
IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.l.8, as amended,
and Ontario Regulation 293/85

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

COACHMAN INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Mark Donaldson for the Applicant

Jamie Pollack for the Respondent

Deanna Gilbert counsel for non party "Q"

Introduction

Ontario's systems for injury compensation related to motor vehicle accidents have migrated away from a traditional tort based system in the past 20 years. In 1990, fundamental changes were introduced limiting tort rights and enhancing the availability of significant first party benefits payable on a "no fault" basis.

Concurrent with these changes, and subsequent refinements, the first party compensation system has addressed significant ancillary issues that arise between insurers in relation to the obligation to fund the "no fault" Statutory Accident Benefits.

The outcome is that a single injury claim may now trigger as many as four dispute resolution processes. There may be some overlap in the issues faced, and there is almost certainly some overlap in the evidence needed to address these multiple disputes.

The various interactions that can trigger the disputes are:

1. The claims for payment of Statutory Accident Benefits. This is a claim made by the injured person and made against an insurer. The issues involved may touch on matters such as injury, causation, reasonable needs, mitigation, and other process issues. These disputes go first to mediation at the Financial Services Commission of Ontario (FSCO) and then proceed to FSCO arbitration or court, at the choice of the insured person.¹ Even prior to a dispute, a claimant is obliged to submit to examination under oath in circumstances described in the SABS regulation. At arbitration the person may be required to testify in addition.
2. Tort claims for compensation based on fault and negligence principles. This is principally a claim made by the injured person against a tortfeasor. Typically the claim names the tortfeasor as defendant, but for practical purposes is in fact being made against the tortfeasor's insurer that has issued a policy of automobile insurance, including liability coverage. Occasionally, where a responsible motorist is uninsured or underinsured, this proceeding will include a direct claim against a named insurer for reimbursement of tort damages. These disputes go into the court system, which sometimes requires mediation in the course of the process.
3. Priority disputes in respect of Statutory Accident Benefits. This is a claim made by the insurer that responds to a claim for Statutory Accident Benefits against another insurer. The essence of the dispute is that the wrong insurer has responded to the claim and that another insurer should assume ongoing handling of the claim and should reimburse the first insurer for amounts already paid out. The issues may involve a variety of matters, but we commonly see disputes about the injured person's financial dependency, about whether an automobile was made available for the person's regular use and other issues. The injured person is not a party, but might be a material witness. The extent of the injured person's impairment and associated losses may be an issue. These disputes go to private arbitration in accordance with the *Arbitration Act* 1991.
4. Loss Transfer disputes in respect of Statutory Accident Benefits. These are claims made between insurers for reimbursement of most costs (not all) incurred by the responding insurer. This is only available in limited circumstances and depends largely on the nature of the vehicles involved in the accident. Most commonly, loss transfer claims arise when either the victim's vehicle is a motorcycle or the "at fault" vehicle is a heavy commercial vehicle. The insurer responding to the Statutory Accident Benefits claim is pursuing indemnification from the insurer of an involved vehicle based on fault principles. The injured person is not a party, but might be a material witness. The fault issue may be determined by the fault approximations prescribed by the Fault Determination Rules, or may call for the application of ordinary rules of negligence. These disputes go to private arbitration in accordance with the *Arbitration Act* 1991.

In addition to these civil processes, there may be proceedings arising out of charges laid in connection with an accident.

It is possible for a single accident to give rise to several different types of dispute. In each of these interactions, resolution requires the evaluation of evidence and application of legal rules to the facts determined. Necessarily this means that the disputants are immersed in the collection, assessment and presentation of information relevant to the injury and its

¹ There is an option for private arbitration which does not seem to be used.

circumstances. Inevitably the various proceedings may address overlapping issues, or at least issues where witnesses are common to more than one proceeding.

The question that arises here is the extent to which information from one of the proceedings must be divulged in another of the proceedings that arises from the same event.

The Nature of the Proceeding

The matter before me is a priority dispute. Essentially this is a dispute between two automobile insurers as to which insurer has the obligation to pay Statutory Accident Benefits in respect of an injured person. In this case the injured person Nuruzzaman Q.² ("Q") was injured in an accident on January 31, 2003 and made claim for benefits from State Farm, and State Farm is paying the benefits.

State Farm alleges that the benefits should be paid by Coachman. The substantive issue of which insurer has the obligation to pay benefits is determined by reference to section 268 of the *Insurance Act*, and the provisions of Ontario Regulation 403 which define the Statutory Accident Benefits Schedule.

The procedure to be followed with this dispute is mandated by Ontario Regulation 283/95. That regulation requires the parties to submit the dispute to arbitration pursuant to the *Arbitration Act*, 1991. This is what the parties have done, and I have been appointed the arbitrator.

This is a dispute in the third category of those listed earlier.

The parties have entered into an arbitration agreement dated August 27 and September 2, 2008.

In the course of the arbitration proceedings, the parties have sought to obtain production of transcripts of discovery evidence from an action in the Superior Court of Justice, action number 05-CV-28305 PDI. The material before me indicates that one of the litigants before me, State Farm, has counsel in the other proceeding as well, Mr. Michael Taylor. The Thomson Rogers law firm represents Q in those proceedings. As deposed in the affidavit, Thomson Rogers does not agree with the release of the transcripts from the Superior Court proceeding discoveries for use in this priority arbitration under the *Arbitration Act*, 1991 and the *Insurance Act*.

Ms. Gilbert from Thomson Rogers made representations on behalf of Q.

Firstly, it is asserted that the deemed undertaking rule applies and that it is not appropriate to use Q's transcript for a collateral purpose in a proceeding to which he is not even a party.

Secondly, it is further asserted that it is an undue invasion of Q's privacy for the insurers (the parties to this arbitration presumably) to gain access to unrelated information that might be in the transcripts.

Thirdly, it is argued that while Q might have relevant information, it would be an abuse of process to require him to be examined or cross-examined again. I gather that this relates to the

² In consideration of the privacy interests of witnesses who were required to provide information about their personal affairs, I have deleted reference to surnames.

fact that Q has already been subject to examination by the insurers in the context of an Examination Under Oath. As noted, a SABS claimant may be examined under oath in accordance with the provisions of the SABS regulation.

The Authority of the Arbitrator

My authority is derived from the *Arbitration Act* 1991, the Arbitration Agreement and the provisions of the *Insurance Act* and its regulations.

Counsel point to section 17 of the *Arbitration Act* 1991 which grants me the power to determine my jurisdiction.

With respect to the production of documents, I am referred to s.18 of the *Arbitration Act* 1991 which provides as follows:

18. (1) On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection.

(2) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

I also note subsection 25 (6) which provides:

25. (6) The parties and persons claiming through or under them shall, subject to any legal objection, comply with the arbitral tribunal's directions, including directions to,

- (a) submit to examination on oath or affirmation with respect to the dispute;**
- (b) produce records and documents that are in their possession or power.**

In addition, the *Arbitration Act* 1991 contemplates that evidence may be obtained from witnesses in accordance with section 29 which provides:

29. (1) A party may serve a person with a notice, issued by the arbitral tribunal, requiring the person to attend and give evidence at the arbitration at the time and place named in the notice.

(2) The notice has the same effect as a notice in a court proceeding requiring a witness to attend at a hearing or produce documents, and shall be served in the same way.

The Production Issues

On the evidentiary record before me I am satisfied that the evidence given at discovery in the tort proceedings is sufficiently relevant to the issues in this arbitration proceeding. That evidence may be intermingled with other information that is not relevant, but this is no reason to exclude production of the documents. However, no document should be required to be produced that has no relevant parts. The balancing of Q's privacy interests against the need for a fair adjudication of factual issues between the litigants clearly requires that relevant evidence

be available unless some privilege applies. This addresses the second argument advanced on behalf of Q.

With respect to the third argument, that it is an abuse to require Q to testify, this argument is clearly premature. At this point the question of Q's testimony has not been raised. If he were summoned to testify, such arguments could be advanced at that time. But I would caution that there would need to be a clear record of the basis for such objection. Such a record is not before me at present.

The main argument, the "deemed undertaking" objection, is the most difficult argument to address in this case. That rule, now codified in the *Rules of Civil Procedure* 30.1 provides:

RULE 30.1 DEEMED UNDERTAKING

APPLICATION

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
 - (i) Rule 30 (documentary discovery),
 - (ii) Rule 31 (examination for discovery),
 - (iii) Rule 32 (inspection of property),
 - (iv) Rule 33 (medical examination),
 - (v) Rule 35 (examination for discovery by written questions); and
- (b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1). O. Reg. 61/96, s. 2.

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents. O. Reg. 61/96, s. 2.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

- (a) evidence that is filed with the court;
- (b) evidence that is given or referred to during a hearing;
- (c) information obtained from evidence referred to in clause (a) or (b). O. Reg. 61/96, s. 2.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding. O. Reg. 61/96, s. 2.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action). O. Reg. 61/96, s. 2.

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just. O. Reg. 61/96, s. 2; O. Reg. 263/03, s. 3.

Indeed the information now sought is testimony from a discovery process. Counsel for State Farm in the tort process may well be subject to the deemed undertaking rule. This of course creates a direct conflict with the deemed undertaking rule, and the obligations under the *Arbitration Act* 1991 for State Farm to produce the transcripts. It seems well beyond the contemplation of Rule 30.1 that a litigant would be shielded from producing relevant information to an adversary in this fashion.

It could be argued that the deemed undertaking applies to all of the parties and their counsel. But the Court of Appeal in *Kitchenham v. AXA*³ has addressed this issue:

(i) Who is Subject to the Deemed Undertaking?

[25] Rule 30.1 is referred to as the deemed undertaking rule. With respect to the contrary view, an interpretation of that Rule that extends the deemed undertaking to the party who provided the information and to strangers to the litigation in which the information was provided is inconsistent with the meaning of an undertaking in the litigation context. "Undertaking" is defined in *Black's Law Dictionary*, 4th ed., revised, in part as:

[A] promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party.

[26] An undertaking is a promise given by one party to another party to the lawsuit in exchange for obtaining something from that party. Thus, in the discovery process, one party receives information from another party, and in exchange promises the other party that the information will not be used for any purpose other than the litigation at hand. The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining the disclosure to the party giving the disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure. It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.

[27] I appreciate that it is ultimately the meaning of Rule 30.1 and not the customary meaning of an undertaking that controls the outcome of this appeal. However, the rationale underlying the Rule, the language used in the Rule, and the jurisprudence of this court interpreting the Rule, all support an interpretation that is consistent with the way in which undertakings customarily work.

The court considered the rule, and previous caselaw, and ultimately concluded:

[46] In summary, the rationale for the Rule, the language of the Rule, and this court's jurisprudence, all support the following observation in Garry D. Watson, ed., *Holmsted and Watson: Ontario Civil Procedure*, looseleaf, vol. 3 (Scarborough, Ont.: Carswell, 1984), at p. 30.1-5:

The undertaking *prevents the recipient of the information from revealing it to third parties* (perhaps most particularly, but not limited to, the media) or making use of the information in a proceeding other than the one in which it was obtained. [Emphasis added.]

So while the deemed undertaking rule might apply to State Farm and its counsel, the rule does not apply to Q or Q's counsel.

³ 2008 ONCA 877

When reviewing the possibility of disclosure of material within the broad ambit of Rule 30.1.01 (1) one necessarily considers subrule (8) that contemplates that the Court may vacate the deemed undertaking in certain circumstances. The Court of Appeal has described circumstances that might well be applicable here to call for the application of subrule (8). Indeed it is difficult to understand Q's prejudice that could conceivably justify requiring the parties to this arbitration to go without relevant information. However, my reading of rule 30.1.01 is that the relief contemplated by subrule (8) can only be granted by the court in which that proceeding is conducted. I cannot grant such relief.

I see a number of reasons why we should strive to allow the information in the tort proceeding to be used in this arbitration.

1. These are not unrelated proceedings. They arise out of the same transaction. The evidence emanates from the same witnesses. The insurers, the real parties in interest, are the same.
2. The presumed privacy interest of Q needs to be weighed against the need to have a fully informed dispute resolution process. In this regard I note that privacy legislation such as PIPEDA specifically carves out exceptions in respect of information associated with a formal dispute resolution process, which this is.
3. The multiplicity of proceedings is a burgeoning problem. We should strive to minimize duplicative efforts and testimony.
4. There is a great potential for the embarrassment of the administration of justice if one proceeding is required to operate in ignorance of cogent evidence known to other parties in associated proceedings.
5. We should strive to be mindful of the cost of litigation. Requiring parties to this arbitration to repeat the evidence gathering work that has been done in another context is wasteful.
6. It is conceivable that in some instances failure to access information from another proceeding might have the unintended effect of cloaking dishonesty, and might result in a miscarriage of justice.
7. The deemed undertaking rule is a very limited rule. The legislature did not create a privilege of general application, as has been done in other instances.

It is my view that the authority under section 29 of the *Arbitration Act* 1991 to compel a witness to provide documents is applicable to Q.

I doubt that section 18 is applicable to this issue. This section seems directed at cases where the documents themselves are the subject matter of the arbitration.

Section 25 might have application for State Farm as it is a party to this arbitration and might be in a position to produce the transcripts from the tort litigation absent the deemed undertaking rule. Until a court applies subrule 30.1.01 (8), I would be reluctant to use this route, and decline to do so as I consider that the parties have another route to achieve the same end.

Conclusion

The deemed undertaking rule has no application to the obligation of Q or Q's counsel to make available relevant information in this arbitration proceeding. That information should be produced in the same manner as any information or document from a witness.

The application of subrule (8) of rule 30.1 is not decided by me. In the event that the court were to give an order of that nature, the parties could come back to me for any further directions necessary.

I am making no ruling at this time about the further examination or cross-examination of Q.

In these circumstances, I do not think this is an appropriate case for costs.

Dated at Toronto this 6th day of April, 2010.



LEE SAMIS
Arbitrator