IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 275 and ONTARIO REGULATION 668

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Jane Cvijan for the Applicant

Mark S. Wilson for the Respondent

ISSUE:

1. Is Kingsway required to indemnify Dominion pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act* either under Rule 9 of the *Fault Determination Rules,* or in accordance with the ordinary rules of law as set out in section 5?

RESULT:

1. Rule 9 does not apply in these circumstances. However, Kingsway's insured is 100% at fault for the accident in accordance with the ordinary rules of law, and Kingsway is therefore required to indemnify Dominion pursuant to section 275 of the *Insurance Act.*

BACKGROUND:

This loss transfer dispute arises out of a "chain reaction collision" that took place in the eastbound lanes of the Gardiner Expressway, near the Jarvis Street exit, on May 16, 2008. Qinghe Lin was injured when his Toyota Corolla, insured by Dominion of Canada ("Dominion"), was struck from the rear by a Ford van driven by John Parson. Mr. Parson's vehicle had been struck by a Mack truck insured by Kingsway, driven by Jose Ferreira, and the force of that impact caused him to collide with the Claimant's vehicle. The Claimant in turn struck another vehicle in front of him, driven by Jacob Zacharias.

Mr. Lin applied to Dominion for payment of accident benefits under the *Statutory Accident Benefits Schedule.* His claim has now been resolved on a full and final basis.

Dominion seeks indemnification from Kingsway under the Loss Transfer provisions of the *Act.* Kingsway takes the position that this remedy is not available to Dominion, given Justice Pitt's ruling in *GAN General Insurance v. State Farm Mutual Insurance* [1999] O.J. No. 4467.

ARBITRATION AGREEMENT:

Counsel did not file a written Arbitration Agreement with me, but agreed to the following terms and requested that I set them out in writing:

1. Either party has the right to appeal my decision within thirty days of its issuance, without leave, on a question of law or mixed fact and law.

2. The unsuccessful party will pay the legal costs of the successful party, and if counsel are unable to agree on the quantum payable, I will determine the amount payable.

3. The unsuccessful party will bear the complete fees charged and disbursements incurred by the arbitrator, and in the event of an appeal, these fees will be split equally until the matter is finally resolved.

EVIDENCE:

The parties filed an Agreed Statement of Facts setting out most, but not all, of the relevant facts. Counsel also relied on notes taken by the police officer who investigated the accident, as well as transcripts from the examinations for discovery conducted of the Claimant, Mr. Parson (the driver of the vehicle that rear-ended the Claimant) and the driver of the truck in the tort action commenced by the Claimant.

As set out above, the parties agree that the incident was initiated by the Mack truck driven by Mr. Ferreira rear-ending the Parson vehicle and setting off a chain reaction collision. The Parson vehicle then struck the Claimant's vehicle from the rear, which in turn struck the Zacharias vehicle. The truck insured by Kingsway never came into direct contact with the Claimant's vehicle.

The parties also agree that all four vehicles involved in the collision were traveling in the same direction and in the same lane. As well, they agree that the Mack truck that initiated the collision meets the definition of "heavy commercial vehicle" in section 9 of *Regulation 664* to the *Act*.

Mr. Ferreira was charged with careless driving under section 130 of the *Highway Traffic Act* and was convicted under subsection 148(5) of that *Act*.

Finally, the parties agree that while the accident took place in May 2008, Dominion's first request for indemnification under the loss transfer provisions was made on October 26, 2010. Counsel have agreed that the benefits in issue are those payable pursuant to section 275 of the *Act* from October 26, 2008, that is from two years prior to the first indemnification request, until the date that the claim was resolved in November 2011.

While the parties agree that a "chain reaction collision" took place, they do not agree about whether Rule 9 of the *Fault Determination Rules* applies to the incident. On a factual level, they dispute whether the other vehicles involved in the incident were either stopped or moving at the point at which the truck struck the Parson vehicle. If all of the other vehicles were in motion, Rule 9(3) would apply, whereas if they were all stopped, Rule 9(4) would apply. Some of the evidence before me on this point is inconsistent, as described below:

Mr. Parson – vehicle #2:

Mr. Parson is the driver of the Ford van that struck the Claimant's vehicle after being rear-ended by the truck. He was interviewed by the investigating police officer at the scene of the accident, and stated that his vehicle had been stopped for approximately thirty seconds before he was struck by the truck. Mr. Parson gave the same evidence at his examination for discovery, conducted in October 2010. In contrast, Mr. Ferreira (the truck driver who struck his vehicle) testified at his discovery that the Parson vehicle was moving, albeit slowly, at the time of the impact. I also note that the police officer did not indicate on the Motor Vehicle Accident Report ("MVA Report") that the Parson vehicle was stopped, but rather that it was "slowing or stopping".

Mr. Lin (Claimant) – vehicle #3:

Mr. Lin was also interviewed by the police officer at the scene. He stated that his vehicle was moving at the point that it was rear-ended by the Parson van. Mr. Lin provided the same evidence when he was examined for discovery in the context of the tort claim. I note that Mr. Parson, the driver of the vehicle that struck Mr. Lin's vehicle, testified at his

examination that Mr. Lin's vehicle was either moving or going "just slow, really slow". The MVA report notes the Lin vehicle as "slowing or stopping".

Mr. Zacharias – vehicle #4:

Mr. Zacharias told the investigating police officer that his vehicle was stopped at the time of impact. He was not examined for discovery, as he was not named as a party in the Claimant's tort claim. The investigating officer noted on the MVA Report that the Zacharias vehicle was stopped. I note that Mr. Parson, who would have been two vehicles behind the Zacharias vehicle, testified at his examination for discovery that Mr. Zacharias was moving slowly at the time of impact.

RELEVANT PROVISIONS:

Insurance Act – section 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.
>
> (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.

Regulation 668 –

> **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.
>
> **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.

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.

(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.

PARTIES' ARGUMENTS:

Dominion's position

Counsel for Dominion acknowledged that the evidence on the question of whether the other vehicles were moving or not at the time that the truck struck the Parson vehicle was inconsistent. She contended that the best evidence on that point is that of the drivers themselves, and noted that each driver's evidence at the examinations for discovery was consistent with what they had told the investigating police officer at the scene of the

accident, two years earlier. Counsel submitted that by most accounts, Mr. Zacharias' vehicle was stopped at the point of impact, and she urged me to accept the other drivers' evidence on this point - namely that Mr. Lin's vehicle was moving and Mr. Parson's vehicle was stopped at the time of impact. She contended that in these circumstances, neither Rule 9(3) nor 9(4) would apply.

Counsel noted that the police officer indicated on the MVA Report that Mr. Parson's vehicle was moving at the time of impact, and that Mr. Lin's vehicle was stopped – the reverse of what each driver had recalled on two occasions. She submitted, however, that even if the police officer's notations on the report are accepted over the evidence provided by the drivers, the end result would still be that two of the vehicles were moving and one was stopped at the point at which the truck initiated the chain reaction collision, and that in those circumstances, neither Rule 9(3) nor 9(4) would apply.

Counsel contended that no other Fault Determination Rule applies to the circumstances, and that section 5 then requires that the degree of fault of each insured should be determined in accordance with the ordinary rules of law. She submitted that on that analysis, given the evidence before me and Mr. Ferreira's conviction under the *Highway Traffic Act,* Kingsway's insured should be found to be 100% liable for any damage or injury caused to the drivers of the other vehicles.

Finally, counsel for Dominion argued alternatively that if my factual findings result in a determination that either Rule 9(3) or 9(4) does apply, the driver of the Kingsway truck should still be determined to be 100% liable for damage or injury caused to the Claimant, regardless of the fact that there was no contact between their two vehicles. She submitted that this approach would be consistent with the underlying purpose of the loss transfer scheme, namely that losses should be redistributed among insurers in a manner that reflects the fact that heavy commercial vehicles cause a disproportionate amount of damage to passenger vehicles and consequently, personal injury to their occupants.

Ms. Cvijan cited Justice Lax' appeal decision in *Co-operators v. Canadian General Insurance* [1998] O.J. No. 2578 as authority for the proposition that direct contact between two vehicles is not a prerequisite for the application of Rule 9(4). She argued that on this basis, I should find that Mr. Ferreira is fully liable for the accident and that Kingsway should indemnify Dominion for all benefits that it has paid out to the Claimant. Counsel contended that the appeal in *GAN v. State Farm, supra,* was wrongly decided, and that Justice Pitt's finding that there is no apportionment of liability between vehicles that did not collide is not binding upon me, given that there are two decisions from the same level of court that arrive at different findings on the point.

Kingsway's position

Counsel for Kingsway contended that Mr. Parson's evidence that his vehicle was stopped for thirty seconds before it was rear-ended by the truck should not be accepted. He submitted that the police officer had implicitly rejected this view by noting that his vehicle was "slowing or stopping" on the MVA Report, despite having recorded Mr. Parson's statement when questioned at the scene that his vehicle was stopped at the time of impact. Counsel also pointed out that Mr. Ferreira, the truck driver, testified that the Parson vehicle was moving slowly at the time of impact, and that Mr. Lin had stated at his examination for discovery that all vehicles involved in the accident were moving.

In light of all of this evidence, Mr. Wilson urged me to find that the Parson vehicle was in motion at the point at which it was rear-ended by the truck. He also suggested that Mr. Parson's statement that his vehicle was fifty feet behind Mr. Lin's vehicle at the time that he was rear-ended by the truck only makes sense if his vehicle was moving at the time of the impact, given that his vehicle subsequently struck the Lin vehicle.

Mr. Wilson stated that if I then accept that each of Mr. Ferreira, Mr. Parson and the Claimant's vehicles were all in motion at the time of the chain reaction collision, Rule 9(3) would apply to the incident. He contended that the drafters of the regulation intended that the rule be approached with "clusters" of three vehicles in mind when apportioning liability for a multi-vehicle collision, noting that the diagrams accompanying Rule 9(3)

and 9(4) only depict three vehicles. He argued that the Zacharias vehicle, being the fourth vehicle in the row, should therefore not be considered in the analysis.

Counsel went on to state that Rule 9(2) directs that the relative degree of fault be determined between pairs of automobiles, which makes it clear that there is no apportionment of liability between the first vehicle in the chain reaction and the third vehicle. He allowed that Mr. Parson's insurer would be entitled to recover 50% from Kingsway, given the direct contact between those two vehicles, but that Mr. Ferreira should not be found to be liable for any damage or injury caused to the Claimant, whose vehicle was not struck by the truck.

Counsel for Kingsway cited Justice Pitt's decision in *GAN v. State Farm, supra,* and submitted that it stands for the proposition that when Rule 9 applies to the circumstances of an incident (as he states it does here) no "leapfrogging" is permitted between the rear vehicle and a subsequent vehicle in the chain that did not directly collide with rear vehicle. Mr. Wilson contended that Justice Lax' decision in *Co-operators v. CGI, supra*, is not inconsistent with the ruling in *GAN,* noting the different manner in which the "loss transfer argument" arose in that case, as well as the fact that Justice Lax did not award loss transfer indemnification to the applicant insurer. Counsel also noted that the arbitrator in *GAN* considered Justice Lax' decision, and argued that we can therefore assume that Justice Pitt, as the reviewing judge, would have been aware of this prior ruling and likely did not mention it because he thought that his decision was consistent with it.

ANALYSIS & FINDINGS:

As set out above, the parties agree that all of the vehicles involved in the incident were travelling in the same direction, in the same lane, and that the chain reaction collision was initiated when the Mack truck, insured by Kingsway and driven by Mr. Ferreira, rear-ended the Parson vehicle. In order to determine whether Rule 9 applies to this incident, I must determine whether the other vehicles involved were in motion or were stopped at the time of that impact.

Mr. Parson told the investigating officer that his vehicle was stopped at the time of the impact. For the reasons submitted by counsel for Kingsway, I do not accept that evidence. Mr. Ferreira testified at his examination for discovery that the Parson vehicle was moving slowly at the time, but was not stopped. The investigating officer present at the scene chose to note on the MVA Report that this vehicle was "slowing or stopping" as opposed to "stopped", another option on the form. It is clear that the officer did not accept Mr. Parson's evidence on this point, and neither do I. I conclude that the Parson vehicle was moving at the time of impact.

Mr. Lin testified that his vehicle was moving at the time of the impact. Mr. Parson, the driver of the vehicle that struck him, also testified to this effect. The investigating police officer indicated on the MVA Report that the Lin vehicle was "slowing or stopping"; from all of this evidence it is clear that Mr. Lin's vehicle was also moving at the time of impact.

That leaves the last vehicle in the chain reaction, driven by Mr. Zacharias. He told the investigating officer that he was stopped at the time of impact, and the Zacharias vehicle is the only one that is noted as being "stopped" on the MVA Report. While Mr. Parson did state at his discovery that the Zacharias vehicle was moving slowly at the time, I question the veracity of this evidence, given that the Lin vehicle was directly ahead of him in the lane, likely blocking his view of the road ahead. I find on a balance of probabilities that the Zacharias vehicle was stopped at the point of impact.

Accordingly, I find that the first two vehicles in front of the Kingsway-insured truck were moving at the time of impact, while the third one was stopped. In these circumstances Rule 9(3) does not apply, as its application requires that "all automobiles involved in the incident are in motion". (I note parenthetically that I would have reached the same conclusion if Mr. Parson's statement that his vehicle was stopped at the time of the impact was accepted). Rule 9(4) likewise does not apply to the circumstances outlined,

as its application requires all vehicles other than the one initiating the accident to be stopped, which is clearly not the case.

Counsel for Kingsway contends that Rule 9(3) does apply, as the accompanying pictogram depicts only three vehicles, suggesting that the analysis of fault should only be carried out with respect to clusters of three vehicles. He argues that only the two vehicles in front of the Kingsway-insured truck – namely the Parson and Lin vehicles - should be considered, and they were both in motion at the relevant time. He stated that the fact that the Zacharias vehicle may have been stopped is not relevant, as the drafters of the regulation intended that it be excluded from the analysis.

I do not accept this contention. Rule 9(1) states that that provision applies "with respect to an incident involving three or more automobiles", suggesting that the section is meant to address multi-vehicle accidents. Rule 9(2) then states that the fault for each collision between two vehicles is to be determined without reference to any related collisions. Rule 9(3) goes on to stipulate that it applies if "all automobiles involved in the incident are in motion". The fact that the drafters of the regulation include the specific directions above, but make no mention of approaching the analysis in clusters or groupings of three vehicles leads me to conclude that this was not their intention. I find nothing in the words of the section to suggest that the analysis to be conducted should only include groupings of three vehicles, and note particularly that Rule 9(3) specifies that it applies if all automobiles involved in the incident are in motion.

Consequently, as Rule 9(3) does not describe the circumstances in this case, and no other rules apply, I am directed by section 5 to determine the degree of fault of the Kingsway insured in accordance with the ordinary rules of law. On the evidence before me, I find Mr. Ferreira to be 100% at fault for the collision, After what seemed to be a comprehensive police investigation, Mr. Ferreira was charged with careless driving under the *Highway Traffic Act.* He was subsequently convicted of another offence under the *Act* relating to failure to pass on the left when overtaking another vehicle in order to avoid a collision. I have reviewed his evidence provided at the examination for discovery, and am

not persuaded by anything in the transcript that he should be found to be less than 100% liable.

Kingsway is therefore responsible to indemnify Dominion for all of the benefits they have paid out to Mr. Lin, subject to the usual requirement of "reasonableness".

These findings are sufficient to end this matter. However, in light of counsels' submissions on the applicability of the *GAN* decision and Justice Lax' decision in *Co-operators v. CGI, supra,* I will address the arguments raised on these issues.

The facts of the *Co-operators'* case are somewhat unusual. In that case, a truck insured by CGI slid on ice and came to a stop on the shoulder of a highway, with part of its trailer protruding onto the passing lane. A car driven by a Mr. Chipman then collided with the truck in the passing lane. A few minutes later, a car driven by a Mr. Ieraci approached the scene and hit the Chipman vehicle, and possibly struck the truck as well. There would be no loss transfer claim between the insurer of either of the two cars, so the focus of the inquiry was not on which driver was at fault for that collision. Rather, Co-operators', as Mr. Ieraci's insurer, pursued CGI, the insurer of the truck, arguing that the truck had created a hazard for oncoming traffic by stopping on the road with its trailer partially occupying the passing lane.

Counsel in that case argued that Rule 6 or Rule 9 could potentially apply to the incident. The arbitrator determined that if the Ieraci vehicle collided with the truck insured by CGI, the application of the Rules would lead to a conclusion that the Ieraci vehicle was 100% at fault for that collision. On appeal, Justice Lax considered the applicability of Rule 9 to the incident. She stated that Rule 9 "is broad enough to include multiple collisions" and that the fact that there was a temporal separation between the first and second collisions did not prevent its application. She determined that in accordance with Rule 9(4), Mr. Ieraci was 100% at fault for the accident, whether or not his vehicle struck the truck insured by CGI. The result of that finding was that no loss transfer claim could be brought.

Given the facts outlined above, I find the *Co-operators* case to be of limited value to the analysis required in this case.

Of more interest is the recent decision of Justice Chapnik (2012 ONSC 3095) in the appeal of Arbitrator Robinson's decision in the case of *AXA Insurance v. Royal and SunAlliance* (July 27, 2011), released shortly after the hearing in this case. That case involved a multi-vehicle accident on a foggy morning in the southbound lanes of Highway 400, involving approximately two hundred vehicles. While the facts were more complex than those in the instant case, the essence of the analysis is the same. The arbitrator found that the AXA-insured car (driven by Ms. Rigby) was stopped on the road as was the vehicle immediately behind her (driven by Ms. Jones), when the Jones vehicle was rear-ended by a "heavy commercial vehicle" insured by RSA. That collision caused the Jones vehicle to rear-end the Rigby vehicle. The arbitrator also found that the truck subsequently hit the left bumper of the Rigby vehicle as it rolled passed that vehicle, after its initial collision with the Jones car. These findings were upheld by Justice Chapnik on appeal.

AXA sought loss transfer indemnification from RSA, the insurer of the truck. The arbitrator found that Rule 9(4) applied to the circumstances, and determined that the truck driver was 100% at fault for the collision. He ordered RSA to pay the full amount sought by AXA in accordance with the loss transfer provisions. RSA appealed both the arbitrator's factual findings and his application of Rule 9. While Justice Chapnik upheld the factual findings, she stated that Rule 9(4) would apply "even if the subject automobiles did not collide with each other".

This decision was brought to my attention in the context of another matter I heard and recently decided (*State Farm* v. *Old Republic* (Mahavalingasivam) – released on November 2, 2012). State Farm contended in that case that the Chapnik decision was inconsistent with Justice Pitt's ruling in the *GAN* case and that I was consequently not bound by it. After reviewing both decisions closely, I determined that Justice Chapnik's

ruling cannot be reconciled with Juctice Pitt's decision. I also found that Rule 9(2) does not preclude the insurer of the front vehicle (State Farm in that case) in a chain reaction collision from claiming indemnification under the loss transfer provisions from the insurer of the heavy commercial vehicle that initiated the incident, even if there was no contact between the two vehicles.

I reproduce the relevant excerpts of the decision below:

> *Had the AXA v. RSA, supra, decision not been issued, I would have had to find in favour of Old Republic in this case. The GAN decision is clearly on point, and is therefore a precedent from the court that I am bound to follow. The parties agree that there are no distinguishing facts in this case that take the circumstances that we are dealing with here outside of its ambit. However, Justice Chapnik has reached a different conclusion on the this question in AXA v. RSA, and has made some important statements on the issue that differ substantially from the views expressed by Justice Pitt in the GAN case. This has "levelled the playing field" in regard to this question, and requires me to analyse each approach carefully.*
>
> *The AXA v. RSA arbitration arose from a multi-vehicle collision in the southbound lanes of Highway 400 on a foggy winter morning, involving approximately two-hundred vehicles. AXA insured a car driven by Cheryl Rigby. Ms. Rigby was stopped on the roadway as was the car behind her, driven by Bronwen Jones. While conflicting evidence was presented at the hearing, Arbitrator Robinson determined that a truck (whom all parties agreed met the definition of "heavy commercial vehicle" in the regulation) insured by RSA collided with the Jones vehicle, which caused that vehicle to rear-end the Rigby vehicle insured by AXA. The arbitrator also found that the truck subsequently hit the left bumper of the Rigby vehicle after the initial 'chain reaction collision', as it passed that vehicle on the left side.*
>
> *AXA argued that Rule 9 applied in these circumstances, and that as the driver of the truck was fully liable for the accident, RSA should indemnify it for the benefits it had paid out to Ms. Rigby. RSA contended that Rule 9 did not apply, and that the evidence supported a finding that Rule 11 (regarding "pileups') applied. The arbitrator concluded that Rule 9(4) applied to the facts, and that AXA could seek indemnity under the loss transfer provisions from RSA. He referred to the GAN case, and found that it was distinguishable on the facts.*
>
> (at p. 7)

I go on to state (at p.9):

Reading Arbitrator Robinson's decision closely, it is not clear whether he would have reached the conclusion that the insurer of the rear vehicle (truck) was liable in loss transfer to the insurer of the lead vehicle, if there had not been any direct contact between those two vehicles. While there was conflicting evidence presented on that point, he clearly determined that the truck insured by RSA had struck the bumper of the AXA insured's vehicle as it passed by on the left of that car, after the initial impact with the middle vehicle. However, he did not state that his conclusion that RSA was liable to indemnify AXA was specifically based upon the fact that there was a direct impact between the two vehicles, nor did he find that the ruling in GAIN would not apply regardless of that fact.

Justice Chapnik accepted the arbitrator's factual findings and stated on appeal that 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." She found that the arbitrator applied Rule 9(4) correctly, and stated as folloes: (para.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.* (emphasis added)

With this statement, Justice Chapnik makes it clear that she does not consider direct contact between the vehicles to be a prerequisite for the application of Rule 9(4). In this way, she takes issue with Justice Pitt's statement in the GAN case that the legislators intended that there should be no apportionment of liability between two vehicles that do not directly collide within the context of a "chain reaction collision".

She then goes on to state - (at para. 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.*

With this passage, she essentially finds that when the underlying purpose of the loss transfer scheme is considered, and the general principles of

negligence upon which it is based are applied, the fact that Rule 9(4) does not explicitly state that the rear vehicle in a chain reaction collision is liable for damages caused to the front vehicle in the absence of direct contact between them is not a bar to a claim for indemnification.

Finally, in the last paragraph of her analysis, she finds that regardless of whether there was a secondary impact between the truck and the claimant's vehicle, the Fault Determination Rules hold that the truck is 100% at fault for the collision between the truck and the Jones' (middle) vehicle. She then states that 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." This statement implies that apart from her comment above regarding the legislative intent behind the section, Rule 9(4)(b) can be read to mean that the rear vehicle in a chain reaction collision is 100 per cent at fault for the incident <u>not only</u> between it and the vehicle it directly collides with, but that the insurer of the next vehicle in the lineup, or the Rigby vehicle in that case, can also seek indemnification on a 100% basis from the truck's insurer.

Counsel advised that Justice Chapnik's decision has not been appealed.

Can this ruling be reconciled with the decision in GAN ? In my view, it cannot. Aside from stating that Arbitrator Robinson had distinguished the facts in GAN and preferred Justice Sachs' reasoning in Dominion v. Kingsway, Justice Chapnik does not refer to Justice Pitt's ruling or his comments excerpted earlier in this decision. By stating that it would be contrary to the legislation's intention to leave AXA without recourse to a loss transfer claim when the RSA truck was completely at fault for the damage it caused, she has explicitly rejected the view expressed in GAN that the combined effect of sections 9(4) and 9(2) results in no apportionment of liability between two vehicles that do not collide.

While Rule 9(4) clearly specifies how fault should be allocated between vehicle "A" (the lead vehicle) and "B" (the middle vehicle), and between vehicle "B" and "C" (the rear vehicle), it is silent on the question of how or if fault should be allocated as between vehicle "C" and vehicle "A" when these two vehicles do not directly collide. This is, of course, the source of the difficulty. What should be made of this omission? Old Republic argues that Rule 9(2) mandates that fault is only to be determined between two vehicles directly collide. State Farm contends that Rule 9(2) does not go that far, and that if the rule provides that the rear vehicle in the chain reaction is 100% liable for the accident, it is fair and logical to assume that not only the insurer of vehicle B can claim indemnification under the loss transfer provisions, but also the insurer of vehicle A, whose driver similarly bears no fault for the collision.

After much consideration of the issue, I have concluded that the latter position 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 incident, 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.

I find support for my conclusion in the words of section 275(2) of the Act, which mandate that the respective degree of fault of <u>each</u> insurer's insured is to be determined under the Rules. The specific words in the Fault Determination Rules must be interpreted with that general instruction in mind. In this context, that means that given the instructions in subsections (a) and (b) of Rule 9(4), the driver of the Pepsi truck at the rear of the chain bears 100% fault for the accident, while the Claimant bears no fault, and consequently, the Claimant's insurer can claim indemnification from Old Republic, the insurer of the truck.

Finally, given that the Fault Determination Rules are roughly based upon negligence principles, and that the underlying intention of the loss transfer provisions is to balance costs of providing compensation on a first party basis between insurers of specified classes of vehicles, I find that the conclusion urged upon me by Old Republic that State Farm cannot seek indemnification from the insurer of the truck that caused damage and injury to its insured, when Rule 9(4) clearly provides that the driver of the truck is 100% at fault for the incident, cannot be justified.

If I had determined that the facts of this case triggered the application of Rule 9(4) of the Fault Determination Rules, I would have reached the conclusion I did in the above case, for the reasons set out.

ORDER:

As determined above, the driver of the Kingsway insured vehicle is 100% at fault for the incident in this matter, and I therefore find that Kingsway is required to indemnify Dominion for the amounts that are agreed to be owing in relation to accident benefits paid to Qinghe Lin. I remain seised of this matter in the event that the parties are unable to agree on the quantum payable.

Dominion is also entitled to its legal costs. If the parties are unable to agree on the quantum of costs payable, I will hear submissions on the issue. Kingsway/Jevco is also required to pay the full arbitration fee, including all disbursements.

DATED AT TORONTO, ONTARIO, THIS DAY OF NOVEMBER, 2012.

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Shari L. Novick
Arbitrator