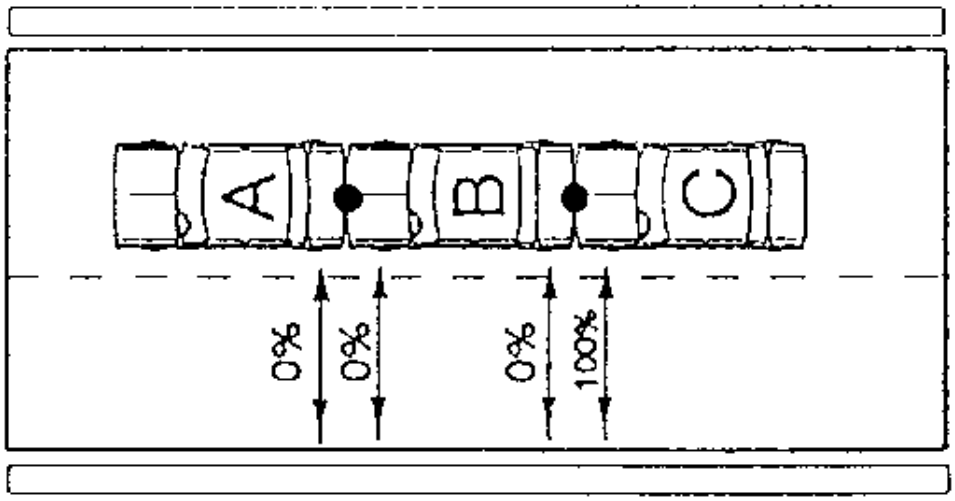
Loss Transfer: *State Farm v. Old Republic*, 2015 ONCA 699

Kevin S. Adams
October 2015

On October 20, 2015, the Court of Appeal released its decision in *State Farm v. Old Republic* (2015 ONCA 699), which settles a conflict in the interpretation and application of s. 9(4) of the Fault Determination Rules (FDRs) by Superior Court Judges. The conflict has been resolved in favour of heavy commercial insurers.

Section 9(4) of the FDRs deals with "chain reaction" rear-end collisions involving three or more vehicles. The language of the section and the corresponding diagram specifically address the allocation of fault as between vehicles A & B, and as between vehicles B & C, but not as between vehicles A & C (which do not collide).



There were conflicting Superior Court decisions on how fault should be allocated in this type of chain-reaction collision as between the drivers of vehicle A (passenger) and vehicle C (heavy commercial).

In *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 4467 (On S.C.J.), Justice Pitt held that, when rule 9 applies to an incident, there is no allocation of fault between vehicles that do not collide with each other. Therefore,

the insurer of vehicle A has no ability to recover loss transfer indemnity as against the insurer of heavy commercial vehicle C.

However, in *Royal & Sun Alliance Insurance Company of Canada v. AXA Insurance (Canada)* (2012 ONSC 3095), Justice Chapnik held that, based on the intention of the legislation, the insurer of a vehicle that initiates a chain reaction collision is liable to indemnify all other insurers for the statutory accident benefits payments flowing from the incident.

In *State Farm Mutual Automobile Insurance Co. and Old Republic Co. of Canada, Re* (2014 ONSC 3887), Justice Perell applied the same rationale as Justice Chapnik in *Royal & Sun Alliance Insurance* and found that, notwithstanding there was no collision between the heavy commercial vehicle and the private passenger vehicle, 100% fault should be attributed to vehicle C, and loss transfer indemnity is available to the insurer of vehicle A.

On further appeal of Justice Perell's decision in *State Farm v. Old Republic*, the Court of Appeal considered all of the conflicting decisions and essentially concluded that Justice Pitt's interpretation was correct. The Court's decision (2015 ONCA 699) is founded on its interpretation of the term "incident". Justice Simmons, writing for the panel, cited six reasons why the word "incident" as used in s. 9(4) "can refer only to the collision identified in the particular sub-clause and that it cannot reasonably refer to the entire chain reaction". Consequently, the insurer of the heavy commercial vehicle C which initiated the rear-end chain reaction was not responsible to pay loss transfer indemnity to the insurer of vehicle A.

Justices Chapnik and Perell seem to have ignored the plain wording of the FDRs and decided on principles of fairness that "to leave the insurer of a passenger vehicle without recourse to 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."

The Court of Appeal has now confirmed that this interpretation was incorrect, and endorsed Justice Pitt's reasoning and interpretation that the specific language in s.9(4) of the FDRs must be applied and there is no apportionment of liability amongst non-colliding vehicles.