CITATION: Economical Mutual Insurance Company v. Jevco Insurance Company, 2017 ONSC 6534
COURT FILE NO.: CV-17-573297
DATE: 20171117

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Economical Mutual Insurance Company	)	H. Kawaguchi and A. LoCicero, for the applicant
Applicant (Applicant on Appeal)	)	
– and –	)	
Jevco Insurance Company	)	A. Lennox and R. Brown, for the respondent
Respondent (Respondent on Appeal)	)	
	)	**HEARD:** October 5, 2017

AKBARALI, J.

Introduction

[1] This application is an appeal from a preliminary issue hearing award of Arbitrator Densem dated March 15, 2017 in a loss transfer arbitration[1].

[2] The question before the arbitrator was whether rule 14(2) of the *Fault Determination Rules*, R.R.O. 1990, Reg. 668 (the "FDRs") applies in determining fault in respect of a motor vehicle accident involving vehicles insured by the parties. Arbitrator Densem found that the rule was applicable, and concluded that the applicant's insured was 100% at fault.

[3] The applicant appeals on the basis that the arbitrator erred in law in his interpretation of FDR 14(2) by having regard to the *Highway Traffic Act*, R.S.O. 1990, c. H.8, thus improperly reading ordinary rules of law into FDR 14(2). The applicant also argues that, if the arbitrator was entitled to have regard to s. 136(1) of the *HTA*, he made mixed errors of fact and law in failing to

[1] The arbitration was brought under under s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, s. 9 of *Automobile Insurance*, R.R.O. 1990, Reg. 664 and s. 23 of the *Arbitration Act, 1991*, S.O. 1991, c. 17.

apply s. 136(2) of the *HTA* and in misapplying FDR 3. The applicant also argues that the arbitrator made errors of mixed fact and law in concluding that its insured was 100% at fault for the incident when the evidence disclosed that its insured was not charged with a *HTA* infraction.

Background

[4] The facts are set out in an agreed statement of facts. The motor vehicle accident at issue occurred on August 26, 2008. R.R. was travelling southbound on Carrick Road in Hamilton on a motorcycle insured by the respondent. M.S. was travelling westbound on Dunsmure Road in Hamilton in a car insured by the applicant.

[5] Where Carrick Road and Dunsmure Road intersect, there were stop signs for eastbound and westbound traffic on Dunsmure Road. There were no stop signs for northbound and southbound traffic on Carrick Road. In other words, M.S. had a stop sign. R.R. did not.

[6] M.S. came to a full stop at the stop sign for westbound traffic. Her view of southbound traffic was blocked by a parked vehicle on the east side of Carrick Road. She pulled forward and stopped again to check for traffic. She looked left and right, saw a clear way to cross, and proceeded westbound at approximately 5 km/hr.

[7] M.S.'s vehicle was struck on its front passenger side by R.R.'s motorcycle. Some witnesses indicated that R.R. was speeding, estimating speeds of 60-80 km/hr in a 50 km/hr. zone.

[8] The police investigated the accident. The provincial prosecutor recommended against charging M.S. because she exercised her obligation under the *Highway Traffic Act* on entering the intersection.

[9] After the accident, R.R. applied for accident benefits to the respondent. The respondent commenced a loss transfer proceeding against the applicant. Arbitrator Densem was appointed. The parties agreed to proceed with a preliminary issue hearing to determine whether FDR 14(2) applies to the accident.

[10] The parties' arbitration agreement provides for a right of appeal on questions of law or questions of mixed law and fact.

The Statutory Scheme

[11] Central to this appeal are the FDRs, and the manner in which they should be interpreted. The s. 275 *Insurance Act* loss transfer framework, which includes the FDRs, provides for an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The FDRs allocate fault in a manner that in most cases would probably but not necessarily correspond with actual fault: *State Farm Mutual Automobile Insurance Company v. Aviva Canada Inc.*, 2015 ONCA 920.

[12] Three FDRs are particularly relevant to the arbitrator's analysis.

[13] FDR 3 provides that:

> 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.

[14] FDR 5(1) provides that, "if an incident is not described in any of these rules, the degree of fault of the insured shall be determined in accordance with the ordinary rules of law".

[15] FDR 14 applies to an "incident that occurs at an intersection with traffic signs." FDR 14(2) states:

> If the incident occurs when the driver of automobile "B" fails to obey a stop sign, yield sign or a similar sign or flares or other signals on the ground, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

[16] As I discuss below, a key issue in this appeal is how to interpret the phrase "fails to obey a stop sign". The parties disagree on the extent of the use which can be made of s. 136 of the *HTA*, which provides:

> (1) Every driver or street car operator approaching a stop sign at an intersection,
>
> (a) shall stop his or her vehicle or street car 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 and, having so yielded the right of way, may proceed.
>
> (2) Every driver or street car operator approaching, on another highway, an intersection referred to in subsection (1), shall yield the right of way to every driver or operator who has complied with the requirements of subsection (1).

The Arbitrator's Decision

[17] Arbitrator Densem began his analysis by reviewing the legislative intent behind the s. 275 loss transfer framework which, as I have noted, provides for an expedient and summary method

of allocating fault between insureds and providing for reimbursement between insurers. The arbitrator relied on the legal framework for the application of FDRs in a loss transfer case, which framework was described by the Court of Appeal for Ontario in *State Farm v. Aviva*.

[18] After identifying the incident in question, the arbitrator concluded it was described in FDR 14 because it occurred at an intersection which had traffic signs, that is, stop signs for traffic on Dunsmure Road.

[19] The arbitrator next concluded that FDR 14(2) is the relevant subsection because FDR 14(2) describes the situation where only one motor vehicle has a stop sign. He noted that this conclusion is supported by the diagrams accompanying FDR 14(2), and by his reading of the other subsections of FDR 14 which refer, for example, to all-way stop intersections, while FDR 14(2) does not.

[20] The arbitrator then considered how FDR 14(2) ought to be applied. He described the essence of the dispute to be "how to properly interpret the words "fails to obey a stop sign"". He concluded that FDR 14(2) continues to apply after a vehicle stops at a stop sign. He turned to s. 136(1) of the *HTA* to interpret what "fails to obey a stop sign" means.

[21] The arbitrator noted *State Farm v. Aviva*, in which the Court of Appeal considered what type of law is appropriate to consider when applying FDR 5, which, by its terms, provides that fault shall be determined in accordance with the "ordinary rules of law". The Court of Appeal concluded that the *HTA* and analogous FDRs are proper considerations when applying FDR 5. However, the arbitrator found that the overarching *ratio* of *State Farm v. Aviva* is that all the FDRs should be applied without implementing a tort law analysis. He found that the decision in *State Farm v. Aviva* supports his conclusion that relying upon *HTA* sections or analogies to other FDRs are an appropriate means to apply all the FDRs.

[22] The arbitrator found that FDR 3 limits the factors that can be considered in the analysis under the FDRs, and provides specific examples of factors that should not be considered. However, he found that FDR 3 does not confine the factors that are irrelevant to the analysis under the FDRs to only those external to the drivers involved in the incident.

[23] In the result, the arbitrator concluded that an objective interpretation of s. 136(1) of the *HTA* was available to him as an aid in the interpretation of the phrase "fails to obey a stop sign" contained in FDR 14(2). He found that M.S. stopped for the stop sign but concluded that she "did not yield to traffic approaching the intersection so closely that to proceed would constitute an immediate hazard". He concluded that the collision was confirmation by itself that she failed to obey the stop sign. He found that an analysis of whether M.S. could have or should have seen R.R.'s motorcycle would be a tort type of analysis, geared towards explaining why the collision occurred. Such an approach is contrary to the proper application of the FDRs.

[24] The arbitrator found that interpreting FDR 14(2) by having regard to s. 136(1) of the *HTA* is consistent with the "rough justice" manner in which the FDRs are to be interpreted.

[25] Thus, the arbitrator found that M.S. was 100% at fault for the incident. The respondent was thus entitled to recover its costs from the applicant.

Issues

[26] There is no appeal taken with respect to the applicability of FDR 14(2). Rather, the appeal focuses on the interpretation and application of FDR 14(2). It raises the following issues:

a. What is the appropriate standard of review from an arbitrator's decision on a question of law, that is, the interpretation of the phrase "fails to obey a stop sign", under FDR 14(2)?

b. Did the arbitrator commit reversible error by using s. 136(1) of the *HTA* to interpret the phrase "fails to obey a stop sign" in FDR 14(2)?

c. Are the arbitrator's conclusions of mixed fact and law that M.S. was 100% at fault for the incident unreasonable?

Standard of Review

[27] The parties agree that questions of mixed fact and law are reviewable on a reasonableness standard.

[28] The applicant argues that the standard of review for a question of law, including the interpretation of FDR 14(2), is correctness. It relies on *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110, where the court found that a question of law arising from a loss transfer arbitration is reviewed on a correctness standard.

[29] In my view, *Old Republic* has been overtaken by the decision of the Court of Appeal in *Intact Insurance Co v. Allstate Insurance Co. of Canada,* 2016 ONCA 609. In *Intact v. Allstate*, the Court of Appeal considered the standard of review of an extricable question of law arising on a priority dispute. It followed the two stage analysis set out in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 62. This analysis requires a court to first ascertain whether the jurisprudence has already determined the degree of deference to be accorded to a particular category of question. Second, if the degree of deference has not yet been determined, the court must proceed to an analysis of certain factors making it possible to identify the proper standard of review.

[30] *Intact v. Allstate* cautions that the question for which the appropriate standard of review is sought must be identified precisely. In that case, the court considered the standard of review for an insurance arbitrator's interpretation of the *SABS* and, in particular, the meaning of "dependency" for purposes of that regulation.

[31] Thus, the court considered a different precise question than the one that arises before me – the standard of review for an insurance arbitrator's interpretation of the FDRs and in particular, the meaning of "fails to obey a stop sign" in FDR 14(2).

[32] However, the Court of Appeal's detailed analysis of the applicable standard of review in *Intact v. Allstate* applies equally to the question before me. I note that the court in *Old Republic* did not have the benefit of the Court of Appeal's analysis when it reached its conclusions as to standard of review.

a. The Supreme Court of Canada found in *Creston Moly Corp. v. Sattva Capital Corp*¸ 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 106 that the standard of review on an appeal from a question of law on an arbitration will be reasonableness unless the question is one that would attract the correctness standard, such as jurisdictional questions, constitutional questions, or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The Supreme Court's holding was applied to arbitrations under the *Arbitrations Act, 1991* (like the arbitration at issue here) by the Court of Appeal in *Ottawa (City) v. Coliseum Inc*., 2016 ONCA 363, 35 C.P.C. (7th) 213 (Ont. C.A.): *Intact v. Allstate,* at paras. 41 and 42.

b. A right of appeal on questions of law or questions of mixed law and fact does not render *Sattva* inapplicable: *Intact v. Allstate,* at paras. 43 and 44. The arbitration agreement here provides for a right of appeal on questions of law or questions of mixed law and fact.

c. The question at issue here is not one of the exceptional questions identified in *Sattva* as attracting a correctness standard of review: *Intact v. Allstate,* at paras. 41 and 51.

d. Insurance arbitrators are recognized as having expertise and experience in interpreting insurance laws. The parties are able to select their decision makers, thus creating a presumption that they will choose someone with relevant expertise. The presumption of a reasonableness standard of review applies: *Intact v. Allstate,* at paras. 46 and 50.

e. The question at issue – the interpretation of the FDRs – is not one over which the insurance arbitrator and the court share jurisdiction at first instance: *Intact v. Allstate,* at para. 51.

[33] I thus conclude that on an appeal to the Superior Court from an insurance arbitration regarding the interpretation of the FDRs on an extricable question of law, a reasonableness standard of review will apply unless the question is the kind of exceptional question identified by the Supreme Court of Canada in *Sattva*, that is, a question of jurisdiction, a constitutional question or a general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized error of expertise.

[34] A reasonableness standard is concerned "mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir,* at para. 43.

Was the arbitrator's approach to the interpretation of FDR 14(2), and in particular his use of s. 136(1) of the *Highway Traffic Act,* unreasonable?

[35] The applicant argues that the arbitrator erred by having regard to s. 136(1) of the *HTA* to interpret the phrase "fails to obey a stop sign". I disagree. I find that the arbitrator's conclusion was reasonable. If the standard of review were correctness, I would have found that the arbitrator's interpretation was correct.

[36] The parties agree that the arbitrator was bound to apply the modern approach to statutory interpretation which requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[37] The arbitrator first correctly identified the nature of the legislative scheme. The parties agree that the loss transfer scheme provides an expedient and summary method of spreading the cost of statutory accident benefits among insurers, in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude: *State Farm v. Aviva,* at para. 56; *Jevco Insurance Co. v. York Fire & Casualty Co.*, (1996), 27 O.R. (3d) 483, 1996 CanLII 11780 (C.A.), at paras. 8-9. This is a relevant consideration when interpreting FDR 14(2).

[38] The arbitrator then correctly noted that FDR 3 prohibits the consideration of ordinary principles of tort law when interpreting any of the FDRs: *State Farm v. Aviva*, paras. 59, and 66-71. Thus, in his approach to the interpretation of FDR 14(2), the arbitrator was cognizant that he could not take into account ordinary principles of tort law.

[39] The arbitrator concluded that *State Farm v. Aviva* supported his decision to have regard to the *HTA* as an interpretive aid. The applicant argues this is reversible error.

[40] *State Farm v. Aviva* was a decision concerning FDR 5, which by its terms provides for fault determinations in accordance with "the ordinary rules of law." The Court of Appeal found that the arbitrator in that case had proper regard to analogous FDRs and to provisions of the *HTA* when determining fault under FDR 5. The applicant argues that this *ratio* is limited to fault determinations under FDR 5. It states that to allow resort to the ordinary rules of law such as the *HTA* when considering fault under FDR 14(2) renders FDR 14(2) meaningless. All fault determinations would effectively proceed under FDR 5 if the ordinary rules of law could be imported into the determination of fault under anything other than FDR 5.

[41] In my view, *State Farm v. Aviva* does not squarely address whether the ordinary rules of law are a proper consideration in the interpretation of the FDRs other than FDR 5. The question does not arise in the circumstances of that case. However, the court's approach leaves open the possibility that the *HTA* is an appropriate interpretive aid when other FDRs, apart from FDR 5, are at issue.

[42] In *State Farm v. Aviva,* the court noted that when determining fault under FDR 5, the arbitrator considered two things, both of which fall within the "ordinary rules of law" - an

analogous FDR and the relevant *HTA* provision. On the facts of that case, each of these ordinary rules of law supported the same fault determination. The court found the arbitrator's approach to be consistent with the legislative scheme to provide an expedient and summary method of determining fault for the purposes of indemnification, in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude. The decision suggests that the *HTA* may be an appropriate interpretive aid in view of the purposes of the legislative scheme.

[43] Moreover, in *Jevco v. York*, the court found that the "thrust" of the FDRs is "based on well-established rules of the road to determine the probability of fault": para. 6. This also supports the use of the *HTA* as an interpretive aid to the FDRs.

[44] The arbitrator noted the case law suggesting a common sense approach should be taken to the application of the FDRs. He found that, in the absence of a definition of "fails to obey a stop sign," it makes sense to look to the *HTA,* which governs road traffic in Ontario, to seek assistance in giving the words a reasonable meaning.

[45] The applicant argues that the arbitrator should only have considered the plain meaning of the words "fails to obey." It offers dictionary definitions of "fails" and "obey" to suggest that the phrase "fails to obey" denotes the failure to abide by a rule or a law. This raises the question: what rule? What law?

[46] The modern approach to statutory interpretation required the arbitrator to consider the context of FDR 14(2). In my view, the plain language "fails to obey a stop sign" supports the use of the *HTA* as an interpretive aid. It is the rules of the road, upon which the FDRs are based, that provide the context to understand what it means to fail to obey a stop sign. The rules of the road are contained in the *HTA.* It was reasonable for the arbitrator to have regard to the *HTA* when interpreting that phrase.

[47] The arbitrator concluded that "fails to obey a stop sign" includes failing to stop at a stop sign and failing to yield to traffic approaching the intersection so closely that to proceed would constitute an immediate hazard. This language is drawn directly from s. 136(1) of the *HTA*. It is consistent with the plain meaning of the words and the context of FDR 14(2). It is a reasonable interpretation of the phrase.

[48] The applicant alleges that if the arbitrator was entitled to have regard to s. 136(1) of the *HTA*, the arbitrator made an error of mixed fact and law in failing to also have regard to s. 136(2). In my view, whether s. 136 of the *HTA* can only be an interpretive aid to FDR 14(2) if it is taken in its entirety is a question of law, so I address this argument at this stage of my analysis.

[49] The argument is that a driver cannot be at fault for failing to obey a stop sign if, by her actions, she has gained the right of way as contemplated by s. 136(2) of the *HTA.* In my view, the arbitrator reasonably declined to consider s. 136(2) when determining the approach to FDR 14(2).

[50] The arbitrator declined to consider s.136(2) because to do so would have required an analysis of factors precluded by FDR 3, including whether M.S.'s visibility was impeded and

whether she could have seen R.R.'s motorcycle approaching. The arbitrator found that these considerations would import a subjective interpretation of the wording, when an objective interpretation was mandated.

[51] The applicant argues that the arbitrator's interpretation of FDR 14(2) deprives the phrase "fails to obey a stop sign" of meaning because on his interpretation, the phrase may as well read "has a stop sign". The respondent states that the phrase "fails to obey a stop sign" is correct because if the phrase were "has a stop sign", a driver who was stopped at a stop sign and was then struck by a vehicle that did not have a stop sign would be at fault. I accept this distinction between "has a stop sign" and "fails to obey a stop sign". The arbitrator's decision is consistent with this distinction.

[52] The arbitrator's decision is also consistent with the purpose behind the legislative scheme, to provide a summary and expedient way of allocating fault that in most cases will probably, but not necessarily, correspond with actual fault. A full examination of the circumstances of the accident, including tort considerations, might well favour M.S. But the legislative scheme leaves room for cases where fault is allocated in a manner inconsistent with actual fault.

[53] In my view, the arbitrator considered relevant factors in interpreting FDR 14(2), applied the modern approach to statutory interpretation and reached a reasonable conclusion.

Was the arbitrator's conclusion that M.S. was 100% at fault for the incident unreasonable?

Did the arbitrator unreasonably fail to consider relevant factors because he misapplied FDR 3?

[54] The applicant argues that the arbitrator unreasonably erred in his application of FDR 3 when he concluded that the fact of the collision was confirmation by itself that M.S. proceeded into the intersection when R.R. was so close to the intersection that M.S.'s proceeding constituted an immediate hazard. The applicant argues that the arbitrator should have considered other factors, and particularly, the actions of R.R. The applicant relies on *Kingsway General Insurance Company v. The Dominion of Canada General Insurance Company*, an appeal decision of Sachs J. dated January 11, 2000, unreported, wherein she found that FDR 3 could not be used to preclude a consideration of "the very circumstance that gives rise to the application" of the FDRs.

[55] In my view, *Kingsway v. Dominion* is distinguishable. There, a heavy commercial vehicle was involved in the incident, but not in the accident. The involvement of the heavy commercial vehicle was the reason the FDRs applied to determine fault. An argument was made that FDR 3 precluded the consideration of the actions of the heavy commercial vehicle. Sachs J. found that to apply the FDR rules because of the heavy commercial vehicle's involvement, and then be precluded from considering that involvement, thus rendering the FDR at issue inapplicable, made no sense.

[56] Similarly, in *Lombard Canada Co. v. Axa Assurance Inc.*, 2007 CanLII 4322 (ON S.C.), another case on which the applicant relies, the court was considering a chain reaction collision involving three vehicles. The question was whether the actions of the driver involved only in the first collision in the chain were relevant to the assessment of fault in the second accident in the chain. Newbould J., in o*biter,* wrote that the FDRs should not be used in a way that ignores one of the drivers involved in the incident.

[57] In this case, the arbitrator did not fail to consider R.R.'s involvement in the incident. He took note of the fact that R.R. had no stop sign while M.S. did. He noted that there was a collision between the vehicles in the intersection. Thus, he did not ignore any of the drivers involved in the incident. Rather, he declined to take account of R.R.'s speed, concluding it was an impermissible tort consideration. This was not an unreasonable approach. It is consistent with the approach taken by Chiappetta J. in *Farmers' Mutual Insurance Company (Lindsay) v. State Farm Insurance Company*, 2013 ONSC 2269, at para. 28.

[58] By not considering the speed at which R.R. was travelling or any factors that would engage a tort analysis, the arbitrator's approach was consistent with the purpose of the FDRs as an expedient and somewhat arbitrary way to determine fault. In my view, the arbitrator did not unreasonably conclude that the fact of the collision in the intersection was sufficient to determine that M.S. was 100% at fault under FDR 14(2).

Did the arbitrator unreasonably fail to consider the evidence that M.S. was not charged under the HTA?

[59] The applicant argues that the arbitrator unreasonably failed to conclude that M.S. was not at fault for the incident. It relies on the police investigation and the recommendation of the provincial prosecutor not to charge M.S. because she exercised her obligation under the *HTA* on entering the intersection. The applicant argues that, having used the *HTA* as a guide to interpreting FDR 14(2), it is inconsistent to conclude M.S. is at fault when charges against her were considered and not laid because she met her obligation under the *HTA.*

[60] The police investigation is not restricted by FDR 3. In their investigation, the police can consider a myriad of factors that are not permissible under the FDRs, including the speed at which R.R. was travelling, whether M.S.'s visibility was obstructed, and any other factors relevant to an actual determination of fault. The police investigation necessarily takes into account factors that are relevant in a tort analysis.

[61] As I have already noted, the purpose of the FDRs is to provide for a summary and expedient way of determining fault that will probably, but not necessarily, accord with actual fault. The results of the police investigation suggest that M.S. may not bear actual fault in this case. Actual fault is not relevant for the purposes of the FDRs.

[62] The arbitrator did not unreasonably fail to consider the results of the police investigation. Had he considered them, he would have been importing impermissible considerations into the determination under the FDRs.

Conclusion

[63] The standard of review from Arbitrator Densem's decision is reasonableness. The arbitrator reasonably interpreted FDR 14(2) having regard to s. 136(1) of the *HTA*. He reasonably concluded that M.S. was 100% at fault for the incident for purposes of the FDRs. The appeal is dismissed.

[64] The parties agree that the successful party is entitled to its costs of this appeal in the amount of $5,000 plus H.S.T. The applicant shall pay this amount to the respondent within thirty days.

Akbarali J.

Released: November 17, 2017

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REASONS FOR JUDGMENT

Akbarali J.

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