# COURT OF APPEAL FOR ONTARIO

CITATION: State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada, 2015 ONCA 699
DATE: 20151020
DOCKET: C59786



Simmons, Gillese and Rouleau JJ.A.

BETWEEN

State Farm Mutual Automobile Insurance Company

Applicant (Respondent)

and

Old Republic Insurance Company of Canada

Respondent (Appellant)

Kadey B.J. Schultz and Jason R. Frost, for the appellant

Daniel Strigberger, for the respondent

Heard: April 28, 2015

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated June 25, 2014, with reasons reported at 2014 ONSC 3887, 120 O.R. (3d) 740 dismissing an appeal from the decision of Arbitrator Shari L. Novick dated November 2, 2012, with reasons reported at (2012), 17 C.C.L.I. (5th) 156.

**Simmons J.A.:**

## A. INTRODUCTION

[1] The issue on appeal is whether Old Republic Insurance Company of Canada must indemnify State Farm Mutual Automobile Insurance Company for statutory accident benefits ("SABs") paid by State Farm.

[2] The issue turns on the proper interpretation of s. 275 of the *Insurance Act*, R.S.O. 1990, c. I-8, (the "Act") and related regulations (the "Loss Transfer provisions") that require certain classes of insurers to indemnify certain other classes of insurers for SABs payments made in limited circumstances.[1] The full text of the relevant provisions is included as an appendix to these reasons.

[3] The relevant facts are not in dispute. In November 2007, a Pepsi truck rear-ended a Dodge stopped near an intersection in Mississauga. The impact of this collision caused the Dodge to rear-end a Nissan, also stopped near the intersection. All of the automobiles[2] were travelling in the same direction and in the same lane.

[4] The Pepsi truck was insured by Old Republic. The Nissan was insured by State Farm. The driver of the Nissan was injured in the accident and collected SABs from State Farm, the insurer required to pay the benefits under s. 268 of the Act. State Farm, in turn, claimed indemnification from Old Republic for the SABs payments under the Loss Transfer provisions of the Act.



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[1] In a 2008 article published in the Advocates' Quarterly, John McNeil explains that loss transfer "is the colloquialism that is applied to the scheme of indemnity that was created in 1990 to allow insurers, in some degree, to recover no fault benefits paid to an insured": John S. McNeil, *The Enigmatic Exemption to the Bar Against Subrogation: S. 275 of the Insurance Act*, (2008) 34 Advoc. Q. 172, at p. 172

[2] As defined in s. 224(1) of the Act, "automobile" includes:

> (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
>
> (b) a vehicle prescribed by regulation to be an automobile.

[5] Section 275 of the Act and a related regulation provide that an automobile insurer that pays SABs is entitled, in certain circumstances, to indemnification from the insurer of a heavy commercial vehicle where a heavy commercial vehicle was "involved in the incident" from which the obligation to pay SABs arose.

[6] Under s. 275(2) of the Act, indemnification is made "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules."

[7] Old Republic does not dispute that the Pepsi truck was a heavy commercial vehicle as defined under the regulations. Nor does it dispute that the Pepsi truck was involved in the incident from which the obligation to pay SABs arose. However, Old Republic does dispute that it is at fault in relation to the Nissan under the fault determination rules (the "FDRs").

[8] The FDRs are set out in R.R.O. 1990, Reg. 668. The insurers agree that s. 9(4) of the FDRs applies to this case.

[9] Section 9 of the FDRs "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')": s. 9(1).

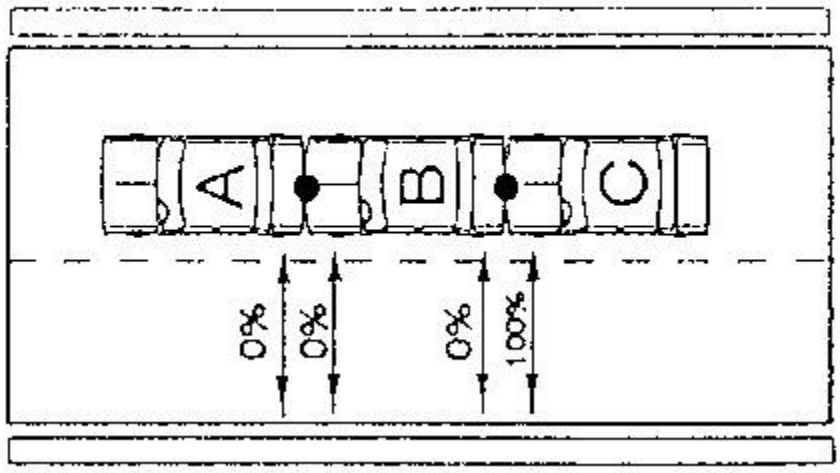
[10] Section 9(2) of the FDRs requires that "[t]he degree of fault for each collision between two automobiles involved in the chain reaction [be] determined

without reference to any related collisions involving either of the automobiles and another automobile."

[11] Section 9(4) addresses a chain reaction where only the rear vehicle is in motion when the incident occurs. Section 9(4) includes an illustrative diagram and states:

> 9. (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.

Diagram




[12] The matter proceeded to arbitration by way of an Agreed Statement of Facts. Before the arbitrator, the insurers relied on conflicting decisions from the Superior Court concerning whether s. 9(4) means the rear automobile is at fault

for the entire chain reaction or only for the collision with the automobile that it rear-ended.

[13] The arbitrator held that, under s. 9(4) of the FDRs, the Pepsi truck is 100 per cent responsible for the incident – meaning the chain reaction – and that its insurer, Old Republic, therefore must indemnify State Farm for 100 per cent of the SABs payments State Farm made. The Superior Court appeal judge upheld the arbitrator's decision.

[14] Old Republic appeals to this court, with leave.

[15] For the reasons that follow, I would allow the appeal. Reading s. 9(4) in the context of the FDRs and the Loss Transfer provisions as a whole, I conclude that the Pepsi truck is 100 per cent at fault only for the collision between it and the Dodge.

## B. THE AGREED STATEMENT OF FACTS

[16] The essential elements of the Agreed Statement of Facts, which formed the basis for the arbitration, are as follows:

- On November 8, 2007, there was a multi-vehicle accident at the intersection of Mavis Road and Eglinton Avenue in Mississauga.
- Vehicle 1 in the accident was a Pepsi truck insured by Old Republic.
- Vehicle 2 in the accident was a Dodge insured by The Dominion of Canada General Insurance Company.

- Vehicle 3 in the accident was a Nissan insured by State Farm.
- At the time of the accident, all three vehicles were travelling in the same direction in the same lane.
- The accident occurred when vehicle 1 rear-ended vehicle 2, causing vehicle 2 to rear-end vehicle 3. At the time of the collision between vehicle 1 and vehicle 2, vehicles 2 and 3 were stopped. There was never any contact between vehicle 1 and vehicle 3.
- State Farm paid the driver of vehicle 3 SABs benefits under s. 268 of the Act.
- Vehicle 1 is a heavy commercial vehicle. Old Republic is a second party insurer under s. 9 of R.R.O. 1990, Reg. 664.

## C. LOSS TRANSFER PROVISIONS – SABS

[17] Section 275(1) of the Act and the provisions of a related regulation provide that an automobile insurer that pays SABs (a "first party insurer"[3]) is entitled, in certain circumstances, to indemnification from the insurer of a heavy commercial vehicle that was "involved in the incident" from which the obligation to pay SABs arose.

[18] Section 275 (1) reads as follows:

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[3] See R.R.O. 1990, Reg. 664, s. 9(1): "'first party insurer' means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits".

> 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. [Emphasis added.]



[19] Section 9 of Reg. 664 specifies the insurers of which classes of automobiles are required to provide indemnification under s. 275 of the Act to the insurers of which other classes of automobiles.

[20] Section 9 requires insurers of heavy commercial vehicles to indemnify first party insurers (the insurer required to pay SABs) unless the person receiving SABs is claiming them under a policy insuring a heavy commercial vehicle.

[21] Notably, s. 9 also provides for indemnification of insurers of motorcycles, off-road vehicles and motorized snow vehicles by other classes of vehicles in certain circumstances.

[22] The relevant provisions of s. 9 of Reg. 664, titled “Indemnification for Statutory Accident Benefits (Section 275 of the Act)” read as follows:

> 9. (1) In this section,
>
> "first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*;

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

> (i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
>
> (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

> (i) if the motorized snow vehicle was involved in the incident out of which the

> responsibility to pay statutory accident benefits arises, or
>
> (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy.
>
> (3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.



[23] Section 275(2) of the Act addresses the extent of the indemnification and how it is determined:

> 275. (2) Indemnification under subsection (1) shall be made <u>according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.</u> [Emphasis added.]

[24] I pause to observe that the SABs Loss Transfer provisions do not provide for indemnification for SABs payments based on fault for all accidents. Rather, they provide for indemnification between specified – and strictly limited – classes of vehicles in certain circumstances.

[25] Thus, the Loss Transfer provisions shift the financial burden of first party SABs payments to insurers of heavy commercial vehicles from other classes of automobiles in certain circumstances where one or more heavy commercial vehicles is involved in an incident. In certain circumstances, they also shift the financial burden of first party SABs payments from insurers insuring motorcycles,

off-road vehicles and motorized snow vehicles to insurers of other classes of automobiles.

[26] The rationale for this limited indemnification was explained in interpretation bulletins issued by the former Ontario Insurance Commission (now the Financial Services Commission of Ontario) shortly after the partial no-fault scheme of insurance was introduced in Ontario in 1990. In brief, it is intended to balance the costs of moving away from a tort-based system of compensation for people injured in motor vehicle accidents to a partial no-fault system of compensation between insurers of different classes of vehicles.

[27] Bulletin A-9/92 explains loss transfer as follows:

> Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay no-fault benefits (the first-party insurer) may be reimbursed by another insurer (the second-party insurer) for all or part of a claim.
>
> Loss transfer only operates between insurers of different classes of vehicles … and only applies when the policyholder of the second-party insurer was at least partly at fault in an accident. The purpose of loss transfer is to balance the cost of no-fault benefits between different classes of vehicles. [Emphasis added.]

[28] Bulletin A-11/94 points out that there is no right of subrogation for SABs and explains in more detail the rationale for loss transfer:

> Since June, 1990, insureds look to their own insurers for accident benefits instead of seeking compensation from

> third parties. Certain types of vehicles that might have been less likely to experience bodily injury claims under a tort-based compensation system are more likely to require accident benefits payments for such claims under a no-fault system. Loss Transfer balances the cost of providing compensation on a first party basis between these specified classes of vehicles. For example, loss transfer shifts costs from insurers insuring motorcycles to insurers of other classes of automobiles under certain circumstances. Loss transfer also shifts costs to insurers of heavy commercial vehicles from other classes of automobiles under certain circumstances.



## D. THE FAULT DETERMINATION RULES (FDRS)

### (1) Purpose of the FDRs

[29] The FDRs are set out in R.R.O. 1990, Reg. 668. As I have said, whether Old Republic is required to indemnify State Farm turns on the proper interpretation of the Loss Transfer provisions, which include the FDRs. To interpret the FDRs, it is necessary to understand the purposes they serve under the Act.

[30] According to Allan O'Donnell in *Automobile Insurance in Ontario*, (Markham: Butterworths Canada Limited, 1991) at pp. 56-58, and as becomes apparent from an examination of the Act, the FDRs serve two purposes.

[31] First, the FDRs determine an insured's degree of fault for the purpose of establishing the insured's entitlement to direct compensation from the insured's

own insurer for property damage to the insured's automobile caused by the driver of another automobile.

[32] Where damage to an insured's automobile has been caused by the fault of the driver of another insured automobile, the insured's own insurer compensates the insured for the damage to the insured's automobile (including contents damage and loss of use) under the third-party liability section of the insurance policy to the extent the insured was not at fault for the accident.

[33] Section 263(3) of the Act provides that "[r]ecovery under subsection (2) [for property damage] shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules."

[34] Accordingly, even where an insured has not purchased optional collision coverage, an insured may recover against her own insurer for damage to her automobile to the extent that the insured was not at fault for the accident as determined under the FDRs.

[35] Mr. O'Donnell explains, at p. 56, that the FDRs "are … [skewed] somewhat in favour of policyholders seeking to maximize their own insurer's contribution to automobile repair costs" in two ways. One way is that, under s. 3 of the FDRs, the degree of fault is determined without reference to, among other things, weather conditions, road conditions and visibility.

[36] Another way is that, under s. 4 of the FDRs, if more than one FDR applies, the one that attributes the least degree of fault to an insured is applied. Mr. O'Donnell notes, at p. 57: "the FDRs under direct compensation can in a two automobile accident allow *each* insured to recover 100 per cent of their respective automobile damage" (emphasis in original).[4]

[37] Further, while insurers are bound by the FDRs, insureds are not. Thus an insured may sue her insurer for direct compensation for property damage claims if she is unhappy with the result produced by the FDRs.

[38] The second purpose of the FDRs relates to Loss Transfer. Loss Transfer is available in certain circumstances in relation to SABs. It is also available in very limited circumstances in relation to direct compensation for property damage and collision coverage. As I have explained, Loss Transfer allows one insurer to obtain indemnification from another insurer for payments made to an insured.

[39] In relation to SABs, Loss Transfer is made according to the respective degree of fault of each insurer's insured as determined under the FDRs: s. 275(2) of the Act.



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[4] Concerning s. 4, in *The Enigmatic Exemption to the Bar against Subrogation: S. 275 of the Insurance Act*, at footnote 10, p. 175, Mr. McNeil says: "The Fault Determination Rules have a dual use. They are to regulate the assessment of liability when an insured is seeking direct compensation for the property damage to his vehicle from his insurer, under s. 263 of the Insurance Act. When that is kept in mind, some of the seemingly nonsensical language of the Rules (e.g. 4(1): "if more than one rule applies with respect to the insured, the one that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies", impossible to apply in allocating fault between two motorists) evaporates.

### (2) Relevant Provisions of the FDRs in addition to s. 9

[40] In addition to s. 9, several other provisions of the FDRs are relevant for the purposes of this appeal.

[41] Sections 1 to 5 of the FDRs address general matters. Of these provisions, ss. 2, 3 and 5 are relevant to this appeal.

[42] Section 2(1) requires that an insurer determine the degree of fault of its insured in accordance with the FDRs:

> 2. (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.

[43] Section 2(2) provides that "the diagrams in this Regulation are merely illustrative of the situations described in these rules."

[44] Section 3 stipulates that the degree of fault of an insured is determined without reference to road conditions and other factors:

> 3. The degree of fault of an insured is determined without reference to,
>
> (a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or
>
> (b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.

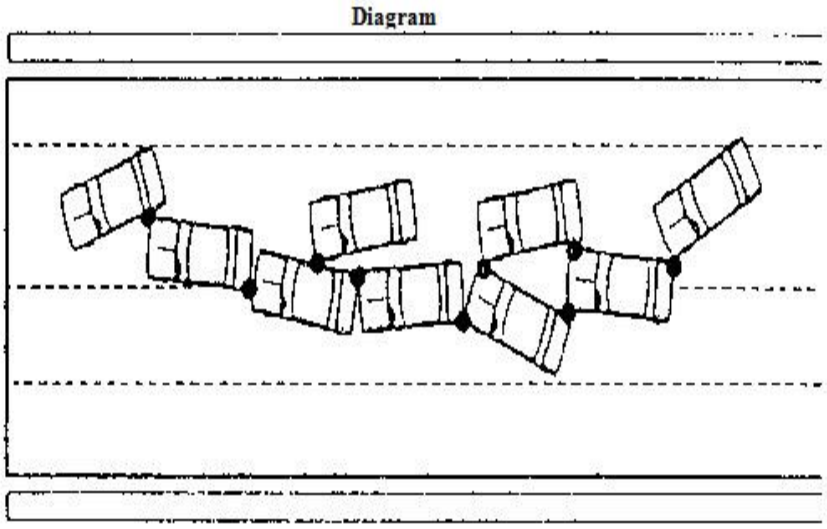
[45] Section 5 requires that an insured's degree of fault be determined in accordance with the ordinary rules of law if an incident is not described in the FDRs or if there is insufficient information to determine the insured's degree of fault:

> 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.
>
> (2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

[46] Sections 6 to 9 provide rules for automobiles travelling in the same direction and lane. Sections 6, 7 and 8 all describe two-automobile accidents.

[47] Sections 10 and 11 provide rules for automobiles travelling in the same direction and adjacent lanes. Apart from s. 9, s. 11 is the only section in the FDRs that specifically addresses an incident involving three or more automobiles. It addresses a "pile-up":

> 11. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes (a "pile-up").
>
> (2) For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident.






**(3) Section 9**

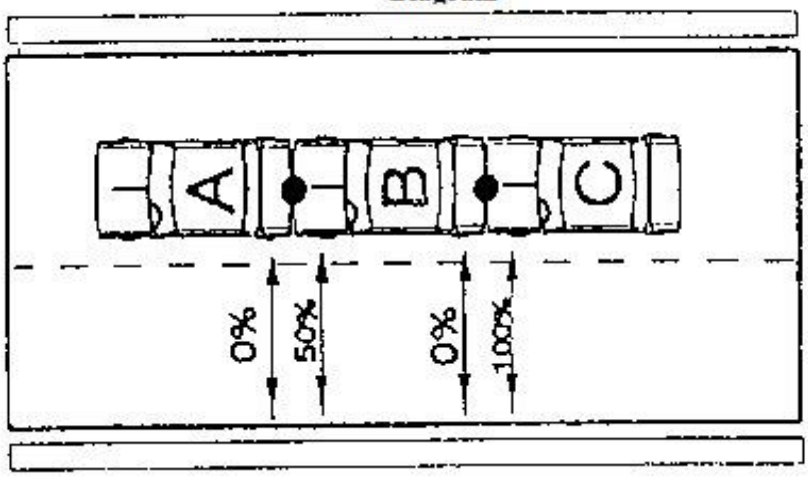
[48] As s. 9 is central to this appeal, I will reproduce it in full:

> RULES FOR AUTOMOBILES TRAVELLING IN THE SAME DIRECTIONS AND LANE
>
> …
>
> 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.

Diagram

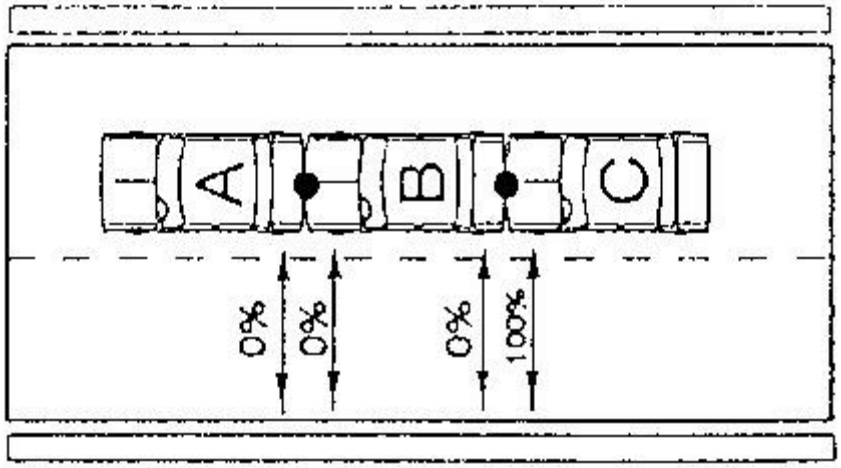



(4) If only automobile "C" is in motion when the incident occurs,

(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.

Diagram






**(4) Applying the FDRs**

[49] This court has held that the loss transfer regime is meant to provide an "expedient and summary method" of reimbursement. As such, fault is to be determined strictly in accordance with the FDRs. As Griffiths J.A. explained in *Jevco Insurance Co. v. Canadian General Insurance Co.*, (1993), 14 O.R. (3d) 545, at p. 545:

> The scheme of the legislation, under s. 275 of the *Insurance Act* and companion regulations, is to provide for an expedient and summary method of reimbursing the first-party insurer for payment of no-fault benefits from the second-party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the fault determination rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.

[50] Similarly, in *Jevco Insurance Co. v. York Fire & Casualty Co.*, (1996), 27 O.R. (3d) 483, at p. 486, this court held that the "purpose of the legislation is to

spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude." And in *Jevco Insurance Co. v. Halifax Insurance Co.*,*(*1994), 27 C.C.L.I. (2d) 64 (C.J.) at para. 7, Matlow J. observed that the FDRs are meant to facilitate indemnification and that they allocate fault in a manner that is usually, but not always, consistent with actual fault:

> [The Fault Determination Rules] set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of a particular accident in a manner that, in most cases, would probably but not necessarily correspond with actual fault. [Emphasis added.]

## E. THE CONFLICTING SUPERIOR COURT DECISIONS

[51] In the proceedings before the arbitrator and on appeal to the Superior Court, the insurers relied on conflicting Superior Court decisions relating to the proper interpretation of s. 9(4) of the FDRs in support of their respective positions.

[52] Old Republic relied on *GAN General Insurance Co. v. State Farm Mutual Insurance Co.* (1999), 19 C.C.L.I. (3d) 266 (Ont. S.C.) ("*GAN*"). In *GAN*, a transport truck set off a chain reaction collision and State Farm, the insurer of the third automobile in line, sought indemnification for SABs payments under s. 9(4), or ss. 6(1) and (2), of the FDRs. Following an arbitration hearing, the arbitrator

held that s. 9(4) of the FDRs does not apply to determine the fault of the rear automobile in a chain reaction accident for collisions between automobiles with which the rear car did not directly collide. Rather, under s. 5(1) of the FDRs, the ordinary rules of law apply.

[53] On appeal to the Superior Court, Pitt J. rejected that conclusion. He found, based on s. 9(2) of the FDRs, that in relation to chain reaction incidents, the legislature had decided not to apportion liability between automobiles that do not collide. He explained, at paras. 17-19:

> I conclude that the Arbitrator made an error of law in his interpretation of Rule 9 and that it did apply to the fact situation before him, by virtue of s. 9(2).
>
> 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 going 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), and because s. 5 in not applicable, there is simply no apportionment between car "C" and "A".

[54] State Farm relied on *Royal & SunAlliance Insurance Co. of Canada v. AXA Insurance (Canada)*, 2012 ONSC 3095, [2012] I.L.R. I-5299 ("*Royal*"), in which Chapnik J. came to a different conclusion. In *Royal*, an arbitrator found that a truck had initiated a chain reaction collision, and that, following the initial impact between the truck and a stopped vehicle, the truck also struck the third vehicle in line. The insurer of the third vehicle claimed indemnification for SABs from the truck's insurer.

[55] The arbitrator rejected the submission that s. 11 of the FDRs, dealing with pile-ups, should apply. Rather, he concluded that s. 9(4), dealing with chain reaction collisions, was the appropriate section to apply. The arbitrator found the case was distinguishable on its facts from *GAN*. In any event, he adopted the reasoning in other decisions to hold that the absence of contact between vehicles is but one factor to consider in analysing whether a loss transfer applies. He concluded that, under s. 9(4), the truck was 100 per cent responsible for the chain reaction because it was the only moving vehicle in the lane when the accident occurred.

[56] On appeal to the Superior Court, Chapnik J. upheld the arbitrator's conclusions. She explained, at paras. 30-33:

> 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.
>
> In my view, the arbitrator applied Rule 9(4) correctly.
>
> 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.
>
> …
>
> [T]he *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.



## F. THE ARBITRATOR'S DECISION

[57] The arbitrator in this case preferred the approach adopted by Chapnik J. over that of Pitt J. She rejected the proposition that the combined effect of ss. 9(4) and 9(2) results in no apportionment of liability between two vehicles that do not collide. In her view, s. 9(2) "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": at para. 32. She found that s. 9(2) was helpful in interpreting s. 9(3), but not s. 9(4). At paras. 32-33 of her decision, she wrote:

> After much consideration of the issue, I have concluded that [*Royal*] 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 incident5, 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. [Emphasis added.]

[58] She found further support for this proposition in s. 275(2) of the *Insurance Act,* which mandates that the respective degree of fault of each insurer's insured is to be determined under the FDRs. In her view, given that s. 9(4)(a) indicates

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[5] This statement appears to reflect a misreading of s. 9(3) of the FDRs, as s. 9(3)(a) states that "in the collision between [the front and middle automobiles], the driver [of the front automobile] is not at fault and the driver [of the middle automobile] is 50 per cent at fault for the incident".

that the driver of the front vehicle is not at fault and s. 9(4)(b) says that the driver of the vehicle at the rear of the chain is 100 per cent at fault, the driver of the front vehicle is entitled to indemnification from the driver of the rear vehicle. This is so even though these vehicles did not collide.

[59] Finally, the arbitrator noted the underlying intention of the loss transfer provisions to balance the costs of providing first party compensation between specified classes of vehicles. She concluded it would be inconsistent with that intention to find that the insurer of the front vehicle cannot seek indemnification from the truck that caused the damage and injury to its insured.



## G. THE SUPERIOR COURT APPEAL JUDGE'S DECISION

[60] The Superior Court appeal judge also preferred the result in *Royal*. He disagreed with Pitt J.'s view in *GAN* that the application of s. 9(4) is governed by s. 9(2). According to the Superior Court appeal judge, at para. 76, s. 9(2) "is a rule about how to determine the degree of fault for each collision in the chain reaction, but it does not provide a rule for the vehicle that started the series of collisions." In other words, "it does not follow from Rule 9(2) that the Legislature has decided that no determination of liability is to be made between vehicles involved in the same chain collision but which do not directly collide."

[61] The Superior Court appeal judge found, at para. 85, that the "plain meaning of Rule 9(4) is that if only automobile 'C' is in motion when the 'incident'

occurs, then automobile 'C' is 100 per cent at fault for the 'incident.'" In his view, "incident" means the entire chain reaction; thus, automobile "C" is responsible for the entire chain reaction.

[62] He also found that Pitt J.'s interpretation "changes the meaning of Rule 9(4)" because it effectively replaces the word "incident" with "collision" so it would read "the driver of automobile 'C' is 100 percent at fault for the collision". He explained, at para. 88: "That interpretation would indeed make the driver of automobile 'C' only liable for 'collisions' but that is not what the Legislature said. The Legislature said that the driver of automobile 'C' is 100 per cent at fault 'for the incident'".

[63] He concluded that the interpretation adopted by Chapnik J. in *Royal* was consistent with the purpose of the legislative scheme, "which is to impose risk and liability on the relatively more dangerous and damage causing vehicle when there is an incident": at para. 93.

[64] The Superior Court appeal judge rejected Old Republic's argument that interpreting the word "incident" in sub-clauses (a) and (c) of s. 9(4) to mean the entire chain reaction would put at risk the economic viability of the no-fault accident system by exposing insurers of heavy commercial vehicles to unlimited liability for no fault benefits. He noted that that interpretation was consistent with fault determination at common law. He also observed that there was no empirical

evidence that that interpretation would change the underwriting risk of heavy commercial vehicles.

[65] The Superior Court appeal judge concluded that Old Republic is liable to indemnify State Farm for the SABs paid to its insured and dismissed Old Republic's appeal.



## H. ANALYSIS

[66] The issue on appeal is fundamentally one of statutory interpretation.

[67] The modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

[68] The rules governing statutory interpretation apply equally to regulations. Importantly, a regulation must be read in the context of the enabling Act, having regard to the purpose of the enabling provisions: *Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 37-38.

[69] The difficult problem posed by this case is that the obvious interpretation of s. 9(4), when read in isolation, is that "incident" should retain the same meaning in sub-clauses (a) and (b) as it carries in the main clause of s. 9(4) – and in s.

9(1) – that is, “incident” refers to the chain reaction. The problem, however, with that interpretation is that it does not appear to make sense when applied to s. 9(3) – which is a parallel provision to s. 9(4).

[70] Accordingly, applying the modern rule of statutory interpretation to s. 9(4), I conclude that the word “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) can refer only to the collision identified in the particular sub-clause – and that it cannot reasonably refer to the entire chain reaction. I reach this conclusion for six reasons.

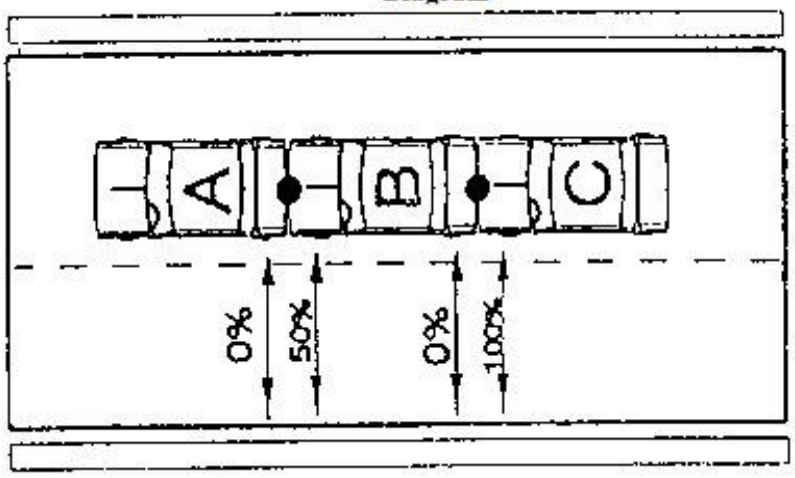
[71] First, reading s. 9(4) in conjunction with s. 9(3) leads inevitably to this conclusion. Otherwise, s. 9(3) could lead to over-indemnification of some insurers in some circumstances. I repeat s. 9 for ease of reference:

> RULES FOR AUTOMOBILES TRAVELLING IN THE SAME DIRECTIONS AND LANE
>
> …
>
> 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.

Diagram

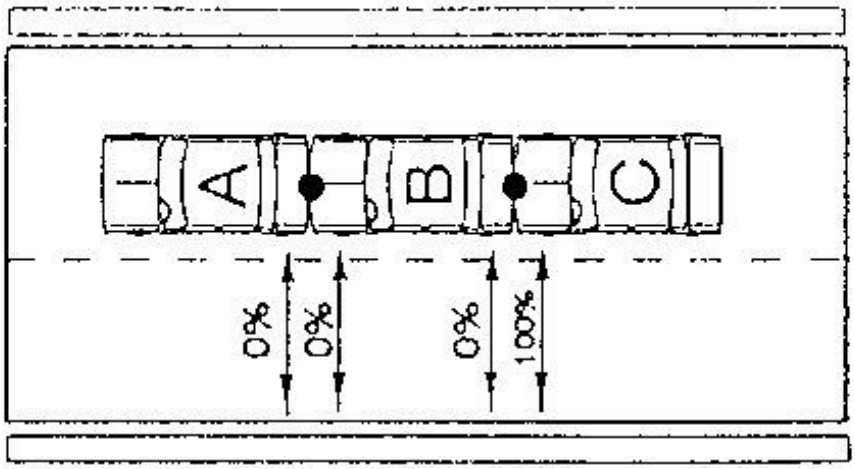



(4) If only automobile "C" is in motion when the incident occurs,

(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.

Diagram






[72] Sections 9(3) and 9(4) are parallel provisions. Having regard to their parallel nature, I am satisfied that these provisions must be read consistently.

[73] Section 9(3) addresses a chain reaction in which all automobiles are in motion; s. 9(4) addresses a chain reaction where only the rear automobile is in motion. Each provision includes two sub-clauses: the first sub-clause addresses the collision between the lead and middle vehicle; the second sub-clause addresses the collision between the middle and rear vehicle. In the case of each provision, the language used in each sub-clause is consistent with the language used in the same sub-clause of the parallel provision.

[74] Section 9(3) cannot reasonably be read as meaning that the rear automobile is 100 per cent at fault for the entire chain reaction. If that were the case, depending on the types of automobile involved in the accident, that would

mean the first party insurer of the lead vehicle could be entitled to be indemnified for 150 per cent of the SABs payments it made.

[75] This is because the first party insurer of the lead vehicle would be entitled to be indemnified for 50 per cent of the SABs payments made by the second party insurer of the middle vehicle and for 100 per cent of the SABs payments made by the second party insurer of the rear vehicle.

[76] A similar result would ensue if both the middle and rear vehicles involved in the chain reaction were heavy commercial vehicles.

[77] In my view, the legislature cannot have intended that one insurer would be indemnified by other insurers for 150 per cent of SABs payments made. That would be an absurd result.

[78] This leads to the conclusion that “incident” as it appears in sub-clauses (a) and (b) of s. 9(3) can refer only to the collision identified in the particular sub-clause. Because of the parallel nature of ss. 9(3) and (4), this supports the conclusion that “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) can refer only to the collision identified in the particular sub-clause.

[79] Second, s. 9(2) also supports the conclusion that “incident” as it appears in sub-clauses (a) and (b) of ss. 9(3) and (4) can refer only to the collision identified in the particular sub-clause.

[80] Section 9(2) requires that the “degree of fault for each collision between two automobiles involved in the chain reaction [be] determined without reference to any related collisions involving either of the automobiles and another automobile.” Immediately following s. 9(2), ss. 9(3) and (4) address, in sub-clauses (a) and (b) of each provision, the responsibility of the drivers of two automobiles for the collision between their two automobiles.

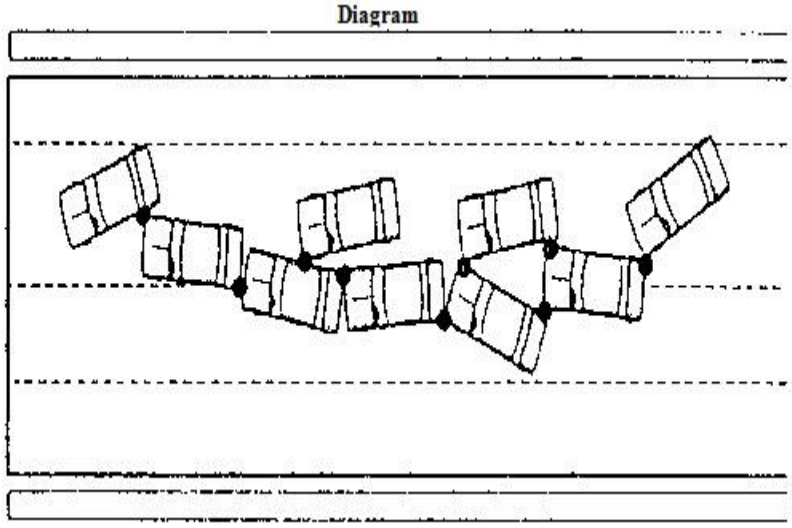
[81] Considered in the light of the direction in s. 9(2) to determine “degree[s] of fault for each collision between two automobiles involved in a chain reaction … without reference to any related collisions”, it makes no sense that when addressing a collision between two automobiles in each of sub-clauses (a) and (b), the legislature would also try to address the responsibility of a particular automobile for the entire chain reaction.

[82] Third, s. 11 also supports the conclusion that “incident” as it appears in sub-clauses (a) and (b) of ss. 9(3) and (4) can refer only to the collision identified in the particular sub-clause.

[83] As indicated above, apart from s. 9, s. 11 is the only other provision of the FDRs that addresses an incident involving more than two automobiles. I repeat s. 11 for ease of reference.

> 11. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes (a "pile-up").

> (2) For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident.




[84] Section 11(2) uses similar language to the language that appears in sub-clauses (a) and (b) of ss. 9(3) and (4). Like s. 9(3), s. 11(2) would produce absurd results – over-indemnification of a first party insurer – if "incident" as it appears in that section were interpreted to mean the pile-up and if one or more of the automobiles involved in the pile-up were entitled to indemnification under the motorcycle Loss Transfer provisions or if multiple heavy commercial vehicles were involved in the incident.

[85] I therefore conclude that "incident" as it appears in s. 11(2) refers to "each collision between two vehicles" as those words appear in s. 11(2) and that it does not refer to the entire pile-up. This supports interpreting s. 9(4) as I have

suggested. “Incident” as used in the FDRs means different things in different contexts.

[86] Fourth, interpreting “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) as referring to the collision identified in each particular sub-clause is not inconsistent with the purpose of SABs Loss Transfer provisions. Those provisions are designed to balance the financial costs of SABs payments among insurers of different classes of vehicles “in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.”

[87] Loss transfer is not available generally to insurers in relation to SABs based on fault. The fact that not all insurers required to pay SABs will be entitled to indemnification from a heavy commercial vehicle “involved in the incident” under s. 275(2) of the Act in every case does not make this interpretation of s. 9(4) inconsistent with the purposes of the SABs Loss Transfer scheme.

[88] Fifth, interpreting “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) of the FDRs as referring to the collision identified in the particular sub-clause sits comfortably with the use of the FDRs to determine direct compensation claims for property damage. That is because recovery for direct compensation claims is based on the degree of fault of an insurer’s insured as determined under the FDRs. This interpretation will therefore have no impact on that use of the FDRs.

[89] Sixth, interpreting “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) as referring to the collision identified in each particular sub-clause is not inconsistent with the direct compensation for property damage claims Loss Transfer provisions. This interpretation will have no impact on the garage or towing loss transfer provisions because those provisions rely on the fault of the garage operator or their employee or the driver of the automobile towing the insured automobile.

[90] As for the Loss Transfer provisions relating to direct compensation for damage to automobile contents greater than $20,000, those provisions operate in the same fashion as the SABs Loss Transfer provisions. Just as it makes no sense that a SABs first party insurer would be entitled to more than 100 per cent indemnification for SABs payments, it makes no sense that an insurer who pays out direct compensation for contents damage greater than $20,000 would be entitled to more than 100 per cent indemnification for those payments.

[91] Applying the modern rule of statutory interpretation in this case, I conclude that the word “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) refers to the collision identified in each sub-clause and not the entire chain reaction.

[92] On appeal to this court, Old Republic reiterated its argument that interpreting “incident” as it appears in sub-clauses (a) and (b) of s. 9(4) to mean the chain reaction would have dire consequences for the insurance, trucking and

heavy commercial vehicle industries. Like the Superior Court appeal judge, I reject this argument as it was advanced on an *in terrorem* basis, without an evidentiary foundation and without any assistance concerning the technical aspects of this very technical area of the law.



## I. DISPOSITION

[93] Based on the foregoing reasons, I would allow the appeal, set aside the arbitrator's order and substitute an order providing that Old Republic is not required to indemnify State Farm for SABs payments.

[94] Costs of the appeal and the motion for leave are to Old Republic on a partial indemnity scale fixed in the amount of $14,000.00 inclusive of disbursements and applicable taxes.

Released:

"OCT 20 2015"
"EEG"

"Janet Simmons J.A."
"I agree E.E. Gillese J.A."
"I agree Paul Rouleau J.A."

Appendix 'A'

*Insurance Act,* R.S.O. 1990, c. I.8

**PART VI AUTOMOBILE INSURANCE**

**Interpretation, Part VI**

224. (1) In this Part,

"automobile" includes,

(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and

(b) a vehicle prescribed by regulation to be an automobile;

…

"fault determination rules" means the rules prescribed under paragraph 21 of subsection 121 (1);

...

"insured" means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person;

...

"statutory accident benefits" means the benefits set out in the regulations made under paragraphs 9 and 10 of subsection 121 (1);

"Statutory Accident Benefits Schedule" means the regulations made under paragraphs 9 and 10 of subsection 121 (1).

...

**DIRECT COMPENSATION - PROPERTY DAMAGE**

**Accidents involving two or more insured automobiles**

263. (1) This section applies if,

(a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;

(b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section; and

(c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section.

...

**Damage recovery from insured's insurer**

(2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239 (1) as though the insured were a third party.

**Fault-based recovery**

(3) Recovery under subsection (2) shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules.

**Dispute resolution**

(4) An insured may bring an action against the insurer if the insured is not satisfied that the degree of fault established under the fault determination rules accurately reflects the actual degree of fault or the insured is not satisfied with a

proposed settlement and the matters in issue shall be determined in accordance with the ordinary rules of law.

**Restrictions on other recovery**

(5) If this section applies,

(a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;

(a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss;

(b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.

...

**Indemnification in certain cases**

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.

**Idem**

(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.

...

**Arbitration**

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitrations Act.

…

**R.R.O. 1990, Reg. 664: AUTOMOBILE INSURANCE**

DEFINITIONS

1. In this Regulation,

"commercial vehicle" means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation, and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes, a vehicle rented for thirty days or less, or a trailer intended for use with a commercial vehicle;

…

**Direct Compensation - Property Damage (Clause 263 (5) (b) of the Act)**

6. (1) For the purpose of clause 263 (5) (b) of the Act, the insurer of an automobile that is in the care, custody or control of a person who is engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles is entitled to indemnification from the person.

(2) The amount of the indemnity is limited to that proportion of the loss that is attributable to the fault, as determined under the fault determination rules, of the person or of an employee or agent of the person.

(7). (1) For the purpose of clause 263 (5) (b) of the Act, the insurer of an automobile that is being towed by another automobile is entitled to indemnification from the lessee or, if there is no lessee, from the owner of the automobile towing it,

(a) if the lessee or owner, as the case may be, is engaged in the business of towing automobiles; or

(b) if the automobile towing the insured automobile has a gross vehicle weight greater than 4,500 kilograms.

(2) The amount of the indemnity is limited to that proportion of the loss that is attributable to the fault, as determined under the fault determination rules, of the driver of the automobile that is towing the insured automobile.

8. (1) For the purpose of clause 263 (5)(b) of the Act, the insurer of an automobile the contents of which suffer damage in an amount greater than $20,000 is entitled to indemnification from the insurer of the other automobile involved in the incident.

(2) The amount of the indemnity is limited to that proportion of the loss over $20,000 that is attributable to the fault, as determined under the fault determination rules, of the driver of the other automobile.

...

**Indemnification for Statutory Accident Benefits (Section 275 of the Act)**

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the Highway Traffic Act;

"motorized snow vehicle" means a motorized snow vehicle as defined in the Motorized Snow Vehicles Act;

"off-road vehicle" means an off-road vehicle as defined in the Off-Road Vehicles Act;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

…

**R.R.O. 1990, Reg. 668: FAULT DETERMINATION RULES**

**General**

1. In this Regulation,

"centre line" of a roadway means,

(a) a single or double, unbroken or broken line marked in the middle of the roadway, or

(b) if no line is marked, the middle of the roadway or that portion of the roadway that is not obstructed by parked vehicles, a snowbank or some other object blocking traffic.

2. (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.

(2) The diagrams in this Regulation are merely illustrative of the situations described in these rules.

3. The degree of fault of an insured is determined without reference to,

(a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or

(b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.

4. (1) If more than one rule applies with respect to the insured, the rule that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies in the circumstances.

(2) Despite subsection (1), if two rules apply with respect to an incident involving two automobiles and if under one rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident.

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.

(2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

...

**RULES FOR AUTOMOBILES TRAVELLING IN THE SAME DIRECTIONS AND LANE**

…

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").

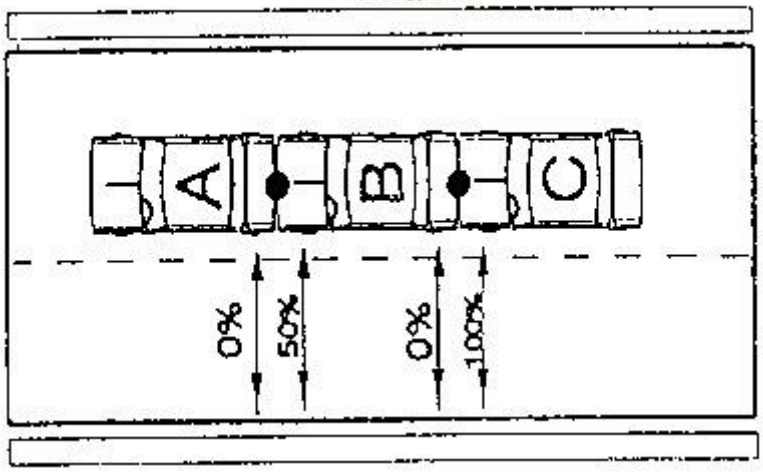
(2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile.

(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.

Diagram



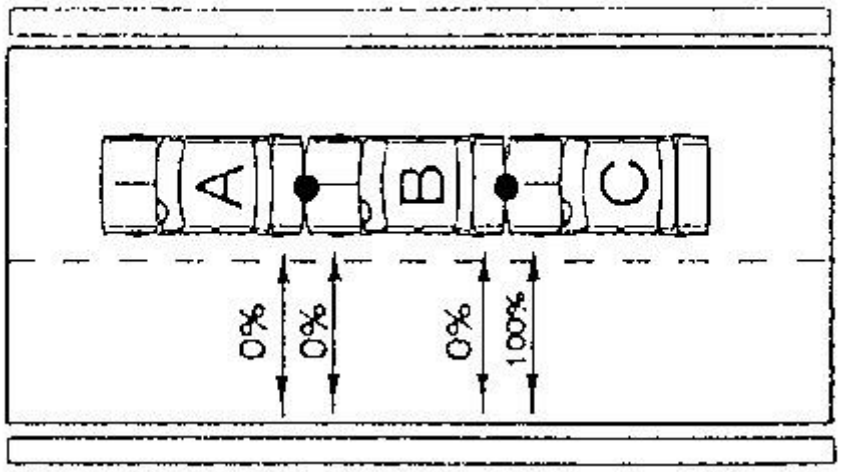

(4) If only automobile "C" is in motion when the incident occurs,

(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.



Diagram




...

11. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes (a "pile-up").

(2) For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident.

**Diagram**