

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990

AND IN THE MATTER OF AN ARBITRATION

Pursuant to the Arbitration Act, R.S.O. 1991

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

- and -

ROYAL INSURANCE COMPANY OF CANADA

Hearing Date: September 3rd, 1997

Counsel:

Stephen M. Malach, Esq, Q.C.
Solicitor for the Applicant

John J. Aikins, Esq.
Solicitor for the Respondent

AWARD

Co-operators General Insurance Company ("Co-operators") claims to be entitled to indemnification from Royal Insurance Company of Canada ("Royal") in relation to the benefits paid by Co-operators under the Statutory Accident Benefits Schedule, by reason of the death of Joyce Bagshaw and injuries sustained by Jennifer Joyce in a motor vehicle accident which occurred on March 11th, 1993.

The Arbitration was restricted to legal argument and an agreed Statement of Facts.

AGREED STATEMENT OF FACTS:

1. The subject accident occurred on March 11, 1993, at approximately 1:00 a.m., at the intersection of Provincial Highway 27 and King/Vaughan Town Line, in King Township, in the Regional Municipality of York.
2. A vehicle operated by Zenon Gaweda had been proceeding in an easterly direction on the King/Vaughan Town Line, failed to stop for a stop sign for eastbound traffic at the intersection of Provincial Highway 27, and proceeded out into the southbound lane of Highway 27.
3. A vehicle operated by Russell Douglas Lee had been proceeding in a southerly direction in the southbound lane of Provincial Highway 27. The Lee vehicle was struck by the Gaweda vehicle after it had failed to stop for the stop sign.
4. A vehicle operated by Joyce L. Bagshaw had been proceeding in a northerly direction on Provincial Highway 27, in the northbound lane, approaching the King/Vaughan Town Line at about the same time as the Lee vehicle was struck by the Gaweda vehicle.

5. Upon being struck by the Gaweda vehicle, the Lee vehicle was pushed across the centre line of Provincial Highway 27, into the northbound lane, and struck the Bagshaw vehicle head-on in the northbound lane of Provincial Highway 27.

6. Royal Insurance Company of Canada insured the Lee vehicle at all material times.

7. Co-operators General Insurance Company insured the Bagshaw vehicle at all material times.

8. The Lee vehicle was a heavy commercial vehicle as defined in s.9(l) of Regulation 644, R.R.O. 1990, at the time of the subject accident.

9. Co-operators General Insurance Company paid benefits pursuant to the Statutory Accident Benefits Schedule--Accidents Prior to January 1, 1994, by reason of the death of Joyce Bagshaw and the injuries suffered by Jennifer Joyce, who was a passenger in the Bagshaw vehicle.

10. The issue for determination in this Arbitration is whether or not Royal Insurance Company of Canada is obliged to reimburse Co-operators General Insurance Company for the payments made under the S.A.B.S. by Co-operators, in respect of the death of Joyce Bagshaw and the injuries sustained by Jennifer Joyce, by reason of the provisions of s. 275 of the Insurance Act, R.S.O. 1990, c.l.8.

Section 275 of the Insurance Act establishes a mechanism by which an automobile insurer who pays no-fault benefits may be reimbursed by other insurers of vehicles "involved in the incident from which the responsibility to pay the no fault benefit arose". Indemnification is available in limited circumstances. The intention of the scheme is to create balance in the payment of no-fault benefits between different classes of vehicles:

275. (1) **Indemnification in certain** cases.--The insurer responsible under subsection 268(2) for the payment of no-fault 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 no-fault benefits arose.

(2) **Indem.**--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.

APPLICANT'S POSITION:

Mr. Malach argues that there are two collisions and that the collision between

Gaweda and Lee is irrelevant. Lee was then pushed across the centre line and struck

the Bagshaw vehicle. Counsel says that collision falls within fault determination Rule 12(4), as contained in Regulation 668:

(4) If automobile "B" is over the centre line of the road when the incident occurs, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 percent at fault for the incident.

Diagram of cars in the lanes

He further looks at Section 275(l) and says that "Co-operators" should be substituted for "insurer responsible under sub-section 268(2) for the payment of no-fault benefits"; he then says that "Royal" should be substituted for "the insurers of such class or classes of automobiles as may be named in the regulations". It is argued that this second collision is caused by a negligent truck being partly on the wrong side of the road. Since the truck is a heavy commercial vehicle, indemnity lies.

RESPONDENT'S POSITION:

Mr. Aikins states that the accident should not be split into two collisions; there is one accident. He contends that Gaweda was negligent in moving from a stop sign to a through highway and colliding with his client, Lee. Further, he says there was no negligence on Lee, but that it all falls on Gaweda.

5

The only Fault Determination Rule relied upon by Co-operators is Rule 12(4). It is Mr. Aikin's argument that, since there was one accident, Rule 12(4) does not apply, thus no indemnity lies.

Section 275 uses the word "incident" rather than "accident". In Young v. Donway Ford Sales Limited, 26 O.R. (3d) 607, Borins J. considered the word "incident" in Section 266. At page 615, Mr. Justice Borins said:

In other words "incident" means the accident in which loss or damage was caused the Plaintiff by the use or operation of an automobile.

I adopt this conclusion and find that "incident" and "accident" are interchangeable where the word "Incident" is used in Section 275 and in the Fault Determination Rules, and particularly as it is used in Rule 12(4).

In Progressive Casualty Co. v. Jevco Insurance Co. (unreported), Somers J. discussed Section 275. At page 2, he said, "Another required condition [of Sec. 275] is that the second party vehicle must be to some degree at fault in the accident." The only way the Applicant can argue fault on the part of Lee is to split the accident into separate collisions, as contended by Mr. Malach.

In Colin Campbell Electric Ltd. v. Frensemeier, 98 W.S.R. (2d) 412, the Nova Scotia Court of Appeal considered the interpretation of an inter-company agreement. While the Fault Determination Rules may differ, the Court's approach to the problem is helpful. This too was a three vehicle accident. The Trial Judge concluded:

I find it was all one accident with two collisions. I find it is not appropriate to break down the first and second collisions artificially just to allow the settlement chart to apply.

The Court of Appeal accepted her conclusion.

The Trial Judge had adopted the reasoning of Mr. Justice Wachowich in Pawliuk v. & So, 1985 (2d) C.C.L.I. 170 (Alberta Q.B.). He said, at page 176, "I am unable to find any indication that in the instant case the agreement was intended to cover the more complex factual situation at the Bar."

I adopt this reasoning and conclude that there was one accident with two collisions. The collisions cannot be viewed separately in order to squeeze the case into the confines of Rule 12(4). This is not a case which falls within any of the Fault Determination Rules. In the result,

there is no right of indemnification.

Counsel agreed that the unsuccessful party would pay the Arbitrator's costs and \$2,500.00 costs to the opposing party. Co-operators will therefore pay those costs.

This Award is privileged and confidential. However, if both parties consent to its release, they may consent in writing and supply the Arbitrator with a copy of their consent.

DATED at Toronto this 19th day of September, 1997.

THE HON. R. S. MONTGOMERY, Q.C.