IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

and

ECONOMICAL INSURANCE COMPANY

Respondent

AWARD

Heard: March 12, 2015

Supplementary Submissions: May & October, 2016

Counsel:

Amanda M. Lennox for the Applicant, Jevco Insurance Company ("Jevco")

Ashu Ismail, for the Respondent, Economical Insurance Company ("Economical")

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is a loss transfer arbitration arising out of a motor vehicle accident occurring August 26, 2008 at the intersection of Dunsmure Road and Carrick Avenue in the City of Hamilton.

The Applicant, Jevco Insurance Company ("Jevco") seeks to recover, pursuant to section 275 of the *Insurance Act*, Statutory Accident Benefits ("SABS") paid to its insured, Randy Rev, who was the operator of a motorcycle insured by Jevco at the time of the accident. Jevco seeks to recover the SABS paid from the Respondent, the Economical Mutual Insurance Company ("Economical"). Economical insured Marie Stewart who was operating a regular, passenger automobile at the time of the accident.

Mr. Rev was injured as a result of a collision occurring in the above-mentioned intersection between his motorcycle, and Ms. Stewart's automobile. He advanced a claim for SABS to Jevco as a result of the injuries sustained in the accident.

Indemnification in loss transfer pursuant to section 275 of the *Insurance Act* is made according to the respective degree of fault of the insured drivers involved in the accident, as determined by the Fault Determination Rules found in Ontario Regulation 668 – Fault Determination Rules made pursuant to the *Insurance Act.*

This Award is a decision on the preliminary issue of whether Fault Determination Rule ("FDR") 14 (2) is applicable to the determination of fault for the accident.

As I understand what is contemplated by the parties, my determination of this issue (subject to any appeal) will inform whether or not FDR 5 may apply to the

circumstances of this accident, in which case the parties contemplate that there will have to be a full arbitration hearing to have this matter decided pursuant to FDR 5.

FDR 5 applies in the event that an incident is not described in any of the FDRs, and requires the degree of fault to be determined in accordance with the ordinary rules of law. The Court of Appeal has recently dealt with an FDR 5 case. I will have more to say on this subject later in my Award.

Issue

As indicated in the introduction, the preliminary issue to be decided is whether FDR 14 (2) is applicable to the determination of fault for the accident.

Evidence

The preliminary issue proceeded on the basis of an Agreed Statement of Facts dated March 4, 2015. The Agreed Statement of Facts was Exhibit 2 in the proceedings, with the parties' Arbitration Agreement being Exhibit 1.

The Agreed Statement of Facts contains 29 narrative paragraphs, and includes the following documents which are part of the Exhibit:

Tab 1: Serious Injury Motor Vehicle Collision Reconstruction Report (Hamilton Police Service).

Tab 2: Examination for Discovery of Marie Stewart (Economical insured), June 19, 2012.

Tab 3: Examination for Discovery of Randy Rev (Jevco insured), June 19, 2012.

Tab 4: Giffin Koerth Smart Forensics report, December 6, 2013.

Tab 5: AT Traffic Safety Corporation report, May 10, 2013.

Tab 6: Google Maps Street View of intersection, May 2012.

I will make reference to the narrative paragraphs and the documents in the Agreed Statement of Facts in my analysis of the issue to the extent necessary for my decision.

Analysis

In my opinion**,** the appropriate way to begin the analysis of the issue is to review the legislative intent behind the section 275 loss transfer framework, and the proper approach mandated by the case law to be taken in applying the FDRs in a loss transfer case.

These issues have been addressed in many cases. One analysis which I find provides a very helpful summary of the law on these issues is found in *ING Insurance Co. of Canada v. Farmers' Mutual Insurance Co. (Lindsay)*.[1]

Justice Perell stated as follows (paragraphs 25 – 27):

> In Jevco Insurance Co. v. Canadian General Insurance Co. (1993) 14 O.R. (3d) 545 (C.A.) at p. 547 the Court Of Appeal described the scheme of the (FDRs) as follows:
>
> > The scheme of the legislation under s. 275 of the Insurance Act and companion regulations is to provide for an expedient and summary method of reimbursing the first party insurer for payment of

[1] [2007] O.J. No. 2150 (ONSC), ("*ING. v. Farmers*")

> no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tort feasor is irrelevant.
>
> In Jevco Insurance Co. v. Halifax Insurance Co. [1994] O.J. No. 3024 (Gen. Div.), at para. 8, Matlow J. described the (FDR) as follows: 'They set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of particular incident in a manner that, in most cases, would probably but not necessarily correspond with actual fault.' In Jevco Insurance Co. v. York Fire & Casualty Co. (1996), 27. O.R. (3d) 483 (C.A.) at p. 486, Carthy J.A. stated that 'the purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude."
>
> The (FDR) are to be liberally construed and applied and in accordance with their own factors and not those which would apply under the ordinary Rules of tort law: Cooperators General Insurance Co. v. Canadian General Insurance Co. [1998] O.J. No. 2578 (Gen. Div.).

The Court of Appeal, in its decision in *State Farm Mutual Automobile Insurance Company v. Aviva Canada Inc*.[2] has very recently confirmed the accuracy of the description of the purpose of the loss transfer scheme outlined in the preceding paragraphs. In fact, the Court (at paragraph 56) cited the same excerpt of Justice Carthy's comments from *Jevco v. York Fire*.

I believe it would be appropriate here to review the Court of Appeal's decision in *State Farm v. Aviva* because the analysis in that decision informs the approach an arbitrator must take to the application of the FDRs to a loss transfer case.

[2] 2015 ONCA 920 ("*State Farm v. Aviva*")

Although the facts and the FDR under consideration in *State Farm v. Aviva* were different than the case before me, there is no doubt that much of the Court's analysis is of general application to an FDR – loss transfer case.

The loss transfer dispute in *State Farm v. Aviva* arose out of an intersection accident involving a motorcycle which intended to travel straight through the intersection, and a passenger vehicle making a left turn at the intersection across what would have been the path of the motorcycle.

In *State Farm v. Aviva* the parties' arbitration both at first instance and on appeal to the Superior Court and the Court of Appeal proceeded on the basis that FDR 12 (5) did not apply on the facts. FDR 12 (5) governs the situation where one automobile (automobile "B") turns left into the path of another automobile (automobile "A"). FDR 12 (5) stipulates that the left turning automobile is 100% at fault for the incident.

To understand why FDR 12 (5) did not apply, one must have reference to FDR 12 (1) which appears to set out the general criteria for the application of one of the other subsections of FDR 12. FDR 12 (1) applies when automobile "A" collides with automobile "B" and the automobiles are traveling in opposite directions and in adjacent lanes.

In *State Farm v. Aviva*, the facts were that there was no collision between the motorcycle and the left turning passenger vehicle. The motorcyclist was injured when he lost control of his motorcycle and crashed to the roadway in avoiding a collision with the passenger vehicle.

Since there was no collision between the vehicles as required by FDR 12 (1), the parties agreed that none of the subsections of FDR 12 could apply, and therefore they proceeded on the basis that FDR 5 should be applied to determine fault.

FDR 5 provides that if an incident is not described in any of the FDRs, fault is to be determined in accordance with the "*ordinary rules of law*". The essence of the dispute between the parties in *State Farm v. Aviva*, was whether "*ordinary rules of law*" meant that the principles of tort (negligence) law should be used to determine fault, or whether to properly apply the FDR, an approach distinct from tort law is required. Arbitrator Shari Novick held the non-tort law approach to be the correct one, and the Court of Appeal agreed.

The Court of Appeal used a statutory interpretation approach to conclude that determining fault in accordance with the "*ordinary rules of law*" precludes using a tort law approach. The court held that the application of every FDR, including FDR 5, is governed by FDR 3. FDR 3 reads as follows:

> 3. The degree of fault of an insured is determined without reference to,
>
> (a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or
>
> (b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.

The Court also considered the purpose of the loss transfer scheme to reinforce its interpretation that tort law is not to be used in determining fault under the FDR.

The Court stated (at paragraph 69):

> Having determined that rule 3 informs fault determinations made under rule 5 (1), "the ordinary rules of law" cannot be interpreted as "the ordinary rules of tort law". A determination of fault based on tort law rules would necessarily engage a consideration of the circumstances that the legislature purposely excluded from consideration by rule 3. Furthermore…resort to pure tort law for the determination of fault would run contrary to the purpose of the loss transfer scheme, which is to provide an expedient and summary way of resolving indemnification claims.

The Court of Appeal approved of Arbitrator Novick's reliance upon the analogous FDR 12 (5) and subsection 141 (5) of the HTA. The Court stated (at paragraph 73), "*In the Award, the arbitrator referred to two things, both of which fall within the meaning of "the ordinary rules of law" as those words are used in rule 5 (1) of the FDRs.*"

Arbitrator Novick came to the conclusion that the left turning passenger vehicle was 100% at fault, with the motorcyclist bearing no fault. She relied upon FDR 12 (5) in support of her conclusion, in spite of the fact that it did not technically apply because there was no collision between the vehicles. The Court of Appeal found this to be appropriate and stated (at paragraph 74), "*Although not directly applicable, rule 12 (5) provides persuasive guidance for fault determination in this case.*"

The Court of Appeal noted that Arbitrator Novick also relied upon subsection 141 (5) of the *Highway Traffic Act* ("HTA") in coming to her conclusion on fault. It provides that a driver shall not turn left across the path of an approaching vehicle, "*unless he or she has afforded a reasonable opportunity to the driver or operator of the approaching vehicle to avoid a collision*". Arbitrator Novick made a finding of fact that the left turning

driver did not see the approaching motorcyclist and so could not have provided him with an opportunity to avoid a collision.

In *ING v. Farmers'*, Justice Perell set out the following steps as the correct approach to be followed to applying the FDRs in a loss transfer case (paragraph 33):

> (The arbitrator's first task is)… To determine the facts; namely,… To determine what was 'the incident' and second to determine if that incident was described in any of the rules… To determine if the rule 'applies with respect to the insured'… Third, if the incident…was described in any of the rules, then…to apply that rule or rules, arbitrary and expedient as the application of the (FDRs) might be. Fourth, if the incident was not described in any of the rules,…to determine the degree of fault of the insured in accordance with the ordinary rules of law.

With this legal framework for the application of the FDRs in a loss transfer case in mind, I will now apply it to the facts and the FDR under consideration in this arbitration.

My first task is to determine what was "the incident". In this case, that is relatively straightforward since the parties have set out a detailed description of the incident in their Agreed Statement of Facts (paragraphs 1 through 12). In summary, the incident is described as collision occurring at the intersection of Carrick Avenue and Dunsmure Road in the City of Hamilton between the Jevco insured motorcycle and the Economical insured automobile. It is agreed that intersection was governed by stop signs for traffic traveling on Dunsmure Road (the Economical insured automobile), and that traffic traveling on Carrick Avenue (the Jevco insured motorcycle) had the right-of-way.

I must next determine whether this incident is described in any of the FDRs. The situation in the case before me is distinguishable from the situation before Arbitrator

Novick in *State Farm v. Aviva*. In that case the parties looked first to FDR 12 (1) as the subsection setting out the general conditions in which any of the other subsections of the FDR could apply to the incident. They agreed that none of the other subsections of the FDR could apply because the incident did not come within the description set out in FDR 12 (1) – there was no collision between the vehicles as required by FDR 12 (1). Since no other FDR applied, the parties sought a determination of fault pursuant to FDR 5.

In this case, FDR 14 (1) sets out the general requirements for the application of any of the other subsections of FDR 14. FDR 14 (1) reads as follows:

> 14 (1) This section applies with respect to an incident that occurs at an intersection with traffic signs.

In my opinion, giving the words of this subsection their plain and ordinary meaning, the facts of the incident in this case as agreed to by the parties clearly fall within the parameters of FDR 14 (1). The incident occurred at an intersection – Carrick Avenue and Dunsmure Road, and the intersection had traffic signs – stop signs for traffic traveling on Dunsmure Road.

Having determined that the general facts of the incident are described in FDR 14 (1), the next step is to consider which of the various subsections of FDR 14 should be applied to the specific facts of the incident, and to properly apply that subsection without using tort law.

The parties have posed the question as to whether FDR 14 (2) applies to the incident in this case. FDR 14 (2) reads as follows:

> 14 (2) If the incident occurs when the driver of automobile “B” fails to obey a stop sign, yield sign or similar sign or flares or other signals on the ground, the driver of automobile “A” is not at fault in the driver of automobile “B” is 100 per cent at fault for the incident.

Although it may not be readily apparent from the wording of FDR 14 (2), in my opinion this subsection describes the situation where the intersection in which the incident occurred is controlled by stop signs for traffic traveling in the direction of automobile “B”, and traffic traveling in the direction of automobile “A” has the right-of-way – or in other words, automobile “A” does not have a stop sign. That is the situation as described by the agreed facts in this case.

My conclusion is reinforced by the fact that generally the FDR and the diagrams therein describe situations where typically automobile “A” is the automobile not at fault, and automobile “B” is at fault.

Further, a review of the other subsections of FDR 14 confirms to me that FDR 14 (2) is meant to deal with the specific situation where only one of the vehicles approaching the intersection has a stop sign and the other does not.

For example FDR 14 (3) assigns 50% fault to each automobile if each automobile fails to obey a stop sign. FDR 14 (4) assigns 50% fault to each automobile if it cannot be established who failed to obey a stop sign. Obviously in these situations the involved vehicles must each have a stop sign for these subsections to apply.

Subsections 14 (5), (6), and (7) clearly indicate that they are meant to deal with the situation where there are stop signs at each point of entry to the intersection – in other words for every vehicle approaching the intersection in any direction. As those

subsections indicate, such intersections are typically referred to as "*all-way stop intersections.*"

In my opinion, since the facts of this incident as agreed to by the parties are described by FDR 14 (2), there is no need to consider FDR 5. The issue to be decided in this case is not whether FDR 14 (2) applies to the facts of the incident, but how it should be applied. As I see it, my task is to properly interpret FDR 14 (2) in applying it to the facts of the incident, without using tort law.

Depending on how FDR 14 (2) is interpreted there will either be a finding of 100% fault against Economical's insured, and no fault against Jevco's insured, or a finding of no fault against both Economical's insured and Jevco's insured.

The submissions made by the parties were completed in two stages. The first submissions were made prior to the Court of Appeal's decision in *State Farm v. Aviva*. After *State Farm v. Aviva* was released, the parties sought leave to make further submissions, and I agreed that it was appropriate to do so given the significant impact *State Farm v. Aviva* has on the proper application of the FDRs.

The essence of the dispute between the parties over the application of FDR 14 (2) is how to properly interpret the words, "***fails to obey a stop sign***" in respect of the driving actions of Economical's insured driver who was traveling on Dunsmure Road which, as indicated, was controlled by a stop sign at its intersection with Carrick Avenue.

Jevco's position, as outlined in its initial submissions, is that the proper interpretation of FDR 14 (2) should follow the line of authority established by Arbitrator

Jay Rudolph in *Royal & SunAlliance Insurance Company of Canada v. Kingsway General Insurance*.[3] This interpretation would result in a 100% finding of fault against Economical's insured, and 0% fault against Jevco's insured.

In that case an eastbound heavy commercial vehicle facing a stop sign was making a left turn at an intersection. Traffic traveling north and south through the intersection did not have a stop sign. Arbitrator Rudolph found that the heavy commercial vehicle did not see the approaching southbound automobile until after he had started his left turn and was in the intersection. The evidence indicated that thick fog may have interfered with the heavy commercial vehicle operator's ability to see the approaching southbound vehicle. A collision occurred in the intersection between the heavy commercial vehicle and a southbound automobile.

Arbitrator Rudolph decided that FDR 14 (2) applied to the facts of the incident and assessed 100% fault against the heavy commercial vehicle. In interpreting what was meant by the words, "*fails to obey a stop sign*", he applied what is effectively the test in subsection 136 (1) of the HTA in concluding that the heavy commercial vehicle failed to obey the stop sign because it did not yield to the southbound vehicle which was approaching the intersection so closely that it would constitute an immediate hazard for the heavy commercial vehicle to proceed. For clarity, subsection 136 (1) of the HTA reads as follows:

> 136 (1) Every driver or streetcar operator approaching a stop sign at an intersection,

[3] Arbitration Award, April 5, 2012. Upheld on appeal, *Jevco Insurance Co. v. Royal & SunAlliance Insurance Co. of Canada*, [2013] O.J. No. 4331. (Whitaker J.) ("*Jevco v. Royal & SunAlliance*").

> (a) shall stop his or her vehicle or streetcar at a marked stop line or, if none, then immediately before entering the nearest crosswalk or, if none, then immediately before entering the intersection; and
>
> (b) shall yield the right-of-way to traffic in the intersection or approaching the intersection on another highway so closely that to proceed would constitute an immediate hazard…

Arbitrator Rudolph declined to follow the Superior Court decision of *Allstate Insurance Co. v. CGU Group Canada Ltd*.[4] It is the approach taken by the arbitrator and the Court in *Allstate v. CGU* upon which Economical relies for its argument that a proper interpretation of FDR 14 (2) in this case should result in a finding of 0% fault against either driver.

Allstate v. CGU involved an intersection collision in which a heavy commercial vehicle stopped at a stop sign. The Court agreed with the arbitrator's finding that the heavy commercial vehicle proceeded into the intersection "*yielding to traffic in the passing lane*". A northbound vehicle was in the passing lane, but moved into the curb lane and collided with the heavy commercial vehicle.

In upholding the arbitrator's conclusion that the heavy commercial vehicle operator was not at fault, Keenan J. stated as follows:

> 6. The arbitrator correctly found that rule 14 (1) and (2) could not refer only to the duty to "stop". Once the driver has stopped at the intersection rule 14 no longer applies. Rule 5 applies. The driver is then subject to sec. 136 of the *Highway Traffic Act.* The arbitrator found that (the heavy commercial vehicle operator) did comply, in that he yielded to any traffic which would constitute an immediate hazard. He found that there was no negligence on the part of (the heavy commercial vehicle operator).

[4] [2001] O.J. No. 2963 (Keenan J.) ("*Allstate v. CGU*").

Arbitrator Rudolph found the decision in *Allstate v. CGU* to be, "*so short and so confusing that I do not feel that I can be bound by it when to do so would go against the obvious and plain meaning of Section 14 (2) of the Fault Determination Rules*". In particular, he found the court's reasoning that obeying a stop sign required both stopping, and yielding to traffic to be inconsistent with the conclusion that once a driver has stopped at an intersection, FDR 14 no longer applies, and that FDR 5 then applies.

In my view it may not have been necessary for Arbitrator Rudolph to say anything other than the Superior Court decision in *Allstate v. CGU* was distinguishable on its facts from the case before him. It would appear that in *Allstate v. CGU* the arbitrator had made a factual finding that the heavy commercial vehicle operator did yield to traffic approaching the intersection so closely that to proceed would constitute an immediate hazard, notwithstanding that a collision occurred. Perhaps this conclusion was based on the finding that the vehicle which collided with the heavy commercial vehicle moved from the passing lane – the lane of traffic to which the heavy commercial operator was found to have yielded, into the curb lane before the collision.

In any event, fortunately I am not in Arbitrator Rudolph's position of having to be concerned about being bound by *Allstate v. CGU*. The Superior Court upheld Arbitrator Rudolph's application of FDR 14 (2) in *Jevco v. Royal & SunAlliance.* Justice Whitaker stated the following (at paragraphs 17 and 19):

> In summary, the Arbitrator correctly identified the issues which required adjudication. The Arbitrator turned his mind to the statutory context in which the Rules operate. He considered the related jurisprudence and the plain language meaning of Rules 12.5 and 14.2. Further, the Arbitrator identified and applied the appropriate rules of law…The decision is in all respects, reasonable, supported

> by the plain language meaning of the Rule and understood in the context of the scheme of the Rules in the Regulations.

It is open to me to adopt the approach taken by Arbitrator Rudolph, and, to the extent required, if at all, to prefer the Superior Court judgment approving of Arbitrator Rudolph's decision in *Jevco v. Royal & SunAlliance* over the decision of Keenan J. in *Allstate v. CGU*.

I agree with Arbitrator Rudolph's implicit conclusion that FDR 14 (2) does not cease to apply after a vehicle stops at a stop sign at an intersection. Nor is it necessary, in my view, as Keenan J. suggested in *Allstate v. CGU*, to invoke FDR 5 to consider subsection 136 (1) of the HTA in interpreting FDR 14 (2).

In my opinion, FDR 14 (2) applies throughout the facts of the incident, and the use of subsection 136 (1) of the HTA to interpret what is meant by "*fails to obey a stop sign*" is an appropriate means of interpreting FDR 14 (2).

I believe I am supported in this view by the analysis of the Court of Appeal in *State Farm v. Aviva*. Although the court was considering what type of law was appropriate in applying FDR 5 – the "*ordinary rules of law*", when it concluded that relying upon an HTA section and an analogous FDR was a proper means of applying FDR 5, in my opinion the overarching *ratio* of the decision was that all the FDRs should be applied without implementing a tort law analysis.

The Court of Appeal's reasoning in *State Farm v. Aviva* supports the proposition that relying upon HTA sections or analogies to other FDRs is an appropriate means to

apply all the FDRs. In any case, resort should not be had to tort law analysis which the Court said is specifically excluded by FDR 3, and the overall scheme of the FDRs.

My comments in these immediately preceding paragraphs are essentially the basis for Jevco's supplementary submissions. Jevco emphasizes that *State Farm v. Aviva* significantly limits the extent of the inquiry which should be made in applying the FDRs. Specifically, resort should not be had to concepts of tort law in interpreting and applying the FDRs.

For its part, in its first submissions Economical actually did not disagree with the approach of making use of subsection 136 (1) of the HTA to interpret and apply FDR 14 (2). The difference is in the analysis Economical submits is required to apply 136 (1).

Economical's argument is essentially the same as what was advanced in *Allstate v. CGU*, that even though there was a collision in the intersection, its insured operator did obey the stop sign at the intersection. Economical submits that the evidence proves its insured stopped both before reaching the stop sign, and again before entering the intersection. Economical also submits that the evidence proves its insured yielded to traffic approaching so closely that to proceed would constitute an immediate hazard because she yielded to any traffic she could see, before she proceeded. Economical submits that using HTA 136 (1) to interpret the "*fails to obey a stop sign*" wording of FDR 14 (2) leaves no option but to conduct an analysis of what the driver required to yield knew or could have known about approaching traffic in the circumstances.

Economical submits that it does not run counter to the intent of the FDRs to make a finding that there is no fault on its insured even though a collision occurred in

the intersection where its insured had a stop sign and the Jevco motorcycle did not. A proper interpretation of FDR 14 (2) makes it possible for such a collision to occur, but with a finding that neither driver is at fault pursuant to the FDRs. Economical submits that the finding of the arbitrator in *Allstate v. CGU*, as upheld by the Superior Court, supports this argument.

In its supplementary submissions following the release of *State Farm v. Aviva*, Economical made a creative argument that the Court of Appeal's reasoning justifies nothing more than what I would call a "bare bones" approach to interpreting the FDRs, apart from FDR 5, whereby it would not even be appropriate to reference subsection 136 (1) of the HTA in applying FDR 14 (2).

Economical submits that the prohibition against conducting any type of tort law analysis to applying the FDRs requires interpreting the wording of FDR 14 (2) unaided, other than perhaps by a dictionary. Economical submits that in a post *State Farm v. Aviva* world, the proper way to interpret the FDRs would be not to make use of any external laws or interpretive aids for any FDRs – except FDR 5, which does authorize a consideration of the "*ordinary rules of law*", as long as it is not tort law. Instead, Economical suggests that "*fails to obey a stop sign*" in FDR 14 (2) should be decided solely on whether the vehicle facing the stop sign stops at or before the intersection.

The additional factor of whether the vehicle yields to traffic with the right-of-way after stopping should not be considered in interpreting FDR 14 (2). That is a concept imported from another statute – the HTA. There is no reference to a requirement to yield after stopping in the "*fails to obey a stop sign*" wording of FDR 14 (2). More importantly,

a reading into FDR 14 (2) of such a requirement would inevitably introduce the need to undertake a tort type analysis which the Court of Appeal in *State Farm v. Aviva* has said is inappropriate.

Economical's submissions highlight what I must say seems to be somewhat of a conundrum presented by the Court of Appeal's decision in *State Farm v. Aviva* – deciding what law – other than tort law, is appropriate in interpreting a particular FDR, and then avoiding using tort law principles in applying that law. The Court of Appeal itself seems to have recognized that this presents a very tricky exercise.

The Court stated (at paragraph 73):

> Aviva (which was arguing for a tort law approach to the "ordinary rules of law" in FDR 5) says that if fault is not determined under rule 5 (1) in accordance with tort law, the parameters for fault determination under that rule are unclear. I accept this complaint to a point: it is correct that determining fault without reference to pure tort law create some uncertainty as to what can be referred to, in making that determination.

The Court does not actually offer a solution to the problem other than stating that in the case before it, the arbitrator selected two things (an analogy to FDR 12 (5), and HTA subsection 141 (5)) which satisfied its non-tort law interpretation of "*ordinary rules of law*" in FDR 5.

The difficulty presented by having to interpret the FDRs without applying tort law principles is demonstrated by the situation which confronted Arbitrator Novick in *State Farm v. Aviva.* Relying upon FDR 12 (5) to find 100% fault against the left turning vehicle in that case was perhaps easier than making use of HTA subsection 141 (5) to find 100% fault against the left turning driver. The only difference between the facts of

the case and FDR 12 (5) was that there was no collision between the vehicles. Relying on FDR 12 (5) did not require Arbitrator Novick to have to make any findings of fact other than perhaps concluding that the actions of the left turning driver caused the motorcyclist to crash his motorcycle to the road in avoiding a collision.

Relying upon HTA subsection 141 (5) was more complicated however, because it involved determining whether the left turning driver afforded the approaching motorcycle a "*…reasonable opportunity…to avoid a collision*".

It appears that this required Arbitrator Novick to undertake an analysis which, in my humble opinion was remarkably similar, if not identical, to what would be performed to apply tort law principles. The Court of Appeal was clear however, that in its view Arbitrator Novick did not use tort law to determine fault.

To illustrate my point, The Court of Appeal describes Arbitrator Novick's approach and findings of fact as follows (at paragraphs 13)

> The arbitrator heard the oral testimony of both drivers. She also had before her the transcripts of the examination for discovery of the drivers. She weighed the evidence and made the following findings of fact:
>
> - (the motorcyclist) clearly had the right-of-way as he proceeded southbound on Young Street, approaching the intersection in question;
> - (the motorcyclist) did not have a full view of the intersection as he approached it because of cars that were stopped in the passing lane to his left;
> - there was no evidence that (the motorcyclist) was traveling at a speed faster than approximately 30 km/hr, a speed well below the posted speed limit of 50 km/hr;
> - (the left turning driver) did not see (the) motorcycle before making his left turn, although "it is clear that the motorcycle was there to be seen";

- there was no impact between the vehicles but as a result of (the left turning vehicle's) turn, (the motorcyclist) lost control of his motorcycle, fell to the ground and sustained injuries.

For the purposes of the HTA 141 (5) analysis, the key fact found by Arbitrator Novick was that the left turning vehicle did not see the approaching motorcycle. Based on that finding of fact, Arbitrator Novick concluded the left turning driver could not have afforded the approaching motorcyclist a reasonable opportunity to avoid a collision.

It should be noted that one of the grounds of appeal to the Superior Court was that Arbitrator Novick erred in not apportioning fault in accordance with the similar facts of a case which was determined in accordance with tort law principles (*Nash v. Sullivan* (1973), 1 O.R. (2d) 133, 1937 CanLII 785 (C.A.).

Spence J. found that Arbitrator Novick erred by not apportioning some fault to the motorcyclist. He stated that her finding that there were vehicles stopped to the motorcyclist's left as he approached the intersection ought to have led to a 50/50 apportionment of fault because the motorcyclist was not alert to that fact.

The Court of Appeal reversed the appellate judge in both the result and with respect to his application of the *Nash* case. The Court stated that there was no evidence to support the finding of fact he made which the Arbitrator did not make – that the motorcyclist was not alert to the stopped vehicles to his left as he approached the intersection. More significantly, the Court rejected the appellate judge's application of *Nash*.

Interestingly, the rejection seems to be based on Arbitrator Novick's factual findings which, the Court stated, rendered *Nash* inapplicable. It was not based on the

suggestion that a tort law analysis was improperly applied by the appellate judge. The Court of Appeal emphasized (at paragraph 26) that Arbitrator Novick's findings of fact were entitled to deference because, "*…she…had the advantage of seeing and hearing the testimony first-hand…the evidence was mainly testimonial – as opposed to documentary – and credibility was in issue.*"

The Court of Appeal distinguished *Nash* from the facts in *State Farm v. Aviva* by noting the significant factual difference that the motorcyclist in *Nash* was found to have been hidden from view to left turning vehicles as he approached the intersection, whereas Arbitrator Novick found as a fact that the motorcyclist in *State Farm v. Aviva* "*was there to be seen*".

In commenting on Arbitrator Novick's handling of the *Nash* case, the Court of Appeal stated the following (at paragraph 19):

> The arbitrator opined that had this case had been considered within the context of a tort action, some contributory negligence might be attributed to (the motorcyclist) based on (*Nash)*. However, because of her analysis of the loss transfer provisions, she found (the left turning driver) to be 100% at fault for the accident.

Later in its judgment, when it embarks upon its analysis which concludes that tort law is to be excluded from fault determination in the FDRs, the Court states the following (at paragraphs 41, 42, and 45):

> In the arbitrator's view, the quoted words in rule 5 (1) call for an approach distinct from a pure tort law analysis. To determine the degree of fault, she looked at rule 12 (5) of the FDRs – which governs situations similar to this case except that they involve a collision – and s. 141 (5) of the HTA. She did not use tort law to determine fault.

> The application judge acknowledged that rules 1 through 5 of the FDRs are provisions of general application. However, he saw nothing in them that would require the court to disregard the circumstances of the accident – specifically, that the cars to (the motorcyclist's) left as he approached the intersection were stopped – for the purposes of determining fault under rule 5 (1). In his view, it was an error in law for the arbitrator to have disregarded that circumstance. As a result, he set aside her decision and determined fault in accordance with the tort law jurisprudence, specifically, the *Nash* decision…
>
> In my view, the arbitrator correctly interpreted and applied the quoted words in rule 5 (1), having regard to the purpose and scheme of the loss transfer provisions as a whole. Accordingly, there was no basis for the application judge to set aside the Award and substitute his own determinations as to fault.

I will say that with its decision in *State Farm v. Aviva*, the Court of Appeal has presented a significant challenge to arbitrators tasked with interpreting the FDRs. They must interpret the FDRs without applying concepts of tort law even where the wording of a particular FDR may make it difficult to do so without undertaking what is essentially a tort law type of analysis.

In my view, the Court of Appeal's own comments in *State Farm v. Aviva* are indicative of what is a delicate balancing act: how to conduct a sufficient amount of analysis of the facts of an incident to properly apply an FDR, without venturing into the application of tort principles which are to be excluded from the analysis.

In commenting on Arbitrator Novick's approach to the interpretation of the FDRs the court said the following (at paragraph 77, arbitrator's emphasis):

> **The arbitrator's fault determination could be criticized for being insufficiently nuanced**. However, her approach is consistent with the legislative

> scheme, which is to provide an expedient and summary method of determining fault for the purposes of indemnification.

Only a few paragraphs earlier however (at paragraph 68, arbitrator's emphasis), the court reasoned as follows:

> **A determination of fault in tort law is often a lengthy, detailed and nuanced process, which requires findings of fact on the very circumstances excluded from consideration by rule 3**. By precluding a pure tort law approach to fault determination, rule 3 acts in harmony with the purpose of the legislative scheme because it promotes an expedient, more summary approach for determining fault.

In my opinion, determining the extent of analysis which may or may not be permissible following *State Farm v. Aviva* in interpreting the words, "*fails to obey a stop sign*" in FDR 14 (2) is most effectively accomplished by recalling that FDR 3 clearly sets out limitations on what may be considered in the analysis. For ease of reference I will set out here again the wording of FDR 3:

> 3. The degree of fault of an insured is determined without reference to,
>
> (a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or
>
> (b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.

The meaning of the words, "*the circumstances in which the incident occurs*", and "*including*", found in subparagraph 3 (a), received consideration in *Allstate v. CGU*. It would appear from the decision that the arbitrator considered that the words, "*the circumstances in which the incident occurs*" must relate only to circumstances external to the drivers of the vehicles involved in the incident. Unfortunately the arbitration

decision was unavailable for review in *Jevco v. Royal & SunAlliance*, and has remained so to date.

It is conceivable the arbitrator may have based his conclusion on the fact that the word "*including*" follows "*the circumstances in which the incident occurs*", and thereafter several "circumstances" are itemized citing factors which arguably would be external to the drivers – weather conditions, road conditions, visibility, and the actions of pedestrians.

Counsel for Allstate argued that the arbitrator erred in this conclusion because proper statutory interpretation as confirmed by the Court of Appeal in *Macartney v. Warner*[5] required that the words "*circumstances in which the incident occurs*" be given an expansive meaning, not a restricted one.

Macartney v. Warner dealt with an issue of whether the wording in subsection 61 (1) of the Family Law Act, R.S.O. 1990. c. F.3 was broad enough to include claims for nervous shock for relatives of the injured person. It is relevant to the issue in this case for its statutory interpretation analysis.

Laskin J.A. stated that where in a statute a list of specific examples follows more general wording, the ordinary rule of statutory interpretation – *ejusdem generis,* or the limited class rule does not apply. He stated further that where general wording was followed by the words "*may include*", this shows that the list of examples which follows "*may include*" is not intended to be an exhaustive definition of the general category.

[5] 2000 CanLII 5629 (ONCA).

Further, Laskin J.A. stated that where the legislative drafter has used specific examples introduced by the words "*may include*" this may be done so that there is no doubt as to the fact that the specific examples used are part of the general category, or that the general category extends to matters otherwise thought to fall outside of it. In either case, the purposes for which this is done are not intended to restrict the general category.

Keenan J. did not specifically agree or disagree with the argument advanced by counsel for Allstate based on *Macartney*. He stated simply, *"even if the arbitrator was wrong in his interpretation of Rule 3, there was no error in his ruling and disposition of the matter."*

Although the specific words used in the statute being analyzed by Laskin J. A. in Macartney were "*may include*", whereas in FDR 14 (2), the word used is "*including*", in my opinion a proper reading of the entirety of Laskin J. A.'s analysis is that where a statute sets out some specific examples following what is more general wording describing a category, the examples are not meant to restrict or limit the generality of the words describing the category.

When this principle of statutory interpretation is taken together with the stated purpose and intent of the FDRs to provide a means of allocating fault which is arbitrary, and favours expediency and economy over exactitude, in my opinion the words, "*the circumstances in which the incident occurs*" are not confined to factors external to the drivers involved in the incident such as those enumerated following the word "*including*" in FDR 14 (2).

I have been able to find a Superior Court decision which supports my interpretation of FDR 3, *Farmers' Mutual Insurance Company v. State Farm Insurance Company.*[6]

The Superior Court decision was an appeal of an arbitration award of Arbitrator Vance Cooper. It involved whether Arbitrator Cooper had properly applied FDR 7 (3). In summary, FDR 7 (3) allocates 100% fault to a vehicle exiting a driveway or parking lot onto a public highway which collides with a vehicle traveling on the public highway. Arbitrator Cooper found that FDR 7 (3) applied to the facts of the incident notwithstanding there was an issue as to which lane the motorcycle which had the right-of-way on the public highway was traveling in at the time the other vehicle exited a private driveway resulting in a collision.

One of the criticisms of Arbitrator Cooper's decision by Farmers' (who insured the vehicle exiting the driveway) was that his conclusions in the application of FDR 7 (3) would mean that a driver entering a highway from from a private road or driveway is always "*a sitting duck for any careless driver who is driving along the road.*"

In rejecting that argument, and approving Arbitrator Cooper's analysis, the court stated as follows (at paragraphs 27 and 28):

> …The difficulty with this submission is that it is grounded in the circumstances of the incident and ignores the direction of Rule 3; the degree of fault must be determined without reference to the circumstances in which the incident occurs.

[6] 2013 ONSC 2269 (Chiappetta J.) ("*Farmers' Mutual v. State Farm*").

> There is no doubt that a consideration of the circumstances in which the incident occurred would impact negatively on (the motorcyclist with the right-of-way on the public highway). (The motorcyclist) was operating his motorcycle at a high rate of speed and significantly in excess of the governing speed limit at that time. Prior to the incident, he had passed a number of vehicles in contravention of a double solid line governing his movements. He is not a sympathetic passer-by. In my view, however, Farmers' is attempting to use the circumstances of the incident to have its insured's involvement in the incident ignored. The facts are that their insured was entering the roadway and State Farm's insured was passing by. The facts fit squarely into the plain language of Rule 7 (3). A consideration of the circumstances contrary to Rule 3 would force a traditional tort like assessment; the exact lengthy assessment the *Fault Determination Rules* are meant to avoid.

The reasoning of the Court in *Farmers' Mutual v. State Farm* demonstrates that it considered the speed and driving behaviour of the motorcyclist with the right-of-way to be part of the "*circumstances in which the incident occurs"*. Clearly these are not factors external to the drivers involved in the incident.

In my opinion, considering all of the foregoing, the analysis I need to undertake, and should undertake in applying FDR 14 (2) is extremely brief.

Notwithstanding the novelty of Economical's argument that the consequence of *State Farm v. Aviva* means that HTA 136 (1) should not be used to interpret the words "*fails to obey a stop sign*" in FDR 14 (2) because of necessity this would involve the application of tort principles, I do not believe it is correct.

Arbitrator Novick's reliance on HTA 141 (5), and her methodology leading to several findings of fact made after hearing evidence was approved of by the Court of Appeal. In the Court's opinion this was appropriate, and it was not an impermissible

venture into the application of tort law. As the Court clearly stated, in its opinion *"…She did not use tort law to determine fault.*"

I am of the opinion that the authority *State Farm v. Aviva* provides justification for the use of HTA 136 (1) to aid in the interpretation of "*fails to obey a stop sign*" in 14 (2).

Further, the case law suggests that a "common sense" approach should be taken to the application of the FDRs.[7] It seems to me that it in the absence of a definition in the FDRs of the words "*fails to obey a stop sign*", it makes sense to look to a statute which governs road traffic in Ontario, the HTA, to seek assistance with giving the words a reasonable meaning for the purpose of dealing with a road traffic case. Arbitrator Rudolf did so in *Jevco v. Royal & SunAlliance*, and the Superior Court found his approach to be in keeping with the purpose and intent of the FDRs.

Therefore, I will rely upon HTA 136 (1) to interpret the meaning of the words, "*fails to obey a stop sign*" in FDR 14 (2), in allocating fault for this incident.

The facts as set out in the Agreed Statement of Facts which I find are the only ones essential for my application of FDR 14 (2) are outlined below (source references for the facts are omitted but can be readily determined by reviewing Exhibit 2):

> 1. On August 26, 2008, Randy Rev ("Rev") was involved in a motor vehicle accident ("the accident") while traveling southbound on Carrick Avenue, in Hamilton, Ontario.
>
> 4. On August 26, 2008, Rev's motorcycle collided with Stewart's motor vehicle.

[7] See *Royal & SunAlliance Insurance Company v. AXA Insurance Company*, private arbitration Award of Arbitrator Bruce Robinson, November 21, 2003.

5. The accident occurred at the intersection of Carrick Avenue and Dunsmure Road in Hamilton, Ontario…At the intersection of Carrick Avenue and Dunsmure Road, traffic traveling north and southbound on Carrick Avenue had the right-of-way, and traffic traveling east and westbound on Dunsmure Road was governed by stop signs.

6. According to the Motor Vehicle Accident Report, Stewart was traveling westbound on Dunsmure Road when she "stopped for sign" at its intersection with Carrick Avenue. The Motor Vehicle Accident Report further indicates that Rev, traveling southbound on Carrick Avenue was "unable to stop for" Stewart's vehicle and the two vehicles "collided"…

8. At her examination for discovery on June 19, 2012, Stewart testified that on the day of the accident she was traveling westbound on Dunsmure Avenue (*sic*) when she came to its intersection with Carrick Avenue. Stewart stated that she initially came to a complete stop before the stop sign. Stewart remained stopped for a few seconds, during which she scanned for traffic on Carrick Avenue to determine whether it was safe to proceed through the intersection…she had difficulty seeing the southbound traffic on Carrick Avenue due to a vehicle parked on the east side of Carrick Avenue north of the intersection…she moved her vehicle further into the intersection in order to see around the parked car. Following this second stop Stewart again looked both directions along Carrick Avenue for traffic…when she looked to her right she saw a "clear way" for her to cross.

12. Stewart testified that the first time she saw Rev's motorcycle prior to the collision was immediately before the accident occurred…She agreed that she did not "have an opportunity" to observe his vehicle approaching the intersection prior to the collision.

Based on the agreed facts submitted to me, Economical's insured did stop for the stop sign at the intersection of Carrick Avenue and Dunsmure Road. The question is, did she yield to traffic approaching the intersection (*i.e*. Jevco's insured motorcyclist, Randy Rev) so closely that to proceed would constitute an immediate hazard?

I find that Economical's insured did not yield to traffic approaching the intersection so closely that to proceed would constitute an immediate hazard. I agree with Jevco's submission, that based on the facts agreed to, the collision which occurred in the intersection between the Economical and Jevco vehicles is confirmation by itself that Economical's insured proceeded into the intersection when Jevco's insured was so close to the intersection that Economical's insured proceeding constituted an immediate hazard.

I do not agree with Economical's submission on HTA 136 (1) that if the evidence establishes its insured, Ms. Stewart, could not have seen Rev's motorcycle approaching on Carrick Avenue until it was virtually upon her after she had moved into its path in the intersection then she cannot be found to have not yielded as the subsection requires. This is a subjective interpretation of the wording which I am not even sure would apply using a tort analysis to absolve Economical's insured of fault. I am certain it should not be applied in interpreting FDR 14 (2) to absolve her of fault.

In my view, considering that the courts have clearly stated that the FDRs are to be applied in a "rough justice" manner, an objective interpretation of HTA 136 (1) should be used to interpret FDR 14 (2). The collision occurring in the intersection between the vehicles proves that Rev's motorcycle was approaching the intersection so closely that it was an immediate hazard for Ms. Stewart to proceed – whether or not she could have seen it approaching before she did.

This approach to interpreting the FDRs is in keeping with that taken by Arbitrator Rudolph in *Jevco v. Royal & SunAlliance* – approved on appeal, and with Arbitrator

Novick's approach in *State Farm v. Aviva*. In the latter case the Court of Appeal specifically noted and approved of Arbitrator Novick's finding that because the left turning driver did not see the approaching motorcyclist, he could not have afforded the motorcyclist a "…*reasonable opportunity to avoid a collision".*

In my opinion, for the purposes of applying FDR 14 (2) as the case law suggests it should be applied, the inquiry should end there, and 100% fault rests with Economical's insured.

An analysis of the evidence on the issue of whether Economical's insured could have, or should have seen Rev's motorcycle approaching before she did would, in my view, be a tort type of analysis of the "*circumstances in which the incident occurred*." The purpose of such an analysis would really be to explain how or why the collision occurred, which is not how the FDRs are to be applied.

For example, such an inquiry might consider whether Economical's insured's view of traffic approaching in the direction of Jevco's insured motorcyclist may have been obstructed by parked vehicles, by other stationary obstructions such as a mailbox, or perhaps even by the layout of the road in the approach to the intersection.

Such an inquiry could also focus on an whether there was evidence of excessive speed on the part of Jevco's insured motorcyclist – a speed that would be unexpected by Economical's insured in the circumstances, reducing significantly the time in which Economical's insured would have had to react to the approach of Jevco's insured motorcyclist and contributing to causing the accident.

A tort analysis would involve weighing the witness evidence described in the Agreed Statement of Fact against the evidence of Economical's insured driver. It may or may not lead to the conclusion that, as Arbitrator Novick put it in *State Farm v. Aviva*, Jevco's insured motorcyclist "was there to be seen", but for whatever reason, Economical's insured failed to see Jevco's insured motorcyclist as early as she should have, and she entered the intersection only adverting to the danger at the last moment.

All of these inquiries would in my view however, require a tort principle analysis in the application of FDR 14 (2). The possible obstruction of Economical's insured driver's view of the intersection by parked vehicles or other objects, the possible excessive speed of Jevco's insured motorcyclist and its effect on the perception of Economical's insured driver, and the possibility that, based on witness evidence, Economical's insured driver ought to have seen Jevco's insured motorcyclist before she did, are all, in my opinion, "*circumstances in which the incident occurs*".

Such an analysis would be done in a tort case where the issue of apportionment of fault for the collision to Jevco's insured motorcyclist would be relevant. It is not a relevant issue however, for FDR 14 (2). FDR 14 (2) is directed to allocating either 100% to the driver who "*fails to obey a stop sign*", or theoretically, if Economical's interpretation had been accepted, 0% fault to that driver. It is not directed to allocating a portion of fault to the driver with the right of way.

According to the case law, determining the apportionment of liability with "exactitude" is not the purpose of the FDRs, nor is it the type of analysis that, in my view, would be appropriate given the Court of Appeal's decision in *State Farm v. Aviva*.

To embark upon such an inquiry would be determining fault by referring to the "*circumstances in which the incident occurs*" – an analysis specifically excluded from the application of the FDRs by FDR 3, as confirmed by the Court of Appeal in *State Farm v. Aviva.*

Conclusion

For the foregoing reasons I conclude that FDR 14 (2) applies to the facts of the incident in this case. Applying FDR 14 (2) in accordance with the principles of the case law, especially *State Farm v. Aviva,* I find that Economical's insured is 100% at fault for the incident, and that Jevco is entitled to loss transfer indemnity from Economical on a 100% basis.

As the successful party in this arbitration, Jevco is entitled to recover its costs from Economical, including its share of the accounts I have rendered to date, and its share of my account for services subsequent to the arbitration hearing enclosed with this Award. Of course the ultimate disposition of costs and responsibility for payment of the arbitrator's fees and disbursements is subject to any readjustment which may be required consequent upon the result of any appeal of my Award.

Should the parties require my involvement in dealing with any costs issues, please contact my Coordinator to arrange a telephone conference to discuss them.

Dated at Toronto, March 15, 2017

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Scott W. Densem, Arbitrator