

## Case Dismissed: Defendant Not Liable in Left Turn Car Accident

**Brian Sunohara**  
**June 2017**

In left turn car accident cases, liability is often found on both drivers. However, a recent court decision shows that, in some circumstances, the driver travelling straight can avoid liability, even on a summary judgment motion with apparent credibility issues.

On June 22, 2017, the Ontario Court of Appeal released a decision in *Mayers v. Khan*, 2017 ONCA 524. The Court of Appeal upheld an order granting summary judgment to the defendant and dismissing the plaintiff's action.

### Facts

The accident occurred at a busy intersection in Scarborough. The defendant was operating a heavy Brinks truck 60 to 70 km/h in a 60 km/h zone.

At the motion, the plaintiff argued that she made a left turn on an advance green, and the defendant drove his truck through a red light and struck her. In a statement given to the police, the plaintiff made no mention of an advance green. The plaintiff also argued that the defendant was driving too fast and failed to take proper care as a professional driver.

The defendant stated that he entered the intersection on a green light. The light turned yellow when he was in the middle of the intersection. At that point, the plaintiff made a left turn. The defendant said that he immediately slammed on his brakes but was unable to stop his truck in time to avoid a collision.

An independent witness largely supported the defendant's version of events. However, he did not hear the Brinks truck apply the brakes, and he told the investigating police officer that the Brinks truck was travelling "really fast". Further, the witness did not know the colour of the traffic light when the defendant entered the intersection, although he said it was yellow when the plaintiff made her turn.

### Motion Decision

The motion judge, Justice Glustein, outlined the law in left turn cases, including:

- A very heavy onus is placed upon a driver making a left-hand turn. He or she may turn into the path of approaching traffic only after having assured himself or herself that he or she can do so in safety.
- Section 141(5) of the *Highway Traffic Act* states: "No driver or operator of a vehicle in an intersection shall turn left across the path of a vehicle approaching from the opposite direction unless he or she has afforded a reasonable opportunity to the driver or operator of the approaching vehicle to avoid a collision".
- If there is evidence of negligence on the part of a driver going through an intersection, that driver may be contributorily liable for the accident. An oncoming driver must take reasonable care to avoid an accident.
- Even if a driver drives through a red light, the other driver with a right of way still has a duty to exercise reasonable care to avoid a collision if: (1) the driver becomes aware or should become aware that the driver without the right of way is going to go through the intersection, and (2) if the circumstances are such that the driver with the right of way had the opportunity to avoid the collision.

- A driver travelling in excess of the posted speed limit will not *per se* be found negligent. The rate of speed which may be considered excessive and thereby constitute negligent driving will vary depending on the nature and condition of the particular road travelled upon and the traffic faced by the driver. The speed of the dominant driver exercising reasonable prudence is a question of fact that turns on the circumstances of each case.

In describing how to deal with conflicting evidence on a summary judgment motion, the motion judge stated: "...it is not simply because there is a conflict in the evidence that a case must proceed to trial. The court must consider the evidence as a whole to determine whether it is confident that it can make the necessary findings of fact and apply the relevant legal principles."

The motion judge weighed the evidence, rejected the plaintiff's arguments, and dismissed the action. He found that there was no genuine issue requiring a trial on the issue of the defendant's liability.

The motion judge relied heavily on the evidence of the independent witness in finding that the plaintiff did not have an advance green and that the defendant did not run a red light. Further, the evidence supported that the accident happened quickly, such that the defendant could not have avoided the accident.

### Appeal Decision

On appeal, the plaintiff argued that the motion judge reversed the evidentiary burden and made palpable and overriding errors. She also argued that a mini-trial should have been ordered.

The plaintiff submitted that the onus was on the defendant to lead expert evidence that the defendant could not have done anything to avoid the accident. The Court of Appeal disagreed, outlining the onus of proof as follows:

The moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial. Only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success.

Since the motion judge concluded that the defendant had demonstrated there was no genuine issue requiring a trial, the burden shifted to the plaintiff to show that the defendant contributed to the accident. The plaintiff was obliged to lead evidence to satisfy the burden, which she did not do.

The Court of Appeal rejected the plaintiff's other arguments, stating that it was satisfied the motion judge properly considered and weighed the evidence. There was no reversible error. The appeal was dismissed.

### Commentary

In our view, and as supported by the Court of Appeal, the motion judge properly applied the principles outlined by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. The Supreme Court stated that summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.

Further, the Supreme Court indicated that an issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the

necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial.

The courts have seemed hesitant to grant summary judgment in motor vehicle accident cases because there are often different versions of how an accident occurred and credibility issues may be at play. However, as stated by the motion judge:

Motor vehicle negligence cases may often raise credibility issues with respect to liability. However, if such conflicting evidence can be addressed with fairness and confidence under the Hryniak principles, summary judgment is appropriate, particularly given the extensive trial time and cost that is often required to address damages, causation, and statutory threshold issues which would not be necessary if there is no genuine issue requiring a trial with respect to liability.

In the right liability dispute, and especially when a credible independent witness supports a defendant's version of events, a summary judgment motion should be considered by a defendant. Before bringing a summary judgment motion, a party must ensure that it has a very good chance of success. There has to be strong evidence.

A party bringing a summary judgment motion on a liability issue faces not only losing the motion and being subject to a cost award, but also the possibility of the judge reaching the exact opposite conclusion and making a finding of liability against the moving party, even without a cross-motion by the responding party. For example, in the left turn case discussed above, it was open to the motion judge to find the defendant driver liable.

As stated in *Deluca & Vogeli v. MacLaren Art Centre Inc.*, 2016 ONSC 1428:

If the defendant takes the position that the court can determine liability without a trial, it takes the chance that the court will determine liability in the plaintiff's

favour. A party cannot bring a summary judgment motion on the issue of liability (as the defendant in this case did) and take the position that a trial is unnecessary only if determination of liability falls in its favour. A party that asks the court to determine liability without a trial must prepare for the motion on the assumption that the court will determine liability, in their favour or not, without a trial.

Therefore, although there are great benefits to summary judgment motions, they can be risky and can backfire.