Case Name:

Royal & Sunalliance Insurance Co. of Canada v. Axa Insurance (Canada)

IN THE MATTER OF the Arbitration Act, 1991, S.O. 1991, c. A.24
AND IN THE MATTER OF the Insurance Act, R.S.O. 1990, c. I.8, s. 275, as amended and Regulation 668
Between
Royal & Sunalliance Insurance Company of Canada, Appellant, and
Axa Insurance (Canada), Respondent

[2012] O.J. No. 2537

2012 ONSC 3095

Court File No. CV-11-433813

Ontario Superior Court of Justice

S. Chapnik J.

Heard: May 3, 2012.
Judgment: May 28, 2012.

(36 paras.)

Counsel:

Peter D. Kazdan and Diana Shligold for the Appellant.

Linda Matthews and L. Hodgins for the Respondent.

REASONS FOR DECISION

1 S. CHAPNIK J.:-- On March 17, 2003, on a foggy morning, a multi-vehicle accident occurred in the southbound lanes of Highway 400 in Barrie, Ontario, involving approximately 200 vehicles. Scene A, as outlined by the police, involved at least 86 identified vehicles that were travelling in the same direction. The vehicle insured by the appellant, Royal & Sunalliance Insurance Company of

Canada ("Royal"), described as a heavy commercial truck, and the automobile insured by the respondent AXA Insurance (Canada), ("AXA"), were both included in Scene A.

2 The arbitrator described the incident as "one of the largest multi-vehicle car accidents in Ontario". The case and this appeal arise out of a claim by AXA for a "loss transfer" payment from Royal for statutory accident benefits paid to AXA's insured following the accident.

OVERVIEW

3 The incident on March 17, 2003, involved multiple vehicles. Visibility on Highway 400 between 7am and 9am was compromised due to heavy fog.

4 The claimant, Cheryl Rigby, was operating an automobile insured by AXA. At the time of the impact, her automobile was stopped in the middle southbound lane. Approximately 30 seconds after she had come to a full stop, her vehicle was rear-ended by another automobile ("the Jones vehicle").

5 Ms. Rigby subsequently submitted an application for accident benefits to AXA for injuries she sustained in the collision.

6 On August 17, 2005, AXA served a Notice of Loss Transfer upon Royal, claiming 100% indemnity for the statutory accident benefits paid and payable to the claimant. Royal took the position that there was inconclusive evidence its insured truck ("the Gaspar truck") was involved in the collision, and if it were involved, the collision was part of a "pile-up" and, therefore, subsection 11(1) of the *Fault Determination Rules* would permit only 50% liability for the collision.

7 The loss transfer dispute was heard in a private arbitration by Arbitrator Bruce Robinson over four days in June 2011.

THE ARBITRATOR'S DECISION

8 The arbitrator made the following findings of fact:

(i) it was a very foggy morning and visibility was dramatically reduced as drivers approached the Molson Park overpass on Highway 400;
(ii) prior to and at the time of impact, the Rigby and Jones vehicles were fully and safely stopped in the centre southbound lane of Highway 400;
(iii) there were no other impacts on this particular stretch of Highway 400 before the Gaspar truck arrived on the scene;
(iv) there was only one heavy commercial truck involved in the collision, namely the Gaspar truck;
(v) the Gaspar truck approached the accident scene in the southbound curb lane before moving into the centre lane and striking the rear of the Jones vehicle;
(vi) the impact between the Gaspar truck and Jones vehicle propelled the Jones vehicle into the Rigby vehicle;
(vii) at the time of impact, all three vehicles were in the centre southbound lane; and
(viii) the damage to the front left bumper of the Rigby vehicle was caused by the Gaspar truck as it passed by on its left side.

9 The arbitrator also found, given the above, that Rule 9 of the *Fault Determination Rules* is applicable "as all three vehicles were in the same centre lane at the time of impact".

10 The arbitrator made three findings that are disputed by the appellant. He determined that,

(i) AXA is entitled to reimbursement from Royal for 100% of the accident benefits paid to it on behalf of Cheryl Rigby, its insured, arising from the accident;
(ii) rule 9 of the *Fault Determination Rules* applies; and
(iii) a collision occurred between Royal's insured (the Gaspar truck) and the AXA insured (the Rigby vehicle).

11 Royal takes the position that the arbitrator's decision was wrong in fact and in law, and more specifically:

(i) The accident involved a pile-up as defined in Rule 11 of the *Fault Determination Rules*, rather than Rule 9;
(ii) If Rule 9 applies, as found by the arbitrator, he erred in law by not apportioning liability as between the Royal and AXA vehicles; and
(iii) The arbitrator erred in finding there was a collision between the Royal and AXA vehicles which was caused by the truck insured by Royal as it passed by on the left side of the AXA vehicle.

STANDARD OF REVIEW

12 The applicable standard of review from a decision of a private arbitrator under the *Insurance Act*, R.S.O. 1990, c. I.8 ("the *Act*") is correctness on questions of law and reasonableness in questions of fact and mixed fact and law. *Zurich Insurance Co. v. Personal Insurance Co*., [2009] O.J. No. 2157 (S.C.), at para. 29.

13 In regard to the standard, it has been held that private arbitration does not necessarily import expertise in the area of law or specifically, in the requirement to interpret and apply the *Fault Determination Rules*. See *Dominion of Canada General Insurance Company v. Kingsway General Insurance Company*, (23 August 1999) unreported (Arbitrator Lee Samis), aff'd (11 January 2000), Toronto, 99-CV-176780 (Ont. S.C.), per Sachs J.

THE STATUTORY FRAMEWORK

14 Section 275 of the *Act* creates a scheme for "loss transfer" payments where an insurer who pays statutory accident benefits may be indemnified, that is, repaid, by another insurer for benefits paid to its own insured.

15 Under s. 275(2), indemnification shall be made to the respective degree of fault of each insured as determined under the *Fault Determination Rules*, R.R.O. 1990, Reg. 668. In applying the Rules, expedition and economy are favoured over exactitude. *Jevco Insurance v. York Fire & Casualty Co*., [1996] O.J. No. 646 (C.A.).

16 Rule 9 governs "chain reaction" collisions between three or more automobiles travelling in the same direction and lane. Pursuant to subsection 9(4), if only the last automobile was in motion when a chain reaction incident occurred, the driver of that automobile is 100% at fault. In making the assessment, fault is determined without reference to related collisions involving either of the automobiles and another automobile.

17 Rule 11 applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes and this is described as a "pile-up". Pursuant to Rule 11(2), for each collision between two automobiles involved in the pile-up, the driver of each automobile is 50% at fault for the incident.

ANALYSIS

18 The arbitrator found that the three vehicles involved in the collision were in the southbound centre lane when the impact occurred, and that the Royal truck caused a chain reaction that resulted in the Jones vehicle impacting the AXA or Rigby automobile.

19 Royal argues that the arbitrator's finding that the loss transfer dispute arose from "one of the largest multi-vehicle car accidents in Ontario involving an estimated 200 motor vehicles" makes the entire area the subject of a pile-up collision pursuant to Rule 11. In doing so, Royal relies on the decision of Pitt J. in *GAN General Insurance Company v. State Farm Mutual Automobile Insurance Company*, [1999] O.J. No. 4467 (S.C.), in which the court found that the formula in Rules 9(2) and 9(4) does not apply to cars that are involved in the same chain collision but do not collide with each other; and further, that between the two cars that have not collided with each other, the legislature has placed no apportionment of liability between those two cars.

20 The arbitrator distinguished the facts in *GAN* and held that to the extent his decision was inconsistent with it, he preferred the reasoning of Sachs J. in *Dominion of Canada General Insurance Co. v. Kingsway, supra.*

21 In that case, the Court concluded that loss transfers of 100% fault applied in respect of a vehicle that did not physically strike any other vehicle while emphasizing that the absence of contact is only one factor in determining whether a loss transfer applies.

22 The arbitrator found that the Royal vehicle was 100% at fault for the accident pursuant to Rule 9(4), being the only moving vehicle in the centre lane at the time of the impact. According to the appellant, even if Rule 9(4) applies, the subject automobiles did not collide with each other and, therefore, no apportionment should, in law, be made between the two cars. This brings us to the third issue and the submission of Royal that the physical evidence does not support the arbitrator's finding of a collision between the truck and the AXA vehicle.

23 Royal submits that the front end damage sustained by the AXA vehicle was caused by a collision to the rear of a vehicle owned and operated by Mr. Kotei, who reported to police at the time that his car was hit from behind by the AXA vehicle. According to the appellant, the arbitrator failed to consider that evidence and erred in finding the Royal truck struck the AXA vehicle again on the left front bumper, moving it to the side. Indeed, it is alleged by Royal that no physical damage was found to the front left side of the AXA vehicle to support the arbitrator's finding.

24 A reading of the arbitrator's decision, however, demonstrates that he did not ignore the evidence of Mr. Kotei regarding a possible collision between his vehicle and the AXA Rigby vehicle. His decision contains a summary of Mr. Kotei's evidence.

25 As for the physical evidence, the arbitrator preferred the evidence of AXA's expert who concluded that the Royal truck struck the front left bumper of the Rigby vehicle during a secondary impact. When asked about the evidence of Mr. Kotei (which he had not known previously), AXA's expert testified that even if the Kotei vehicle was struck by the front end of the Rigby vehicle, a secondary impact between the truck and the Rigby vehicle likely occurred. In that regard, he noted a

buckle in the front left of the Rigby vehicle, which he found more likely the result of "a sideways load" consistent with the post-impact motion of the Rigby vehicle.

26 The arbitrator carefully considered the photographs and extensive documentary evidence, as well as the *viva voce* evidence of the involved parties, independent witnesses and two expert engineers, including their forensic engineering simulators of the collision.

27 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.

28 In my view, it was open to the arbitrator on the evidence to find that notwithstanding a possible impact between the Kotei and Rigby vehicle, the damage to the left bumper of the Rigby vehicle was caused by the Royal truck.

29 The scheme of the legislation under s. 275 of the *Insurance Act* and its regulations is to provide for an expedient and summary method of re-imbursing the first party insurer for payment of no-fault benefits from the second party insurer. As noted above, the fault of the insured is to be determined strictly in accordance with the *Fault Determination Rules* as provided by the regulation. Given that the Rigby and Jones vehicles were stationary and in the same lane at the time of impact, Rule 9 of the Rules would apply.

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.

31 In my view, the arbitrator applied Rule 9(4) correctly.

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.

33 The collision, if it occurred, with the Kotei vehicle, does not change the fact that the *Fault Determination Rules* hold that the truck is 100% at fault for the collision involving the Jones and the AXA automobile. In my view, 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.

CONCLUSION

34 I can find no misapprehension of the evidence or error in fact or law in the arbitrator's decision. Thus, the appeal is dismissed. AXA is entitled to full indemnification for the statutory accident benefits it paid to the insured as a result of the collision that occurred on March 17, 2003. The award of the arbitrator Bruce Robinson, dated July 27, 2011, is affirmed.

35 The parties have requested costs of the arbitration and appeal. Their respective costs outlines present similar claims for fees. Taking into account that fact and the criteria set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, an appropriate order for costs within the reasonable contemplation of the parties is the all-inclusive sum of $20,000.

36 I thank counsel for their able and helpful submissions in this matter.

S. CHAPNIK J.

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