

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.1.8
SECTION 275 AND *ONTARIO REGULATION 668***

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

TD INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Darrel March for the Applicant

David Visschedyk and Ken Yip for the Respondent

ISSUE:

1. Which of the Fault Determination Rules in *Regulation 668* to the *Insurance Act* apply to the incident involving Robert Barwick on November 16, 2009, if any, and what is the result of that finding?

RESULT:

1. Rule 10(4) applies and the TD insured driver is therefore 100% at fault for the incident involving Mr. Barwick.

BACKGROUND:

1. Robert Barwick was injured when the motorcycle he was driving collided with a car insured by TD on November 16, 2009. The accident occurred in the area where the southbound ramp of the Don Valley Parkway merges with the westbound Gardiner Expressway in downtown Toronto. Two large City of Toronto trucks were slowly proceeding up the left lane of the ramp at that time in order to remove debris on the road.

2. There are two lanes of southbound traffic on the ramp. While the evidence differs as to how and exactly where on the roadway the collision occurred, the presence of the trucks on the ramp required the vehicles coming off of the Don Valley Parkway to merge into the right lane in order to avoid them. As one or both of their vehicles were merging, Mr. Barwick's motorcycle made contact with the right rear side of the Dodge Caliber driven by Alexandra Koumantaros. The impact caused him to be thrown from the bike. He sustained a loss of consciousness and serious injuries as a result of falling onto the highway.

3. Mr. Barwick's motorcycle was insured by Jevco Insurance at the time of the accident. He applied to Jevco for payment of accident benefits under the *Schedule*, and they paid various benefits to him and on his behalf. His claim has now been resolved on a full and final basis. Jevco seeks indemnification of the benefits it paid out from TD Insurance, the insurer of the Koumantaros vehicle, under the Loss Transfer provisions in

section 275 of the *Insurance Act*. Jevco contends that Ms. Koumantaros was 100% at fault for the accident by virtue of Rule 10(4) of the *Fault Determination Rules* in Regulation 668, as the incident occurred when she was changing lanes.

RELEVANT PROVISIONS:

The following provisions are pertinent to my determination of this matter:

Insurance Act – Section 275

(1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

(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.

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitration Act.

Regulation 668 – Fault Determination Rules

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.

10. (1) This section applies when automobile "A" collides with automobile "B", and both automobiles are travelling in the same direction and in adjacent lanes.

(4) If the incident occurs when automobile "B" is changing lanes, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

THE EVIDENCE:

4. Six witnesses testified during the course of a three-day arbitration hearing. Various documents were also filed, including the police report and investigation file, witness statements, and transcripts from both drivers' Examinations for Discovery in the tort claim commenced by Mr. Barwick. Pictures of the damage sustained by both vehicles, as well as photographs of the City trucks that were driving up the ramp were also filed into evidence.

5. The parties agreed that the evidence to be tendered at the hearing would focus solely on the question of liability for the accident, and that any disputes regarding the reasonableness of payments made by Jevco would be deferred to a later date, if required.

6. According to the police report, and all of the witnesses other than Mr. Barwick, the collision took place on the ramp from the southbound Don Valley Parkway to the westbound Gardiner Expressway. There are two lanes on the ramp, and it curves gradually to the right in a westerly direction from its original southbound direction. The ramp is approximately 250 meters long.

7. The police file contains a Motor Vehicle Accident Report with diagram, as well as statements from the driver of the car and two independent witnesses. The diagram is fairly crude and depicts the Dodge vehicle (noted as V2) straddling the two lanes on the ramp, slightly angled toward the right, while the motorcycle (noted as V1) is represented by a long arrow moving from the left to the right hand lane, as the ramp starts to curve to the right. The "synopsis" part of the report states – "V1 and V2 w/bound right L1. V2 changes to L2 due to partial road closure. V1 strikes rear of V2". The point of impact is noted as "undetermined". No charges were laid as a result of the accident.

8. The diagram and above summary suggest that the vehicles are merging from the left to the right lanes. Yet, in the diagram accompanying the synopsis, the right lane is noted as "L1", and the left lane is designated as "L2", suggesting that both vehicles were changing from the right lane to the left lane. While the officer who prepared the sketch was not called to testify, it is clear from the statements that he recorded, and all of the other

evidence tendered, that he appears to have accidentally transposed the two lanes, and that his reference to L1 in the synopsis is actually to the left lane, with the right lane being L2. This discrepancy caused some confusion at the hearing, though both parties acknowledged the error. Given the above, I do not attach any weight to this material.

9. Both drivers involved – Mr. Barwick and Ms. Koumantaros – gave different explanations for what led to the collision, and where their vehicles were located when the incident occurred. Two independent witnesses provided statements to the police after the accident – Wayne Epp, a driver who witnessed the accident as he was following behind Mr. Barwick, and Aubrey Fernandes, the driver of one of the City of Toronto trucks who had stopped to pick up debris on the ramp. Their recollections of the positions of the vehicles prior to their impact are at odds with each other.

10. As well, both parties retained forensic engineers to provide expert opinions on how the accident occurred and the positions of the two vehicles on the roadway. They each testified at the hearing, and provided reports that were submitted into evidence.

11. I will summarise the evidence tendered below.

Alexandra Koumantaros

12. Ms. Koumantaros was the driver of the red Dodge Caliber that collided with Mr. Barwick. She provided a statement to the police officer at the scene of the accident, and was also examined for discovery in the tort action in July 2011. Some answers she provided at that time differed from her *viva voce* evidence at the hearing.

13. Ms. Koumantaros testified at the hearing that she entered the ramp from the southbound Don Valley to the Gardiner Expressway in the left lane. She recalled seeing a “construction truck” at the top of the ramp, with a sign affixed to it indicating that the left lane would be closing ahead. She testified that she turned on her right turn signal, checked her blind spot and started to merge into the right lane. She noticed that there were three cars in front of her that were also starting to merge into that lane.

14. Ms. Koumantaros stated that the first car merged into the right lane easily, passed the City truck and proceeded up the ramp. The other two cars, however, were proceeding very slowly. She testified that although she had started to merge her vehicle into the right lane, she had to stop in order to let these cars merge ahead of her. She recalled feeling “vulnerable” at that point, because she was stopped on a ramp that led to a highway, in the middle of two lanes. She stated that she then felt something make contact with her vehicle, and saw Mr. Barwick “twirl by” her window. She testified that she did not see the motorcycle before it collided with her car.

15. When asked where her car was situated when she felt the impact, Ms. Koumantaros stated that she was stopped “in the middle of the two lanes, perhaps more in the right lane”. She stated that the motorcycle struck her back bumper or tire, and also made contact with her rear side mirror.

16. The statement that Ms. Koumantaros provided to the police officer is difficult to read. It appears that she was asked whether her vehicle was still moving “when he struck you”, and she responded that she did not think so, and that she thought that she had “already merged... and was waiting for the two cars ahead to do so”. When she was asked what this notation meant at the hearing, she stated that she recalled having made her way into the right lane, but was not likely fully in the right lane at that point when she stopped to let the two cars ahead of her merge in front of her.

17. Ms. Koumantaros’ evidence at her examination for discovery differed than that set out above on one key point. She initially stated that she was stopped in the *left lane* when the impact occurred, “letting the other cars go through”. Later in the examination she testified that part of the right front of her vehicle was in the right lane at the point of impact, so that she was straddling the two lanes at the time of the collision.

18. When confronted with this inconsistency at the hearing, the witness stated emphatically that she was not in the left lane when the impact occurred. When asked why

she had stated earlier that she had been in that lane, she explained that she was very upset about the accident, and had tried to suppress the details surrounding it. She explained that attending the Examination for Discovery was difficult for her. She stated that when she reviewed the police material provided to her prior to the arbitration hearing she gave the matter more thought, and realised that as she had told the officer at the scene, she had not been in the left lane when she stopped to allow the cars ahead of her to merge, but was rather in the middle of the two lanes, mostly in the right lane.

Robert Barwick

19. Mr. Barwick's evidence differed from that of Ms. Koumantaros in a few material respects. He disputed her statement that her vehicle was stopped when his motorcycle collided with it, stating that she had pulled into the right lane in front of him and "cut him off". He also testified that the accident occurred while both vehicles were on the Gardiner Expressway, beyond the ramp from the Don Valley Parkway leading to the highway, rather than on the ramp itself.

20. Mr. Barwick worked as a carpenter around the time of the accident. He was scheduled to start working at a new jobsite downtown on the day following the accident, and was traveling there to drop off his tools on the day in question. He recalled that traffic had been moving smoothly, but that as he was travelling past the "off-ramp to the Gardiner", he saw a very large sign indicating that the left lane was closed. He recalled changing into the right lane immediately after leaving the ramp, and starting to slow down while driving on the left side of that lane in what he described as the "blocking position".

21. Mr. Barwick recalled noticing that cars were merging from the left lane into the right, as they approached the slow moving trucks. He testified that he had been in the right lane for about ten to fifteen seconds when he noticed Ms. Koumantaros' vehicle still positioned in the left lane. He stated that he watched her car closely as he expected her to merge into the right lane ahead of him, but saw no sign of her intention to do so. He decided to proceed past her vehicle, and increased his speed. He recalled that as the front tire of his motorcycle was about to pass the rear bumper of her car in the left lane, Ms.

Koumantaros pulled her car into his lane and struck his motorcycle. He testified that this happened suddenly, and that he was not able to avoid the collision.

22. Mr. Barwick's evidence at his Examination for Discovery in December 2011, approximately two years after the accident, was generally consistent with his testimony at the hearing. I note that the documentary evidence filed, as well as his *viva voce* evidence, establishes that he suffered from a head injury and acquired brain injury as a result of the accident. It is not clear whether this impacted on Mr. Barwick's recollection of the details surrounding the accident – such as where it occurred (on the Gardiner expressway itself and not the ramp from the DVP), and the suggestion that there were no other vehicles in front of Ms. Koumantaros' Dodge – as these were different than what all of the other witnesses recalled.

Wayne Epp

23. Mr. Epp witnessed the accident as he was driving southbound on the ramp from the DVP that led to the Gardiner Expressway. He was interviewed by the police at the scene of the accident, and also provided two signed statements in March 2010 and April 2010. Mr. Epp recalled that he was driving southbound on the DVP in the middle lane, heading toward the Gardiner Expressway, on his way to attend a meeting downtown. He noticed Mr. Barwick's motorcycle slightly ahead of him in the middle lane. He saw City trucks ahead of him beginning to slow down, with their warning signs illuminated. He stated that he realised that he would either have to change into the right hand lane, or would have to stop behind the trucks. He recalled that both he and the motorcycle shifted into the right lane, with the motorcycle proceeding slightly ahead of him, just before the base of the ramp.

24. Mr. Epp testified that he started to slow down, as the cars in the left lane that were behind the slowing trucks began to merge into his lane. He observed Mr. Barwick doing the same in front of him. He recalled that one or two cars merged into the right lane without incident, but that a red Dodge Caliber started to pull into the right lane and move toward Mr. Barwick's motorcycle. Mr. Barwick attempted to swerve in order to avoid

colliding with it, but could not do so. He testified that Mr. Barwick struck the right passenger side of the Dodge, somersaulted over his motorcycle and landed on the ground near the guardrail of the highway.

25. Mr. Epp stated that Mr. Barwick had been in the right lane for “several seconds” before Ms. Koumantaros’ vehicle accelerated to pull into the right lane and cut him off. He stated that he presumed that she did not see the motorcycle before doing so. In the statement provided by Mr. Epp a few months after the accident, he stated both that the impact between the car and motorcycle occurred when the car was about “one-half to three-quarters of the way into the lane” and that the Dodge “managed to get $\frac{3}{4}$ of the way into the lane” that Mr. Barwick was driving in.

26. Mr. Epp testified at the hearing that Mr. Barwick was travelling approximately 20 km/hour at the time of the collision. When cross-examined, he was directed to the statement he had provided to the police just after the accident, in which he advised that the motorcycle was travelling between 60 and 70 km/hour. He explained that the motorcycle would have decelerated rapidly as the cars ahead were merging into his lane. He also testified at the hearing that he saw Ms. Koumantaros’ right turn signal activate prior to her changing lanes, but when asked about that by the police at the scene of the accident, he had responded that he had not seen a turn signal. Mr. Epp acknowledged this inconsistency, but testified that he was “90% certain” that her turn signal was on.

Aubrey Fernandes

27. Mr. Fernandes worked for the City of Toronto for thirty-five years prior to retiring approximately five years ago. At the time of the accident, he was employed as a truck driver in the City’s highway department. He was interviewed at the scene by the police officer investigating the accident, and was called to testify at the hearing. He advised that the log entries that he had made about the accident on the day that it took place were destroyed, but that he “had a memory” of the accident that he had witnessed on November 16, 2009.

28. Mr. Fernandes recalled that he had received a call from the dispatch office that morning, directing him to pick up debris in the left lane at the top of the ramp where the Don Valley Parkway meets the Gardiner Expressway. He stated that in an area like that, two trucks would be dispatched to travel to the location of the debris, with one driver in each vehicle. The trucks would activate their electronic signs with large arrows, directing drivers to either proceed to the left or right, and the rear truck would stop to block the lane to traffic whenever it was safe to do so. The driver of the truck in front would then exit the vehicle and remove the debris. He recalled that he was driving the front truck on the day in question.

29. The witness brought photographs depicting the type of truck that he was driving on the day of the accident. Mr. Fernandes was the last witness to testify, and appeared on the third day of the hearing, so these photos were not shown to any of the other witnesses. The truck depicted has a cab in the front in which the driver sits, and a storage area behind the cab, which is outfitted to carry large cones and pilons. A large electronic sign extends upwards from the rear of the truck, containing a large “double arrow” which can be illuminated. There is no rear view mirror inside the cab, but there are two side mirrors on each side, extending out from the doors. The top mirror is large, and there is a smaller one below it. The witness explained that the large mirror allows the driver to see far back behind the truck, and the small one provides a side view.

30. Mr. Fernandes recalled that his vehicle was stopped in the left lane of the ramp and was in “park” when the collision occurred. He was waiting for the cars behind him to merge into the right lane, so that he could exit and retrieve the debris. He testified that while he was looking at the scene behind him through his right side view mirror, he saw that three cars had entered the space in the left lane between the two City trucks, and that two had slowly merged into the right lane. He then saw that a third car, the red Dodge driven by Ms. Koumantaros, was struck by the motorcycle as it was moving slowly into the right lane. He stated that the motorcycle was travelling up the ramp in the left lane, at approximately 70 to 75 km/hour.

31. Mr. Fernandes was questioned closely about his ability to see behind him while he was sitting in the truck. He acknowledged that the pilons stacked in the back part of the truck prevented him from seeing anything out of the back window of the cab, but he testified that the side mirrors allowed him to see all of the lanes behind him. When cross-examined about whether the curve in the ramp affected his view, he insisted that it did not. When asked about the position of Ms. Koumantaros' vehicle on the road, Mr. Fernandes initially stated that her car was partly in the right and partly in the left lane, at an angle, when it was struck. He testified that the car was stopped when it was struck, waiting for the slow-moving cars ahead of hers to move.

32. Mr. Fernandes stated that given the trucks' presence in the left lane, Mr. Barwick's motorcycle "had nowhere to go", and suggested that he applied his brakes forcefully and the bike "fishtailed", which caused him to drop the bike. He recalled seeing Mr. Barwick sliding along the ground, while the motorcycle struck the car and flipped over. Mr. Fernandes testified that he was certain that Mr. Barwick was driving behind his truck in the left lane, and that he never saw the motorcycle in the right lane. He testified that the front wheel of the motorcycle hit the back of the right rear bumper of the car, once Mr. Barwick was already on the ground.

33. The witness also recalled that Mr. Barwick got up off the ground after the collision and walked back to the motorcycle to see how much damage it had sustained, and then sat on the side of the road.

34. Mr. Fernandes' statement to the police at the scene provides that "All of a sudden the motorcycle came up in lane one. He was moving fast. He veered off to the right and hit her where she was stopped". He explained at the hearing that his reference to "lane one" meant the left lane.

Craig Wilkinson

35. Mr. Wilkinson is a forensic engineer and was accepted as an expert in engineering physics, to provide opinion evidence on accident reconstruction. He was retained by Jevco

to investigate and prepare a report analysing the collision, in order to determine the most probable driver conduct that led to the accident. He was provided with photos of the property damage sustained by both vehicles, as well as the police notes, statements and transcripts of evidence provided by both parties. He did not examine the vehicles themselves.

36. Mr. Wilkinson concluded from the photos of the property damage to the Dodge Caliber that the collision occurred in the right lane, and that the motorcycle was travelling faster than the car at the point of impact. He also found that the car was turned on an angle to the right at the time of the collision. He allowed that the motorcycle could have also steered to the right, but found that the property damage suggested that the car was likely angled further to the right on contact than was the motorcycle. He noted that the damage on the right side of the car extended from the right rear corner to the side mirror on the right side, and that there is an area of “black transfer” on the metal part of the right rear wheel of the car, suggesting contact with the front wheel of the motorcycle.

37. While he stated that it is not possible to determine the exact location of the collision as no “road evidence” was documented, Mr. Wilkinson’s report provides a sketch depicting the “approximate impact location” relative to the lanes on the ramp. Noting that Mr. Barwick testified that he had been riding in the “blocking” position in the right lane, the sketch shows the red car driving almost entirely in the right lane, slightly angled to the right.

38. Based on the above, Mr. Wilkinson determined that Ms. Koumantaros was in the process of changing lanes, either while stopped or in motion, at the time of the collision.

39. Finally, when asked about Mr. Fernandes’ statement providing that the motorcycle was travelling in the left lane behind the truck prior to the collision, Mr. Wilkinson stated that this was not likely. He claimed that Mr. Fernandes’ view of the position of the vehicles before the collision was not as good as that of Mr. Epp, as he would have been watching the events through his mirror, at a point at which the road curved.

David Porter

40. Mr. Porter was retained by TD Insurance to provide an opinion regarding the mechanics of the collision, and to review and comment on the findings of Mr. Wilkinson. He is also a forensic engineer, and was accepted as an expert in engineering physics as it relates to accident reconstruction. He was similarly not provided access to the vehicles involved, and based his findings on the property damage information, various witness statements and the police file.

41. Mr. Porter agreed with Mr. Wilkinson that the evidence provided suggested that Mr. Barwick's motorcycle was traveling faster than the Dodge Caliber before the collision, but that the specific speeds of the vehicles could not be determined based on the information provided. He also agreed that the front wheel of the motorcycle likely first made contact with the back right wheel of the Caliber, given the black mark on the area of silver paint on the car's wheel.

42. While he also agreed that it is not possible to determine the precise positions of the vehicles relative to the roadway at the point of impact, Mr. Porter came up with two potential scenarios, based on the witness statements provided to him. His first scenario placed the motorcycle fully in the right lane and the Dodge Caliber partially in both the left and right lanes at the time of impact. In the second scenario, both vehicles are placed fully in the left lane at the time of impact, with the motorcycle being in the right side of that lane, or the "blocking position". He noted that each of the two scenarios are corroborated by at least one witness, and that a determination of the probable circumstances of the collision "cannot be made without assessing which witness statement is more probable".

43. In either case, Mr. Porter acknowledged that given the damage to Ms. Koumantaros' Dodge, it would have been rotated clockwise (i.e. to the right) relative to the motorcycle, and that the two scenarios outlined contemplate different locations on the road but have roughly the same "impact orientation". He conceded that given the information

provided, it is more likely that the car was oriented more to the right relative to the lane, than the motorcycle.

PARTIES' ARGUMENTS:

Jevco's submissions

44. Counsel for Jevco submitted that the evidence supports a finding that Ms. Koumantaros was changing lanes when the incident occurred. He contended that Rule 10(4) of the *Fault Determination Rules* would therefore apply, and that she is accordingly 100% at fault for the accident.

45. Counsel acknowledged that the witnesses had different recollections about the positions of the vehicles at the time of impact. He urged me to accept Mr. Epp's testimony as the most credible, noting that he has no interest in the outcome of the proceedings, and that he had the best view of the events that led to the collision, as they unfolded directly in front of him. Counsel noted that the statements provided by Mr. Epp a few months after the accident were consistent with the evidence that he gave at the hearing, namely that the motorcycle was driving in front of him in the right lane for awhile before the accident occurred, and that Ms. Koumantaros pulled into that lane and caused the collision.

46. Counsel for Jevco also noted that both expert witnesses had determined that the property damage to the vehicles ruled out the possibility that a rear-end collision had occurred. He submitted that their statements that the front wheel of the motorcycle hit the right rear quarter-panel of the Dodge Caliber, was consistent with Mr. Epp's and Mr. Barwick's evidence that the motorcycle was established in the right lane, and that Ms. Koumantaros' vehicle was changing lanes prior to impact. He noted her admission that she had partly changed lanes before the point of impact, and contended that when this evidence is considered along with that of Mr. Barwick and Mr. Epp, it is clear that Rule 10(4) applies and that the TD insured should be found to be 100% at fault for the accident.

47. Finally, Mr. March urged me not to accept Mr. Fernandes' statement that Mr. Barwick was travelling in the left lane before the accident occurred. He questioned Mr.

Fernandes' ability to see the motorcycle approaching in the left lane as he claimed through his side mirror, noting that he did not have a rear-view mirror. Counsel suggested that given the curve in the ramp at that point, and the fact that Mr. Fernandes' attention would have been directed at other things, his evidence was not as reliable as that of Mr. Epp.

48. Counsel also noted that Mr. Fernandes testified that Mr. Barwick got up from where he had landed on the road after the collision and walked back to his bike, to check on how badly it was damaged. Counsel suggested that this statement puts his recollection of the incident into question, given that Mr. Barwick had lost consciousness and sustained multiple fractures as a result of his fall. He noted that all of the other witnesses testified that Mr. Barwick could not move and remained on the ground until the first responders arrived to treat him.

TD's submissions

49. Counsel for TD agreed that Rule 10(4) would apply if the evidence indicates that the motorcycle was established in the right lane prior to impact, and that Ms. Koumantaros was changing lanes at that time. He contended, however, that Jevco had not met its onus to prove that this occurred, on a balance of probabilities. Counsel acknowledged that there was competing evidence on the question of whether Mr. Barwick was traveling in the right or left lane prior to colliding with the Dodge Caliber, and submitted that I should favour the evidence indicating that he was traveling in the left lane.

50. Counsel noted that neither of the expert witnesses could say with any certainty where the accident happened on the road, and submitted that their opinions were not determinative. He urged me not to accept Mr. Barwick's evidence, as it was at odds with that of the other witnesses on several points, including his insistence that the collision took place after the vehicles had already cleared the ramp and were on the Gardiner expressway, and that Ms. Koumantaros' vehicle was traveling between 60 and 70 km/hour prior to the impact. He also noted Mr. Barwick's statement that he could see the reflection of Ms. Koumantaros' eyes in her rear-view mirror, and submitted that while unlikely, that would only be possible if he had been driving directly behind her in the right lane.

51. Mr. Visschedyk acknowledged that both independent witnesses – Mr. Epp and Mr. Fernandes – were strong in their opinions of how and why the accident occurred. He pointed out that Mr. Epp had told the police officer after the accident that he estimated that Mr. Barwick was traveling approximately 60 km/hour, whereas he testified at the hearing that he was only traveling at 20 km/ hour. He argued that in contrast, Mr. Fernandes’ statement that he clearly saw Mr. Barwick’s motorcycle driving in the left lane prior to the impact was consistent in his police statement and at the hearing, and that his evidence withstood thorough cross-examination.

52. Counsel also pointed out that Mr. Epp was driving at the time of the accident and would have been paying attention to everything around him, including the City trucks advancing slowly in the next lane, and the many cars that were being forced to merge into his lane. He noted that in contrast, Mr. Fernandes was stopped in the left lane, with his truck in “park”. He suggested that Mr. Fernandes was likely paying very close attention to what he saw in his side mirror was taking place behind him, given that he was about to exit the truck to pick up the debris, and that his safety would depend on what was going on behind him. For these reasons, he urged me to accept his evidence over that of Mr. Epp.

Reply submissions

53. Counsel for Jevco acknowledged that Mr. Fernandes could see Mr. Barwick’s motorcycle coming up the ramp through his side view mirror. He suggested, however, that I should not accept his statement that he was certain that he was traveling in the left lane, given the angle of his side mirror, the truck’s position and the curve in the ramp, and the fact that Mr. Fernandes had testified that he was unable to see the second City truck that was following approximately 150 metres behind him, because of the curve in the road.

ANALYSIS & FINDINGS:

54. The question to be determined here is predominantly factual – did the incident described above occur when Ms. Koumantaros was changing lanes? Both parties agree that if the evidence supports that finding, Rule 10(4) of the Fault Determination Rules would

apply, and Ms. Koumantaros would be 100% at fault for the incident. If not, Rule 5 would apply and the degree of fault must be determined in accordance with “the ordinary rules of law.”

55. Having considered the evidence carefully, I conclude that Ms. Koumantaros was changing lanes when the incident occurred, and that Rule 10(4) applies. All of the evidence supports that finding, save for Mr. Fernandes’ statement that he observed Mr. Barwick driving in the left lane before the collision. Before I analyse the evidence in this regard, I will set out the appropriate context for the analysis required for a Loss Transfer “claim” under section 275 of the Act.

56. The legislative intent behind the Loss Transfer provisions has been reviewed and summarised in various cases decided by the courts in Ontario. The Court of Appeal stated in *Jevco Insurance Co. v. Canadian General Insurance Co.* (1993) 14 O.R. (3d) 545 that the purpose of the scheme is to “provide 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”. Justice Carthy stated in *Jevco Insurance v. York Fire & Casualty Co.* (1996) 27 O.R. (3d) 483 (C.A.) 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”.

57. As I and other arbitrators have stated in previous decisions, the clear message from these judicial pronouncements is that a “rough and ready” approach is to be taken when analysing these cases. If the evidence supports a finding that one (or some) of the Fault Determination Rules applies, that rule should be invoked. I note that the Court of Appeal has recently affirmed these principles in its decision in *State Farm Mutual Automobile Insurance v. Aviva Canada Inc.* 2015 ONCA 920 (CanLii).

58. In the context of this case, I take these comments to mean that if the preponderance of reliable evidence favours a finding that the accident occurred as the Dodge Caliber was

changing lanes, Rule 10(4) should be applied. As stated above, I am satisfied from the evidence tendered that Ms. Koumantaros was changing lanes when the incident occurred. Mr. Epp testified that Mr. Barwick was driving in front of him in the right lane for several seconds before the Dodge Caliber changed lanes. While I have some concerns about the evidence provided by Mr. Barwick, he echoed that view. Notably, both accident reconstruction experts provided opinion evidence that the property damage to both vehicles, especially to Ms. Koumantaros' Dodge Caliber, indicated that her vehicle was angled to the right before impact. And finally, Ms. Koumantaros herself testified that she had started to merge into the right lane when she felt the motorcycle collide with her car.

59. Her evidence merits further review. She testified at the hearing that she started to merge from the left lane into the right lane, but had to slow down and stop while doing so, in order to allow two cars that were still ahead to merge in front of her. When asked where her car was located on the road when she was struck by the motorcycle, she stated that she was stopped in the middle of the two lanes, perhaps more in the right lane. Given this evidence, the discrepancy between her recollection and that of Mr. Barwick is not whether she was changing lanes, but rather whether she was stopped or moving when the collision occurred.

60. Ms. Koumantaros was questioned closely on cross-examination, as expected, regarding why she testified at her Examination for Discovery that she was stopped in the left lane when the collision occurred. While her explanation that those answers were given because she had suppressed the details of the accident and felt anxious about being examined for discovery in the lawsuit may be questioned, it is clear that she told the police officer investigating the accident that she "had already merged" at the point that she was struck. I note that her evidence in this regard is also supported by Mr. Epp and the two expert witnesses.

61. The only real evidence to the contrary is that of Mr. Fernandes. While he gave his evidence in a forthright manner, and I appreciate that he has nothing to gain by providing the evidence that he did, his evidence raised some questions. He acknowledged that the

truck he was driving that day had no rear view mirror, and that he was unable to see behind him through the back window of the cab of the truck. While he insisted that the large side view mirror on the right side of the truck provided a clear view of what was going on behind him, I must question this, in light of his evidence provided under cross-examination that he could not see the second City truck proceeding approximately 150 meters behind him on the ramp, as his truck was stopped at the top of the ramp and the other truck was located toward the bottom of the ramp. That truck is significantly larger than Mr. Barwick's motorcycle, and the fact that it was not visible to him at all makes me question how he could be so certain that he saw the motorcycle approach in the left lane.

62. Mr. Fernandes' recollection that Mr. Barwick got up from the ground after being thrown some distance from the bike, and walked back to his bike to assess the damage is also at odds with the evidence of all of the other witnesses, and quite unlikely, given the severity of the injuries suffered by Mr. Barwick. This also leads me to question the accuracy of his recollection of the events of that day.

63. Counsel for TD contended that Mr. Epp's evidence should be viewed with scepticism, given that he testified at the hearing that Ms. Koumantaros had activated her right turn signal before she shifted her vehicle into the right lane, while his statement to the police at the scene was that he had not seen any turn signal activated. I acknowledge this inconsistency and agree that it affects the weight to be placed on Mr. Epp's recollection of events. However, given the fact that both forensic engineers testified that the property damage sustained by Ms. Koumantaros' vehicle supports the idea that she was merging into the right lane, or at the very least, had her car angled to the right at the point of impact, I favour Mr. Epp's evidence over that of Mr. Fernandes.

64. In the end, it is that evidence which I find to be the most persuasive of the fact that the incident occurred as Ms. Koumantaros' vehicle was changing lanes. Both engineers noted a black stain on the right rear wheel of the car, and Mr. Porter, TD's expert witness, suggested that the motorcycle made its initial impact with the car at that point. Clear damage was also evident on the right rear side quarter-panel of the Dodge Caliber, which

also suggests that the car was angled to the right at the point of impact. Unusually, both experts agreed that “Scenario 1” was a likely depiction of the orientation of the vehicles at the time of impact, which indicates that a lane change was taking place.

65. Given the above, I find that Rule 10(4) of the Fault Determination Rules applies and that the TD insured driver is 100% at fault for the incident. TD is therefore liable to indemnify Jevco for the benefits that it has paid out to Mr. Barwick in accordance with section 275 of the Act.

ORDER:

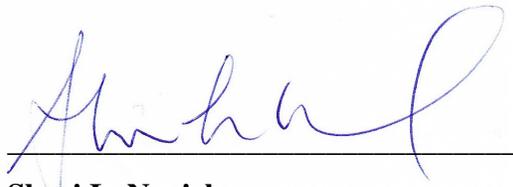
The Application for Arbitration is hereby granted. TD is required to indemnify Jevco for the benefits that it has reasonably paid out to Robert Barwick, subject to the provisions of the Loss Transfer provisions in the Act.

COSTS:

In light of the above, Jevco is entitled to payment of its legal costs in relation to the arbitration, on a partial indemnity basis. If counsel cannot agree to the quantum of costs payable, I invite them to contact me so that a process can be arranged for submissions to be exchanged.

Finally, as stated at the outset, the parties agreed that this decision would address the liability issue only. If any disputes arise regarding the quantum to be reimbursed that cannot be resolved by the parties, counsel may contact me and a further teleconference will be convened.

DATED at TORONTO, ONTARIO this __26th__DAY OF OCTOBER, 2017.



Shari L. Novick

Arbitrator