured by AXA. The arbitrator also found that the truck subsequently hit the left bumper of the Rigby vehicle after the initial 'chain reaction collision', as it passed that vehicle on the left side.

AXA argued that Rule 9 applied in these circumstances, and that as the driver of the truck was fully liable for the accident, RSA should indemnify it for the benefits it had paid out to Ms. Rigby. RSA contended that Rule 9 did not apply, and that the evidence supported a finding that Rule 11 (regarding "pileups') applied. The arbitrator concluded that Rule 9(4) applied to the facts, and that AXA could seek indemnity under the loss transfer provisions from RSA. He referred to the *GAN* case, and found that it was distinguishable on the facts.

Arbitrator Robinson also referred to Justice Sachs' decision in *Dominion of Canada General Insurance Company v. Kingsway General Insurance Company* (unreported decision, dated January 11, 2000), in which she upheld Arbitrator Samis' finding that a heavy commercial vehicle could be "involved in an incident" and therefore expose its insurer to loss transfer without actually colliding with any other vehicles. He stated that Justice Sachs' decision "provides a more reasonable review of the law", and found that "the absence of contact between two vehicles is relevant in analysing whether a loss transfer applies, but is only one factor among many".

Arbitrator Robinson also noted that Arbitrator Bialkowski had considered both of the above decisions in his arbitration award in *Royal and SunAlliance v. State Farm* (unreported decision, January 2006), and had stated that the GAN decision conflicted

with the analysis accepted by Justice Sachs in *Dominion v. Kingsway, supra*. While Arbitrator Bialkowski found that the facts in his case were clearly distinguishable from those in GAN, he had found her analysis – namely that the absence of contact between two vehicles does not prevent the application of the loss transfer provisions - to be preferable.

Reading Arbitrator Robinson's decision closely, it is not clear whether he would have reached the conclusion that the insurer of the rear vehicle (truck) was liable in loss transfer to the insurer of the lead vehicle, if there had not been any direct contact between those two vehicles. While there was conflicting evidence presented on that point, he clearly determined that the truck insured by RSA had struck the bumper of the AXA insured's vehicle as it passed by on the left of that car, after the initial impact with the middle vehicle. However, he did not state that his conclusion that RSA was liable to indemnify AXA was specifically based upon the fact that there was a direct impact between the two vehicles, nor did he find that the ruling in GAN would not apply regardless of that fact.

Justice Chapnik accepted the arbitrator's factual findings and stated on appeal that there "was sufficient physical and expert evidence to support the finding that the Royal truck was involved in a secondary impact with the Rigby vehicle." She found that the arbitrator applied Rule 9(4) correctly, and stated as follows: (para.30)

> *The factual circumstances here support the application of Rule 9(4),* ***even if the subject automobiles did not collide with each other.*** *It is common ground that all three subject automobiles were in the centre southbound lane at the time of the impact. Pursuant to Rule 9(4) if only the last vehicle is in motion at the impact, that vehicle is 100% at fault for the collision.*
>
> (emphasis added)

With this statement, Justice Chapnik makes it clear that she does not consider direct contact between the vehicles to be a prerequisite for the application of Rule 9(4). In this way, she takes issue with Justice Pitt's statement in the *GAN* case that the legislators

intended that there should be no apportionment of liability between two vehicles that do not directly collide within the context of a "chain reaction collision".

She then goes on to state - (at para. 32):

> *Moreover, I agree with the submission of the respondent that to leave the insurer of a passenger vehicle without recourse to a loss transfer despite a finding that a heavy commercial vehicle is 100% at fault for the damages sustained by it, would be contrary to the legislation's intention.*

With this passage, she essentially finds that when the underlying purpose of the loss transfer scheme is considered, and the general principles of negligence upon which it is based are applied, the fact that Rule 9(4) does not explicitly state that the rear vehicle in a chain reaction collision is liable for damages caused to the front vehicle in the absence of direct contact between them is not a bar to a claim for indemnification.

Finally, in the last paragraph of her analysis, she finds that regardless of whether there was a secondary impact between the truck and the claimant's vehicle, the *Fault Determination Rules* hold that the truck is 100% at fault for the collision between the truck and the Jones' (middle) vehicle. She then states that the "arbitrator was correct in finding that AXA is entitled to indemnification based on the apportionment of fault to the Royal truck for the collision." This statement implies that apart from her comment above regarding the legislative intent behind the section, Rule 9(4)(b) can be read to mean that the rear vehicle in a chain reaction collision is 100 per cent at fault for the incident <u>not only</u> between it and the vehicle it directly collides with, but that the insurer of the next vehicle in the lineup, or the Rigby vehicle in that case, can also seek indemnification on a 100% basis from the truck's insurer.

Counsel advised that Justice Chapnik's decision has not been appealed.

Can this ruling be reconciled with the decision in *GAN* ? In my view, it cannot. Aside from stating that Arbitrator Robinson had distinguished the facts in *GAN* and preferred

Justice Sachs' reasoning in *Dominion v. Kingsway*, Justice Chapnik does not refer to Justice Pitt's ruling or his comments excerpted earlier in this decision. By stating that it would be contrary to the legislation's intention to leave AXA without recourse to a loss transfer claim when the RSA truck was completely at fault for the damage it caused, she has explicitly rejected the view expressed in GAN that the combined effect of sections 9(4) and 9(2) results in no apportionment of liability between two vehicles that do not collide.

While Rule 9(4) clearly specifies how fault should be allocated between vehicle "A" (the lead vehicle) and "B" (the middle vehicle), and between vehicle "B" and "C" (the rear vehicle), it is silent on the question of how or if fault should be allocated as between vehicle "C" and vehicle "A" when these two vehicles do not directly collide. This is, of course, the source of the difficulty. What should be made of this omission? Old Republic argues that Rule 9(2) mandates that fault is only to be determined between two vehicles directly collide. State Farm contends that Rule 9(2) does not go that far, and that if the rule provides that the rear vehicle in the chain reaction is 100% liable for the accident, it is fair and logical to assume that not only the insurer of vehicle B can claim indemnification under the loss transfer provisions, but also the insurer of vehicle A, whose driver similarly bears no fault for the collision.

After much consideration of the issue, I have concluded that the latter position is correct. In my view, Rule 9(2) does not go as far as counsel for Old Republic suggests, or Justice Pitt asserts in the GAN decision. It simply states that when determining the degree of fault between automobiles that collide, no reference should be made to any collisions that one of those vehicles may have had with another vehicle. That direction is instructive with respect to Rule 9(3), which applies in circumstances in which all three vehicles involved in a "chain reaction" collision are in motion. That rule dictates that as between the front and middle vehicles that collide, each are 50 per cent at fault for the incident, and as between the middle vehicle and the rear vehicle, the rear vehicle is 100 per cent at fault. Given the above, it only makes sense that each collision is to be considered separately, and that the driver of the middle vehicle is both 50 per cent at fault for one

collision and bears no fault at all for another. Rules 9(2) and 9(3) weave together well in that sense, and result in a separate analysis being applied for each collision between two vehicles in order to determine fault.

Conversely, Rule 9(2) does not really assist in interpreting and applying Rule 9(4). In my view, to say that the language in 9(2) directs that fault is only to be apportioned between two vehicles if they directly collide is to stretch the meaning of its words well beyond their clear meaning.

I find support for my conclusion in the words of section 275(2) of the Act, which mandate that the respective degree of fault of each insurer's insured is to be determined under the Rules. The specific words in the Fault Determination Rules must be interpreted with that general instruction in mind. In this context, that means that given the instructions in subsections (a) and (b) of Rule 9(4), the driver of the Pepsi truck at the rear of the chain bears 100% fault for the accident, while the Claimant bears no fault, and consequently, the Claimant's insurer can claim indemnification from Old Republic, the insurer of the truck.

Finally, given that the Fault Determination Rules are roughly based upon negligence principles, and that the underlying intention of the loss transfer provisions is to balance costs of providing compensation on a first party basis between insurers of specified classes of vehicles, I find that the conclusion urged upon me by Old Republic that State Farm cannot seek indemnification from the insurer of the truck that caused damage and injury to its insured, when Rule 9(4) clearly provides that the driver of the truck is 100% at fault for the incident, cannot be justified.

ORDER:

In light of my findings above, Old Republic is required to indemnify State Farm pursuant to the loss transfer provisions for the benefits it has paid out to the Claimant. I leave it to counsel to determine the exact amounts owing, and remain seised of the matter in the event that they are unable to agree.

State Farm is also entitled to its legal costs. If the parties are unable to agree on the quantum of costs payable, I will hear submissions on the point. Old Republic is also required to pay the arbitration fee, including all disbursements.

DATED AT TORONTO, ONTARIO, THIS DAY OF NOVEMBER, 2012.

_____

Shari L. Novick
Arbitrator