

# Court Denies Summary Judgment To Defendant Driver With Right-Of-Way

November 15, 2018

In *Clarke v. Toronto Transit Commission*, 2018 ONSC 6453, the Ontario Superior Court dismissed the moving defendant's motion for Summary Judgment in a case involving a collision between a motor vehicle and a pedestrian.

On July 16, 2013, the plaintiff was a passenger on a TTC bus traveling south on Keele Street. When the bus stopped in the right lane of the intersection at Keele and Donald Avenue, the plaintiff exited and then walked in front of the bus in an attempt to cross Keele. As the plaintiff stepped out in front of the stopped bus and into the left lane, he was struck by the defendant, Mr. Sosa.

Mr. Sosa brought a motion for Summary Judgment alleging that the plaintiff was responsible for the accident because he darted into traffic, past the bus, against a red light. Mr. Sosa further argued that he was entitled to proceed on the assumption that he had the right-of-way.

Conversely, the plaintiff argued that even if he had proceeded into the intersection as described by Mr. Sosa, a trial would nonetheless be required to determine various issues in dispute.

## Court's Decision

The Court agreed with the plaintiff, and found that a just and fair determination could not be reached on the paper record before the Court. Further, the Court ruled that this case was not suitable to apply the enhanced fact-finding procedures provided by Rule 20 as there would be no efficiency gained by it.

Specifically, the Court focused on three issues raised by the plaintiff which necessitated a trial:

1. the speed Mr. Sosa was driving;
2. **Mr. Sosa's conduct as he approached the intersection; and**
3. whether Mr. Sosa had been drinking in the car.

These three issues all went to a determination of the apportionment of liability against Mr. Sosa.

## **Conflicting Expert Reports**

As part of the motion record, the parties filed reports from accident reconstruction experts who opined on the speed at which Mr. Sosa was driving. The plaintiff's report and Mr. Sosa's report differed in their methods, assumptions, and conclusions as to Mr. Sosa's actual speed. Although it was submitted that the Court was in a position to review the reports, assess the mathematical equations and determine which report made the most sense, the Court disagreed. Instead, the Court held that given the complexities of the reports, "whatever understanding [the Court] would derive from reading about complex mathematical calculations in an expert's report would be haphazard". To rely on the Court's interpretation of the reports would be running the risk that any misunderstanding would create an unfairness in the adjudication of the motion. Finally, the Court may also have to determine which of the competing experts is more credible, a task which is not appropriate on a paper record.

## **Defendant Driver 's Conduct/Credibility Issues**

With respect to the conduct of Mr. Sosa as he approached the subject intersection, the plaintiff submitted that given the numerous buses in the area at the time of the accident, a prudent driver would have slowed down to scan the intersection before proceeding. Further, there was conflicting evidence as to the colour of the stoplight at the time of the accident. The non-party eye witness evidence in this regard was contained within the **investigating officers' notes, rather than in witness affidavits, and therefore were not** subject to cross-examination. The Court held that a trial was required to provide the trier of fact with further evidence needed to draw an inference about the disputed circumstances of the accident.

Finally, during the investigation into the accident, the police discovered a bottle of beer **in the side door panel of Mr. Sosa's vehicle. While Mr. Sosa explained during his** examination for discovery how the beer bottle came to be inside his car, the plaintiff argued that the explanation raised an issue of credibility on which he was entitled to cross-examine Mr. Sosa. The Court agreed.

## **Considerations**

Overall, this decision is important to consider when determining whether a claim is ripe for Summary Judgment. It appears that when the disputed facts call for an assessment of credibility, such an assessment may not be available during a motion for Summary Judgment. Further, while expert reports are often considered and encouraged during a motion for Summary Judgment, thought must be taken as to whether the content of the reports may require further detailed explanations that can only be provided for during a trial by the author of the report. Finally, the decision also highlights that even in cases where it appears the defendant driver had the right-of-way, such a finding may not end the liability analysis.

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