COURT OF APPEAL FOR ONTARIO

CITATION: Zurich Insurance Company v. Chubb Insurance Company of Canada, 2014 ONCA 400
DATE: 20140515
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Juriansz, Pepall and Pardu JJ.A.

BETWEEN

Zurich Insurance Company

Applicant (Respondent)

and

Chubb Insurance Company of Canada

Respondent (Appellant)

Claude Blouin and George Kanellakos, for the appellant

Kevin S. Adams, for the respondent

Heard: January 27, 2014

On appeal from the order of Justice Robert F. Goldstein of the Superior Court of Justice, dated April 3, 2013, with reasons reported at 2012 ONSC 6363.

Pardu J.A.:

[1] This appeal concerns the application of the pay first and dispute later rules governing insurers that receive an application for Statutory Accident Benefits (SABS) following a motor vehicle accident. To reduce delays in payments of the benefits, the regulatory scheme requires that the first insurer who receives the application for benefits pay them, provided that there is some non-random nexus

or connection between the claimant and the insurer. If that insurer takes the position that another insurer should be responsible for payment of those benefits, it must nonetheless pay them, but give notice within 90 days to the other insurer; and follow the statutory scheme of arbitration to determine which insurer should pay the SABS.

[2] The issue on this appeal is whether any insurer of any kind, or only "motor vehicle liability insurers" are obliged to pay first and dispute later.

Factual background

[3] Sukhvinder Singh rented a vehicle from "Wheels 4 Rent". The rental vehicle was insured pursuant to a "motor vehicle liability policy" issued by Zurich Insurance Company (Zurich). Chubb Insurance Company of Canada (Chubb) issued an accident policy (the Chubb policy) to Wheels 4 Rent. This policy contained no coverage for liability to others as a result of a motor vehicle accident. Rather it provided optional death and dismemberment insurance to Wheels 4 Rent customers, and extended to death or dismemberment unrelated to a motor vehicle accident, provided it occurred during the rental period.

[4] Ms. Singh did not purchase Chubb's optional coverage. She had a single vehicle motor vehicle accident on September 23, 2006. Having at some point obtained a pamphlet for the optional Chubb policy made available by Wheels 4 Rent, she submitted a claim for SABS to Chubb on November 17, 2006.

[5] Chubb refused to pay. Zurich ultimately began payment of the SABS and the two insurers submitted their dispute to arbitration before Stanley C. Tessis.

[6] The arbitration agreement provided:

> 1. The arbitrator shall determine all matters in dispute among the parties arising out of a dispute regarding priority of payment of Statutory Accident Benefits with respect to Sukhvinder (Susan) Singh, arising out of a motor vehicle accident which occurred on or about September 23, 2006.
>
> 2. The questions submitted for determination by the Arbitrator with respect to the priority of payment of Statutory Accident Benefits with respect to Sukhvinder (Susan) Singh, are as follows:
>
> 1) Is Chubb Insurance Company of Canada an "insurer" under Section 268 of the *Insurance Act* and Ontario Regulation 283/95 – Disputes Between Insurers;
>
> 2) If it is decided that Chubb Insurance Company of Canada is an insurer under Section 268 of the *Insurance Act* and Ontario Regulation 283/95 – Disputes Between Insurers, then there will be an issue as to whether Chubb Insurance Company of Canada has complied with the provisions of the Ontario Regulation 283/95; and
>
> 3) What amounts, if any, is Chubb responsible for indemnifying Zurich?
>
> 3. The Arbitrator shall have the power to grant any relief to the facts and circumstances that would be within the jurisdiction of a Judge of the (Ontario) Superior Court of Justice at trial in that Court.

The Decisions Below

[7] The manner in which the parties structured the issues for the arbitrator reflects their agreement in correspondence that Chubb's liability depended on whether Chubb was an insurer within the meaning of s. 268 of the *Insurance Act*.

[8] The arbitrator concluded that Chubb was not an "insurer" for the purposes of the priority dispute settlement statutory regime because "there was no 'sufficient nexus' existing between Chubb Insurance Company of Canada and Ms. Singh". As a result, Chubb was not obligated to pay her benefits under the pay first and dispute later rules. In his view, no nexus existed because Chubb had never issued a "motor vehicle liability policy" to either Wheels 4 Rent or Ms. Singh. He noted that Zurich had submitted a number of cases where a sufficient nexus had been found, and that:

> In all of those cases, the Arbitrators and Judges found a nexus or substantial connection because:
>
> (a) An insurer has at one time or at the time of the accident issued a policy of insurance on a motor vehicle, regardless of whether statutory accident benefits were payable pursuant to the policy; or
>
> (b) A motor vehicle liability policy of insurance had been presented at the scene of the accident or to an investigating officer, but the policy had expired or was fraudulent.
>
> In this Arbitration, there is no suggestion that Chubb had ever issued a motor vehicle liability policy on a motor vehicle owned by Wheel 4 Rent or Ms. Singh that had expired or was cancelled, that a Certificate of

> Insurance or Pink Motor Liability Insurance Slip had been produced to Ms. Singh showing Chubb as a motor vehicle liability insurer, or that Chubb had issued a motor vehicle liability insurance policy for a vehicle somehow connected with the accident of September 23, 2006.

[9] Zurich appealed from this ruling. The application judge allowed the appeal, concluding that Chubb was an "insurer" under the statutory regime, because the Chubb policy was a "motor vehicle liability policy" as defined by the *Insurance Act*, R.S.O. 1990, c. I.8, and there was a sufficient nexus between Ms. Singh and Chubb to require Chubb to pay the SABS first.

Issue

[10] The sole issue on this appeal is whether the application judge erred in deciding that Chubb is an "insurer" for the purposes of the pay first and dispute later rules. If Chubb is an insurer for the purposes of these rules, then it was required to pay benefits to Ms. Singh.

[11] Embedded within this issue are the questions of whether (a) the Chubb policy is a "motor vehicle liability policy" for the purposes of s. 268 of the *Insurance Act*, and (b) whether there was a sufficient nexus between Chubb and Ms. Singh to justify payment.

Standard of Review

[12] The arbitration agreement between Chubb and Zurich provided:

> The decision of the Arbitrator shall be binding upon the parties, but any party may appeal the Arbitrator's decision on a point of fact or on a point of law or on a point of mixed fact and law to a Judge on the Ontario Superior Court of Justice, without leave of the Court, within thirty (30) days of the date of the Arbitrator's written decision. The standard of review to be applied on appeal with respect to the Arbitrator's decision(s) on questions of law shall be correctness. The standard of review to be applied on appeal with respect to the Arbitrator's decision(s) on questions of fact and questions of mixed fact and law shall be reasonableness.

[13] The application judge adopted a standard of review of correctness, on the ground that there were no factual issues in dispute. Mesbur J. summarized the applicable standards of review in *Aviva Insurance Co. of Canada v. Royal & SunAlliance Insurance Co.* (2008), 66 C.C.L.I. (4th) 262 (Ont. S.C.), at para. 7:

> First, on a question of law, the standard is one of correctness. Second, on a question of fact, the decision below can only be set aside on the basis of an overriding and palpable error. Last, on a question of mixed fact and law, the standard is one of reasonableness.
>
> The Ontario Court of Appeal has also commented that on a question of mixed fact and law, where the decision is highly dependent on a factual finding, the standard is more akin to "overriding and palpable error". It is noteworthy that this case also dealt with an appeal from an arbitrator's decision under the provisions of the *Insurance Act*. The court commented that arbitrators have a special expertise "in evaluating facts for determination of dependency for statutory accident benefits entitlement", and unless the arbitrator was unreasonable, he is entitled to deference. I infer arbitrators have similar special expertise in determining issues of loss transfer, and thus their conclusions

> should be equally afforded deference. [Citations omitted.]

[14] Here I would characterize the issue of whether Chubb was a "motor vehicle liability" insurer as a question of law reviewable on the standard of correctness and the issue of whether there was a sufficient nexus between Chubb and the claimant as a question of mixed fact and law reviewable on the standard of reasonableness.

Statutory Regime

[15] The relevant portions of the *Insurance Act* are as follows:

> 2. In this Act, except where inconsistent with the definition sections of any Part,
>
> …
>
> "insurer" means the person who undertakes or agrees or offers to undertake a contract;
>
> …
>
> "motor vehicle liability policy" means a policy or part of a policy evidencing a contract insuring,
>
> (a) the owner or driver of an automobile, or
>
> (b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person's employee or agency or any other person on that person's behalf,
>
> against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use of operation thereof; ("police de responsabilité automobile")
>
> …

224. (1) In this Part,

…

"contract" means a contract of automobile insurance that,

(a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or

(b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule by an insurer that has filed an undertaking under section 226.1;

…

Statutory accident benefits

268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[Emphasis added.]

[16] *Disputes Between Insurers*, O. Reg. 283/95, governing disputes between insurers provides:

0.1 In this Regulation,

"application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule;

…

> 1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.
>
> 2. (1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2. [Emphasis added.]

Analysis

[17] This court has dealt with these priority disputes in the SABS context a number of times.

[18] In *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*, 2007 ONCA 62, 84 O.R. (3d) 507, this court stated, at para. 19:

> Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies section 2 is that the first insurer to receive an application for benefits must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay, or as in this case, by an insurer's claim that no policy of insurance existed at the time.

[19] Further, this court noted in *Kingsway General Insurance Co. v. West Wawanosh Insurance Company* (2002), 58 O.R. (3d) 251 (C.A.), at para. 10:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated

> litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases. [Emphasis added.]

[20] In my view the application judge erred in concluding that the Chubb policy was a "motor vehicle liability policy". There was no element of that accidental death and dismemberment policy that insured against liability to others arising out of property damage or injury caused by an automobile or the use or operation thereof.

[21] The content of "motor vehicle liability policies" is highly regulated. These policies must provide for payment of SABS, and a statutory minimum amount of liability coverage. The Chubb policy has none of these characteristics.

[22] The rationale expressed in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* would not be furthered by requiring insurers other than "motor vehicle liability insurer[s]" to respond to a claim for SABS. An insurer providing fire or life insurance or some group or accident or disability insurance not having the features of a "motor vehicle liability policy" may have no expertise in adjusting these claims, and should not be expected to respond to them where

it has not issued a motor vehicle liability policy even if there is a nexus or relationship between the claimant and such insurer.

[23] The priority and dispute resolution regime established under O. Reg. 283/95 applies to "disputes as to which insurer is required to pay benefits under s. 268 of the *Insurance Act*" (emphasis added).

[24] Section 268 says every contract "evidenced by a motor vehicle liability policy" shall be deemed to provide for SABS. These benefits are not incorporated into insurance policies which are not motor vehicle liability policies and those insurers may have no expertise in adjusting these claims.

[25] All of the cases cited in which an analysis is made to ascertain whether there was a sufficient nexus between the claimant and the first insurer to review an application for SABS are premised on there having been an actual or purported motor vehicle liability policy in place at some time.

[26] For example, in *Ontario (Minister of Finance) v. Royal & Sun Alliance Insurance Co.* (January 2003, Arbitrator M. Guy Jones), the investigating officer was given a certificate of insurance issued by Royal which had expired four years earlier and covered a different vehicle. This was found to be a sufficient nexus to a motor vehicle liability insurer to justify an obligation to pay. In *Ontario (Minister of Finance) v. Progressive Casualty Insurance Co. of Canada*, 2009 ONCA 258, 95 O.R. (3d) 219, and *Lombard Canada Ltd. v. Royal & SunAlliance Insurance*

Co. (2008), 94 O.R. (3d) 62 (S.C.), motor vehicle liability policies expired two months before the accident. In these cases the claimants' choice of recipient of the claim for SABS was not random or arbitrary and was connected to a "motor vehicle liability policy". Similarly in *Danilov v. Unifund Assurance Co.*, [2009] O.F.S.C.D. No. 69 (FSCO Arb.), there was a fraudulent pink motor vehicle liability policy slip purporting to evidence a "motor vehicle liability insurance policy".

[27] Ms. Singh's choice to send her application to Chubb was not random or arbitrary, but was based on the optional coverage provided to Wheels 4 Rent customers. Nonetheless Chubb was not required to respond as it was not a "motor vehicle liability insurer", nor had it held out or represented to have ever provided such coverage at any relevant time.

[28] Both the plain meaning of s. 268 of the *Insurance Act* and O. Reg. 283/95, and the underlying policy behind the legislation, favour excluding non-motor vehicle liability insurers from the obligation to pay first and dispute later.

Disposition

[29] Accordingly, I would allow the appeal. I would set aside the order of the application judge of April 3, 2013, setting aside the decision of Arbitrator Stanley Tessis and awarding costs to Zurich, and substitute an order dismissing the application and awarding costs in favour of Chubb in the sum of $7,149.00.

[30] I would award Chubb the costs of this appeal fixed in the agreed upon sum of $12,000 inclusive of all disbursements and H.S.T.

"G. Pardu J.A."

"I agree S.E. Pepall. J.A."

Juriansz J.A. (Dissenting):

[31] I have read the decision of Pardu J.A. and, with respect, I am unable to agree with either the reasons or the result. I would simply apply the established "nexus" test to determine whether Chubb, as the first insurance company to receive a completed application for benefits, was obliged by O. Reg. 283/95 ("the Regulation") to pay those benefits while disputing coverage.

[32] There is a mature and stable jurisprudence relating to the "nexus" test and the application of the Regulation. Both the courts and arbitrators of the Financial Services Commission of Ontario have applied the nexus test on numerous occasions to determine whether an insurance company must pay benefits under s. 2: see, for example, *Allstate Insurance Co. of Canada v. Brown* (1998), 40 O.R. (3d) 610 (Div. Ct.); *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.* (2008), 94 O.R. (3d) 62 (S.C.); *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*, 2007 ONCA 62, 84 O.R. (3d) 507; *Rozmerets v. Wawanesa Mutual Insurance Co.*, [2002] O.F.S.C.D. No. 99 (FSCO Arb.); *Bianca v. Wawanesa Mutual Insurance Co.*, [2004] O.F.S.C.D. No. 185 (FSCO Arb.); *Vieira v. Royal & SunAlliance Insurance Co. of Canada*, [2005] O.F.S.C.D. No. 7 (FSCO Appeal). It is, in my view, both unnecessary and unwise to adopt a new and different interpretation of the Regulation.

[33] Further, I am unclear as to the meaning of the term "non-motor vehicle liability insurer", which Pardu J.A. introduces in concluding that "[b]oth the plain meaning of s. 268 of the *Insurance Act* and O. Reg. 283/95, and the underlying policy behind the legislation, favour excluding non-motor vehicle liability insurers from the obligation to pay first and dispute later."

[34] If the term "non-motor vehicle liability insurer" were used broadly to denote an insurer that does not offer motor vehicle liability policies to the public, I would agree with Pardu J.A. that the legislature could not have intended that the Regulation would apply to such insurers. The scope of the Regulation does not permit a "nexus" to be found between a claimant and an insurer that does not write motor vehicle liability policies in Ontario. However, counsel for Chubb acknowledged that Chubb does regularly write motor vehicle liability policies in Ontario. Chubb is not a "non-motor vehicle liability insurer" in the broad sense.

[35] The policy that Chubb offered to Ms. Singh in this case was not a motor vehicle liability policy as it did not provide liability coverage. However, it is also apparent that Pardu J.A. does not use the term "non-motor vehicle liability insurer" in the narrow sense to denote an insurer who, as a matter of fact, has not issued a motor vehicle liability policy that provides coverage to the applicant. To apply this narrow sense of the term would effectively overturn existing case law under the Regulation. Instead, Pardu J.A. avoids overruling the earlier case law by suggesting that the Regulation will continue to apply to an insurance

company that has not issued a policy to any relevant person so long as there was "purported" or "represented" coverage. On this basis, she distinguishes *Danilov v. Unifund Assurance Co.*, [2009] O.F.S.C.D. No. 69 (FSCO Arb.), which involved a fraudulent insurance certificate, and *Ontario (Minister of Finance) v. Royal & Sun Alliance Insurance Co.* (January 2003, Arbitrator M. Guy Jones), which involved a long-expired certificate that covered a different vehicle. Justice Pardu's use of the term "non-motor vehicle liability insurer" does not exclude such insurers despite the fact they have not issued a relevant motor vehicle liability policy.

[36] I expect that adjudicators in future cases will struggle with determining whether an insurer is a "non-motor vehicle liability insurer". They will have difficulty reconciling the conclusion that the plain meaning of the Regulation excludes "non-motor vehicle liability insurers" with the proposition that the pay first obligation will continue to apply in cases where there is no actual coverage, but only "purported" or "represented" coverage.

[37] In the earlier cases, the rationale for applying the Regulation in cases of "purported" or "represented" coverage was that the applicant chose the insurance company based on a non-arbitrary belief that the insurance company provided coverage on the relevant vehicle. This is the crux of the nexus test. If the claimant's non-arbitrary but mistaken belief is a basis for requiring the insurance company to pay benefits in cases of "purported" or "represented" coverage, I see

no reason to treat claimants differently if their non-arbitrary beliefs are based on information other than a false representation. In my view, it would be best to allow adjudicators to continue to consider whether there is some connection between the parties as set out in the familiar and established nexus test. I now turn to the application of that test.

[38] With the advantage of hindsight, it is evident that, as a matter of fact, Zurich is the motor vehicle liability insurer of Wheels 4 Rent's vehicles, and Chubb is not. However, there is no hint in the record that Ms. Singh knew anything about the relationship between Wheels 4 Rent and Zurich when she was injured in the rental car or when she applied to Chubb. The application judge reasoned that:

> The connection between Ms. Singh and Chubb may have been remote, but it was not arbitrary. Ms. Singh rented a vehicle from Wheels4Rent. Wheels4Rent was insured by Chubb. Chubb made the optional policy available to Ms. Singh through Wheels4Rent. Although Ms. Singh did not take up the optional policy, the obvious inference that the parties agree can be drawn is that she learned of it through Wheels4Rent when she rented the vehicle.

[39] The mistaken inference that Chubb insured Wheels 4 Rent's vehicles could not be described as completely arbitrary. Justice Pardu states that "Ms. Singh's choice to send her application to Chubb was not random or arbitrary". I agree. Given the non-arbitrariness of Ms. Singh's choice of insurer, I see no

reason why the result should be different than it would have been had someone falsely represented to her that Chubb was the insurer.

[40] The overriding public policy of the Regulation is to provide timely delivery of benefits to all persons injured in car accidents in Ontario, despite the inconvenience to insurance companies who must provide benefits immediately and seek reimbursement from the correct insurance company later. As Laskin J.A. said at para. 21 of *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*, "I am inclined to agree…[o]nly in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay". In my view, that public policy would be seriously eroded by allowing an insurance company that writes motor vehicle liability policies in Ontario to argue, in a case in which the nexus test is satisfied, that it is a "non-motor vehicle liability insurer".

[41] For these reasons, I would apply the established nexus test and find that it is satisfied on the facts of this case. Consequently, I would dismiss the appeal.

Released: May 15, 2014

(G.P) "R.G. Juriansz J.A."