

**IN THE MATTER OF THE *INSURANCE ACT*,  
R.S.O. 1990 c. I. 8 Section 275 AND ONTARIO  
REGULATIONS 664 and 668, R.R.O. 1990**

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

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N :

ROYAL & SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

**AWARD**

**COUNSEL**

P. Diane McDowell and J.C. Rioux  
Counsel for the Applicant, Royal & SunAlliance Canada

John D. Withrow  
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company

**ISSUES IN DISPUTE**

This Arbitration concerns a dispute between Royal & SunAlliance Insurance Company ("Royal") and State Farm Mutual Automobile Insurance Company ("State Farm") as to the extent, if at all, State Farm is required to indemnify Royal with regard to statutory accident benefits ultimately paid by Royal to the occupants of the Virostek vehicle, arising out of the motor vehicle accident of June 16, 1999, pursuant to Section 275 (2) of the Insurance Act, R.S.O. 1990, c.I.8 and pursuant to Ontario Regulation 668.

The issues in dispute, as set out in the Arbitration Agreement executed by all parties, are as follows:

1. What is the "respective degree of fault under the Fault Determination Rules" of the drivers involved in the motor vehicle accident of June 16, 1999 herein and which insurer is responsible for the payment of statutory accident benefits paid to the occupants of the Virostek motor vehicle. (Section 275 of the *Insurance Act* and *Ontario Regulation 668*, R.R.O. 1990);

2. Which party is responsible for the payment of the Arbitrator's fees and other costs associated with the administration of the Arbitration, or in what proportion are each of the parties responsible for same?
3. Which party is responsible for the legal costs and disbursements incurred by the parties in this dispute?

### **AGREED STATEMENT OF FACTS**

The parties have consented to this Arbitration proceeding on the basis of an Agreed Statement of Facts. The agreed upon facts are as follows:

1. On June 16, 1999, a red Dodge minivan driven by Cyril Virostek (the "Virostek minivan") was southbound on Highway 40, attempting to turn left onto a private drive.
2. A 1997 Dodge truck driven by Kenneth Chambers (the "Chambers truck") was behind the Virostek minivan.
3. A tractor-trailer unit driven by Nathaniel Mallot and insured by Royal & SunAlliance (the "Mallot tractor-trailer") struck the Chambers truck in the rear.
4. The Chambers truck was propelled forward and collided with the rear of the Virostek minivan.
5. The Virostek minivan was pushed across the centre line of Highway 40, into the path of a northbound dump truck, insured by Dominion of Canada and driven by John Barrett (the "Barrett dump truck").
6. The Barrett dump truck struck the Virostek minivan.
7. State Farm paid accident benefits to one or more occupants of the Virostek minivan. The total amount of the accident benefits paid to occupants of the Virostek minivan as a result of the June 16, 1999 accident was \$71,001.40.
8. State Farm requested indemnification from Royal & SunAlliance for the amounts it paid to occupants of the Virostek minivan as a result of the June 16, 1999 accident. In or around November 2004, Royal & SunAlliance paid \$69,002.40 (net of the \$2,000 statutory deductible) to State Farm.
9. Royal's position in this loss transfer arbitration is that the \$69,002.40 it paid to State Farm was paid in error and pursuant to a mistake of law.
10. The Chambers truck was in motion at the time of the accident.
11. The Mallot tractor-trailer, the Chambers truck and the Virostek minivan were all automobiles travelling in the same lane, in the same direction at the time of the accident.

12. No vehicle insured by Royal & SunAlliance ever came into contact with or ever collided with the Virostek minivan at any material time.
13. The Barrett dump truck was travelling in an opposite direction in an adjacent lane and was in its own lane when it struck the Virostek minivan.
14. The Barrett dump truck was a heavy commercial vehicle.
15. The Mallot tractor-trailer was a heavy commercial vehicle.
16. The Virostek minivan was not a heavy commercial vehicle.
17. The Chambers truck was not a heavy commercial vehicle.

### **ANALYSIS AND FINDINGS**

The Applicant Royal takes the position that Rule 9 of the Fault Determination Rules is applicable to the present fact situation. Fault Determination Rule 9 provides, in pertinent part, as follows:

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");

9 (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.

The Applicant Royal takes the position that this Fault Determination Rule does not apportion liability between the lead vehicle (in this case Virostek) and the third vehicle in the chain (in this case Mallot). It is submitted that since there is an applicable rule without apportionment, it would be unreasonable to rely on Rule 5 of the Fault Determination Rules and make the determination in accordance with the ordinary Rules of Law. Rule 5 provides as follows:

5 (1) If an incident is not described in any of these Rules, the degree of fault of the insured shall be determined in accordance with the ordinary Rules of Law.

The Applicant Royal takes the position that subsection 2 of Rule 9 of the Fault Determination Rules precludes reference to any related collisions involving either of the automobiles and another automobile.

The Respondent State Farm takes the position that Rule 9 of the Fault Determination Rules does not describe the subject incident in that Rule 9 only applies "with respect to an incident involving three or more automobiles travelling in the same direction and in the same lane (a "chain reaction"). It is submitted that the present fact situation involves a "collision partner" being the Barrett vehicle which was not "travelling in the same direction and in the same lane". It is further submitted that the Fault Determination Rules ought not be applied in a way that ignores a main event leading to the payment of no fault benefits. It is submitted that in the present case, the main event leading to the payment of no fault benefits was the collision

between the southbound Mallot vehicle and the southbound Chambers truck which set into motion a series of collisions.

At risk of oversimplification, the issue at hand is whether multiple collisions involving vehicles travelling in both directions ought to be looked at as independent incidents, or whether the actions of the other vehicles materially “involved” in the incident ought to be considered to determine whether an individual Fault Determination Rule is applicable in the circumstances. I am of the opinion that in situations involving multiple collisions involving vehicles travelling in both directions, that it would be inappropriate to consider each collision as a separate incident without regard to the actions of other vehicles meaningfully “involved” in the incident. I refer to the decision of State Farm Mutual Automobile Insurance Company v. Dominion of Canada General Insurance Company and Royal & SunAlliance Canada, an unreported decision of Arbitrator Kenneth J. Bialkowski, released the same date as this Award and involving the same incident. Fundamental to my decision is the fact that there was another vehicle meaningfully “involved” in the incident as described in the Agreed Statement of Facts travelling in a different direction than the Virostek, Chambers and Mallot vehicles. I find that the Barrett dump truck was meaningfully “involved” and was travelling in an opposite direction in an adjacent lane and was in its own lane when it struck the Virostek minivan. I therefore find that Rule 9 of the Fault Determination Rules is inapplicable to the present fact situation. Rule 9 of the Fault Determination Rules depicts an incident involving three or more automobiles travelling in the same direction and in the same lane (a “chain reaction”). The subject incident cannot be characterized as simply “involving” three or more automobiles travelling in the same direction and in the same lane. The Barrett dump truck was not travelling in the same direction or in the same lane and as a result, takes the present fact situation outside the scope of Rule 9. I recognize that subsection 2 of Rule 9 of the Fault Determination Rules indicates that the determination is to be made without reference to any related collisions involving either of the automobiles or another automobile. I find that the reference to “another automobile” implicitly is referenced to a vehicle “travelling in the same direction and in the same lane” as described in subsection 1. The fact situation here is different.

The Applicant Royal submits that the present fact situation is on all fours with Gan v. State Farm (1999) O.J. 4467. I find the Gan v. State Farm decision distinguishable from the present fact situation. There is no reference in Gan v. State Farm that the other vehicle involved following the initial collision between the stationary vehicle and the Gan vehicle was not travelling in the “same direction and in the same lane” as the vehicles initially involved in the collision. In any event, the decision in Gan v. State Farm conflicts with the analysis accepted by the Court in The Dominion of Canada General Insurance Company v. Kingsway Insurance Company (unreported decision of Arbitrator Lee Samis, released August 23, 1999, affirmed in an unreported decision of H. Sachs, J. of the Ontario Superior Court of Justice, released January 11, 2000). I find that the analysis accepted by Justice Sachs preferable.

Fundamental to my decision is the finding that there was another vehicle travelling in the opposite direction “involved” in the incident within the meaning of Section 275 of the Insurance Act. I find that an automobile does not have to be a collision partner to be “involved in the incident” within the meaning of Section 275 of the Insurance Act. I rely heavily on the decision in The Dominion of Canada General Insurance Company v. Kingsway Insurance Company. In that decision, Arbitrator Samis sets out the criteria to be considered to determine whether an automobile is “involved in the incident” which includes:

- a) Whether there is contact between the vehicles;

- b) The 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.

In the Dominion of Canada General Insurance Company v. Kingsway Insurance Company decision, the Court properly took into consideration the actions of another vehicle “involved” in the collision rather than simply applying the fault chart depiction with respect to only the two vehicles actually in collision with one another. The facts of that case disclosed that the operator of a heavy commercial vehicle, insured by Kingsway, exited from a truck stop on the east side of Highway 11 and was moving through the northbound lane of Highway 11 while making a left turn. Rock Russeau, who was driving a vehicle insured by Dominion, was driving north on Highway 11 when he saw the heavy commercial vehicle making its turn. Believing the northbound was obstructed by the heavy commercial vehicle, Mr. Russeau applied his brakes, lost control of his vehicle and skidded into a collision with a parked pick-up truck. Mr. Russeau sustained injuries that entitled him to statutory accident benefits from the insurer of his vehicle, Dominion. Dominion sought reimbursement from the insurer of the heavy commercial vehicle, Kingsway. Kingsway denied liability for any loss transfer payment and the two insurers proceeded with an Arbitration. Arbitrator Samis found that although the heavy commercial vehicle exiting from the truck stop was not involved in any collision, it was still a vehicle “involved” in the incident, using the criteria aforesaid. He found that the incident at hand could not be characterized by simply taking into account the actions of only the two vehicles actually involved in the collision. As a result, it was found that the Fault Determination Rules called for the determination of fault in accordance with the ordinary rules of law. The decision of Arbitrator Samis was appealed to the Superior Court of Justice wherein each H. Sachs, J. accepted the analysis and findings of Arbitrator Samis.

I am of the opinion that Rule 9 does not characterize the incident as outlined in the Agreed Statement of Facts. The agreed upon facts involve vehicles travelling in both directions. I must therefore rely on Rule 5 of the Fault Determination Rules and determine the degree of fault in accordance with ordinary rules of law. By so doing, I find the Mallot vehicle fully responsible for the event leading to the payment of no fault benefits herein.

It is reasonable to assume from the Agreed Statement of Facts that the various collisions herein took place within seconds of one another. There is no indication that there was any significant time delay between the three incidents as described by counsel for the Applicant. I find that it would be grossly inequitable to treat the three incidents as distinct and separate collisions. The collisions herein involve vehicles travelling in both directions and as indicated, does not fit in the circumstances to any particular rule or rules of the Fault Determination Rules.

In reaching my decision, I have considered and accept the principles set out in Jevco Insurance C.O. v. Canadian General Insurance Co. (1993) O.J. 174 and Jevco v. York Fire & Casualty Company (1996) 27 O.R. (3d) 483, but simply find that Rule 9 of the Fault Determination Rules inapplicable to the present facts situation for the reasons aforesaid. I am of the view that in the vast majority of cases, the Fault Determination Rules provide a

simple solution to the determination of fault. On rare occasion, as is the case here, the role of other vehicles meaningfully “involved” in the incident must be considered making the application of a particular Fault Determination Rule inappropriate in the circumstances overall.

**ORDER**

It is ordered that Royal is not entitled to reimbursement of monies paid to State Farm in satisfaction of its original claim for indemnity.

It is ordered that the costs of the Respondent of this application be paid on a partial indemnity basis by Royal. If agreement cannot be reached by the parties, I would be happy to fix those costs.

It is further ordered that the Arbitrator’s fees and disbursements be paid by Royal.

DATED at TORONTO this  
day of January, 2006.

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KENNETH J. BIALKOWSKI  
Arbitrator