

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended,

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CAA INSURANCE COMPANY (ONTARIO)

Applicant

- and -

AMERICAN HOME ASSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Ruth Henneberry for the Respondent

ISSUE:

1. Is section 275 of the Insurance Act (loss transfer) applicable in this case?

DECISION:

1. Section 275 is applicable in this case.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred in the province of Nova Scotia on September 22, 2003. On that date Ms. Natalie Gordon suffered personal injuries when her vehicle came into contact with a heavy commercial vehicle owned by Seaboard Liquid Transport which was insured by American Home Assurance Company (American Home). Ms. Gordon's motor vehicle was insured by CAA Insurance Company (Ontario) ("CAA") at the time of the accident. Ms. Gordon applied to CAA for Ontario Statutory Accident Benefits pursuant to the Insurance Act of Ontario. CAA paid the accident benefits and has now claimed loss transfer against American Home pursuant to section 275 of the Insurance Act. That provision states:

The insurer responsible under sub-section 268(2) for the payment of statutory accident benefits to such classes as persons as may be named in the regulation is entitled, subject to such terms, conditions, provisions, exclusion 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.

American Home takes the position that based on the facts of this particular case, the law of the place of where the accident occurred ("Lex Loci Delicti") should apply rather than the laws of the province of Ontario (Lex Fori). The distinction is important as under the laws of the province of Nova Scotia there is no right of loss transfer. Under Ontario law loss transfer is allowed, pursuant to section 275 of the Insurance Act.

American Home argues that the general rule as enunciated in Tolofson vs. Jenson (1994) S.C.J. 110, 3 S.C.R. 1022 (s.c.c.), should apply. CAA takes the position that in loss transfer cases which unlike tort, are statutory in origin, the location of the accident is irrelevant when dealing with two Ontario insurers. American Home further argues that even if the test enunciated in Unifund Insurance Company of Canada vs. Insurance Company of British Columbia (2003) 2 S.C.R. 3 is applied, Nova Scotia laws should apply.

In Tolofson the court was dealing with a tort based matter, rather than statutory. In dealing with that situation the Supreme Court of Canada dealt into a detailed examination of the connection between the parties and the Lex Fori and the Lex Loci Delicti.

Subsequent to Tolofson, the Supreme Court of Canada dealt with a loss transfer situation in Unifund Insurance Company of Canada vs. Insurance Corporation of British Columbia, (2003) 2 S. C. R. 63. In that case Unifund had issued a motor vehicle policy to the claimant in Ontario which included mandatory no fault benefits. The Insurance Company of British Columbia (ICBC) insured the negligent truck owner which vehicle struck the claimant. Unifund sought to obtain reimbursement for the accident benefits paid out to the claimant pursuant to the loss transfer provisions of section 275 of the Ontario Insurance Act.

While rejecting Unifund's claim based on the facts of the case, Mr. Justice Binnie, writing for the majority, made a distinction between tort matters and those based on statute. He stated:

Unifund's problem is to find a cause of action. In this appeal we are dealing only with Unifund's quite separate and distinct claims under section 275 of the Ontario Insurance Act which provides the statutory mechanism for transferring loss between Ontario insurance companies arising out of the payment of "SAB's" under the Ontario Act.

It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC, in the proceedings. In a case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

The Ontario scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated "without regard to" SABs (s.267.1(8) para. 2(I)). However the payer of the SABs (usually the victim's insurer) is entitled by statute to indemnification from the insurer of any "heavy commercial vehicle" (Automobile Insurance Regulations, R.R.O. 1990, Reg 664, s. 9) involved in the motor vehicle accident in question, "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules" (s. 275) i.e., allocated not by general principle of tort but by the rules set out in Ontario regulation. Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration pursuant to the Ontario Arbitration Act, 1991, S.R. 1991, c. 17. There is no doubt that if the appellant were an Ontario insurer it would be required to arbitrate Unifund's claim.

Mr. Justice Binnie went on to find that even though ICBC had signed a Power of Attorney and Undertaking in Ontario, that was not sufficient for the Ontario law to apply. I note that Mr. Justice Bastarache, writing for the minority, found on the facts of the case that ICBC had

sufficiently attorned to the jurisdiction of Ontario to make section 275 of the Insurance Act apply.

The distinction between tort and contract or statutory law was also made in Kingsway General Insurance vs. Canada Life Assurance Company, 149 O.A.C. 303, [2002] I.L.R.1.-4063 (Ont. C.A.), and in Janet Matt et. al. vs. Liberty Insurance Company of Canada et. al., 216 D.L.R (4) 574(Ont. C.A.). In the latter case Mr. Justice Katzman of the Ontario Court of Appeal stated:

The right of subrogation in Kingsway General Insurance Company was expressed in a contract of insurance. The right of subrogation in the present case is expressed in a statute. On this basis of the argument, I see no distinction in principle between Kingsway General Insurance Company and the present case.

Most recently, Mr. Justice Newbould in Royal and Sunalliance Insurance Company of Canada vs. Wawanesa Mutual Insurance Company, 2006 Cam L1142663 (Ont. S.C.) held that Wawanesa could claim Ontario loss transfer against Royal and Sunalliance in an accident that occurred in Vermont where the insurers both wrote insurance policies in the province of Ontario. Mr. Justice Newbould specifically applied the approach set out by Mr. Justice Binnie in Unifund.

If we turn then to the facts of our case, both American Home and CAA are licensed to carry on business on Ontario. Both are authorized to, and do sell insurance in Ontario. Both companies have head offices in Ontario. American Home has filed a Power of Attorney and Undertaking that were in effect at the time of the accident.

There are undoubtedly a number of connections with Nova Scotia in this case. The accident occurred there. Ms. Gordon had lived there since July 1, 2003 and was working there at the same time of the accident. Seabour Liquid Transport Corporation, the owner of the heavy commercial vehicle involved in the accident has its head office in Nova Scotia. The driver of the truck lives in Nova Scotia.

In applying the Unifund test, however, the key point is that American Home is licensed and does carry on the business of selling automobile insurance in Ontario. As such, it is subject to loss transfer and accordingly based on the facts of this case, CAA may pursue its claim pursuant to section 275 of the Insurance Act, against American Home.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this _____ day of January 2007.

M. Guy Jones
Arbitrator