

## Still No Loss Transfer for Non-Colliding Vehicles

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Can loss be transferred between non-colliding vehicles when one vehicle down the chain is not moving at the time of the incident?

In *Kingsway General Insurance Company v. Dominion of Canada General Insurance Company* (2017 ONSC 498), the court considered whether loss transfer is available under s. 9(3) of the Fault Determination Rules (FDRs).

Specifically, the case involved a four-vehicle chain reaction collision with all vehicles travelling in the same direction and lane. The heavy commercial vehicle insured by Kingsway was the last in the chain and struck a moving car, which then struck a moving car insured by Dominion. The Dominion vehicle then struck a stationary car. As such, there was no impact between the Dominion and Kingsway vehicles. Dominion paid SABS to its insured and sought loss transfer from Kingsway.

The parties agreed that, had only the three moving vehicles been involved in the accident or if all four vehicles were in motion, Dominion would not be entitled to seek loss transfer from Kingsway pursuant to s. 9(3) of the FDRs (three or more vehicles travelling in the same direction and in the same lane while all vehicles are in motion). This is due to the decision in *State Farm v. Old Republic* (2015 ONCA 699) wherein the Court of Appeal found that loss transfer is not available under s. 9 between two non-colliding vehicles.

However, since the front vehicle in the chain was not moving, Dominion argued that s.9(3) was applicable and fault should be determined in accordance with the ordinary

rules of law as outlined in s. 5 of the FDRs. At first instance, the arbitrator accepted this argument and concluded that s. 9(3) did not apply and the heavy commercial vehicle was 100% responsible pursuant to s.5.

In the appeal decision, Justice Charney highlighted that the Court of Appeal in *State Farm v. Old Republic* concluded that the word “incident” as it appears in subclauses (a) and (b) of s. 9(4) can refer only to the collision identified in the particular subclause and “cannot reasonably refer to the entire chain reaction.” Further, Justice Charney noted that this equally applies to s. 9(3) as the Court of Appeal held that s. 9(3) and s. 9(4) are parallel provisions that must be read consistently.

As such, Justice Charney found that s. 9(3) of the FDRs properly applies to the fact scenario in this case since there were three vehicles in the chain (A, B and C) in motion and travelling in the same lane and direction. The presence of a stationary fourth vehicle down the chain is irrelevant. Therefore, there was no loss transfer available to Dominion since there was no impact between the Kingsway and Dominion insured vehicles. This is a well-reasoned decision and it accords with the findings of the Court of Appeal in *State Farm v. Old Republic*. It is also a helpful reminder of the longstanding principle that the FDRs are to be interpreted in a “gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.”