

IN THE MATTER OF THE *Insurance Act*, R.S.O. 1990, c l.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:

CARADOC TOWNSEND MUTUAL INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Kevin D. H. Mitchell: Counsel for the Applicant, Caradoc Townsend Mutual Insurance Company (hereinafter called Caradoc)

Tim Crljenica: Counsel for the Respondent, Economical Mutual Insurance Company (hereinafter called Economical)

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991, to arbitrate a dispute between two insurers with respect to a loss transfer matter pursuant to section 275 of the *Insurance Act* and its regulations.

This claim arises from an accident that occurred on June 15, 2018 when there was an incident between a motorcycle insured by Caradoc and a personal automobile/BMW insured by Economical.

All parties agree that loss transfer is applicable. This dispute is with respect to liability.

Both parties agree that Rule 5 of the Fault Chart is applicable but disagree with respect to the facts of the case and what liability flows from those facts.

The parties have selected me as their Arbitrator on consent and this matter proceeded to a Hearing with viva voce evidence on June 23, 2021. At that time, three witnesses were called: LM, the driver of the motorcycle, DK, her husband who was operating his own motorcycle, and QM, the driver of the BMW. In addition, subsequent to hearing the evidence of the three witnesses, counsel submitted written submissions and Books of Authority and we had a half-day of oral submissions on July 20, 2021.

Exhibits:

In addition to the written submissions provided by the parties, I also received the following exhibits:

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| Exhibit 1 | An Arbitration Agreement signed by both counsel |
| Exhibit 2 | A Joint Document Brief including: <ul style="list-style-type: none">• Various certificates of insurance• Notices with respect to the loss transfer and requests for indemnification• Transcripts of the Examination Under Oath of Ms. LM from November 15, 2019 and October 21, 2020• Transcript of the Examination Under Oath of Mr. QM of October 21, 2020• Police reports and records as well as various photographs of the location. |
| Exhibit 3 | A diagram completed by DK during the course of his evidence to show the location of the vehicles when he arrived at the scene |

Issue in Dispute

The Arbitration Agreement identified the issue in dispute with respect to this Hearing as follows:

“What is the apportionment of fault for the accident as between the two insured drivers.”

Issues with respect to indemnification and/or quantum are on hold pending the decision on liability.

Factual Background

On June 15, 2018, LM and her husband DK were on their respective motorcycles travelling through St. Catharines on their way to meet friends in the Niagara Region to enjoy a motorcycle drive together.

The trip began on Scots Street, the claimant's home. Ms. LM and Mr. DK are common-law spouses and motorcycle enthusiasts. They own Harley Davidsons. Both bikes have had the baffle removed on the exhaust pipes to allow a greater engine roar.

The two motorcyclists were proceeding north on Bunting in St. Catharines heading towards Welland Street. They were riding in a staggered position with Mr. DK to the front and left of the lane and Ms. LM at the back and to the right of the lane.

At the corner of Bunting and Carlton, a BMW that had gone into the left lane ostensibly to make a left turn decided not to make the left turn and moved back into the right lane cutting off the two motorcyclists. This was the BMW driven by Mr. QM.

Mr. DK was upset with respect to this and moved up beside Mr. QM's vehicle and either gestured or spoke to him to indicate his displeasure.

The motorcyclists then got back into their staggered position and continued along Bunting.

Mr. QM had started his trip that morning from his home on Butternut Boulevard in Niagara Falls. He was driving a 2013 BMW SUV that was owned by GL a friend his. Mr. QM was going to pick up two individuals in Niagara-on-the-lake who did not have access to a car in order to take them to Popeyes in St. Catharines. These two individuals were picked up and at the relevant time were sitting in the rear-passenger seats of the BMW.

Turning back to the incident itself, Mr. QM was travelling in the same direction as the motorcycles on Bunting having moved back into the right lane after recognizing he had mistakenly gone into the wrong left-hand turn lane to get to Popeyes. As he approached the correct plaza, Mr. QM moved into the left-turn lane. Mr. DK continued on Bunting. Ms. LM moved into the left-turn lane and followed Mr. QM into the plaza entrance.

At the entrance to the plaza, there are two lanes for cars. One entering the plaza and one exiting the plaza. For those cars entering the plaza the lane narrows where a curb moves out into the laneway. In order to access Popeyes one makes a left turn to Popeyes and there are parking spaces in that area.

At this point, the stories of the parties as to what occurred differ considerably.

Ms. LM claims that she followed Mr. QM in as she wished to indicate to him her displeasure with respect to his driving. She claims to have pulled up to the driver's side of Mr. QM's vehicle while it is stopped in the plaza entranceway. At this point, both vehicles were in the same lane travelling in the same direction.

Ms. LM claims that at this point she spoke to Mr. QM and that he saw her through his driver's window. She claims that he then made a left turn to go into Popeyes and the wheels of the car knocked her bike down resulting in her falling into the ground and fracturing her shoulder. Mr. QM then went to Popeyes and parked.

Mr. QM claims that he never saw Ms. LM and that there was no conversation between them. Mr. QM claims that he started his turn to go into Popeyes and then heard a noise and stopped and saw that Ms. LM was in the laneway with her bike fallen over. He denies any contact between his car and the bike.

This is a general outline with respect to the factual background of this case and I will now turn to the relevant evidence of each of the witnesses.

Evidence of LM

Ms. LM was born in 1956. She has been riding a motorcycle for about 6 years.

On the day in question, she and her husband were heading towards Niagara with a view to meeting friends and going on a joy ride. Ms. LM describes herself as an experienced motorcycle driver. They left from home and were proceeding north on Bunting towards Welland Street. At the corner of Carlton and Bunting, there was a red light. They were in a lane together but staggered with Mr. DK ahead and to the left. When the light changed green, a BMW in the left lane suddenly veered into their lane almost cutting off Mr. DK. Ms. LM says that her husband pulled ahead and caught up with the driver of that vehicle and was speaking to him and gesturing. It was her impression that there was some sort of communication between her husband and the driver of the vehicle. Her husband then dropped back and the BMW continued forward.

The BMW then made a left turn from a left turn lane into a plaza. Mr. DK continued on while Ms. LM followed the BMW into the plaza.

Ms. LM says she followed him as she was concerned about his driving.

She claims she honked the horn of her motorcycle and pulled up to the driver's window of the BMW. It was her impression that there were kids in the backseat and that was also of concern to her. She describes both rear windows, front window, and the side windows as being tinted or dark. However, she says that the driver was able to see her and she was able to see him and it was her impression that he knew she was there.

She put her bike in neutral and says that the seat of her bike would be by the driver's window. She started to speak to Mr. QM telling him her concern about his driving. Both vehicles were completely stopped at this point in the same lane. She does not know why Mr. QM had stopped where he did.

Although her motorcycle was in neutral, it was still running. Mr. QM's engine was still running. There was no music on. Ms. LM says the exhaust of her motorcycle is loud because of the removal of the baffles.

She describes her bike as being 8 inches or so from the BMW. She got that close because she wanted his attention. She could have touched the car if she reached out with her hand.

Ms. LM says she knew that Mr. QM saw her because he pointed at her. She acknowledged that the windows were not rolled down on the BMW. Ms. LM believed that Mr. QM was listening to her. She did not however hear his voice.

It was about 45 to 60 seconds from the time that Ms. LM pulled up beside Mr. QM when he started moving forward as to make a left turn. Ms. LM could tell that he was going to hit her motorcycle and she screamed. She lifted her left leg to stop her leg from getting hit and then she and the motorcycle fell to the ground when the left front wheel of the BMW hit the front wheel of the motorcycle.

Ms. LM specifically denies ever losing her balance and says when she was speaking to Mr. QM both feet were on the ground she is quite clear in her evidence that it was the BMW wheel contact to her front wheel that caused the incident.

Ms. LM fell to the ground where she injured her shoulder and later it was determined she had a fracture to her left shoulder.

Ms. LM's evidence is that Mr. QM continued on with his left turn and parked in the Popeyes lot. At this point Ms. LM says she was unable to lift up her motorcycle from the ground herself. She claims Mr. QM got out of his car in the Popeyes parking lot and walked over to her saying "sorry I will pay for everything". At about this time her husband DK arrived to the scene. Mr. DK was very upset and claims that Mr. QM reiterated to him that he would pay for everything and that he was sorry.

Both Ms. LM and her husband claim that there was a witness: Riley. He spoke to them and told them that he had witnessed the incident and gave his name and phone number. The paper with his name and phone number on it (with the name R on it and phone number) were included in the Joint Book of Documents. Riley was never located to give any evidence.

At some point cellphones were used to take pictures of M. QM's information. The police were not called as while there was damage to the motorcycle, all parties believed it was less than \$1,000.00.

As to the passengers in Mr. QM's vehicle Ms. LM never saw them and understands that they went into Popeyes for food.

With respect to the damage to the bike, it was mostly on the left side due to the contact with ground although she claims some damage on the right side.

Ultimately, the police were called when Ms. LM determined that she had a fracture to her shoulder and she believes there was an interview on June 21 when the police officer came and took her report.

Lastly, Ms. LM will say that she did call Mr. QM and speak to him to advise him that she had to call the police and go through the insurance company as she had broken her collarbone.

On cross-examination, Ms. LM acknowledged that she could not confirm whether or not Mr. QM's eyes were looking at her when she was beside his vehicle but only that his head was turned toward her and it was her impression that he was looking and pointing at her.

I found Ms. LM to be a straightforward witness. There were a few inconsistencies in her evidence but none that I found to be significant in relationship to the decision I have to make in this Hearing.

Evidence of DK

Mr. DK was born in 1956 and he works as a quality assurance inspector for NRB Inc. in Grimsby. He too is an experienced motorcycle driver.

Mr. DK's evidence was consistent with the evidence of his wife with respect to the facts leading up to Mr. QM making his turn to go to Popeyes. Mr. DK confirms he was the lead motorcycle with his spouse behind him to his right. When Mr. QM moved from the left lane back into the right lane, Mr. DK claims he was cut off and he had a "few choice words" for Mr. QM.

After this incident, Mr. DK fell back behind the BMW and ultimately continued on north after the BMW turned left into the plaza.

Mr. DK proceeded along Bunting and then looked into his rear-view mirror and noticed that his spouse was not there.

This happened before he reached Welland and he made a U-turn in order to go back and look for her.

Ultimately, he located his spouse in the entrance lane to the plaza. He noted that there was a concrete median and that the lane itself squeezes to the left as it becomes narrower. When Mr. DK arrived at the scene, both vehicles were still in the entrance lane. Both vehicles were stopped in the same lane. Mr. QM's vehicle was on an angle as if it were making a left turn and the motorcycle was on the ground but was in the process of being lifted up when Mr. DK arrived.

Mr. DK says the windows of Mr. QM's vehicle were tinted. He says that the BMW was very close to the bike. The bike was on the ground lying front to back close to the driver's door of the BMW. He says the seat of the motorcycle would have been at the driver's door. With the bike laying on the ground, part of it was in the oncoming lane for traffic exiting the plaza but when it was lifted up Mr. DK's evidence is that it would have been entirely in the incoming lane.

The vehicles were then moved into the parking lot at Popeyes where information was exchanged/pictures taken of Mr. QM's identification.

Mr. DK was clear that the car of Mr. QM was still in the lane when he got there and was not in the parking lot. The bike was beside it.

I found Mr. DK also to be a good witness. There were very few inconsistencies in his evidence. While he did not see the incident, his evidence was quite clear as to what he saw when he arrived at the scene.

Evidence of QM

An interpreter was present to assist Mr. QM as his first language is Mandarin. However, other than on one occasion, Mr. QM did not require the assistance of the interpreter and his evidence was a question/answer entirely in English.

Mr. QM was born in China in 1990. He came to Canada in 2011 as a student. He became a permanent resident in October of 2018.

In June of 2018, he lived in Niagara Falls with his wife. He described an arrangement with GL the owner of the BMW whereby for some period of time he had access to the vehicle with the consent of Mr. GL.

Mr. QM confirms the evidence given by Mr. DK and Ms. LM with respect to the incident when he pulled back into the right lane. Mr. QM said he had left his home to go and pick up two teenagers in Niagara-on-the-Lake to take them to St. Catharines to go to Popeyes. He had some general knowledge of the area and he pulled into a left lane at Carleton believing that was the turn he needed to get into a plaza to go to Popeyes. However, it ended up being a smaller plaza and the wrong one. When the light changed green at this intersection Mr. QM admits that he moved from the left lane into the right lane and that he could have cut off the motorcycles.

Mr. QM also agreed with the evidence of the two motorcycle drivers that Mr. DK pulled up beside him to indicate that he was angry with respect to Mr. QM's driving.

Mr. QM describes the BMW as having tinted windows everywhere with the exception of the driver's window and the front passenger window.

Mr. QM says that the motorcycle driver that had been speaking to him or gesturing to him moved back and Mr. QM proceeded to move into a left turn lane in order to get into the correct plaza where Popeyes was. He says he had his left turn signal on. He made his turn and at that time had no plan as to where he was going to park. He acknowledges that after he completed his turn he stopped his vehicle in the incoming lane in order to see what the situation was. He was going to look around and if it were clear then he would decide where to park. He acknowledges that he would have to execute a left turn in order to get into the parking at Popeyes. He says he was stopped there for just a couple of seconds. The traffic was not heavy but the parking lot on the right side was full and therefore he decided to make a left turn. He looked left out of his window but did not see anything. He says he was looking for oncoming traffic that would be exiting the plaza. He decided it was clear and he started to make his turn. He then heard the sound of a motorcycle falling and he stopped right away.

He stopped in the middle of the lane, got out of his car and he saw the bike on the ground. He acknowledges there was a lady on the bike. He says this was the first time he had seen her. He did not see her follow him in, he did not see her come up beside his vehicle and he claims he did not hear her at any time. The only reason he stopped his vehicle was because he heard the motorcycle falling to the ground.

It is Mr. QM's evidence that he did not believe there was any contact between the motorcycle and the BMW.

Mr. QM's evidence is consistent with the other parties with respect to Mr. DK coming back and notes that he was very angry. Mr. QM denies ever saying anything to Ms. LM with respect to being sorry or agreeing to pay for anything.

The two passengers in Mr. QM's vehicle ultimately went into Popeyes. These individuals are now back in China.

I also found Mr. QM to be a believable witness. His evidence was more or less consistent with that on his previous Examination Under Oath. In my view, Mr. QM believes that his version of the events is an accurate one and what happened.

It is clear that both Ms. LM and Mr. QM believe that the evidence they gave is what happened on that day and believe that it is a truthful version of the events. I did not find that either witness seem to be creating or making up stories.

At the end of the day as we are dealing with loss transfer liability, much of the evidence that was presented is simply not relevant to a loss transfer fault determination. Rather it is the facts at the moment of the incident that are relevant. Where were the vehicles? What lane were they in? What direction were they going? These are the key issues in this case. I now turn to the parties' arguments and position.

Position of the Parties

Both parties agree that there is no specific rule under the Fault Determination Chart (Regulation 668 pursuant to the *Insurance Act*) that is specifically on point in terms of the circumstances of this accident. Both parties make reference to certain rules under the Fault Determination Chart that they claim are analogous to this situation and therefore give some direction in terms of decision making. However, they disagree on which rules are analogous.

Both parties also agree that in light of the fact that there is no specific rule that matches the facts of this case that I am bound to rely on Rule 5, which states:

“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.”.

Both parties agree that in accordance with the case law and specifically the decision in the Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Aviva Canada Inc.* (2015) ONCA 920 that the ordinary rules of law does not mean the “the ordinary rules of tort”. Both counsel accept the Court of Appeal's direction that the purpose of the loss transfer scheme is to provide an expedient and summary way of resolving indemnification claims.

Both parties also agree that Rule 16(2) is applicable and that instructs the decision maker to treat the thoroughfare on which this incident occurred (an incident within a parking lot) as a road for the purposes for determining fault. The parties also agree that the incident that I am to consider took place within the same lane.

Finally, counsel agree that Rule 3 is of some considerable importance in this case as it directs the Arbitrator as to what circumstances are specifically excluded when determining fault for the purposes of loss transfer. Rule 3 states 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.”.

Therefore, while there appears to be considerable agreement between the parties as to how to approach this case, unfortunately there remains disagreement as to what the determination of liability should be on the facts of this case when applying the above agreed upon principles.

Caradoc

Let me turn first of all to the position of the Applicant, Caradoc. Caradoc submits that when trying to determine liability in the absence of any specific rule applying I can look at the other rules and make a determination as to whether one can draw any conclusions or directions from analogous rules. Caradoc submits that in addition to looking at analogous rules that when determining what the ordinary rules of law are that one can look to the *Highway Traffic Act* to see whether or not one or other of the parties committed offences or actions contrary to the *Highway Traffic Act*. Caradoc submits that the *Highway Traffic Act* is representative of the ordinary rules of law and if one of the parties committed an offence under the *Highway Traffic Act* (whether they were charged or not) then an Arbitrator can look at that to assist in determining fault in accordance with the ordinary rules of law.

Caradoc submits that Rule 10(4) is the most analogous rule to be looked at in this case. Rule 10 applies to automobiles travelling in the same direction in adjacent lanes. Caradoc acknowledges that the vehicles in this case were not in adjacent lanes but points out that they were travelling in the same direction. Rule 10(4) provides that where one vehicle is changing lanes and strikes the vehicle in the adjacent lane then the changing lane vehicle is 100% at fault. Caradoc submits that this is similar to the BMW making a left turn towards the motorcycle. It suggests that the BMW should be found 100% at fault as it is moving.

However, Caradoc also argues that while it is appropriate to look for analogous rules that as an Arbitrator I can choose to simply say no rules apply and look to the ordinary rules of law. In that case, Caradoc submits that I should look at Section 142(1) and (2) of the *Highway Traffic Act*. That section of the *Highway Traffic Act* R.S.O. 1990, c. H.8 provides as follows:

142 (1) The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement.

(2) The driver or operator of a vehicle parked or stopped on the highway before setting the vehicle in motion shall first see that the movement can be made in safety, and, if in turning the vehicle the operation of any other vehicle may be affected by the movement, shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement.

Caradoc submits that the driver of the BMW was stopped on a highway and then proceeded to make a left turn not in safety. Caradoc submits that the motorcycle was by the driver's door of the BMW and was there to be seen or certainly to be heard. Mr. QM failed to see or hear the motorcycle. He failed to look and make sure his turn could be made in safety. Therefore, he violated Section 142 of the *Highway Traffic Act* and in doing so should be found 100% responsible for this accident.

Caradoc submits that in considering that evidence I am not considering extraneous circumstances that I am not permitted to do by virtue of Rule 3. That analysis does not involve a consideration of road conditions, visibility or the actions of pedestrians nor does it consider the point of contact between the two vehicles. In fact, both parties seem to agree that whether or not there was even a point of contact between the two vehicles is not necessarily relevant for my determination of fault.

Caradoc therefore submits that relying on the analogous rule of 10(4) and by equating changing lanes to turning left which brings in Section 142 of the *Highway Traffic Act* that the conclusion when applying ordinary rules of law is the BMW is 100% at fault for the incident. Caradoc submits that whether one is turning or commencing a movement from a stopped position that there was an obligation on the driver of the BMW that was not adequately discharged and that resulted in this incident. Caradoc also submits that where there is a difference in the testimony between the various parties that may be relevant to my determination that the claimant and her husband were more compelling and their evidence is to be preferred.

Economical

Economical's position is that I am obliged to look to the Fault Chart Rules and see if there is any analogous rule as the first step in determination of liability. Economical submits that Rule 6 is the most analogous rule. Rule 6 applies to automobiles travelling in the same direction and the same lane. Economical submits that the motorcycle and BMW were travelling in the same direction and were travelling in the same lane. Economical submits that Rule 6(1) directs that the rule is applicable when automobile A is struck from the rear by automobile B. Economical submits that by virtue of Rule 3, I cannot consider any point of contact between the two vehicles. Economical submits that the motorcycle was "lane splitting" at the time this accident occurred. Therefore Rule 6(3) and Rule 6(4) are more analogous. These rules provide that where the forward most vehicle is making a left turn the forward most vehicle is not at fault and the rear vehicle is 100% at fault. The BMW in this case was turning left when the incident occurred. The evidence is that his vehicle was ahead of the motorcycle and therefore the motorcycle should be found 100% at fault.

Economical points to a decision by Deputy Judge Connolly in *Garyfalow v. Certas* (2004) CarswellOnt 1603. That was a decision where a claim for property damage was being made by the plaintiff as against her insurer and the issue was the application of the Fault Chart. In that

case, the plaintiff was driving her vehicle northbound on Bedford Road. It had one lane in each direction and on the right-hand side of the northbound lane there was a bicycle lane. The plaintiff was stopped at a red light and was signalling her intention to turn right. She was stopped in the northbound lane immediately to the left of a broken white line, which indicated the bicycle lane. When the light turned green the plaintiff moved her vehicle forward and started her right turn when she was struck on the right side of her vehicle by a motorist she had previously observed behind her. The motorist had moved into the “bike lane” in an attempt to pass the plaintiff’s vehicle. Judge Connolly held that the bike lane was not a separate lane for traffic. He felt that Rule 6(3) was analogous and as the vehicle following the plaintiff improperly tried to cut between her vehicle and the curb and that vehicle was to be found 100% at fault. Economical submits that case is very similar in terms of the facts here other than that the motorcycle in this case was stopped. Economical submits the motorcycle being stopped beside a vehicle in the same lane is similar to trying to overtake in a bicycle lane.

Economical submits that Rule 10 is not analogous as it requires the vehicles to be in adjacent lanes.

Economical agrees that when looking at the ordinary rules of law one should look at the *Highway Traffic Act*. However, Economical relies on Section 172(1) of the *Highway Traffic Act*. That section provides:

“172 (1) No person shall drive a motor vehicle on a highway in a race or contest, while performing a stunt or on a bet or wager.”.

Economical notes that for the purposes of Section 172 of the *Highway Traffic Act* that a stunt includes any activity where one or more persons engaged in any of the following driving behaviours:

“driving a motor vehicle in a manner that indicates an intention to drive, without justification as close as possible to another vehicle, pedestrian or fixed object on or near the highway.”.

Economical submits that the motorcycle was lane splitting and that lane splitting constitutes a stunt under the *Highway Traffic Act*. They rely on a decision by Justice Band in the case of *R v. Allaudin* (2019 ONCJ 53). In that case, the accused had been charged with dangerous driving. He was out on his motorcycle and was weaving between other motor vehicles. In considering to what extent this constituted dangerous driving, Justice Band provided a definition of what she considered to be lane splitting. She states lane splitting is:

“passing between two other motor vehicles who are travelling in adjoining lanes and riding a motorcycle between another motor vehicle and the shoulder or barrier such as a median.”.

Economical submits that I should find that the driver of the motorcycle by coming up beside the BMW in the same lane and stopping beside it constituted lane splitting and this it was a stunt and Section 172 of the *Highway Traffic Act* is engaged.

Economical also relies on the case of *R v. Bunda* (2009 ONCJ 620) where Justice of the Peace Cuthbertson followed the lane splitting analysis that had been done by Justice Band. In that case, the evidence was that there were 4 motorcycles travelling in a staggered formation. These motorcycles were being followed by a police officer who was concerned about the manner in which they were driving. Mr. Bunda was ultimately charged (he was one of the motorcyclists) under Section 172(1) of the *Highway Traffic Act* alleging that he was performing a stunt. The Justice of the Peace noted that the evidence indicated that Mr. Bunda had a pattern of driving in close proximity to the lead motorcycle at the same time as passing cars. He felt that this was endangering individuals as he was driving a motorcycle with the intention without justification to come as close as possible to another vehicle. At one point, he was a distance of only 2ft from the lead motorcycle and if something had happened, he would have had no time to take appropriate evasive action. He was also passing by close to cars stopped at the traffic light and if a person or child had opened his/her car door then, again, there would have likely had been an incident. He therefore concludes that driving in the manner that he did, Mr. Bunda was committing an offence under Section 172(1) of the *Highway Traffic Act*. Economical submits that the behaviour of Mr. Bunda is consistent with the behaviour of the motorcycle in this case. The evidence is that the motorcycle was close enough to the BMW for the driver to touch the door. Economical submits the fact that the two vehicles were stopped makes no difference in the applicability of the *Highway Traffic Act* in this case.

Economical stressed in its oral submissions that the purpose of the Fault Determination Chart is for an expedient and summary method of determining fault. Finite exactitude is not needed. Consideration of evidence as to the activities of the two vehicles involved prior to the actual incident is not relevant. To make my decision, I must look at the exact point in time that the alleged incident occurred and look to the evidence as to where the cars were, what activity resulted in the incident and then to determine fault based on that narrow perspective in accordance with the ordinary rules of law. In these circumstances one does not look at a duty of care, one does not look at what the driver did or did not do but rather Economical submits that I should consider this as if the vehicle is autonomous without a driver. What did the car do? Economical submits that on all the evidence that the BMW started to make a left turn and that the motorcycle had improperly and contrary to *Highway Traffic Act* pulled up beside or to the rear of the BMW and she should be found 100% at fault.

Finally, both parties did agree that I have the discretion in applying ordinary rules of law to split liability if I find it appropriate to do so. While each party argued that the other party is 100% responsible each conceded that I have the discretion under the Fault Chart and the loss transfer provisions to look at other splits in terms of fault if the evidence justified it.

Analysis

Section 275 of the *Insurance Act* creates a scheme for reimbursement between certain motor vehicles such as heavy commercial vehicles and motorcycles. This came into existence in June of 1990 and has been the subject matter of some considerable decisions both at the arbitration and judicial level.

In this case, there is no dispute that loss transfer is applicable as one of the vehicles involved in the incident is a motorcycle. The issue here is fault.

Section 275(2) of the *Insurance Act* provides as follows:

“ (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer’s insured as determined under the fault determination rules.”.

The fault determinations rules are found under Regulation 668 as published under the *Insurance Act*. They are a set of rules, which identify certain common car accident scenarios. Depending on the scenario, certain responsibility will be assigned to one or more of the drivers. In this case, however, all parties agree that there is no one specific rule that applies to the facts of this situation. Accordingly, I am to apply the ordinary rules of law as directed Rule 5. In considering the ordinary rules of law, I cannot take into consideration the various items outlined under Rule 3. Those include the weather, the road conditions, point of contact, and actions of pedestrians. Under the facts of this case, none of those circumstances are relevant to how the accident occurred but I am cognisant of my obligation to limit my consideration of the evidence to a much narrower factual analysis than one might do if this were a tort case.

As Arbitrator Samis noted in his decision of *Dominion of Canada General Insurance Company v. Kingsway Insurance Company* (1999 CarswellOnt 7019), there is a certain element of “rough justice” involved in determining fault or applying the fault determination rules.

I have carefully reviewed the seminal decision of the Ontario Court of Appeal in *State Farm v. Aviva* (supra). While the court made quite clear that one cannot approach determination of fault in a loss transfer matter based on tort law and only on the ordinary rules of law, the decision does not give a great deal of assistance as to what the ordinary rules of law are. I agree with counsel in this case that in determining the ordinary rules of law that it is helpful to review the fault determination rules first to see if there is any analogous rules that can be applied to determine liability in this case. This is consistent with the Court of Appeal’s comment that the purpose of the loss transfer scheme is to provide for an expedient and summary method of spreading the costs of Statutory Accident Benefits among insurers in a gross and somewhat arbitrary fashion favouring expediency and economy over finite exactitude (*Jevco Insurance Company v. York Fire and Casualty* 1996 27 O.R. 3D483). By looking at the fault determination

rules first for analogous rules expedience, economy and the somewhat arbitrary nature of this whole process is recognized.

Turning to the analogous rules that have been argued before me, I really do not find either Rule 10 or Rule 6 to be particularly helpful. Rule 6 clearly applies when there is a rear-end collision. While it applies when vehicles are travelling in the same direction and the same lane it specifically references that one vehicle is being struck from the rear of another vehicle. Even considering the limited timeframe for the evidence in this case, I cannot liken it to a rear-end collision. The only analogous nature of this rule is that both vehicles were in the same lane and travelling in the same direction.

Similarly, Rule 10 is really not analogous or helpful because it applies to vehicles travelling in adjacent lanes. None of these rules really speak to a set of circumstances where one vehicle is stopped in a parking lot (on a highway per the rules) intending to make a left turn and a motorcycle comes up beside it, stops (the reason for that is irrelevant) and an incident occurs. I therefore find that neither Rule 10 nor Rule 6 are sufficiently analogous to the facts of this case to be of any assistance.

Let me turn briefly to the facts. I conclude that the BMW entered into the thoroughfare of the plaza in order to access Popeyes. I conclude that the driver was stopped but was intending to turn left to park at Popeyes.

I also find that the motorcycle followed the BMW into the plaza and pulled up beside the driver and also stopped. I find that the motorcycle was likely beside and close to the driver's door. While the reason given by the motorcycle driver for pulling up beside the BMW is not relevant to a quick and speedy fault determination. I do note that the evidence of the driver of the motorcycle was that she intended and indeed thought she was engaging the driver of the BMW in a conversation or dressing down about his previous driving behaviour.

The evidence then supports that the driver of the BMW commenced to make a left turn to enter into the Popeyes parking lot. His own evidence is that as he made that turn he was not aware that the motorcycle was beside him. I find that the motorcycle was there to be seen and to be heard by the driver of the BMW and that is an appropriate consideration when applying the ordinary rules of law in this case. I find that as a result of the moving of the BMW that the motorcycle fell over to the left and that the driver was injured. I believe the evidence of the Caradoc insured when she says that the left front wheel of the vehicle struck the wheel of her motorcycle resulting in her falling over. However, as counsel pointed out there does not have to be a finding of contact for there to be a finding of fault. If just the movement of the left turning vehicle caused the driver of the motorcycle to fall over it is still the same action of the BMW that has resulted in the incident.

Considering those facts, what then results from applying the ordinary rule of law.

I find that Section 142(1) of the *Highway Traffic Act* is relevant to this case. The *Highway Traffic Act* requires that the driver of a left turning vehicle that is parked or stopped on a highway before setting the vehicle in motion must make sure that the movement can be made in safety. The driver of the BMW did not do that. He did not see the motorcycle. He did not hear the motorcycle. He did not properly check to make sure he could make his left turn in safety. Therefore, the *Highway Traffic Act* in my view suggests that there must be some level of fault found against the driver of the BMW based on the ordinary rules of law.

However, I also find that the driver of the motorcycle is also at fault for this incident. I do not agree with Economical that her activity constitutes a stunt under Section 172 of the *Highway Traffic Act*. The case law referred to references vehicles that are moving rather than stopped. I also find that it is hard to accept that pulling up beside another vehicle and stopping would constitute a stunt. However, I do draw some analogies from section 172 of the *Highway Traffic Act*. Common sense would suggest that it is dangerous for a motorcycle to pull up in the same lane beside a vehicle and stop at the driver's door. I find that it would be considered risky particularly to pull up so close to the driver's door that as the claimant said you can reach out and touch it. Such an action could only be considered foolhardy. Therefore, in the circumstances in this case, I find that some fault must lay with the Caradoc insured as well as the Economical insured based on the ordinary rules of law.

I allocate fault on a 50/50 basis. Each of the drivers of the motorcycle and the BMW in some way contributed to this incident.

Award

For the reasons outlined above, I conclude that taking into consideration the ordinary rules of law that fault should be allocated on a 50/50 basis as between Caradoc and Economical. Statutory Accident Benefits paid by Caradoc to its insured should therefore be reimbursed by Economical on a 50% basis only.

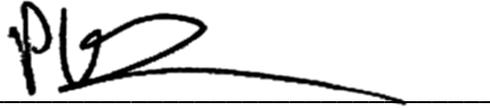
If there is any dispute with respect to the quantum of the reimbursement, counsel can contact me to schedule a further pre-hearing to deal with this issue.

Costs

The Arbitration Agreement sets out various provisions with respect to both the Arbitrator's Account and with respect to legal costs. The Agreement specifically provides that costs shall not be quantified in the original Award and that the scale and quantum of costs are to be determined by the Arbitrator in the subsequent Award in accordance with the *Arbitration Act* 1991. I am also advised by the parties that they wish to make submissions with respect to Costs and that there may be an Offer to Settle that one party wishes to rely upon in terms of costs submissions.

Accordingly, the decision on costs will be deferred until counsel have had an opportunity to make submissions.

DATED THIS 8th day of September 2021 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written over a horizontal line.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP