IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 275

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17; and in particular, s.23;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

KINGSWAY GENERAL INSURANCE COMPANY

Applicant

- and -

THE PERSONAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Catherine Korte for the Applicant

Sean Brown for the Respondent

ISSUES:

1. Is the Personal estopped from altering its earlier position that it was responsible for payment of loss transfer claims in this matter?

DECISION:

1. The Personal is estopped from taking such a position and accordingly the Personal is responsible for payment of loss transfer claims in this matter.

HEARING:

This matter proceeded by way of written submissions and documentary evidence. No viva voce evidence was called.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on September 1, 1999. On that date, Mr. Marcel Baron was operating a motorcycle northbound on Main Street in the Municipality of Thessalon, Ontario. A Mr. Jacobus Zitman was southbound on Main Street and executed a left turn onto Ginelle Street. A collision occurred and Mr. Baron was injured. He subsequently applied for and received accident benefits from his own insurer, Kingsway General Insurance Company ("Kingsway").

Since Mr. Baron was driving a motorcycle at the time of the accident, s.275 of the Insurance Act allows the insurer of the motorcycle to make a claim for any accident benefit payments that it makes, against the insurer of the other vehicle that it claims was at fault for the accident.

Determination of fault is to be in accordance with the fault determination Rules set out in Ontario Regulation 668 or if none of the Rules apply, then the ordinary Rules of law are to apply.

On September 27, 1999, an independent adjuster retained by Kingsway wrote to the Personal, the insurer of Mr. Zitman's motor vehicle, stating:

> Our investigation would reveal that liability would rest solely with your assured as a result of the above noted matter.
>
> We would be pleased if confirmation of coverages and acceptance of liability can be confirmed.
>
> You would note that our assured is a motorcyclist and because of injuries sustained, it would appear that we will be able to subrogate any loss on behalf of our insurers over the $2,000 deductible under Loss Transfer Payments.

An adjuster from the Personal responded on October 20, 1999, or approximately six weeks after the accident, stating:

> Based on our investigation of this loss, it would appear that our insured, Mr. Zitman, made a left hand turn and struck Mr. Baron on his motorcycle. Based on fault determination Rule 12 (5) the Personal Insurance Company has held Mr. Zitman at fault for the above noted loss.
>
> Please forward your loss transfer invoices less the $2,000 deductible every 60 days directly to the Personal Insurance Company for payment.

As a result, Kingsway proceeded to forward loss transfer claims to the Personal. Between February 2000 and April 2005, the Personal made numerous loss transfer payments to Kingsway, amounting to an amount in excess of $183,000.

In April 2004 the Personal requested certain medical documentation relating to Mr. Baron's medical condition from Kingsway. Kingsway took the position that it could not provide that documentation without the consent of Mr. Baron or without an order by an arbitrator. Mr. Baron refused to provide his consent and as a result the Personal refused to pay further loss transfers until it received the documentation. Kingsway then commenced a loss transfer arbitration in front of myself, and on December 15, 2005, I issued an order that Kingsway provide the medical documentation to the Personal.

It was not until late 2005, when the Personal had retained a law firm to defend it in the loss transfer arbitration brought by Kingsway, that the Personal's lawyer reviewed the file and decided that Rule 12 (5) ought not to apply as the collision did not occur in a controlled intersection and that Rule 13 should therefore apply.

Pursuant to Rule 12 (5) the Personal would be 100% at fault and under Rule 13, depending upon how the accident is determined to have happened, either party could be 100% at fault or both parties could be 50% at fault.

It is the position of Kingsway that Rule 13 is inapplicable and Rule 12 (5) was the correct Rule to apply.

The preliminary issue to be determined at this time is whether or not the Personal is to be allowed to arbitrate the liability issue, or whether it is estopped from raising that issue because of its admission in the above noted letter of September 27, 1999 and its subsequent payments.

It is the position of the Personal that its adjuster mistakenly believed that Rule 12 (5) applied and that the adjuster made a mistake of fact. The Personal submits that Rule 12 (5) cannot be applied because the accident occurred at a controlled intersection. Kingsway takes the position that Rule 13 does not apply and that Rule 12 (5) does apply. The answer as to which Rule, on the facts of this case, would apply arguably depends, in part, upon what stop signs were located at the accident scene at the time of the accident. The parties are not in agreement as to what signs were located at the scene at the time of the accident. The preliminary issue, however, is whether the Personal is estopped from arguing the case on its merits by its earlier admission and subsequent payments for roughly 6 years.

As the estoppel argument forms the core of the preliminary hearing, I will deal first with the basis of Kingsway's position.

Kingsway takes the position that the Personal is prohibited from arguing the liability issue pursuant to the doctrines of estoppel by convention and/or the doctrine of promisary estoppel. While the doctrines are very similar, counsel have addressed each of them separately and accordingly I will do so as well.

ESTOPPEL BY CONVENTION:

The criteria for the doctrine of estoppel by convention was set out by the Supreme Court of Canada in Ryan vs. Moore [2005] S.C.J. No. 38.

The criteria are:

1. the parties' dealings must have based upon a shared assumption of fact or law; estoppel requires manifest representation or conduct creating a mutual assumption, nevertheless, estoppel can arise out of silence (implied).
2. a party must have conducted itself, by ie: acted in reliance on such shared assumptions, its actions resulting in a change of its legal position.
3. it must be unjust or unfair to allow one of the parties to resile or to part from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

I will deal with each criteria separately.

1. Shared Assumption of Fact or Law:

The Personal concedes, for the purposes of this arbitration, that its letter of October 20, 1999, was an admission that it accepted loss transfer on a 100% basis due to the application of Rule 12 (5) of the fault determination Rules. The Personal simply maintains that this was the wrong Rule and section 13 should really apply.

I note that Kingsway, in its initial letter, did not specify which fault determination Rule applied, but simply that based on its investigation, fault lay with the Personal's insured. It was the Personal, in its response, that specified that it was responsible pursuant to Rule 12 (5).

I have no hesitation in finding, based on the letters of September 27 and October 20, 1999, as well as the subsequent payments made by the Personal, that the requirements of the first criteria have been met. There is no doubt but that the parties dealings were an on a shared assumption of fact or law. The parties clearly agreed that Rule 12 (5) applied and that as a result the Personal would honour the loss transfer claims.

The Supreme Court of Canada in Ryan, paragraph 38, states:

> This form of estoppel is founded, not only on a representation made by a representor and believed by a respresentee, but on an agreed statement of facts and law, the truth of which has been assumed, by convention by the parties as a basis for the relationship. When the parties have so acted in their relationship upon the agreed assumption that the given set of facts or law is to be accepted between them as true, that it would be unfair for other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is a matter of fact, or promisary and/or proprietary.

This, in my view is what happened in this case. Both parties proceeded on agreed fact and law. In my view, Kingsway has met the first criteria. The parties had, in essence, agreed that liability was no longer in dispute.

2. Reliance on the Shared Assumption:

In Ryan the Supreme Court of Canada found that detrimental reliance was a requirement that must be proven in order to find conventional estoppel. The Court in that case stated in paragraph 69:

> Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the parties seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance on the assumption, thereby altering his or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption detriment will be suffered by the estoppel raiser, because of the change from his or her assumed position.

Kingsway argues that for in excess of six years it relied upon the Personal accepting and settling the loss transfer dispute on the acceptance of Rule 12 (5) as the basis for the Personal being liable for loss transfer. Kingsway argues that it changed its legal position by not obtaining and preserving evidence that it otherwise would have done, but for the Personal's action. Instead of collecting evidence with regard to the liability issue, it turned its attention to the administering of the loss transfer requests and the quantum of the indemnification payments. More specifically, Kingsway claims that it relied on the Personal's acceptance of Rule 12 (5) to its detriment in that:

1. Kingsway gave up its opportunity to investigate the liability issue while the witnesses' recollections were fresh in their minds. It is to be noted that some of the potential witnesses can no longer be located and indeed one has died.
2. Kingsway has lost the opportunity to conduct a thorough forensic accident reconstruction as the vehicles are no longer available for inspection and the various road way marking will no longer be visible.
3. Kingsway gave up its opportunity to have an arbitration at an earlier date, when it could have cross-examined witnesses while their recollections were still fresh.
4. The Personal admitted liability at a tort action and the plaintiff did not therefore investigate liability and his counsel confirmed that he does not have any material in its file regarding liability.
5. Copies of by-laws, etc, including repairs to stop signs, needed to establish if the intersection was regulated can no longer be located.
6. Kingsway, because of the Personal's position, failed to interview the investigating police officer until 6 ½ years after the accident. The Constable has indicated that he now has a very limited recollection of the accident investigation.
7. Because of the passage of time the Sault Ste. Marie courthouse can no longer determine whether charges and convictions were made against Mr. Zitman.

While each of the above items listed by Kingsway may have varying affects upon Kingsway's ability to conduct a thorough investigation at this time, there is little doubt in my mind but that

Kingsway did alter its conduct as a result of the Personal's actions and that it did so to its detriment. While each of the individual items listed might or might not have made a difference, collectively Kingsway did suffer a significant detriment because of the Personal's actions. Accordingly the second criteria has been fulfilled.

3. Unjust or Unfair to Resile or Depart from the Shared Assumption:

Criteria three is in some ways related to criteria two and the facts constituting the injustice or unfairness are similar.

As it is now more than 6 ½ years since the Personal admitted liability under Rule 12 (5) for the reasons set out above, it would be impossible for Kingsway to conduct a proper and thorough investigation of the liability issue at this point in time. For this reason alone it would be unfair to allow the Personal to resile from the mutual resumption. Accordingly the third criteria is met. Kingsway had every right to assume that the Personal would stand by its position that it had held for six years and its ability to establish certain facts with regard to liability has been seriously impaired by the Personal's actions.

The Supreme Court of Canada in Maracle vs. Travellers Indemnity Company of Canada, [1991] 2 S.C.R. 50 stated:

1. The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

There can be little doubt but that the Personal, by its promise or assurance intended to affect the legal relationship. It agreed that Rule 12 (5) applied and that as a result, it would be liable for the loss transfer payments. It is also clear that Kingsway acted upon, or changed its position as a result of the Personal's actions. It no longer investigated the liability issue, and is clear for the reasons given above, that it can no longer conduct a thorough investigation some 6 years later. Accordingly I am satisfied that the criteria as set out in the Maracle decision have been satisfied.

THE PERSONAL'S POSITION:

A number of the submissions raised by the Personal have already been dealt with in my reasons, above. There are, however, a number of additional submissions made by the Personal which I will deal with at this time.

The Personal submits that this is not a case of estoppel but a simple mistake of fact that requires "in fairness and in equity that the respondent not be held to the mistake". The Personal takes the position that I am bound by the decision of Justice Pitt in GAM General Insurance Company vs. State Farm Mutual Automobile Insurance Company, [1999] O.J. No. 4467. It argues that I

should first determine if a mistake were made and if so, find that the previous agreement made by the Personal was invalid. With the greatest of respect, I do not take Mr. Justice Pitt's comments to be as all encompassing as suggested by counsel for the Personal. To give that wide an interpretation would be to limit the doctrine of estoppel far beyond what was set for by the Supreme Court of Canada in both the Ryan and the Maracle decisions. For the reasons set out above, I am of opinion that the doctrine of estoppel is applicable in this case.

Counsel for the Personal also suggested that Kingsway failed to show that it had detrimentally relied on the position taken by the Personal. For the reasons given above, I find that Kingsway did rely on the Personal's actions to its detriment.

The Personal also argues that I should use my equitable jurisdiction to ensure that Kingsway does not benefit from an honest mistake made by it. In essence, it argues that Rule 12 (5) should not apply and that if Rule 13 were applied it would not have to reimburse Kingsway.

I am in agreement with the Personal that I do have the jurisdiction to grant equitable relief in this matter. Having said that I do not find this to be an appropriate circumstance to exercise that jurisdiction. I would point out that it was the Personal, who, after investigating the claim, came to the conclusion that Rule 12 (5) did apply. Counsel for the Personal has provided an argument that Rule 12 (5) does apply but nothing more. No case law has been presented to show that Rule 12 (5) definitely does not apply. Furthermore, it would be unfair to Kingsway, having relied

upon the Personal's assurances, to now have to prove facts, which, with the passage of time, it may no longer be able to do so.

I do not agree with counsel's position that estoppel can not be used in this case because of estoppel can not overrule substantive law. Even if I were to accept counsel's submissions in this regard, what we have here is, at most, a mistake of fact. This case is similar to the Ryan decision and the principles enunciated in that decision should be applied here. Furthermore, this is not a case where equity is being used to overrule substantive law. Equitable relief is being granted here to stop the Personal from resiling from a position upon which Kingsway relied. Thus, we apply the equitable relief before one even gets, in essence, to the substantive law of Rule 12 (5).

In closing I will deal with the Personal's submission that it would be unfair and unjust to allow Kingsway to rely on a mistake of the Personal made shortly after the accident. I think that it is important to consider the purpose and intent of the fault determination Rules. As many arbitrators and the courts have pointed out, the fault determination Rules and the loss transfer provisions are intended to provide a relatively quick and expeditious way of dealing with loss transfer issues. It is a system where certainty, speed and simplicity of resolution are of importance. While the priority dispute regulations are somewhat different from the loss transfer provisions, I think that the statement made by the Ontario Court of Appeal in Kingsway vs. West Wawanosh Insurance Company, 58 O.R. (3rd) 251 is equally applicable to loss transfer. The Court in that case stated:

> Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records.

It is not conducive to such a system if a party can resile from an admission of liability some six years after having made such an admission. In this regard I am reinforced in my view by the comments of the Ontario Court of Appeal in State Farm Mutual Automobile Insurance Company vs. Dominion of Canada General Insurance , [2005] O.J. No. 5502. In that case the Court dealt with the issue of whether an insurer is estopped from disputing fault after making loss transfer payments. The Court stated:

> Any concern that it would be open to an insurer to dispute fault for the first time many years after the first payment, after the insurer had lived with an apportionment of fault for all that time, is surely answered by the doctrine of estoppel.

For the above reasons I find that the Personal is estopped from arguing the issue of liability and accordingly the Personal is responsible for payment of loss transfer in this matter.

In the event that the parties cannot agree as to the issue of costs, I may be spoken to.

Dated in Toronto, this _____ day of June, 2006.

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M. Guy Jones
Arbitrator