

BETWEEN:

FARAJ SALIBA

Applicant

and

**ALLSTATE INSURANCE COMPANY OF CANADA and
PROGRESSIVE CASUALTY INSURANCE COMPANY**

Insurers

REASONS FOR DECISION

Before: John Wilson

Heard: May 16, 2000, at the Offices of the Financial Services
Commission of Ontario in Toronto.

Appearances: David Hayward for Mr. Saliba
Grant Dow for Allstate Insurance Company of Canada
Pamela Brownlee for Progressive Casualty Insurance Company

Issues:

The Applicant, Faraj Saliba, was injured in motor vehicle accidents on January 28, 1992 and May 3, 1992. He applied for and received statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ Allstate paid Mr. Saliba weekly income benefits until July 13, 1992. Progressive Casualty Insurance Company (“Progressive”) also paid

¹The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended by Ontario Regulations 660/93 and 779/93.

Mr. Saliba weekly income benefits until July 13, 1992. Mr. Saliba underwent surgery in 1997 for the treatment of conditions arising from the accidents, which left him with serious consequences.

The parties were unable to resolve their disputes through mediation, and Mr. Saliba applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. An arbitration was held on February 8, 9, 10, 11, and 12, 1999, and Arbitrator Alves rendered a decision on September 16, 1999.

In her decision, the arbitrator found that there was a causal connection between the motor vehicle accidents and Mr. Saliba's surgery in September 1997, and that both Allstate and Progressive were responsible for Mr. Saliba's claims for statutory accident benefits.

Mr. Saliba remains seriously disabled, and now requires extensive care and support.

Although there is no longer a dispute over the weekly income benefits payable to Mr. Saliba, both insurance companies now dispute their respective liability for medical, rehabilitation and care benefits for Mr. Saliba, and are unable to agree on either the apportionment of the expenses or the amounts payable under the policies.

The issues in this hearing are:

1. Which Insurer is required to pay Mr. Saliba's accident benefits?
2. If both Insurers are required to pay, should Mr. Saliba's benefits be apportioned between Allstate and Progressive?
3. Is Mr. Saliba entitled to claim beyond the limits of one policy of insurance under the *Statutory Accident Benefits Schedule*, or is he restricted by the limit contained in subsections 7(2) and 7(3) of the *Schedule* for his entire claim?

4. Is Mr. Saliba entitled to a special award?
5. Is Mr. Saliba entitled to his expenses in this arbitration?

Result:

1. Both Insurers are required to pay Mr. Saliba's accident benefits.
2. Mr. Saliba's benefits should not be apportioned.
3. Mr. Saliba is entitled to claim to the limits contained in subsections 7(2) and 7(3) of the *Schedule* for each policy.
4. Mr. Saliba is not entitled to a special award.
5. Mr. Saliba is entitled to his expenses in this arbitration.

EVIDENCE AND ANALYSIS:

Mr. Saliba, Allstate and Progressive all made submissions at the hearing. No new evidence was presented since all parties agreed that Mr. Saliba continued to be disabled as a result of the accidents and was entitled to accident benefits.

The principal questions to be determined were matters of interpretation and involved which insurance company should pay the care benefits and, if the benefits were to be apportioned, in what manner would this occur.

As well, both Insurers raised the issue of whether the limit of \$3,000 per month provided for by subsection 7(2) of the *Schedule* limited the total claim that could be made by Mr. Saliba from both Insurers for care benefits.

Mr. Saliba maintained that the question of the apportionment of benefits was previously decided by Arbitrator Alves in her decision dated September 16, 1999, and that the matter was *res judicata*. Consequently the Insurers would be estopped from re-litigating these issues.

On page three of her decision, Arbitrator Alves summarized under the heading “ Result”:

2. Allstate and Progressive are both required to respond to Mr. Saliba’s claims for statutory accident benefits.
3. Mr. Saliba’s benefits should not be apportioned. Subject to section 12(4) and section 15 of the *Schedule*: Mr. Saliba is entitled to a weekly income benefit of \$600 from Allstate and \$446.76 from Progressive. Subject to these parameters I leave it to the parties to sort out the precise amounts owing during various periods.

If Arbitrator Alves had the issues before her at the earlier arbitration hearing, then the parties should not be able to raise them again at this hearing. As Middleton J. stated in *McIntosh v. Parent* ([1924] 4 D.L.R. 420):

When a question is litigated, the judgement of the court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgement remains.

The arbitrator decided, as noted above, that both Insurers are required to respond to Mr. Saliba’s claim for statutory accident benefits, and that “ Mr Saliba’s benefits should not be apportioned”.

On page 935 in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.* (No. 2) [1967] 1A.C. 853 (H.L.), Lord Guest identified the requirements for the application of issue estoppel:

...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies...

Arbitrator Alves' decision was final. It was not appealed. The parties to the current arbitration are the same. It only remains to be seen if the issues are the same.

It is likely that the issues of medical and rehabilitation expenses were not directly argued before Arbitrator Alves. In fact, in a letter to the Commission dated November 8, 1999, Mr. Hayward, counsel for Mr. Saliba stated that: “[T]he issue of medical/rehabilitation benefits was not directly before the Arbitrator at the hearing.”

Senior Arbitrator Naylor in *DeCicco and State Farm Mutual Insurance* (OIC-A-000277, December 18, 1991) examined the scope of the issues before an arbitrator at a hearing:

...the scope of the issues before the arbitrator should not be defined in a narrow and technical way. The authority of the arbitrator extends to anything that reasonably and consequentially flows from the issues that are before her.

If the general issue of responsibility for accident benefits was before the arbitrator, then it could be argued that the issue of liability for medical/rehabilitation or care benefits reasonably and consequentially flowed from the more generalized issue.

The courts, and arbitrators, have increasingly taken a liberal view of the scope of the matters before an arbitrator at a hearing. I refer to the recent decisions in *Royal Insurance v. Pisani* [1994] O.J. No. 2616 (General Division), *Woodman v. State Farm Mutual Insurance*, [1999] O.J. 521 (General Division) and *Kaur v. CIBC Insurance* (FSCO A99-000269, May 11, 2000) in support of this interpretation.

In paragraph three of the arbitration order, Arbitrator Alves specifically ordered the payment of a weekly income benefit amount by each Insurer, but made no reference to any specific allocation of care benefits, pursuant to section 7 of the *Schedule* or supplementary medical and rehabilitation benefits pursuant to section 6 of the *Schedule*. She does, however, clearly make a finding that:

“Allstate and Progressive shall both pay Mr. Saliba’s claims for statutory accident benefits.” [emphasis added]

In *Machin v. Tomlinson*, (46) O.R. (3d) 550, Archibald J. examined whether an arbitration decision concerning an accident prevented a party from litigating a different matter that was based on the same factual situation. He found that, even though the matter before the court was not in the arbitrator’s jurisdiction, the parties were estopped from re-litigating the same factual issues before another tribunal:

The factual determinations made by the arbitrator in this case are, however, the identical factual underpinnings which the trial judge would have to consider on the issue of causation which is pivotal to any s. 266(1) determination. To put it another way, even if the person has sustained permanent serious impairment of an important bodily function, if the injury did not occur as a result of the use or operation of an automobile, he/she would not be able to establish that he/she has an entitlement under s. 266(1).

Section 7 of the *Schedule* provides:

- The Insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident, for the care, if any, required by the insured person,
- (a) the reasonable cost of a professional caregiver or the amount of gross income reasonably lost by a person other than the insured person as a result of the accident in caring for the insured person; and
 - (b) all reasonable expenses resulting from the accident in caring for the insured person after the accident.

The condition precedent to the payment of care expenses is the finding that the insured person suffered physical, psychological or mental injury as a result of an accident. Arbitrator Alves specifically made such a finding. The Insurers have not disputed the reasonableness or necessity of Mr. Saliba’s care.

I find that the factual underpinnings of the arbitrator's decision on the issues of the liability of the various Insurers for Mr. Saliba's weekly income benefits to be essentially the same as those necessary for a finding on the care and medical/rehab benefits.

I find, as well, that Arbitrator Alves explicitly acknowledged this linkage by the wording of her order. The use of the general words "accident benefits" rather than "weekly income benefits" in paragraph one of her order is a clear statement that both Insurers are liable for all statutory benefits payable to Mr. Saliba. Only such an interpretation would be consistent with the order, the summary of results on page three, and the general tone of her decision.

I find that issues 1 and 2 were decided by the arbitrator in her decision dated September 16, 1999 and may not be re-litigated by the Insurers. Consequently, both Allstate and Progressive are responsible for Mr. Saliba's care benefits, and the benefits should not be apportioned between the Insurers. I find, as well, that elements of the third issue were before the arbitrator, although she did not rule directly on the application of the limitations contained in section 7 of the *Schedule*.

Unfortunately, this finding leaves us both with the third issue at least partially unanswered, and with no agreed way to structure the payment of Mr. Saliba's care needs by the Insurers.

I will deal first of all with the question of the claim limits contained in section 7 of the *Schedule*.

Insurance Law, especially marine insurance, has a long history of discouraging multiple awards arising from the same loss. Since Lord Mansfield's decision in *Godin v. London Assurance Co.* [(1758) 1 Burr 489], it has been clear that even where there are multiple insurance policies, or "double coverage" available to cover a loss, an insured cannot receive more than his actual loss:

If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata to satisfy the loss against which they have all insured.

An exception to this contribution rule is if one of the policies is designated as “excess insurance.” In such a case the primary policy pays up to the policy limits, with the excess policy picking up any difference. Thus the primary policy usually assumes most of the burden of payment, and payments are not divided equally between the insurers.

This “natural justice” approach to discouraging double recovery has become incorporated into general insurance statute and case law since Lord Mansfield’s day.

Mr. Saliba has argued that he should be able to, in effect, “stack” the benefits available under the two policies, to permit him to be reimbursed fully for his care expenses. In his case there are two policies available to cover his claim. Arbitrator Alves found that both Progressive and Allstate are required to respond to his claim.

Subsection 7(2) of the *Schedule* provides that: “the maximum amount payable under this section is \$3,000 a month with respect to each insured person.”

Progressive argues that this section of the *Schedule*, read together with s. 2.72 of the *Ontario Automobile Policy Form* limits Mr. Saliba’s claim for attendant care to \$3,000 per month in total. It further argues that Mr. Saliba should first access the Allstate policy at \$3,000 per month, and then, when the policy limits of that policy have been totally exhausted, he should be permitted to access the Progressive policy for the same amount, up to the policy limits.

Section 2.72 of the policy reads:

If a person insured under the Policy is entitled to receive benefits under more than one contract providing insurance of the type set forth in this Part (Accident Benefits), the person, any person claiming through or under the person or any person claiming under Part V of the *Family Law Act*, 1986 is entitled to recover only an amount equal to one benefit.

Section 2.72 is fundamentally a restatement of the traditional contribution rule, which was intended to prevent double recovery.

What Progressive is arguing is that Mr. Saliba was covered by two policies, with Allstate's being the primary coverage, and Progressive's being excess coverage. Because of the statutory limit in section 7(2), it argues, the excess coverage cannot be accessed by Mr. Saliba, at least until the Allstate policy is completely exhausted.

Mr. Saliba contends that Progressive's analysis overlooks at least one important matter. There was no overlapping coverage between the two policies. He had one insurance policy when he had the first accident, and another, totally separate policy when he had the second accident. The only common feature between the two situations is the involvement of Mr. Saliba as the ultimate victim.

Griffith J. in *State Farm Mutual Automobile Insurance Co. v. Prudential Assurance Co. Ltd.* (54 O.R. (2d) 621, examined the law of equitable contribution between insurers. He quoted Ivamy as setting out the following pre-conditions for contribution:

1. All the policies concerned must comprise the same subject matter.
2. All the policies must be effected against the same peril.
3. All the policies must be effected by or on behalf of the same assured.
4. All the policies must be in force at the time of the loss.
5. All the policies must be legal contracts of insurance.
6. No policy must contain any stipulation by which it is excluded from contribution.

In Mr. Saliba's case he had two separate accidents, on two separate dates. Each insurance policy was in force at the time of its respective claim, but there was no overlap between the policies, as would be required for contribution to apply.

Although there are policy considerations that have led both the common law and statute law to restrict multiple claims, I find that Mr. Saliba's claim does not fit into these restrictions.

I find that Mr. Saliba is not double-insured. Rather, two separate and distinct accidents led to his total disability. Mr. Saliba could reasonably anticipate, when he purchased his insurance, that each insurer would, if necessary, compensate him up to the policy limits for any incident that occurred during the period covered by that insurance.

I note that Arbitrator Alves, on page 25 of her decision rejected apportionment and affirms that “...each accident gives rise to a fresh set of statutory accident benefits.” This is entirely consistent with my finding in this matter.

I accept that the only reasonable reading of the policy and the *Schedule* leads to the conclusion that the limit of \$3,000 per month applies separately to each Insurer and each incident. Likewise the \$500,000 total limit on care expenses should also be available from each individual Insurer.

I find that there is, indeed, no question of double recovery, since Mr. Saliba is only entitled to indemnification of his actual expenses, up to the insured limits of each policy. I find as well that the limitations in the *Schedule* may be “stacked” for the purposes of Mr. Saliba’s care.

Structuring the payment of Mr. Saliba’s care expenses:

Arbitrator Alves, in her order noted that the weekly benefits should first be paid by Allstate, and thereafter by Progressive. Both were required to respond to his claim, but Progressive was able to benefit from Allstate’s payments, and deduct them from its payments as collateral benefits. In effect, the arbitrator found that Allstate was the primary insurer, and that Progressive provided excess coverage. This allocation of weekly income benefits was not appealed, and the arbitrator’s reasoning stands. I accept that any allocation of care expenses to the Insurers, as well, must be consistent with the principles laid down by Arbitrator Alves.

To be consistent with both the findings and the order of Arbitrator Alves, I find that both Allstate and Progressive should respond to Mr. Saliba’s claim for care expenses. As was the case with

weekly income benefits, Allstate should respond first and pay his claim, up to the monthly limits set by the *Schedule*.

This is not to say that Mr. Saliba will be paid twice for his care expenses. Section 9(1) of the *Schedule* provides:

The Insurer will not pay any portion of an expense referred to in subsection 6(1) or (2) or subsection 7(1) for a service that is reasonably available to the insured person under any insurance plan or law or under any other plan or law that will pay the expense.

Following the priority scheme set up in Arbitrator Alves' decision, Progressive need not make any payments towards Mr. Saliba's care expenses unless the total amount payable in any month exceeds Allstate's limit of \$3,000, since, pursuant to subsection 9(1), that portion of the payment paid by Allstate would be "reasonably available" under another insurance plan.

If Mr. Saliba's care expenses exceed the limits of the Allstate policy in any given month, then the unpaid balance would not be "available" under another plan and would have to be paid by Progressive up to the limits of its policy.

I heard no evidence concerning the exact amounts of the care expenses outstanding. If the parties wish the final order to reflect the exact amounts payable by each Insurer, they shall have 30 days from the date of this decision to advise the Commission that they intend to present such evidence. In the interim, I remain seised of this matter.

Special Award:

Until mediation there were considerable shortfalls in the Insurers' payments of care expenses, and indeed Progressive refused to pay any such expenses. Mr. Saliba acknowledged at the hearing, however, that payments were being made by both Insurers.

Although the failure to pay the care costs in full created unnecessary problems for Mr. Saliba and his family, in light of the complex legal issues involved, I am reluctant to find that the conduct of the Insurers was totally unreasonable. In addition, the Insurers took reasonable steps after mediation to address the care issue. I find that the conduct of the Insurers, although regrettable, does not reach the standard of unreasonableness required for the imposition of a special award.

EXPENSES:

Mr. Saliba has claimed his expenses from the Insurers in this arbitration, as has Progressive from Allstate.

The recovery of expenses is governed by section 73 of the *Dispute Resolution Practice Code* (the “Code”), Third Ed., April 15, 1997. Subsection 73.2 sets out a range of criteria to be used in deciding whether expenses may be awarded. These include the degree of success of the party, his or her conduct, whether positions were taken that were unfounded, frivolous or vexatious, the complexity of the matter, as well as written offers of settlement filed in accordance with the *Code*.

I have no problem with Mr. Saliba bringing this claim to arbitration. Before he filed for mediation, he was receiving nothing towards his care expenses from Progressive, and only a portion from Allstate. This, in spite of the fact that Arbitrator Alves had ruled that both Insurers were responsible for Mr. Saliba’s accident benefits.

Although I understand why Mr. Saliba brought this application, I am less sympathetic to the Insurers for necessitating this step. I have found that the principles of liability for accident benefits in this matter were laid down in Arbitrator Alves’ decision and were, essentially, *res judicata*.

In fact, only the question of the applicable policy limits was not clearly decided by the hearing arbitrator, and even this matter could easily have been fleshed out by an analysis of the principles underlying her decision. In short, this hearing was an unnecessary exercise that re-hashed matters

that were already the subject of an arbitration. If it was a matter of clarifying the meaning and extent of Arbitrator Alves' decision, then the Insurers could have moved before her in an expeditious manner. It should be noted that the arbitrator, in her decision, specifically left the door open for such a request.

There is no reason that the Insurers could not have worked this matter out on their own without putting Mr. Saliba to the trouble and expense of another arbitration hearing. I find that the action of both Insurers, in failing to follow the decision of Arbitrator Alves, "tended to prolong, obstruct or hinder the proceeding." This, combined with Mr. Saliba's success on all issues, with the exception of the special award, leads me to award him his expenses in this matter. These should be paid, as specified in Arbitrator Alves' order, equally by both Insurers.

I can find no justification for an award of expenses to Progressive.

John Wilson
Arbitrator

August 28, 2000

Date

FSCO A99-001179

BETWEEN:

FARAJ SALIBA

Applicant

and

**ALLSTATE INSURANCE COMPANY OF CANADA and
PROGRESSIVE CASUALTY INSURANCE COMPANY**

Insurers

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Both Progressive and Allstate shall pay Mr. Saliba's accident benefits.
2. Allstate shall respond first to indemnify Mr. Saliba for care expenses. Progressive, in turn, shall pay such expenses as may be beyond the limits of the Allstate policy, up to the limits of its own policy.
3. Progressive and Allstate shall each pay one half of Mr. Saliba's expenses in this matter.

John Wilson
Arbitrator

August 28, 2000

Date