

**IN THE MATTER OF THE *INSURANCE ACT*
R.S.O. 1990, C.I.8, AND REGULATION 664 AS AMENDED**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

AVIVA INSURANCE COMPANY

Applicant

- and -

THE COMMONWELL MUTUAL INSURANCE GROUP

Respondent

DECISION

COUNSEL/REPRESENTATIVE:

Hooman E. Zadegan-Counsel for the Applicant, Aviva Insurance Company.

Cecil Jaipaul -Representative for the Respondent, The Commonwell Mutual Insurance Group.

ISSUES:

The parties have submitted this matter for Arbitration pursuant to Section 275 of the Insurance Act, Regulation 664, Regulation 668 thereunder and the Arbitration Act S.O. 1991.

The Arbitration Agreement, paragraph 2, sets out the issues to be decided, as follows:

- a) Which of the two insurers, Aviva or The Commonwell, is responsible for funding the claim for Statutory Accident Benefits advanced by Daniel Bromell, and in what proportions should the insurers pay Accident Benefits?
- b) If the answer to (a) above is or includes the Respondent, what is the appropriate indemnity amount to be reimbursed to the Applicant?
- c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing?
- d) The determination of the costs of the Arbitration and the burden of payment of same.

As discussed below, the decision turns on a determination of which rule set out in Ontario Regulation 668, Fault Determination Rules, is applicable to the facts of this case.

HEARING:

At a Pre-Hearing held on February 10, 2022, the parties agreed to have this matter decided based on the submission of written materials filed and they agreed to waive the need for an in person hearing and any oral submissions. They were not able to come up with an Agreed Statement of Facts. The submissions from both the Applicant and the Respondent have been received, reviewed and have been considered in arriving at the decision which follows.

THE FACTS:

This matter arises as the result of a motor vehicle accident which occurred mid-afternoon on Saturday May 20, 2017.

At the time of the accident, Daniel Bromell was operating a 2008 Harley Davidson motorcycle (the "Bromell motorcycle") eastbound in the curb lane of King Street East on the north side of the street,

near its intersection with Farewell Street, in the City of Oshawa. King Street East is a one-way street with three lanes running eastbound.

The Bromell motorcycle was insured under a policy issued by the Applicant, Aviva Insurance Company ("Aviva").

Jessica Lloyd was operating a Dodge Ram pick up truck owned by Ryan Steel (the "Steel vehicle"). Mr. Steel was a passenger in the vehicle at the time. The Steel vehicle had been proceeding eastbound on King Street East, in the centre lane adjacent to the curb lane.

The Steel vehicle was insured by the Respondent, Commonwell Mutual Insurance Group.

The Steel vehicle moved from the centre lane into the curb lane moving from the right to the left with the Bromell vehicle approaching from behind in the curb lane.

At or near the time of the lane change, the Bromell motorcycle was laid down by Mr. Bromell. Skid marks were estimated to be approximately 50 feet by the investigating police officer-Officer Gajewski. The police officer also noted damage to the side and front of the Bromell motorcycle. The officer noted damage to the Steel vehicle.

The officer charged Ms. Lloyd under s. 142(1) of the Highway Traffic Act. Ms. Lloyd paid the ticket.

The investigating officer took a witness statement from Carri Rowley, a motorist travelling eastbound and to the right of Bromell, apparently behind the Steel vehicle in the centre lane.

Her police statement is set out in full as follows.

Statement of Carri Rowley:

"I would like you to tell me what happened. Everything you tell us is important, and I will be typing everything you say. I can not type as fast as you can speak, so please talk very slowly. I want to be able to type everything you say, so I will be repeating it back to you. If you feel I am typing something you did not say, please stop me, and we will correct it immediately. Please tell me what happened in this incident, starting at any point you feel is appropriate.

A. I was in the middle lane here. I was driving east and then the motorcycle was beside on the left hand side. I heard him open up throttle and a bunch of smoke came out of the back of his bike. The black truck, I'm sorry I don't what kind, went to make a left hand lane change, the bike and it collided. The bike literally ran into the back of the truck. When they

collide the truck turned into the parking lot, the guy flew off the bike and as they were turning he was hanging off the back bumper part of the truck. Then he fell off, the truck parked and the biker stood up and started screaming in pain and everyone told him to lay down and be still. That is when he laid down on that section of grass. We all just told him to lay still in case he had a neck injury. Then I noticed the girl she was the driver but she was shaking so badly I checked on her.

Q. What time approximately did this occur?

A. About 255 pm – 3 pm

Q. What road were you travelling on?

A. King St

Q. What lane was the motorcycle in?

A. The left hand lane

A. Sorry was the truck turning into the plaza or where they doing a lane change?

Q. I'm not sure it happened a ways back from the actual entrance to the parking lot.

Q. What part of the truck did the bike hit?

A. I am going to say it was the back bumper, but I don't know for sure.

Q. How far into the lane change was the truck when the bike struck it?

A. Just had started over.

Q. Is there anything else you would like to add?

A. I was travelling just over 50km/hr and when he opened throttle he sped past me, when he opened he sped right past me.

Q. Just describe the collision again and what you saw?

A. So when the bike hit the back of the truck and the bike kinda went up, the back went up and the guy flew off the bike, the bike skidded along the pavement and somehow the biker was hanging on or stuck to the back left of the bumper. When the truck turned into the parking lot that is when he fell off and then got up and started jumping around."

The investigating officer took another witness statement from Trevor Crump. Mr. Crump was travelling in the centre lane behind the Steel vehicle.

His police statement is set out in full as follows.

Statement of Trevor Crump:

"I would like you to tell me what happened. Everything you tell us is important, and I will be typing everything you say. I can not type as fast as you can speak, so please talk very slowly. I want to be able to type everything you say, so I will be repeating it back to you. If you feel I am typing something you did not say, please stop me, and we will correct it

immediately. Please tell me what happened in this incident, starting at any point you feel is appropriate.

I was travelling in the centre lane there was a dodge ram pick up truck in front of me. I had to put on my brakes because she was slowing down because she was turning left into the Dollarama, seen her lock up her brakes, turned left into Dollarama, she cut across the left lane. The bike was coming eastbound in the left lane, and I can't estimate approximately speed he was going all I heard was him lock up the brakes and skidded, heard them skid beside me. I then came to a stop because I knew what was going to happen and then so basically he fell onto the left side and his body then went over the front of the bike and inside the wheel well of the truck, the left side back wheel well of the dodge, the dodge the came to a stop and he ran out. And that is as far as I saw, I went into my truck and got my cell phone and dialed 911.

Where did this take place?

It was eastbound King Street about 500m east of Wilson Road.

What is the time and date of incident?

It happened about 2:50pm and it is Saturday May 20, 2017.

Was there any traffic between you and the Dodge Ram Pickup?

No. And the traffic was very light, my rate of speed was about 50km/hr before I put on my brakes.

Where was the bike when you heard the skidding?

In my left sideview mirror that's when I seen it and heard the engine of the bike and heard the skidding, that is when the bike went on its side and made impact with the truck.

Where did the bike make impact with the truck?

The bike did not make impact, the bike was on its side to avoid the accident and he locked up his brakes so hard that he went into the wheel well of the truck. He went over the handle bars and into the wheel well of the truck.

Is there anything else you would to add?

No."

The police materials filed do not include any statements from Bromell, Steel or Lloyd.

The Arbitration materials filed by the Applicant include statements of Steel and Lloyd obtained during the investigation of the claim by Commonwell.

Their statements in full are as follows.

Statement of Ryan Steel

"My name is Ryan Steel. This is my statement with regard to the accident in which I was involved on May 20, 2017. I have provided my driver's licence as a form of photo identification. My email is I have lived at the above address since August 31, 2017. I live there with my girlfriend Jessica Lloyd. We are common law. No one else lives with us in the household. We have two vehicles for the household and I have a motorcycle. At the time of the accident, Jessica was driving my vehicle occasionally. I am the primary driver of the vehicle. My vehicle is a 2007 Dodge Ram. It is black, I don't know the plate number. I purchased it used from Pickering Chrysler. That was in 2012. I do regular maintenance on the vehicle. I do the oil changes myself, or my stepdad who is a licenced mechanic. I am the registered owner of the vehicle. The vehicle is used for personal use and for commuting, not for business purposes at all. No one else drives the vehicle other than myself and Jessica. She doesn't drive my vehicle anymore, she is too scared to. Jessica had driven the vehicle that day. It is an automatic. There was not winter tires on the vehicle at the time, it was all season all terrain tires. The tires were about 4 years old. They were in good condition. There was only 60,000 km on the tires at the time. There is 164,000km on the vehicle now. There is no dash cam in the vehicle at all. I still have the vehicle. It did not sustain any damage from this incident, none. Prior to the accident, there was no mechanical issues with the vehicle to my knowledge. There was no recalls on the vehicle that I am aware of. The accident happened in the afternoon, maybe around 4 or 5pm. Jessica was driving the vehicle and I was the front seat passenger. There was no one else with us in the vehicle. We were going home and we were coming from shopping. At the time, we lived in Courtice. We were both wearing our seatbelts. The accident happened near King and Wilson. We were on King Street going east. There are three eastbound lanes there, and we were in the middle lane. The weather was good. It was sunny and warm. Jessica wears contacts, I don't know if she needs them for driving, but she has her contacts in all day long. I don't remember what we were doing in the vehicle. I think we were talking, I think we were talking about what we were doing for dinner. We were not arguing, we were not upset. Jessica was not distracted at all. She was not using a handheld device at all. I had been with her all day, and to my knowledge, Jessica had not consumed any drugs or alcohol in the 24 hours prior to the accident. We were travelling along in the middle lane. There were vehicles in front of us. Traffic was moderate at the time. Jessica was driving my vehicle at the time because we were shopping for bigger items and we needed the room, she was only driving a Jetta at the time. Also, at the time, I didn't have my licence because of a DUI. We were travelling down the middle lane on King Street. King is a one-way street in that area, there is just three lanes. We had passed Wilson. Jessica was changing lanes into the left lane. I remember before she changed lanes, I was looking at her, and I remember seeing the motorcycle about 7 car lengths behind us. I remember Jessica checking her blind spot and putting her signal on, and as she was doing that I heard the crack of a throttle. She then started to change lanes into the left lane. I then heard screeching tires. As we were coming into that lane, I heard the tires, and I looked back and I saw the bike coming at us and then I saw him try to turn, and the bike laid down on its side. As the bike laid down on its side, there was an entrance to a plaza on the left, I think it's a Freshco. We went into the Freshco parking lot. I don't remember any kind of impact at all. I definitely know that he was down before he got even remotely close to the truck. I think what happened is that the motorcyclist laid down his bike because we were merging into the left lane and he was approaching too quickly. The motorcycle was travelling in the left lane. There was a vehicle

traveling behind us. It was a car, I don't remember what it was. I don't remember the colour, maybe a grey or tan colour. That vehicle pulled into the Freshco plaza as well. I got out of the vehicle. Jessica stayed in the vehicle. I wanted to see if the guy was ok. Jessica was kind of in shock and she was upset. I went over to the bike to see if the guy was ok. He was conscious when I saw him. He was laying down cursing and swearing. He hopped over to the sidewalk grassy area. He was hopping on one foot so I assumed there was a scrape on his leg. The bike was on the road, in the left lane. He was quite upset. He was swearing and calling Jessica names, so I didn't approach him after I heard that, I thought that would just make things worse. By that time, there was a couple other people that had been walking down the sidewalk who approached the man from the bike. I asked one of them if they were calling 911 and he said yes. I didn't get anyone's name. The man from the motorcycle had a helmet on. He didn't have a visor. I could see dark hair around the edges of his face. I am pretty sure he had some scruff on his face. He was in his late 30's. He was maybe around 200 pounds, average height. He was Caucasian. I don't remember if he was wearing glasses. He had running shoes on. He had jeans on. I don't remember what he was wearing on his top half. I went back and tried to comfort Jessica because she was kind of in shock. The lady from the vehicle behind us that had pulled over approached us. She said she saw the whole thing and that it wasn't our fault. She said the motorcycle had blown right by her. We were both doing the speed limit, about 55km/h, and the lady said the motorcycle blew right by her. I asked her if she could stay and give a statement to the police and she said yes no problem. I didn't get her name or contact information. She was probably in her 50's, she was shorter, around 5'5". I think she had light brown hair. She was Caucasian. She had an average build. The police arrived at the scene, I think a couple cruisers came. One went to the motorcyclist and another came to us. The police officer asked us what happened and he took a statement from Jessica. I told the officer that there was a witness and he said he would talk to her. To my knowledge, the witness did speak with the officer. When I talked to the officer afterwards, he said he did speak with the witness as well as a couple others, and that there was contradictory versions. An ambulance did arrive on the scene. The paramedics attended to the motorcyclist. I know he went in the ambulance. I did see the man from the motorcycle walking around right after the accident, from the road to the sidewalk area. But I don't remember seeing him up and walking around after that. I don't remember seeing any visible injuries and I don't remember seeing any blood. There was just one person on the motorcycle. He was taken away by ambulance and we asked the officer how the rider was doing, and he said that the man appeared to be ok, and not too badly injured. We asked why he was being taken away by ambulance. The officer said it was protocol to have any motorcyclist taken to the hospital after any accident involving a motorcycle. I do remember there was a lot of police at the scene, maybe 7 or 8 officers. The one officers said not to be nervous about the amount of officers on the scene, because some of them were in training. The officer charged Jessica, I think it was for an improper lane change. I didn't exchange information with the man from the motorcycle and I haven't spoken with him at all. I have not had any repairs done to the vehicle since the date of the accident. There was no damage sustained to my vehicle from this accident. I think there was some damage to the motorcycle, but I don't know what. I just looked like the one side got scraped up. It was towed from the scene. I don't know if we have a police report number. I didn't take any photos at the scene. There is nothing I would like to add. I have read the above and confirm that it is true to the best of my knowledge and belief."

Statement of Jessica Lloyd

"My name is Jessica Lloyd. This is my statement with regard to the accident in which I was involved on May 20, 2017... I have lived at the above address since August 2017. I live there with my boyfriend Ryan Steel, who is the owner of the vehicle I was driving at the time. I have been driving since I was around 16 years old. I don't think I have had any speeding tickets or traffic infractions, other than the charges from this accident in the last 7 years. I was involved in another accident 3-4 years ago where I t-boned someone who ran a stop sign. I was found not at fault for that one and I was not charged. My licence has never been suspended. I have never been convicted of driving under the influence of drugs or alcohol. At the time of the accident, I was driving Ryan's Dodge truck. I think it's a 2007. I had driven it before. I also have my own vehicle as well. I have a 2017 Hyundai Santa Fe. At the time of the accident, I had a VW Jetta. Ryan was with me in the vehicle at the time. He was the front seat passenger. I was driving his vehicle because his licence was suspended. We had been shopping and his vehicle is bigger for bigger items. We had already been shopping and we were on our way home. It was mid-afternoon. It was still light out. It was sunny and beautiful out. I was comfortable driving the vehicle, I grew up driving trucks. I had been in that area before, and I was familiar with it. We were both wearing our seatbelts. We were on King Street near Wilson Road. It was just after the intersection. King is a one way street in that area. We were coming from shopping in Oshawa and we were living in Courtice at the time and we were on the way home. There are three lanes on King Street there. I was driving initially in the middle lane. The speed limit there is 50km/h. I was going around 50km/h. Traffic was busy that day. The left lane was open. There was no one in front of me in the left lane. I was just past Wilson Road. I had not consumed any drugs or alcohol in the 24 hours prior to the accident. I had not taken any medications that would have made me tired or sleepy. I was well rested and alert. I think we were listening to music and maybe talking. I was not distracted. I was not eating or drinking at the time. I had a cell phone with me in the vehicle. It was in my purse which was in the back seat I think. I was not using it at the time. I didn't have a GPS going at the time. I was not distracted in any way. There is lights at Wilson. I don't remember if we had stopped there or not. We were directly beside the Dollarama which was on the left side of the street when the accident happened. I was driving in the middle lane. I noticed it was bumper to bumper in my lane. I didn't like that so I wanted to change lanes into the left lane that was open. I looked in the rear view mirror and saw a motorcycle at least 4 car lengths back from me. He was a safe distance back for me to change lanes in front of him. I also checked my blind spot and my side mirror before moving over. I put on my left signal. The windows were down. As I was changing lanes, I heard a throttle opening on the bike, it's a sound that happens when a motorcycle speeds up. I was fully in the left lane at that point. When I heard that noise, I looked in the rear view mirror and I saw the motorcyclist. And then I looked in my side mirror and that's when I saw him lay his bike down on its side. I assume he did that to avoid hitting me. There was a driveway on the left, and I pulled in. It was the driveway to the Dollarama. I pulled into the parking area. I sat there with the vehicle running. I looked at Ryan and told him to get out and see if the guy from the motorcycle was ok. Where I stopped the truck, it was facing away from the road and where the accident happened. I didn't get out, but the windows were down so I looked out. The man from the motorcycle had gotten up. He was already up off the ground. The man came up to my truck and was screaming at me and he was screaming "fucking bitch" at me. He was still a fair distance away at that time. He didn't approach the truck at any time. I understood that he

was mad, but I was upset that he was yelling at me. Ryan got out. I don't know if he spoke with the motorcyclist. People started walking up to both him and me. I spoke with one lady who said she was going to stick around because she had seen the whole thing. She said she was going to give a statement to the police. She had been driving along King Street when it happened and saw it all she said. She said that the motorcyclist had blew past her at a high speed while driving. I did not get her name or any information from her. She was shorter with a heavy set build. She was in her mid 50's. She was white. I don't remember her hair, but I think it was light. I never saw her car, she just came up to me. I don't know her name. Other people were asking me if I was ok. I did get out after a while, when I saw the police. I sat on the tailgate. The motorcyclist as laying on the grassy area near the sidewalk. When he was screaming at me, it sounded like he was in discomfort. I think he was in pain. He didn't have any visible injuries that I saw. He was not bleeding that I saw. His shoe was by his bike, just one shoe. The bike was still on King Street. He was wearing black sneakers. He was wearing a helmet. I didn't see a visor on the helmet. He was wearing pants. I don't remember what he was wearing up top. I don't remember if he was wearing gloves. I never spoke with him. To my knowledge, he wasn't complaining of any specific injuries. The police came to the scene, I don't know who called the police. The police went to the motorcyclist first. Eventually I spoke with an officer as well and they asked me what had happened. They asked me for my licence and insurance. He asked who was driving, and I said I was. They told us to sit tight. Two cops that were dealing with the motorcyclist came up to us and asked us to put the tailgate up. The police said they couldn't tell me anything about the motorcyclist. I think they also said they were training some cops and that there were just showing them what they were doing. We sat there for a long time. The cop came back and asked if I was ok. I said yes. I asked if the motorcyclist was ok continuously. The officer said that yes he would be ok. There was an ambulance at the scene, and the officer said that the motorcyclist wanted to be checked out. I asked why the ambulance was sitting there for so long, and the officer said that was a good sign. They were obviously not in a hurry to get him to the hospital. The paramedics were there for about half an hour. The officer said that there were some witnesses saying I was at fault and others saying that the motorcyclist was at fault. He also said he was giving me the lowest ticket possible for an improper lane change. I don't know if the motorcyclist got a ticket. There is no damage to our truck from this incident. The cops even acknowledged that at the scene. I don't know if the motorcyclist even hit the back of our vehicle. If anything, he may have slid into the back tire. I didn't feel an impact to my vehicle and I didn't hear any impact either. I don't know if there was any damage to the motorcycle. I think it was a Harley. I am so cautious in every way with motorcycles. My boyfriend rides motorcycles so I am always so cautious around motorcycles when driving. I did try to fight the ticket. I went in to speak with the prosecutor but they did not lower my charge. They said that the officer was being fair that day and it was a low ticket so they didn't throw it out. I did pay the ticket. I didn't get an accident report. I am not sure if the officer gave me a business card. I don't have the ticket anymore, I mailed it away when I chose to speak with the prosecutor. I don't know the accident report number. I don't know any of the officer's names from the scene. I didn't take any photos at the scene. I didn't exchange information with the motorcyclist or anyone else at the scene. I didn't get any witness information either. There is nothing I would like to add. I have read the above and confirm that it is true to the best of my knowledge and belief."

The Applicant and the Respondent have agreed that the provisions of S.275 and Ontario Regulation 668, the “Fault Determination Rules”, are applicable to this case.

These rules govern the determination of any indemnity to be provided from Commonwell to Aviva for Statutory Accident Benefits, paid to Mr. Bromell as the result of injury sustained in the accident.

Aviva gave notice of the Loss Transfer on January 14, 2020.

Aviva served a Notice of Commencement of Arbitration on October 15, 2020.

To date, the sum of \$22,653.97 has been paid in Accident Benefits. Net of the two thousand dollar loss transfer deductible, the claim to date is for \$20,653.97 plus interest.

Commonwell in its materials did not dispute the quantum.

LEGAL FRAMEWORK and ANALYSIS:

The relevant Insurance Act and Regulations in issue are as follows:

a) Insurance Act R.S.O. 1990, c. I.8, 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. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1.

(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. R.S.O. 1990, c. I.8, S.275 (2).

(3) No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (3); 1993, c. 10, s. 1.

(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, 1991. R.S.O. 1990, c. I.8, s. 275 (4); 2015, c. 20, Sched. 17, s. 5.

- b) Regulation 664, Automobile Insurance, Section 9, R.R.O. 1990-Indemnification for Statutory Accident Benefits (Section 275 of the Act):
- (1) “first party insurer” means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;
- “heavy commercial vehicle” means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;
- “motorcycle” means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the Highway Traffic Act,
- “motorized snow vehicle” means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;
- “off-road vehicle” means an off-road vehicle as defined in the *Off-Road Vehicles Act*;
- “second party insurer” means an insurer required under section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.
- (2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,
- (a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,
- (i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
- (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or
- (b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,
- (i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
- (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.
- c) Regulation 668, R.R.O. 1990-Fault Determination Rules-this Regulation is attached as Appendix “A” to these reasons.

Aviva's position is that Rule 10(4) is applicable.

Commonwell maintains Rule 6(2) applies or in the alternative, s.5 is applicable where the rules do not describe the incident in issue.

Commonwell denies that Rule 20 is applicable describing it as irrelevant.

Aviva takes the position that Rule 20 is not applicable.

The submissions of Aviva include the Ontario Court of Appeals reasons in *State Farm Mutual Automobile Insurance Company v. Aviva Canada*, (2015), ONCA 920.

The Court's analysis of the principles of interpretation of the indemnification provisions of s.275 of the Insurance Act and the Fault Determination Rules have been reviewed and considered in arriving at this decision.

The Court of Appeals' reasons in paragraphs 49 through 66 are set out in full as follows:

i. Ontario's Loss Transfer Scheme

[49] Under the Act, Ontario has a partial no-fault system. Since June 1990, regardless of fault, insureds look to their own insurers for the payment of statutory accident benefits, rather than seeking compensation from third parties (and their insurers). The Ontario legislature introduced the loss transfer scheme to address the cost implications for insurers of moving to this partial no-fault system: Ontario Insurance Commission (now the Financial Services Commission of Ontario), Interpretation Bulletin No. A-11/94, "Loss Transfer: Standardized Forms and Procedures" (6 June 1994).

[50] Section 268 of the Act requires an insurer to pay statutory accident benefits to its insured, in certain circumstances. A motorcyclist is covered by this provision.[3] An insurer who pays such benefits to its insured is known as the "first party insurer".

[51] Section 275 of the Act establishes the process by which the first party insurer can claim indemnification from another insurer.

[52] Section 275(1) allows the first party insurer, in certain situations, to claim indemnification from the insurer of the other driver involved in the accident. In this situation,

the other driver's insurer is known as the "second party insurer". It is the indemnification of the first party insurer by the second party insurer which is known as "loss transfer".

[53] Section 275(2) of the Act requires that indemnification be made "according to the respective degree of fault of each insurer's insured as determined under the [FDRs]."

[54] The FDRs consist of twenty rules. The first five rules are general provisions. Those provisions are discussed below. Rules 6 through 19 contain a series of general types of incidents and specify the fault to be attributed to each driver in each incident. Fault is not a nuanced determination in rules 6 through 19: it is typically assigned as 50% or 100%. Rule 20 provides the rules for fault determination when a driver involved in an incident is charged with a driving offence.

[55] If, as in this case, the first party and second party insurers cannot agree on indemnification under s. 275, s. 275(4) of the Act requires them to resolve the matter through arbitration under the Arbitration Act, 1991, S.O. 1991, c. 17.

[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.

ii. Rule 3 of the FDRs

[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).

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". There is nothing in the wording of rule 3 which limits its application to rules 6 through 19, as Aviva contends. On a plain reading, rule 3 applies to all determinations of fault made under the FDRs, including those made under rule 5(1).

Rule 3's location in the FDRs

[60] Rules 1 through 5 of the FDRs are located under the heading "General". The wording of rules 1 through 5 and their location at the beginning of the regulation show that they are rules of general application in the FDRs.

[61] Rule 1 defines the "centre line" of a roadway.

[62] Rule 2(1) provides that an insurer "shall determine the degree of fault of its insured ... in accordance with [the FDRs]".

[63] Rule 3, as I have just explained, limits the way in which fault is determined under the FDRs.

[64] Rule 4 governs situations in which more than one rule applies to an insured or incident.

[65] And, as previously discussed, rule 5 governs where an incident is not described in any of the FDRs.

[66] Accordingly, rule 3's location in the FDRs supports the view that it is a rule of general application and informs fault determinations made under rule 5(1), as well as those made under rules 6 through 19.

ANALYSIS AND FINDINGS:

Issue (a): Which Fault Determination Rule applies?

Rule 6(1) applies where automobile A is "struck from behind" by automobile B and both automobiles are travelling in the same direction and in the same lane. In these circumstances, automobile B is 100 percent at fault.

Rule 10 applies when automobile A "collides" with automobile B and both automobiles are travelling in the same direction and in adjacent lanes. Rule 10(4) states that 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 percent at fault.

The evidence contained in the statements of the four witnesses, Carri Rowley, Trevor Crump, Ryan Steel and Jessica Lloyd are consistent on one key point. The Steel vehicle operated by Jessica Lloyd changed lanes from right to left and into the adjacent curb lane immediately before the accident in issue. The Bromell vehicle was proceeding in the adjacent lane behind the Steel vehicle.

As a result of the lane change, Bromell laid down the bike.

According to the investigating police officer, the motorcycle left 50 feet of skid marks. His statement says there was damage to the Bromell motorcycle to the left side and front.

There is conflicting evidence as to if there was an impact between the Bromell motorcycle and the Steel pick up truck.

Witnesses Lloyd and Steel say they felt no impact. Rowley maintains there was impact between the motorcycle and the pick up truck.

Rowley's evidence is that as the motorcycle appeared to her to be speeding up in the adjacent lane, the pick up truck then started the turn. At one point, according to Rowley, Bromell was hanging on the back bumper as the pick up truck completed a left turn into a parking lot. He came off while the turn was being made. When asked how far in the lane change the truck was when the bike struck it, Ms. Lloyd indicated that it "just had started over".

A key passage from Mr. Steel's statement is:

"I remember Jessica checking her blind spot and putting her signal on, and as she was doing that I heard the crack of a throttle. She then started to change lanes into the left lane. I then heard screeching tires. As we were coming into that lane, I heard the tires, and I looked back and I saw the bike coming at us and then I saw him try to turn, and the bike laid down on its side."

Trevor Crump describes the Steel vehicle attempting to turn left into the Dollarama lot from the centre lane. He describes her lock up her brakes turning left into Dollarama and "she cut across" the left lane. Crump could not estimate the speed but did hear Bromell lock up the brakes and the motorcycle was audible as it skidded beside him. He knew a collision was going to occur. He describes Bromell going inside the left wheel well of the truck. He did not feel the motorcycle made contact with the truck.

There are photographs taken by an adjuster of the Steel vehicle showing damage to the rear left corner of the bumper. Mr. Steel told the adjuster this damage pre-existed the accident in issue.

I find that based on all of the evidence, the lane change of the Steel vehicle into the curb lane occurred at a time when the Bromell vehicle was gaining on the Steel vehicle in the curb lane. The lane change was not made in safety. In response, Mr. Bromell laid down the bike. I find that the Bromell motorcycle made contact with the Steel vehicle. At some point, Mr. Bromell came off the bike and slid into the rear left wheel well.

This is not a case where the Steel vehicle had completed a lane change, was established in the lane and then slowed or came to a stop ahead of the Bromell vehicle such that it could be characterized as a rear end collision, and that Mr. Bromell failed to keep a proper lookout. Rule 6 is not applicable.

I find that the applicable Fault Determination Rules in this matter is Rule 10 and in particular, Rule 10(4). The Steel vehicle (automobile B under this Rule) was changing lanes and the Bromell motorcycle (automobile A) is not at fault.

I note that the diagrams under Rule 10(4) do not specifically show the situation in this case. Section 2 (2) of the Fault Determination Rules states that the diagrams are merely illustrative of the situations described in these rules.

In arriving at this decision, I am keeping in mind the Court of Appeals' comments in Jevco Insurance Co. v. York Fire & Casualty Co. (1996), 27 O.R. (3d) 483, 1996 CanLII 11780 (C.A.), at paras. 8-9:

“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”.

In conclusion, Aviva is entitled to 100% reimbursement from Commonwell.

Issue (b): Quantum of indemnification

The Loss Transfer Request for Indemnification for the period May 20, 2017 to March 15, 2022 was included in the Aviva submissions.

There was no argument made by Commonwell that the amount being sought as of March 15, 2022 in the sum of 22,653.97, less the applicable \$2,000.00 deductible, for a net of \$20,653.97 was unreasonable. Accordingly, Aviva will recover the sum of \$20,653.97 for indemnification under s.275 of the Insurance Act and the Regulations thereunder, for the time period for which the claim has been made to date.

Issue (c): Interest

Aviva is entitled to interest. Interest will run from the date of the Request for Indemnification. My assumption is that the documentation at Tab G of Aviva's submissions, setting out the quantum and the Request were provided to Commonwell at or near the date on the Request for Indemnification dated March 15, 2022.

Issue (d): Costs

Aviva is entitled to its costs based on its success in this Arbitration and the Arbitration Agreement. Its Arbitration Submissions included reference to total costs of \$14,765.50 having been incurred. In this case, the costs included time spent preparing and presenting a motion to have an Arbitrator appointed in the Superior Court. My finding regarding costs does not include consideration of behaviour, conduct or delay as described in the submissions. In my view, the costs awarded should reflect the work undertaken, (including the work required to bring an Application for the appointment of the Arbitrator), the time spent, an appropriate hourly rate, the success achieved, the principal of proportionality and the agreement of the parties that the quantum of costs be assessed on party and party (partial indemnity) basis.

I note that the Arbitration Agreement signed by the parties at paragraph 11 states:

"The costs of the Arbitration including the Arbitrator's fees, expenses and disbursements and the cost of any examinations under oath shall be borne by the unsuccessful party. The successful party shall be awarded party and party costs to be fixed by the Arbitrator."

I am interpreting party and party costs to be the equivalent of what are now known as partial indemnity costs under the Rules of Civil Procedure for the Province of Ontario.

I award Aviva the sum of \$8,000.00 plus HST.

ORDER:

1. It is ordered that Commonwell Insurance indemnify Aviva Insurance Company the sum of \$20,653.97 in accordance with these reasons.
2. It is ordered that interest will be paid on the sum of \$20,653.97 from March 15, 2022. Interest will be paid in accordance with the Courts of Justice Act, R.S.O 1990, c. C.43. In the event that the parties are unable to agree to the interest rate, a Zoom conference will be held and submissions may be made.
3. It is ordered that Commonwell Insurance shall pay to Aviva Insurance Company costs fixed at \$8,000.00 plus HST.
4. It is ordered that Commonwell Insurance shall pay the costs of the Arbitration, including the Arbitrator's fees, expenses and disbursements.

DATED at Hamilton, Ontario this 15th day of June 2022.

Jarvis Scott, Arbitrator

APPENDIX “A”

ONTARIO

Regulation 668 under the Insurance Act

(R.R.O. 1990, Reg. 668)

Fault Determination Rules

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MENU OF REGULATIONS

General

1. In this Regulation, “centre line” of a roadway means,
 - (a) a single or double, unbroken or broken line marked in the middle of the roadway, or
 - (b) if no line is marked, the middle of the roadway or that portion of the roadway that is not obstructed by parked vehicles, a snowbank or some other object blocking traffic.

O. Reg. 276/90, s. 1.
2.
 - (1) An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.
 - (2) The diagrams in this Regulation are merely illustrative of the situations described in these rules.

O. Reg. 276/90, s. 2.
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.

O. Reg. 276/90, s. 3.
4.
 - (1) If more than one rule applies with respect to the insured, the rule that attributes the least degree of fault to the insured shall be deemed to be the only rule that applies in the circumstances.
 - (2) Despite subsection (1), if two rules apply with respect to an incident involving two automobiles and if under one rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident.

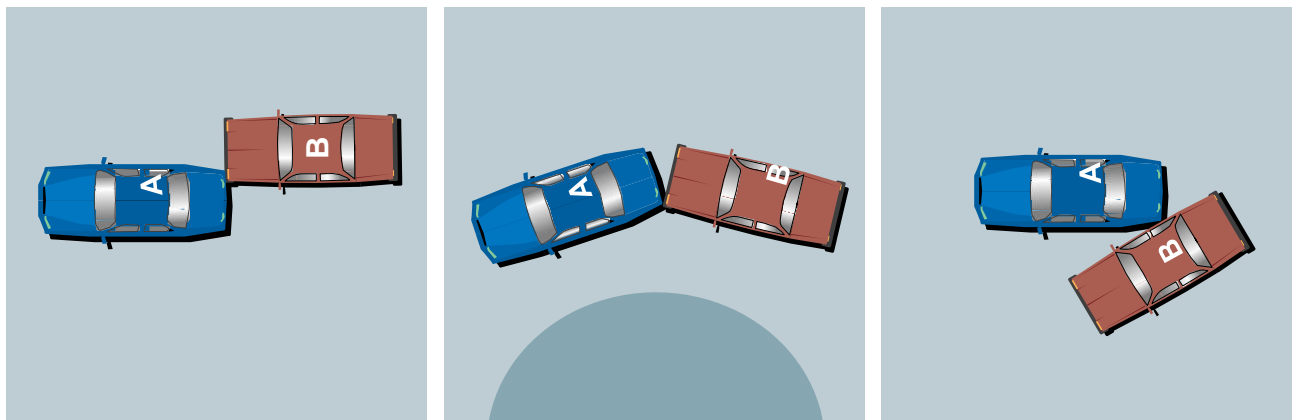
O. Reg. 276/90, s. 4.

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.
- (2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

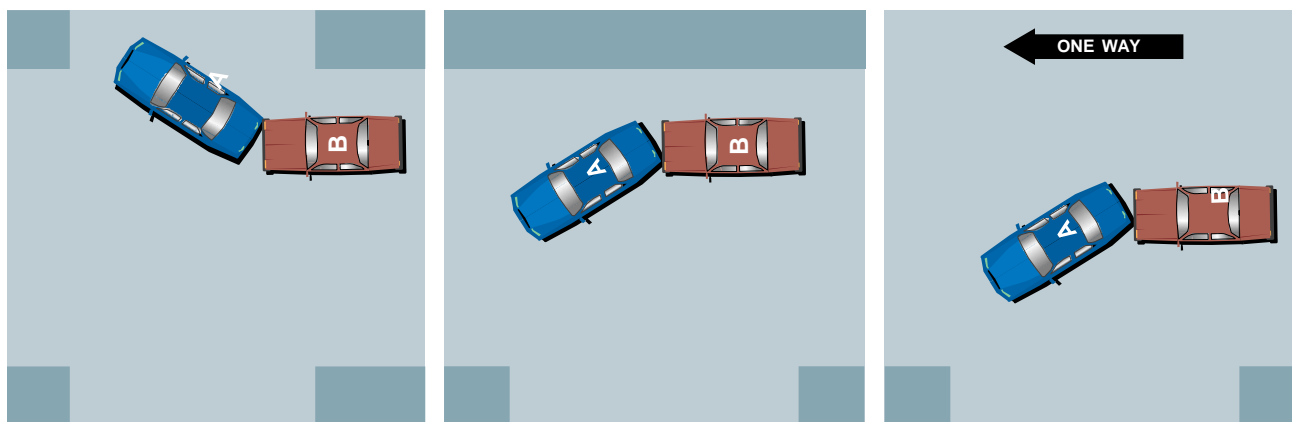
O. Reg. 276/90, s. 5.

Rules for Automobiles Travelling in the Same Direction and Lane

6. (1) This section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are travelling in the same direction and in the same lane.
- (2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

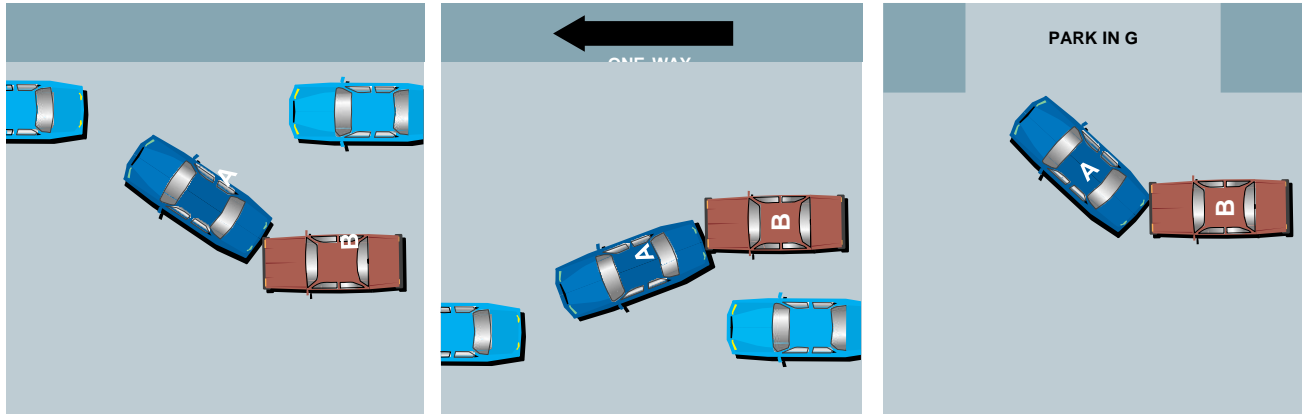


- (3) If automobile "A" is turning, either to the right or to the left, in order to enter a side road, private road or driveway, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.



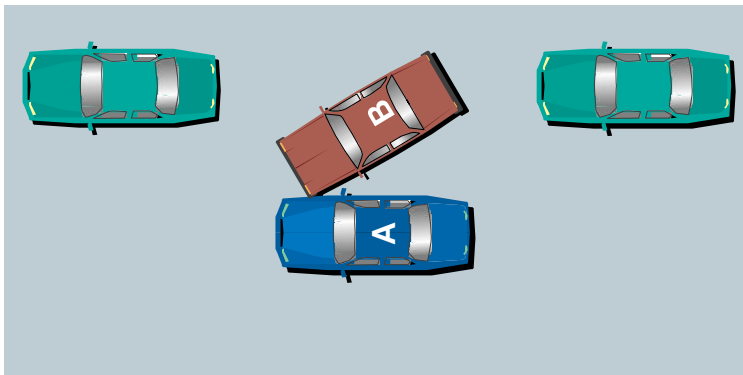
Rules for Automobiles Travelling In the Same Direction and Lane

- (4) If automobile “A” is in forward motion and is entering a parking place on either the right or the left side of the road, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



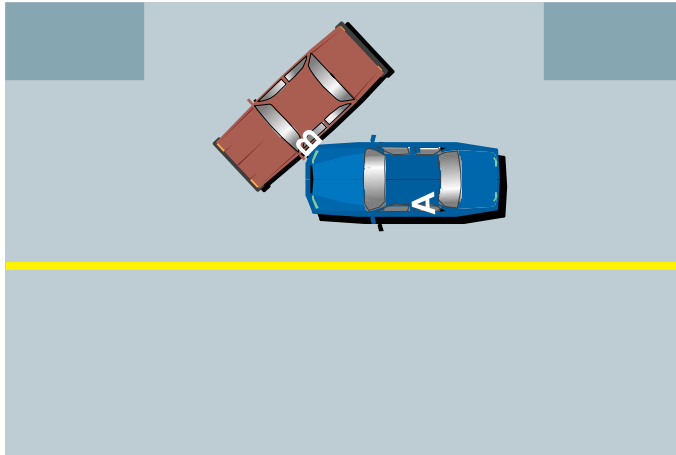
O. Reg. 276/90, s. 6.

7. (1) This section applies when automobile “A” collides with automobile “B” while automobile “B” is entering a road from a parking place, private road or driveway.
- (2) If the incident occurs when automobile “B” is leaving a parking place and automobile “A” is passing the parking place, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



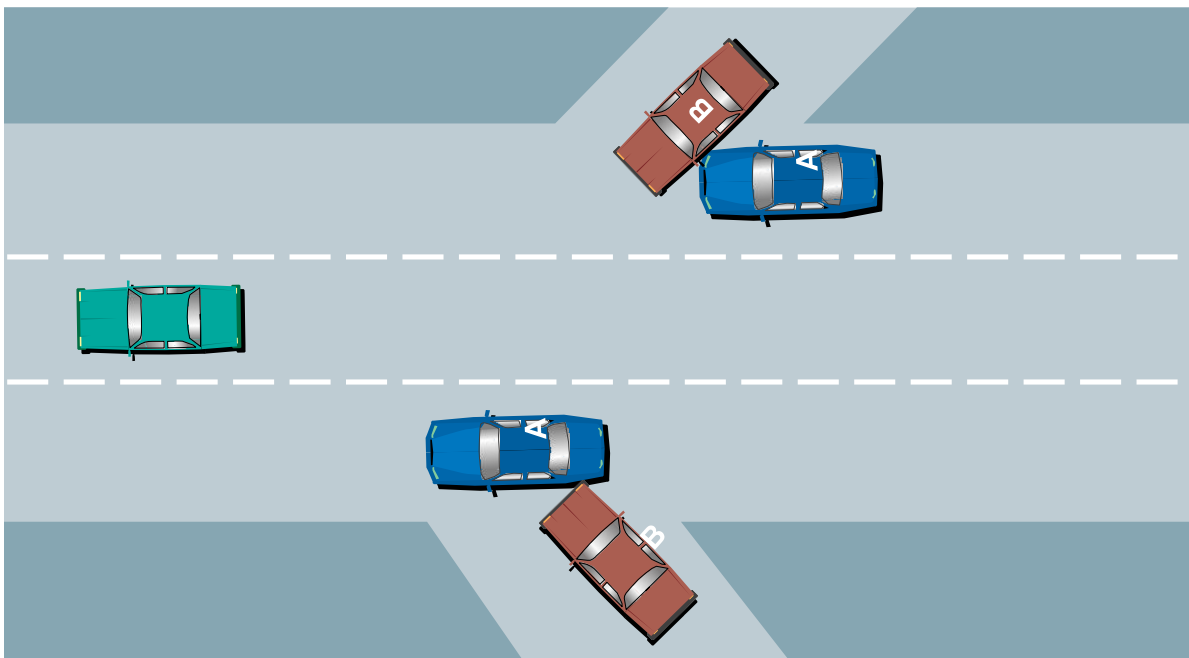
Rules for Automobiles Travelling In the Same Direction and Lane

- (3) If the incident occurs when automobile “B” is entering a road from a private road or a driveway and automobile “A” is passing the private road or driveway and, if there are no traffic signals or signs, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



O. Reg. 276/90, s. 7.

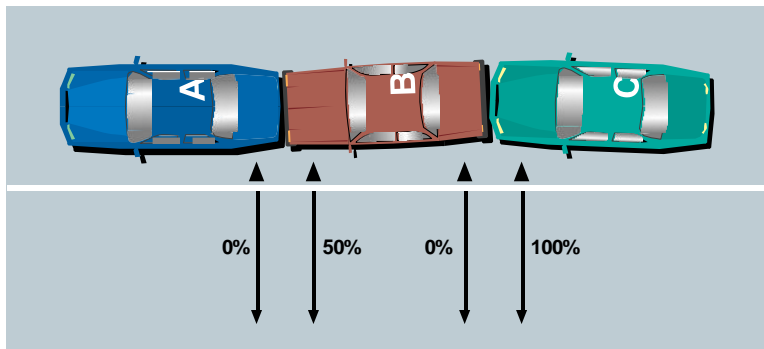
8. If automobile “A” collides with automobile “B” on a controlled access road while automobile “B” is entering the road from an entrance lane, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



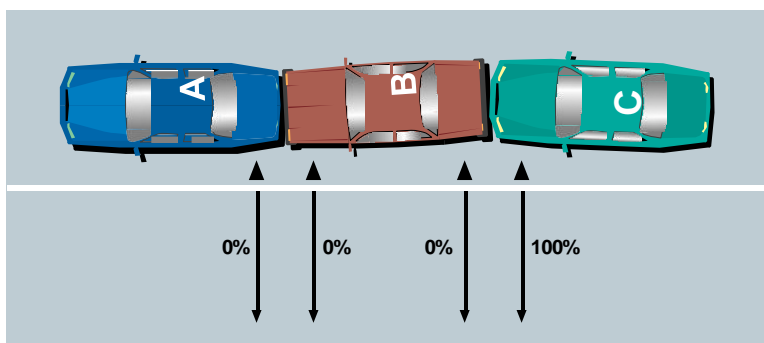
O. Reg. 276/90, s. 8.

Rules for Automobiles Travelling In the Same Direction and Lane

9. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in the same lane (a “chain reaction”).
- (2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile.
- (3) If all automobiles involved in the incident are in motion and automobile “A” is the leading vehicle, automobile “B” is second and automobile “C” is the third vehicle,
- (a) in the collision between automobiles “A” and “B”, the driver of automobile “A” is not at fault and the driver of automobile “B” is 50 per cent at fault for the incident;
 - (b) in the collision between automobiles “B” and “C”, the driver of automobile “B” is not at fault and the driver of automobile “C” is 100 per cent at fault for the incident.

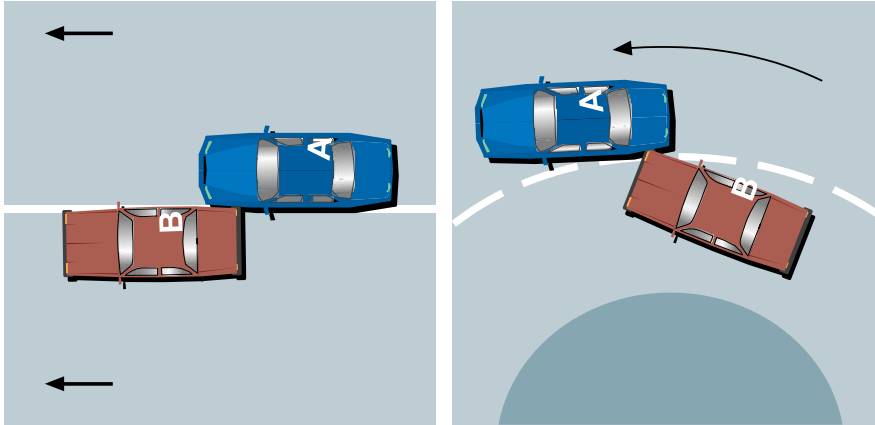


- (4) If only automobile “C” is in motion when the incident occurs,
- (a) in the collision between automobiles “A” and “B”, neither driver is at fault for the incident; and
 - (b) in the collision between automobiles “B” and “C”, the driver of automobile “B” is not at fault and the driver of automobile “C” is 100 per cent at fault for the incident.

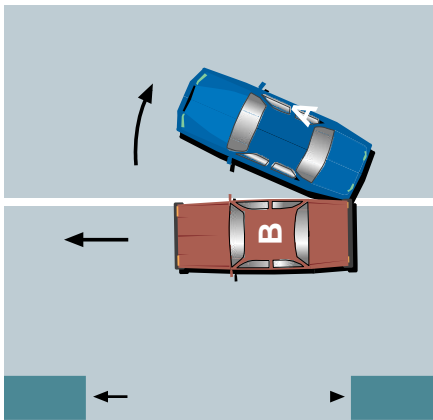


Rules for Automobiles Travelling in the Same Direction in Adjacent Lane

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.
- (2) If neither automobile "A" nor automobile "B" changes lanes, and both automobiles are on or over the centre line when the incident (a "sideswipe") occurs, the driver of each automobile is 50 per cent at fault for the incident.

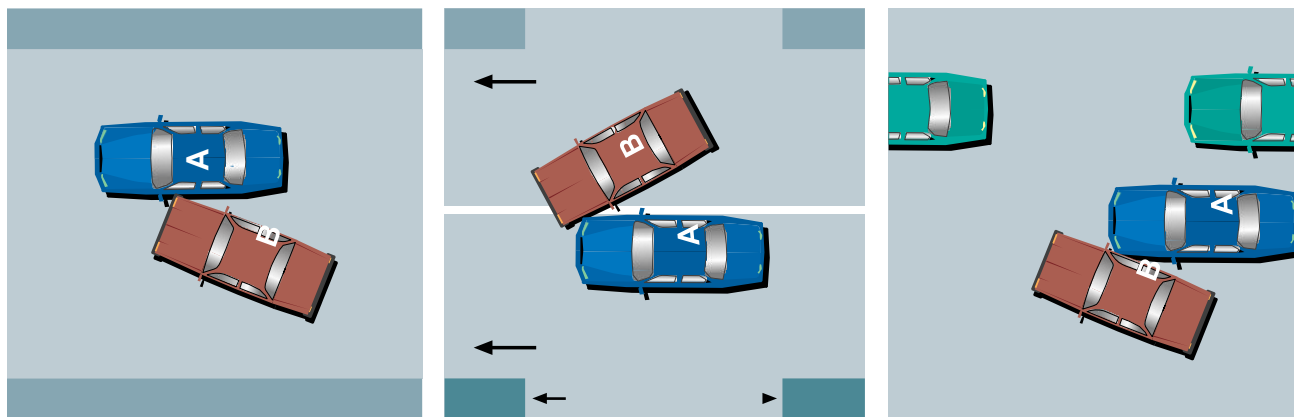


- (3) If the location on the road of automobiles "A" and "B" when the incident (a "sideswipe") occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.

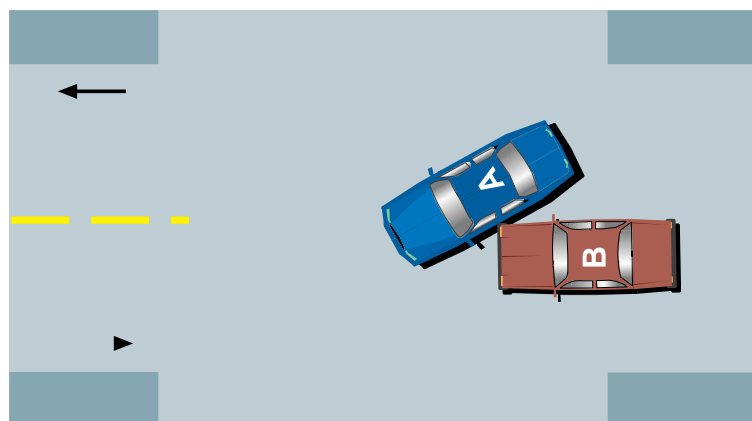


Rules for Automobiles Travelling in the Same Direction in Adjacent Lane

- (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.

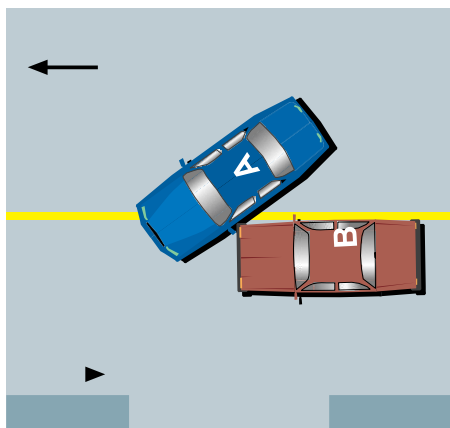


- (5) If the incident occurs when automobile “A” is turning left at an intersection and automobile “B” is overtaking automobile “A” to pass it, the driver of automobile “A” is 25 per cent at fault and the driver of automobile “B” is 75 per cent at fault for the incident.

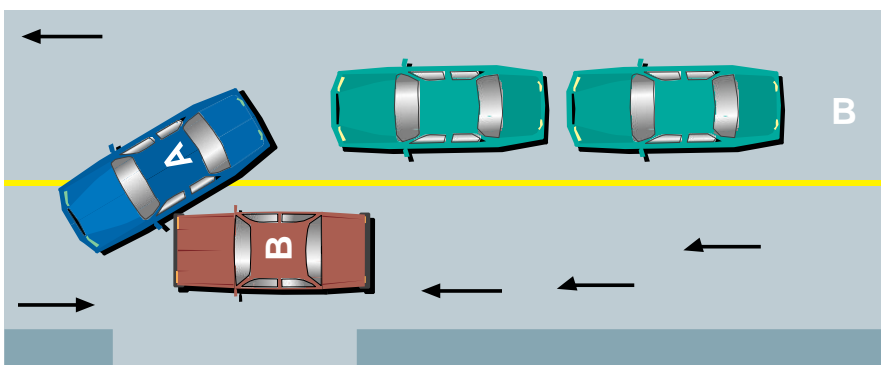


Rules for Automobiles Travelling in the Same Direction in Adjacent Lane

- (6) If the incident occurs when automobile “A” is turning left at a private road or a driveway and automobile “B” is overtaking automobile “A” to pass it, the driver of each automobile is 50 per cent at fault for the incident.



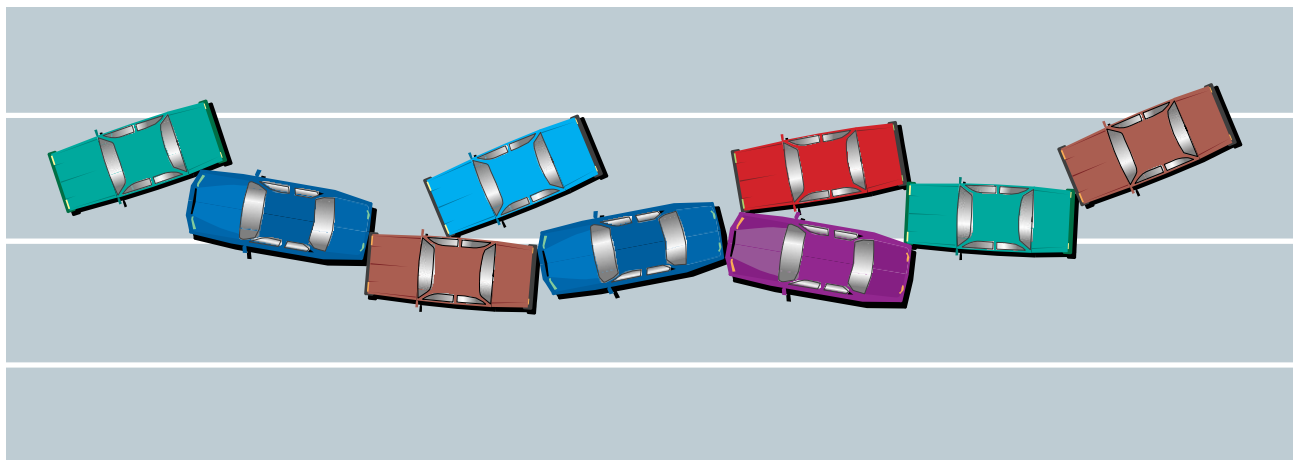
- (7) If the incident occurs when automobile “A” is turning left at a private road or a driveway and automobile “B” is passing one or more automobiles stopped behind automobile “A”, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



O. Reg. 276/90, s. 10.

Rules for Automobiles Travelling in the Same Direction in Adjacent Lane

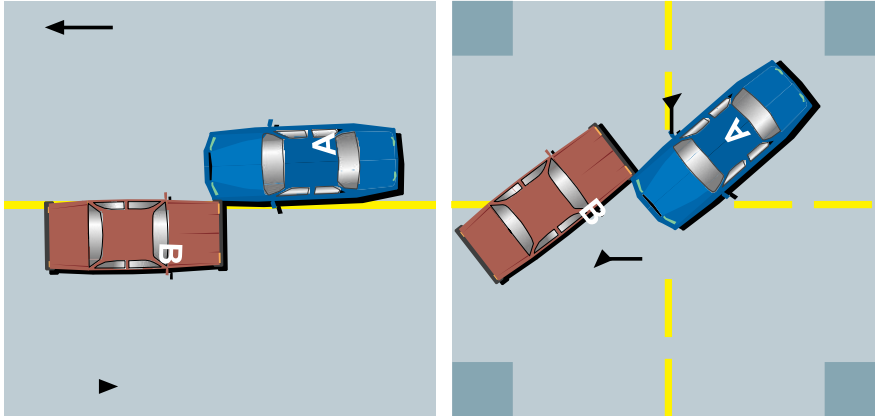
11. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes (a “pile-up”).
- (2) For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident.



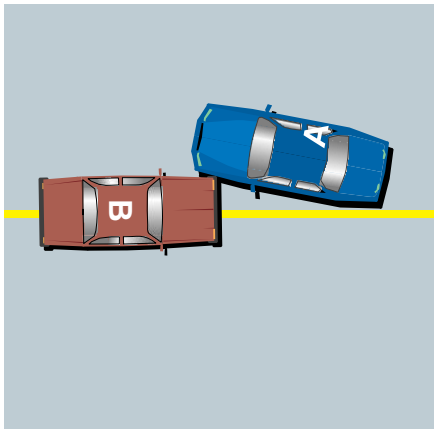
O. Reg. 276/90, s. 11.

Rules for Automobiles Travelling in Opposite Directions

12. (1) This section applies when automobile “A” collides with automobile “B”, and the automobiles are travelling in opposite directions and in adjacent lanes.
- (2) If neither automobile “A” nor automobile “B” changes lanes and both automobiles are on or over the centre lane when the incident (a “sideswipe”) occurs, the driver of each automobile is 50 per cent at fault for the incident.

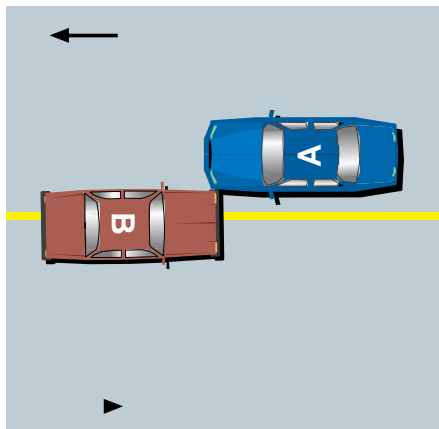


- (3) If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the incident.

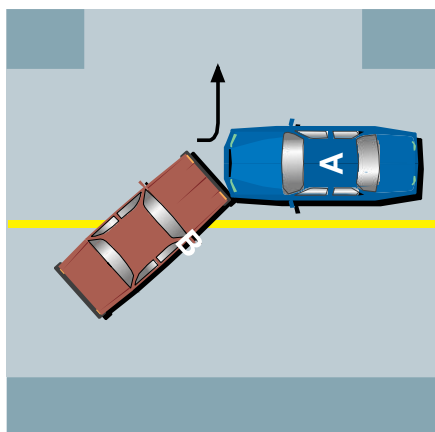
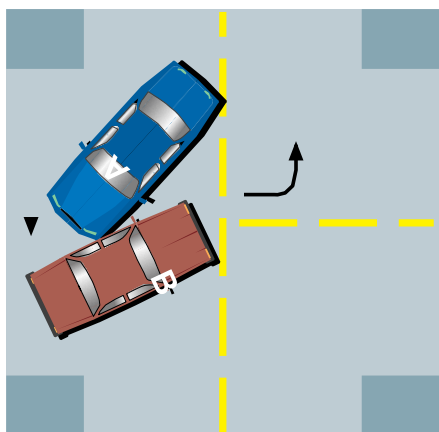


Rules for Automobiles Travelling in Opposite Directions

- (4) If automobile “B” is over the centre line of the road when the incident occurs, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.

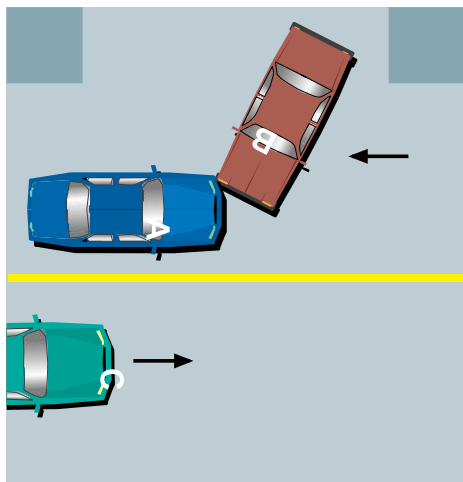


- (5) If automobile “B” turns left into the path of automobile “A”, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



Rules for Automobiles Travelling in Opposite Directions

- (6) If automobile “B” is leaving a parking place or is entering the road from a private road or driveway, and if automobile “A” is overtaking to pass another automobile when the incident occurs, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.



O. Reg. 276/90, s. 12.

13. (1) This section applies with respect to an incident that occurs at an intersection that does not have traffic signals or traffic signs.
- (2) If automobile "A" enters the intersection before automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
- (3) If automobiles "A" and "B" enter the intersection at the same time and automobile "A" is to the right of automobile "B" when in the intersection, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
- (4) If it cannot be established whether automobile "A" or "B" entered the intersection first, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident.

O. Reg. 276/90, s. 13.

14. (1) This section applies with respect to an incident that occurs at an intersection with traffic signs.
- (2) 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.
- (3) If the driver of each automobile fails to obey a stop sign, the driver of each automobile is 50 per cent at fault for the incident.
- (4) If it cannot be established who failed to obey a stop sign, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident.
- (5) If, at an all-way stop intersection, automobile "A" arrives at the intersection first and stops, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
- (6) If, at an all-way stop intersection, both automobiles arrive at the intersection at the same time and stop, with automobile "A" to the right of automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
- (7) If it cannot be established who arrived at the all-way stop intersection first, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident.

O. Reg. 276/90, s. 14.

15. (1) This section applies with respect to an incident that occurs at an intersection with traffic signals.
- (2) If the driver of automobile "B" fails to obey a traffic signal, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.
- (3) If it cannot be established whether the driver of either automobile failed to obey a traffic signal, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident.
- (4) If the traffic signals at the intersection are inoperative, the degree of fault of the drivers shall be determined as if the intersection were an all-way stop intersection.

O. Reg. 276/90, s. 15.

16. (1) This section applies with respect to incidents in parking lots.

(2) The degree of fault of a driver involved in an incident on a thoroughfare shall be determined in accordance with this Regulation as if the thoroughfare were a road.

(3) If automobile "A" is leaving a feeder lane and fails to yield the right of way to automobile "B" on a thoroughfare, the driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for the incident.

(4) If automobile "A" is leaving a parking space and fails to yield the right of way to automobile "B" on a feeder lane or a thoroughfare, the driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for the incident.

(5) In this section,
"feeder lane" means a road in a parking lot other than a thoroughfare;
"thoroughfare" means a main road for passage into, through or out of a parking lot.

O. Reg. 276/90, s. 16.

17. (1) If automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

(2) If automobile "A" is illegally parked, stopped or standing when it is struck by automobile "B" and if the incident occurs outside a city, town or village, the driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for the incident.

O. Reg. 276/90, s. 17.

18. The driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for an incident in which automobile "A" collides with automobile "B" when the driver of automobile "A" fails to obey,

- (a) a police officer's direction;
- (b) a do not enter sign;
- (c) a prohibited passing sign; or
- (d) a prohibited turn sign.

O. Reg. 276/90, s. 18.

19. The driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for an incident that occurs,

- (a) when automobile "A" is backing up;
- (b) when automobile "A" is making a U-turn; or
- (c) when the driver of, or a passenger in, automobile "A" opens the automobile door or leaves the door open.

O. Reg. 276/90, s. 19.

20. (1) For the purposes of this Regulation, a driver is considered to be charged with a driving offence,

- (a) if, as a result of the incident, the driver is charged with operating the automobile while his or her ability to operate the automobile was impaired by alcohol or a drug;
- (b) if, as a result of the incident, the driver is charged with driving while his or her blood alcohol level exceeded the limits permitted by law;
- (c) if, as a result of the incident, the driver is charged with an indictable offence related to the operation of the automobile;
- (d) if the driver, as a result of the incident, is asked to provide a breath sample and he or she is charged with failing or refusing to provide the sample;
- (e) if, as a result of the incident, the driver is charged with exceeding the speed limit by sixteen or more kilometres per hour.

(2) The degree of fault of the insured shall be determined in accordance with the ordinary rules of law, and not in accordance with these rules,

- (a) if the driver of automobile "A" involved in the incident is charged with a driving offence; and
- (b) if the driver of automobile "B" is wholly or partly at fault, as otherwise determined under these rules, for the incident.

O. Reg. 276/90, s. 20.