



Ontario Trial Lawyers Update

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June 1, 2015

Case Summaries

McDonald v. John/Jane Doe **2015 ONSC 2607**

Released April 24, 2015

This was a motion for summary judgment by the defendant insurer who sought to argue that there was no issue requiring a trial on the matter of liability of an unidentified owner and driver in this action.

The facts were largely undisputed. On February 19, 2010, a small school bus was driving on Highway 401 when suddenly, for unknown reasons, it spun out of control and came to rest on the right shoulder of the road without colliding with anything. The first vehicle behind the bus came to an emergency stop and avoided colliding with the bus. The second vehicle behind the bus also came to a hard stop and avoided colliding with the first vehicle. The third vehicle behind the bus, driven by the Plaintiff, collided with the second vehicle and pushed it into the first vehicle. Emergency responders and police attended the scene of the accident. The three vehicles were towed to the collision centre where the three drivers made reports. The school bus remained at the scene until the emergency responders

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arrived; however, there was no information in the police records or emergency records about the bus or the bus driver. The driver of the second vehicle did speak to the bus driver immediately after the accident, but the driver did not respond to his questions about what happened.

There was also an issue where the plaintiff told a number of different versions of his story. The principal difference between his stories related to whether he had executed a lane change at the time of the accident in an effort to avoid colliding with the bus. Counsel for the plaintiff filed medical evidence to support that the inconsistent stories were a function of medical disabilities; the plaintiff was in his 70's at the time of the accident and suffered memory loss.

Following discoveries, the claims against the other two drivers were settled. The only claim remaining was against the unidentified driver and owner of the bus.

The defendant insurer's position was that the plaintiff has the onus of proving negligence of the school bus was a cause of the accident pursuant to s. 265(1)(b) of the *Insurance Act*. The defendant insurer argued that the plaintiff can prove no claim of negligence against the school bus because the plaintiff had no evidence that the spinning out of control of the bus arose from negligence of the driver, noting that the maxim of *res ipsa loquitur* had expired.

Dunphy J., referring to *Gauthier & Company Limited v. The King*, held that a breach of statutory duty was not the only path to finding the existence of a rebuttable presumption of negligence. Dunphy J. concluded that the fact of spinning out of control in this fashion calls out for an explanation failing which negligence is the evident assumption. Dunphy J. concluded that the plaintiff discharged his burden of proof and made a prima facie case for negligence. The burden of proof then shifted to the defendant to rebut the inference of negligence. There was no evidence as among the parties to rebut this inference.

Based on the evidence, Dunphy J. also concluded that the defendant insurer failed to prove that the plaintiff was the sole cause of the accident. The defendant could not rely on the plaintiff's unreliable evidence in some parts and not others. Dunphy J. concluded that failure to stop in an emergency situation with the same reaction time as two other drivers does not give rise to a presumption against

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the plaintiff. As a result, Dunphy J. held that a trial was necessary to determine whether the plaintiff was a contributing case and if so to what degree.

Dunphy J. proceeded to make comments regarding motions for summary judgment when there is an outstanding jury notice. Dunphy J. noted that in this case, the court might conceivably be able to resolve the liability issues by employing the "toolbox" of Rule 20.04(2.1) to draw inferences or make findings of credibility. However, he questioned whether the Court should employ these tools when to do so might deprive a party of their substantive right to a jury. Dunphy J. held that although the existence of a jury notice is not a bar to proceeding with summary judgment motions requiring Rule 20.04(2.1), it is incumbent upon the Court to give due consideration to the right to a jury trial *and other relevant factors* in considering whether the interests of justice require the Rule 20.04(2.1) toolbox to remain unopened. With that, Dunphy J. refrained from using the fact finding powers and dismissed the motion.

Read the full decision on [CanLII](#).

These summaries were provided by **Nga Dang**, OTLA member and lawyer practising with Singer Kwinter.

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