

## Ont. C.A. on How to Interpret the Fault Chart

### A Commentary on *State Farm v. Aviva* by John D. Strung Strung Mediations and Arbitrations Inc.

Update: On Sept. 22, 2016, [leave to appeal to the Supreme Court of Canada](#) was dismissed with costs.

On Dec. 24, 2015, the Ontario Court of Appeal delivered [State Farm Mutual Automobile Insurance Company v. Aviva Canada Inc.](#), 2015 ONCA 920, a decision which will be of absolutely no interest to anyone but members of the motor vehicle insurance bar. However to anyone who has reason to deal with the automobile insurance Fault Chart, reading this case is a must

The case deals with section 5(1) of the Fault Chart which states:

5. (1) 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.

Prior lower court and arbitration decisions had proceeded on the basis that “the ordinary rules of law” equated to “the ordinary tort rules of law”.

This case involved an accident in which a southbound motorcyclist was injured when he swerved to miss a northbound motor vehicle that turned left across his path. Since there was no contact between the vehicles, none of the fact situations enumerated in the fault chart was applicable and fault fell to be determined by the “ordinary rules of law” under section 5(1).

If the term “ordinary rules of law” equated to “ordinary tort rules of law”, the motorcyclist could potentially have been held contributorily negligent. However, the Court of Appeal held that not to be the case and found that under s. 5(1) of the fault chart, the motorist was 100% at fault.

The gist of the Ontario Court of Appeal decision is below:

[46] The meaning to be given to the “ordinary rules of law” in rule 5(1) of the FDRs is a matter of statutory interpretation...

[48] The quoted words are within rule 5(1), rule 5(1) is part of the FDRs, and the FDRs are an integral part of Ontario’s loss transfer scheme. Ontario’s loss transfer scheme, therefore, provides the context within which to consider the quoted words. Thus, I begin with a consideration of that scheme.

[56] The legislation which creates the loss transfer scheme consists of the relevant provisions of the Act together with the FDRs. The purpose of the loss transfer scheme is to provide for 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: *Jevco Insurance Co. v. York Fire & Casualty Co.* (1996), 27 O.R. (3d) 483, 1996 CanLII 11780 (C.A.), at paras. 8-9.

The wording of rule 3

[59] Rule 3 says that fault is to be determined “without reference to ... the circumstances in which the incident occurs”.

[57] For ease of reference, I set out rule 3 again now:

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.

[58] A plain reading of rule 3, considered in conjunction with its location in the FDRs and the purpose of the loss transfer scheme, leads me to conclude that rule 3 informs all fault determinations made under the FDRs, including those made pursuant to rule 5(1).

[67] The view that rule 3 informs all fault determinations made under the FDRs, including those made pursuant to rule 5(1), is further reinforced by reference to the purpose of Ontario’s loss transfer scheme. That purpose, as previously indicated, is to provide an expedient and summary method of resolving indemnification claims.

[68] 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.

[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 purposefully

excluded from consideration by rule 3. Furthermore, as already discussed, 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.

I suspect this issue will require some further clarification by the courts in the future as to exactly what factors can and cannot be considered under s. 5(1).

© Strung Mediations and Arbitrations Inc., December, 2015