# The Third Time is a Charm; or is it?

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**March 2020**

The very recent decision in *Lloyd v. Bush*, 2020 ONSC 842, released on February 6, 2020, demonstrates some of the frailties in our legal system.

*Lloyd v. Bush* arose out of a motor vehicle accident that occurred on January 3, 2003, with the third trial decision being rendered just over 17 years after the accident.

The case involved two distinct aspects of liability. First, there was the issue of liability for the accident itself as between the two drivers. The plaintiff, Leslie Lloyd and the defendant, David Bush who was operating a fuel truck owned by MacDonald Propane were traversing an S curve corner at the same time in winter weather conditions. There was a dispute as to who crossed over the centre line causing the collision.

The second issue was whether the winter maintenance undertaken by the Town of Napanee met the standard of care in place at the time. The plaintiffs' damages were also in dispute.

The first trial proceeded in spring of 2009 before Justice Scott lasting 20 days. During the course of the trial, the defendants David Bush and MacDonald Propane entered into a Pierringer Agreement with the plaintiffs, with the trial against the municipalities proceeding.

Justice Scott dismissed the plaintiffs' case concluding that the plaintiffs had not established liability against either the motor vehicle defendants or the municipalities.

The precise amount of damages awarded was unclear as the trial judge did not make a quantified finding on many care costs, instead simply stating that he agreed with the defence calculations. He did award non-pecuniary general damages of $280,000.00 to Ms. Lloyd, $120,000.00 to her husband for his FLA claim, future loss of earnings of $930,694.00, past lost earnings of $2,449.00, home modifications of $129,129.00, and a finding that attendant care costs be provided in the sum of $31,200.00 per annum.

Justice Scott awarded the Municipal defendants over $400,000.00 in costs.

The case went to appeal. The Court of Appeal overturned the initial trial decision in its Judgment released in May 2012[1]. A new trial was ordered on the basis that the trial judge had made comments during the course of the trial, which rose to the level of creating a reasonable apprehension of bias by the trial judge adverse to the plaintiffs.

The second trial proceeded before Justice Tausendfreund in October 2014, with Judgment rendered February 6, 2015[2]. The second trial took 18 days. Many witnesses from the first trial testified at the second trial.

Justice Tausendfreund awarded Judgment of $2,674,837.02. His Honour found that the Municipality was responsible for the plaintiffs' damages by 60%, David Bush (who had previously settled) 30% and 10% contributory negligence on the plaintiff. Costs of over $900,000.00 were awarded to the plaintiffs.

The second trial decision was appealed by the municipal defendants. The Court of Appeal set aside the second trial judgment on March 28, 2017[3]. The decision on damages was not interfered with.

However, the Court of Appeal did find that the trial judge had committed several errors with respect to his liability analysis. Accordingly, a third trial was ordered as it related to the issues of liability, including causation and contributory negligence.

The case went to trial for a third time before Justice Mew. That trial took 9 days. Some witness testimony from prior trials was relied upon. In his recent decision released February 6, 2020[4], Justice Mew found the Municipality 50% responsible, David Bush 33% responsible and Leslie Lloyd 17% contributorily negligent.

How is it that the same case, with the same witnesses, can proceed before three different judges, with three different outcomes? Is there really justice?

This case illustrates that while the law may be black and white, its application is not. The application of the law to a particular set of facts is at best, a shade of grey. It is informed

[1] Lloyd v. Bush, 2012 ONCA 349.
[2] Lloyd v. Napanee (Town), 2015 ONSC 761.
[3] Lloyd v. Bush, 2017 ONCA 252.
[4] Lloyd v. Bush, 2020 ONSC 842.

by the individual experiences, views, personalities, biases, etc. of triers or fact, both judges and juries alike.

It is those differences that often result in cases proceeding to trial in the first instance. If all lawyers assessed cases the same, there would never be any dispute and every case would settle.

*Lloyd v. Bush*, and all of its various iterations simply highlights the difficulties that lawyers face in predicting trial outcomes. The same case, the same witnesses, the same facts, yet three different outcomes, and markedly so.

Is the third time a charm? As it turns out probably not. Can any one of the parties in this case say they were a "winner"? Probably not.

What can we take away from this? Trial outcomes are unpredictable, a risk factor that should always be taken into account. Or, perhaps as Charles Dickens once said, sometimes "the law is an ass"[5].

[5] Charles Dickens, in *Oliver Twist*.