IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended

AND IN THE MATTER of the *Arbitration Act*, 1991,
S.O. 1991, c.17, as amended

AND IN THE MATTER of an Arbitration between:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel:

Certas Direct Insurance Company: Kevin Griffiths

Royal & SunAlliance Insurance Company of Canada: Derek Greenside

Introduction:

This matter came before me pursuant to the *Arbitrations Act*, 1991, to arbitrate a dispute as between two insurers with respect to a claim for loss transfer pursuant to the *Insurance Act* and its regulations. The claim is with respect to a motor vehicle accident that occurred on March 22, 2001 and a claim for accident benefits that was advanced by Michael Gagner.

The parties selected me as their Arbitrator on consent and the matter proceeded through a single day hearing in London on March 28, 2014.

The Applicant and Respondent are both automobile Insurers and the dispute before me was with respect to a claim by Certas Direct Insurance Company (hereinafter called "Certas") as to whether they had a right to pursue a loss transfer claim against Royal & SunAlliance Insurance Company (hereinafter called "Royal"). In particular the dispute was whether an accident occurred on March 22, 2001 between Michael Gagner's vehicle and a tractor trailer operated by Robert Desmarais, owned by Daimler Chrysler Canada and insured by Royal.

The parties agreed that in the event I determined that an accident had occurred on March 22, 2001 that the loss transfer provisions of the *Insurance Act* applied and further that pursuant to the fault chart 100% liability would rest with Royal. The latter would be based on an accident occurring when Mr. Desmarais transport truck struck the rear of Mr. Gagner's vehicle.

Record:

The record in this matter consisted of the following four exhibits:

Exhibit 1: Arbitration Agreement

Exhibit 2: Joint Arbitration Brief (Tabs 1 through to 8)

Exhibit 3: Report McLarens Toplis to Certas dated April 18, 2001

Exhibit 4: A through to E enlarged photographs taken of the Gagner vehicle by Brian Mathers (McLarens Toplis)

In addition to the documents filed 3 witnesses were called: Michael Gagner, Brian Mathers and Robert Desmarais.

Preliminary Issue:

Before turning to my conclusions on the award a preliminary issue was raised by counsel with respect to the admissibility of a Full and Final Release executed by Mr. Gagner with respect to his claim in tort against Mr. Desmarais. Certas took the position that the document was not privileged and was relevant. Royal took the position that the document was inadmissible based on "settlement privilege" and in any event was not relevant. I was provided with the Full and Final Release in a sealed envelope only to be opened once I had reached a conclusion with respect to its admissibility.

I have concluded that the document is not admissible both based on a finding that it bears settlement privilege and as well based on the finding that in my view the document would not be relevant for my consideration.

Mr. Gagner was not only involved in a motor vehicle accident on March 22, 2001 but was also involved in at least 3 subsequent motor vehicle accidents. No evidence was lead with respect to the circumstances under which the Release was executed. I do not know, for example, whether it was a settlement entered into as a result of a global mediation, at a pretrial or some other independent event. Nor was there any evidence lead as to whether the amount in the Release reflected any specific acceptance of liability, analysis of damages or whether it was simply a sum of money offered to avoid the cost of litigation.

I was provided with some specific wording from the Release which was relied upon by counsel for Royal to support his position that irrespective of any argument about "settlement privilege" that the parties have themselves agreed that the information in the Release would be confidential. The following paragraphs were noted to be within the wording of the Release:

> "IT IS UNDERSTOOD AND AGREED that the said payment or promise of payment is deemed to be no admission whatsoever of liability on the part of the said DAIMLER CHRYSLER CANADA, and ROBERT DESMARAIS.
>
> AND IT IS FURTHER AGREED that the Releasors hereto agree that all of the provisions of this settlement and release shall remain confidential and no terms of the settlement and release shall be disclosed or related in any manner to any other person or entity."

I note therefore that the Release specifically provided that it was not an admission of liability and further that the parties agreed that the settlement and Release was to remain confidential and that no terms were to be disclosed or related in any manner to any other person or entity.

As I understand the submissions made on behalf of Certas they take the position that the Release is relevant as it is in essence an admission on the part of Royal that the accident occurred and that Mr. Gagner sustained injuries in that accident. For reasons that follow I do not accept those submissions.

The law relating to settlement privilege remains in flux. The key cases that were referred to me show there remains a disagreement at the Divisional Court level (not yet resolved by the Court of Appeal) as to whether the question of settlement privilege should be examined on a case by case basis (generally known as the Wigmore Test) or whether settlement privilege is a class/absolute privilege in Ontario. As the Divisional Court has not yet been able to be unified in their approach on that question as a mere Arbitrator I would hesitate to make a ruling as to whether settlement privilege is an absolute one or whether the Wigmore Test is applicable. I have reviewed both lines of cases and it is my conclusion that in this particular case whether I apply the absolute privilege approach or whether I apply the four part Wigmore Test that the Release is still not admissible.

Under the Wigmore Test (see *Ontario (Liquor Control Board) v Magnotta Winery Corp* 97 O.R. (3d) 665: Divisional Court) the case by case analysis by applying the four part Wigmore Test was outlined. The test sets out that the party asserting the privilege must establish the following 4 conditions in order for settlement privilege to be applicable:

1. The communications must originate in a confidence that they will not be disclosed;

2. The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose;

3. The relationship must be one which, in the opinion of the community, ought to be "sedulously fostered"; and

4. The injury caused to the relationship by the disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

In applying the four part Wigmore Test to the circumstances of this case, I note at the outset that both Certas and Royal agreed that the onus fell on Royal to establish settlement privilege. Looking at each of the four criteria outlined in the Wigmore Test and the circumstances of this case I reach the following conclusions:

1. The Release originated in a confidence that it would not be disclosed. That is clearly reflected in the very wording of the Release that was signed;

2. The element of confidentiality is essential to the maintenance of the relationship in which these communications arose. There is a well established rule that settlement negotiations and settlement agreements are privileged whether or not settlement is reached. This is based on the public policy that encourages individuals to settle their differences rather than take them through to the litigious conclusion. Settlement privilege is designed for litigants to freely and frankly put their cards on the table so that settlement can be entered into. Individuals who enter into these discussions have a legitimate expectation that their discussions and the documents around those discussions would be private and privilege (see *Hill v Gordon-Daly Grenadier Securities* 56 O.R. (3d) 388 Ontario Division Court). I note that counsel for Certas accepted that both parts one and two of the Wigmore Test were present in the circumstances of this case;

3. There is no doubt that the ability to openly discuss settlement and enter into an agreement to resolve disputes and that the expectation that that agreement remain confidential is one which whatever test you apply for settlement privileges is something that needs to be "sedulously fostered". There is no doubt that that argument applies to tort settlements. Again counsel for Certas did not press that part three of the Wigmore Test was inapplicable here;

4. It is really part four of the Wigmore Test that counsel for Certas urged upon me. He suggested that the onus of proof that fell to Royal was not met. He argued that in essence part four of the Wigmore Test really spoke to relevance and that the Royal has not met its obligation to establish that it was more important to maintain confidentiality than to have this document available to assist in the disposition of the case. I do not agree. I am simply not satisfied that the Release has any bearing upon the decision that I have to make. I do not know what thought process went into Royal's decision to settle Mr. Gagner's claim in tort. Counsel for Royal points out that Mr. Gagner had three other accidents and he sued in each accident. He claimed pain and suffering for each accident. He submitted that the calculation of Mr. Gagner's tort claim would be assessed on a global basis. Further he submitted that one could equally assume that the reason for the settlement in whatever amount it may have been had been based on a cost analysis for trial. As I noted earlier no evidence was lead as to the context of this settlement.

I therefore conclude that all four criteria of the Wigmore Test were met and that based on the case by case analysis the document would not be admissible. I do note the decision of *Dhrolia v TTC Insurance Company* (FSCO A08-002660), a decision of Arbitrator Feldman in June of 2010. In that case Arbitrator Feldman commented that the information with respect to the settlement of a tort proceeding (in the context of a subsequent AB claim) would normally be considered to be privileged and not relevant or probative of the issues in dispute. He noted that the amount of the settlement could be a poor indicator of the injured party's actual needs.

Turning now to the absolute or class privilege test. This can be found in the Divisional Court's decision in *Inter-Leasing Inc v Ontario Minister of Finance* (2009 Carswell Ont. 6920). In that case the Divisional Court stated that generally communications with respect to settlement negotiations whether oral or written made in the furtherance of the settlement of a litigious dispute are subject to privilege. They set out three conditions for the settlement privilege to apply:

1. A litigious dispute must be in existence or within contemplation;

2. The communication must be made with the expressed or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and

3. The purpose of the communication must be to attempt settlement.

In reviewing these three criteria in relationship to this particular Release I am satisfied again (for the reasons outlined above) that all three criteria are applicable. I also note that in addition to the 3 criteria the court also added in that the communication must be relevant and the disclosure necessary. I do note find the Release relevant nor do I find the disclosure necessary.

Therefore I have not reviewed the Full and Final Release and I have declined to receive it into evidence.

Main Issue in Dispute:

Summary of Evidence

1. Michael Gagner

Mr. Gagner was born in 1980. He attended a technical high school and at the time of the accident in March of 2001 he was working towards becoming a residential electrician. I found Mr. Gagner to be a completely believable witness. I believe that the version of events reported by Mr. Gagner to be credible.

Mr. Gagner says that this accident occurred as he was on his way home from work. He was living with his mother at the time. He was driving a 1993 Saturn.

He was proceeding in a northbound direction on Walkers Road. There are 2 lanes here and Mr. Gagner reported that he was in the right lane closest to the curb. He stopped at the light. There were no cars in front of him. He saw a tractor trailer in his rear view mirror. The light turned green and he proceeded into the intersection. He believed that the truck was behind him in the curb lane and the truck appeared to be travelling at a speed that Mr. Gagner thought that there may be a collision.

His car had a standard transmission so Mr. Gagner began to shift through various gears to attempt to accelerate more quickly through the intersection. He says he engaged the clutch. His evidence was somewhat inconsistent as to whether he was in second gear or third gear when the incident occurred. He says he felt what he describes as a jolt. He knew it was an impact to the rear of his car but he also describes it as feeling like a mis shift.

Mr. Gagner then slowed down with the intention of stopping at the side of the road. He observed the tractor trailer that he believed had struck him coming up behind him on his left. It was not slowing down. He therefore took out a pen and pencil that he kept in the car for work purposes and wrote down the tractor number and the trailer number. The tractor number he noted as being 915 and the trailer was 6161.

Mr. Gagner's recollection was that the time that this accident occurred was around 6:30. Mr. Gagner then went home. He did not seem to feel he was injured at the time. He reports that home is about 10 or 15 minutes from the accident scene. He says after he had a shower he began to feel some discomfort and decided to go to the hospital. At that point he went out and looked at the back of his vehicle and saw there were 2 marks on the rear of his bumper that were about 1 to 1 and ½ inches in size. He believed this was consistent with the impact from the tractor trailer.

He then went to the Hotel Dieu Hospital. He saw the triage nurse but because it was a long wait he decided not to stay.

In cross examination Mr. Gagner admitted that he made no effort to follow the tractor trailer. He did report the accident to the police and gave them the information with respect to the numbers he had taken for the trailer and the tractor. His evidence was that he expected the police to follow up on tracking down the owner and operator. He did not think about staying at the scene. He did have a 2 way radio but can't recall if he had a cell phone and he admitted that he did not make any calls. I did not find that any of the admissions made in cross examination took away from the credibility of the description of how the accident occurred. I accept that Mr. Gagner believed that the accident occurred as described above.

I also note in conjunction with Mr. Gagner's evidence that I was provided with a statement he had made dated March 28, 2011 (Exhibit 2 Tab 3) and his examination for discovery in the tort action (Exhibit 2 Tab 7). I reviewed those documents carefully. Although there were some inconsistencies between Mr. Gagner's evidence at the arbitration, the statement and his discoveries I did not find the inconsistencies to be significant enough to take away from his credibility in terms of how this accident had occurred. I note in the statement of March 28, 2001 he confirmed the tractor and trailer number. He provided a reasonable description of the vehicle. He also reported in the statement that he did not tell Daimler Chrysler about this accident as he did not intend on making a claim for damage to his vehicle under his own insurance policy.

In his examination for discovery more detailed questions were asked than in this hearing about how Mr. Gagner managed to get the tractor number and trailer number and where it had been located. I found this evidence to be credible as well.

2. Brian Mathers

Mr. Mathers at the time of the accident was employed by McLarens Toplis as a Windsor Road Adjuster. He has been so employed since 1999 and has been involved in property, liability, cargo, marine, motor vehicle accident and accident benefit claims.

He was assigned by McLarens Toplis to respond to a request by Certas to do some preliminary investigations into Michael Gagner's claim. The assignment came into McLarens Toplis on March 26, 2001. As a result of the assignment Mr. Mathers arranged to meet with Mr. Gagner, take a statement, secure information relevant to an accident benefit claim and as well he took some photographs of Mr. Gagner's vehicle. The statement that Mr. Mathers took is Exhibit 2 Tab 3, the enlarged photographs were marked as Exhibit 4 A through E but as well can be found on a contact sheet at Exhibit 2 Tab 2. Mr. Mathers' report to Certas is Exhibit 3.

I found that the most important evidence of Mr. Mathers was the photographs that he had taken. The photographs support that there were 2 marks at the back of the Gagner vehicle.

These photographs were taken on March 28th. Mr. Mathers, based on his experience and review of the photographs, felt that the marks were consistent with a minor impact involving the front bumper of a tractor trailer. Also important in Mr. Mathers' evidence was the fact that the statement given to him and his recollection of that statement were, in my view, consistent with the evidence given by Mr. Gagner both at the arbitration hearing and at his examinations for discovery. Mr. Mathers also confirmed that Mr. Gagner told him the trailer number and tractor number.

While Mr. Mathers is not a reconstruction expert his evidence was that he felt the damage to the back of the Gagner vehicle was consistent with something hitting from above. However in cross examination he admitted he did not take any measurements. He also admitted that the damage could be consistent with other possibilities such as a vehicle backing into a linked fence with wooden poles. Mr. Mathers' evidence was that there was no evidence to refute what Mr. Gagner has told him and that he accepted this as a legitimate claim.

Mr. Mathers had only the one interaction with Mr. Gagner. He also admitted that he thought that the incident was a minor one.

In reviewing the photographs taken by Mr. Mathers, and particularly Exhibits 4 C, 4 D and 4 E, I find that there is clear evidence of some sort of impact to the rear of Mr. Gagner's vehicle which is consistent with the evidence that he gave at the arbitration.

3. Robert Desmarais

Mr. Desmarais was a delightful witness. I also found him to be completely credible. I absolutely believe Mr. Desmarais when he outlines his version as to what occurred on March 22, 2001. Mr. Desmarais has been driving a truck since 1969. He has worked with Chrysler steadily since 1973. Mr. Desmarais' oral evidence as to what occurred during the course of the day on March 22, 2001 particularly the timing of various events is supplemented by Exhibits 2 Tab 5 and 6. These are barcode created documents and other internal documents from Chrysler that clearly show where and when Mr. Desmarais' tractor and trailer were during the course of March 22, 2001. I note that those documents are consistent with the evidence that he gave.

Mr. Desmarais says that he started work early on the morning of March 22nd. His route for that day was to take a loaded trailer to Textron Products in Guelph. He would then leave the trailer there and pick up another trailer and return back to the Chrysler plant in Windsor.

Mr. Desmarais' day involves going into the Chrysler plant which happens to be located within a block or less of the intersection where the accident of March 22, 2001 is alleged to have occurred. In 2001 Mr. Desmarais had a regular route from Windsor to Guelph and then back to Windsor again. He would go into the plant where he would be dispatched. By that I mean he would be told what truck he would drive, be given keys to the truck and then would be given a set of bills for the trailer. He would then do a circle check of his vehicle, find the trailer and hook up. The mechanic would do a check in the service garage and then he would depart from

the WIndsor location. As he departs the barcode on the truck would automatically trigger the departure time and it is recorded on the document noted at Exhibit 2 Tab 5. In additional Exhibit 2 Tab 6 is the Daimler Chrysler's drivers log and internal report which is completed by Mr. Desmarais. Mr. Desmarais' evidence is that he took tractor 915 and trailer 6125 on the morning of March 22, 2001 and drove it to Guelph. He then offloaded the trailer in Guelph and hooked up to a new trailer number 6161. He left Guelph at approximately 3:00. He was in London/Exeter at approximately 4:30. Based on his evidence he arrived back in Windsor at the plant at about 6:15. Mr. Desmarais confirms that his route that day would have taken him through the intersection where Mr. Gagner claims this accident occurred. Mr. Desmarais confirms that he was driving tractor 915 and hauling trailer 6161 on that evening.

Mr. Desmarais is quite clear that at no time was he aware of ever being involved in a motor vehicle accident. He says: "I did not hit any car that day". He says if he had hit a car he would have been obliged to use his cell phone and to call dispatch. There is a specific procedure that he would have used. Somebody would have come from the company and have taken pictures of his vehicle and statements in order to provide protection for both the company and the driver from any claims being made.

Mr. Desmarais did admit in cross examination that when driving his tractor that if he gets close up to a smaller car he would not be able to see the bumper. He also admitted that if there had been an impact between the tractor trailer and another vehicle that the person in the car would feel a greater impact than he would have. However he was not moved on cross examination and remained of the view that he would have felt an impact if one had occurred. Further he remained of the view that if an impact had occurred marks would have been left on the bumper of the tractor. He did however admit that when he returns to the yard at the end of the day that he does not do a final circle check after he is finished with the vehicle. The next time that a circle check would be done would be by the next driver and the mechanic.

Exhibit 2 Tab 5 shows that the tractor 915 and trailer 6161 returned to the Windsor plant at 5:58. When asked about the discrepancy between coming in at 5:58 and Mr. Desmarais' note that he came in at 6:15 he notes that one is an electronic swipe card when he clears the gate and the other is his own notation usually made after he clears the gate which can take about 15 minutes.

Analysis:

Therefore we have two completely believable witnesses both of whom tell credible stories. How does one reconcile this?

Counsel for Certas urged upon me that I should accept that both of these gentlemen are telling the story as to what occurred on March 22, 2001 to the best of their ability and that I can believe each of them but still reach the conclusion that the accident happened as described by Mr. Gagner. I agree with counsel for Certas.

I believe that Mr. Desmarais truly believes that this accident never happened. I believe Mr. Desmarais' tractor trailer lightly struck the rear of Mr. Gagner's vehicle and that Mr. Desmarais did not feel the impact. There was never any check done to see if there was any damage to the tractor trailer. Three key pieces of evidence point to this accident having happened as Mr. Gagner describes it. First of all it is his identification of the tractor number and the trailer number. This is not something that Mr. Gagner could make up.

Secondly is the fact that that tractor number and trailer number accurately identified Mr. Desmarais' tractor trailer combination. Mr. Desmarais admits that just before 6:00 on March 22, 2001 his vehicle was at the intersection where this accident occurred.

The third key fact is the photographs taken very shortly after this incident occurred which clearly shows 2 minor impacts to Mr. Gagner's vehicle. I find that based on the evidence before me the damage to the vehicle is consistent with the accident having occurred as described by Mr. Gagner.

The only real discrepancy in my view is the fact that Mr. Gagner recalls and reported that this accident occurred at 6:30. I believe that is simply a mistake on his part when trying to accurately report the time of the impact at some time later on.

I therefore find that on March 22, 2001 shortly before 6:00 that the vehicle operated by Mr. Gagner was struck in the rear by tractor number 915/trailer 6161 being operated by Mr. Desmarais.

Conclusion:

I therefore conclude that in this loss transfer matter that as an accident occurred on March 22, 2001 when the tractor trailer (heavy commercial vehicle) struck the rear of the passenger vehicle (Gagner's vehicle) that in accordance with the provisions of the *Insurance Act* and its regulations loss transfer is applicable. As the parties agree that the liability is 100% against Royal who insures the commercial vehicle I find as follows:

1. Royal and SunAlliance Insurance Company of Canada is liable to indemnify Certas Direct Insurance Company pursuant to Section 271 (1) of the *Insurance Act*.

I understand from counsel that the quantum is not in dispute. If there are any disputes with respect to the amount payable including interest counsel can advise and we can arrange a further prehearing.

Costs:

Pursuant to Arbitration Agreement legal costs were placed in my hands to be determined taking into account the success of the parties, offers to settle, the conduct of the proceeding and the principles generally applied in litigation before the courts of Ontario.

Despite my finding that Mr. Desmarais was a credible witness I did find in favour of the Applicant, Certas Direct Insurance Company. Accordingly I award costs to Certas. If counsel cannot agree on costs then counsel can advise and we can schedule a hearing on the issue to be done either orally or in writing.

DATED THIS 8th day of May, 2014 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP