

CITATION: Kongtakane v. Howes, 2023 ONSC 6167
COURT FILE NO.: CV-18-00000988-00
DATE: 2023 10 31

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: KONGTAKANE, Douangchanh, Plaintiff

AND:

HOWES, Rodney and MITCHELL, Erin K., Defendants

BEFORE: Regional Senior Justice L. Ricchetti

COUNSEL: VILORIO PEGURO, J., for the Plaintiff,
KONGTAKANE, Douangchanh

CHARNEY, T. P. for the Defendants,
HOWES, Rodney and MITCHELL, Erin, K.

HEARD: October 6, 2023; In person Motion for Summary Judgement

ENDORSEMENT

(Defence Summary Judgment Motion)

THE MOTION

[1] This is a Defence motion for summary judgment.

THE POSITION OF THE DEFENCE

[2] The Defence submits that the action should be dismissed on the grounds that Ms. Mitchell (the driver of the vehicle) could not have avoided the accident because she suffered a severe anaphylactic shock, caused by an

allergic reaction to naproxen (the active ingredient in Aleve), which she had taken a short time before the collision.

[3] In other words, the defence put forward on this motion is that this was an “inevitable accident”.

THE POSITION OF THE PLAINTIFF

[4] The issues in this action require a trial.

[5] There are credibility and factual issues which cannot and should not be determined on a summary judgment motion.

THE UNCONTESTED FACTS ON THIS MOTION

[6] Ms. Kongtakane was driving straight through the intersection at Bovaird and McLaughlin in Brampton on February 22, 2017. Mr. Howes was the owner of the vehicle driven by Ms. Kongtakane.

[7] Ms. Mitchell was turning left at the intersection. Ms. Kongtakane’s vehicle was hit by Ms. Mitchell’s vehicle.

[8] The events leading up to the collision:

a) Ms. Mitchell dropped her daughter at hockey practice around 6:30pm.

- b) Ms. Mitchell stopped at a Walmart and purchased some items, including Aleve. It may be that Ms. Mitchell went to Rona before the Walmart – something first recalled 6 years after the collision.
- c) At Walmart, without having read the label or asking the pharmacist, Ms. Mitchell took double the recommended dose of Aleve at approximately, 7:30pm to 7:40pm.
- d) Ms. Mitchell then drove to a Canadian Tire near the intersection in question. Ms. Mitchell went into the Canadian Tire store.
- e) As Ms. Mitchell was leaving Canadian Tire, she started to feel her hands itchy and experienced other symptoms described below.
- f) Ms. Mitchell exited the Canadian Tire parking lot, crossed about 5 lanes (a right turn lane, 3 live lanes and a left turn lane) and continued into an oncoming lane in the opposite direction whereupon she hit Ms. Kongtakane's vehicle.
- g) The distance from the parking exit of the Canadian Tire to the collision was about 70 meters. **If** Ms. Mitchell's evidence that she was travelling 20 kmph is accepted, it would take approximately 12 -14 seconds from the parking lot to the collision site.

- h) The collision occurred at approximately 8:00 pm to 8:12 pm, as the first emergency call was at 8:12pm.
- i) Ms. Mitchell gave evidence that she does not have a recollection of the collision. However, she has also stated to doctor(s) that she recalls the sound of the collision.
- j) After the collision, Ms. Mitchell was found unconscious. The length of time she was unconscious was suggested by a witness to be about 30 seconds.
- k) Ms. Mitchell suffered a concussion from what appears to be hitting her head during the collision.
- l) Sometime later, after paramedics had arrived, her blood pressure dropped precipitously.

[9] Ms. Mitchell and Aleve:

- a) Ms. Mitchell is allergic to codeine, which is not an active ingredient of Aleve.
- b) Ms. Mitchell had been prescribed a drug, which contained the active ingredient in Aleve (naproxen) in 2016. She asked the medical staff about side effects and had concerns whether the drug would make her drowsy. She decided to only take ½ pill. No adverse reactions

were suffered at that time. However, that does not necessarily mean that Ms. Mitchell is not allergic to Aleve. The doctor's evidence is that sometimes a prior exposure to a drug, later found to result in an anaphylactic reaction, may not result in an allergic reaction on the first occasion. Further, even if a person is allergic to a drug like Aleve, there is or can be a threshold, a level at which the allergic reaction is dependent upon the amount of the drug taken. Whether Ms. Mitchell has such a threshold and whether two pills of Aleve exceeded this threshold has not been tested.

- c) Ms. Mitchell states she started to itch and experienced "additional symptoms including suddenly feeling too warm, a rapid pulse, swollen tongue and lips and a tingling feeling in her hands, feet and mouth." These include common symptoms of anaphylaxis. As questioned below, the exact timing of the onset of these symptoms is crucial.

[10] Unconsciousness only occurs in 13% of allergic reactions. The issue is whether the unconsciousness occurred due to the anaphylaxis or due to the collision. Accordingly, when Ms. Mitchell became unconscious is significant:

- a) One witness at the scene said Ms. Mitchell was unconscious for 30 seconds at the collision. This evidence doesn't help with whether and

the length of time Mr. Mitchell may have been unconscious prior to the collision.

- b) Ms. Mitchell stated she couldn't remember the collision which is suggestive of being unconscious at the time of the collision. Other statements by Ms. Mitchell suggest she may have been conscious at the time of the collision and became unconscious because of the collision. There is no independent evidence as to whether Ms. Mitchell became unconscious prior to the collision. What are reported by the doctors, paramedics and police on this issue are based on self-reporting by Ms. Mitchell.
- c) While submissions were made on this topic, I am not persuaded that there is anything that can be ascertained from a review of the damage to the two vehicles, in particular, whether Ms. Mitchell was unconscious while turning left. Drawing such an inference would be speculation.

[11] The fact that the description by Ms. Mitchell was given to the paramedics led them to conclude it was an anaphylactic response, is not conclusive since it relies on Ms. Mitchell's self-reported symptomology. Similarly, having the paramedic tell the police officer on scene that it was an anaphylactic response, doesn't make the police conclusion any more

reliable. That is not to say there wasn't an anaphylactic response as most doctors agree the symptoms described are consistent with an anaphylactic response.

[12] It is a safe assumption that Ms. Mitchell had an anaphylactic reaction. However, to succeed, the Defence must establish that the anaphylactic reaction occurred at a time and in a manner where Ms. Mitchell did not have an opportunity nor ability to stop her vehicle and/or avoid the collision.

THE LAW

[13] The test for summary judgment motions is not in dispute.

[14] Rule 20.04(2) permits a Court to grant summary judgment where "(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence".

[15] The court should first determine if there is a genuine issue requiring a trial based only on the evidence before the court on this motion, without resorting to the enhanced fact-finding powers as set out in R.20.04(2.1).

[16] If, after this step, it appears that there is a genuine issue requiring a trial, the court should then determine if a trial can be avoided utilizing my powers under R.20.04(2.1) and (2.2) to arrive at a fair and just determination of the issues on the merits.

[17] A fair and just determination of the issues on the merits can be made where:

(1) the evidence allows the judge to make the necessary findings of fact,

(2) allows the judge to apply the law to the facts, and

(3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[18] The onus is on the moving party to establish that, based on the evidence before this court on this motion, the court can (with or without its enhanced fact-finding powers under the *Rules of Civil Procedure*. O. Reg. 575/07, s. 6 (1)) make a fair and just determination without requiring a trial.

[19] On the issue of inevitable accident, one of the leading cases in Ontario is *McIntosh v. Bell*, 1931 [1932] OR 179 (ONCA) where the Court of Appeal stated:

A person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.

[20] By way of another example, in *Jones v. Jones*, 2021 ONSC 2115, a summary motion was dismissed by Justice Casullo, explaining the following:

When advancing the defence of an inevitable accident, the onus is on the defendant to establish that the accident could not have been avoided. As the Supreme Court of Canada held in *Rintoul*, to successfully make out a defence of

inevitable accident, the moving party has the burden of demonstrating, on a balance of probabilities, that:

(a) he/she had no warning or indication of the hazard, and could not be warned of the hazard by exercising reasonable care and skill; and

(b) once the hazard was apparent, there were no reasonable steps open to the defendant such that the accident could not be avoided.

[21] If a plaintiff engaged in negligent behaviour, such as drinking alcohol in excess, taking recreational drugs in excess, driving with known medical limitations, then the plaintiff cannot later rely on inevitable accident.

[22] Similarly, if a plaintiff, upon the onset of symptoms, which are such that a reasonable person knows or ought to know they should not drive or continue to drive, then the plaintiff cannot later rely on inevitable accident.

THE ANALYSIS

[23] Considerable evidence was filed on this motion. The evidence included expert medical opinions on many issues. Transcripts were available to the court. Some of the evidence is conflicting particularly, the medical evidence.

[24] There is no doubt that, if summary judgment is to be granted, this court must use its fact finding powers in R. 20.04 (2.1 and 2.2).

[25] Unfortunately, I conclude that this matter requires a trial.

[26] The facts on the issue of liability are far from simple. The issues to be decided are complex and are highly disputed, particularly by the experts.

[27] The events leading to the collision and the collision itself require findings of fact which are essential to the defence alleged. And I am satisfied that these essential findings of fact cannot be made on this evidence so as to arrive at a fair and just determination on the factual issues I would have to decide.

[28] While the occurrence of anaphylaxis is supported, to some extent by experts from both sides, the fact that Ms. Mitchell may have had a severe anaphylactic response, does not necessarily result in a determination of inevitable accident. I set out below some of the essential factual issues that will need to be decided to determine whether the defence of inevitable accident is applicable in these circumstances.

[29] The Defence points to this court's ability to weigh, evaluate and draw inferences to conclude this was an inevitable accident. The fact that this court has these powers does not mean that they can or should use these powers in every case. It depends on the evidence, the issues, and the ability of the court to make essential factual findings that result in a fair and just determination without a trial.

[30] I am satisfied that, in this case, I cannot and should not use these powers to arrive at a fair and just determination on the essential facts and issues that need to be decided based on the affidavit and transcript evidence on this motion.

[31] There are numerous questions on the essential facts which cannot be answered in a manner that results in a fair and just determination. They include:

- a) Was it negligent for Ms. Mitchell to have taken a double dose of Aleve? Does this negate the inevitable accident defence? If it was anaphylaxis caused by the Aleve, would the anaphylaxis have occurred if Ms. Mitchell had only taken one pill as directed on the package?
- b) When Ms. Mitchell started to feel the symptoms she described (such as “like a million bugs in her head”), could and should she have not driven or, if driving, stopped her vehicle? Was she negligent to continue driving after the onset of the symptoms? How long after the commencement of the “symptoms” was the collision? When the symptoms started, was she still in the parking lot? If she was in the roadway, could she have safely stopped in the roadway?
- c) When did Ms. Mitchell lose consciousness? Was it before the collision? Was it after the collision?

[32] Let me describe some of the challenging factual determinations to be made.

Avoided the Situation

Double Dose of Aleve

[33] Ms. Mitchell took two Aleve pills. The package directions described the adult dose as one pill. Ms. Mitchell didn't read the package directions. She didn't ask the pharmacist as to the correct dose. She just bought Aleve at the drug store and took two pills. Its also unclear whether this was the first-time using Aleve as the prior time was described as naproxen, the active ingredient in Aleve.

[34] Ms. Mitchell knew she had another drug allergy – codeine (discovered at a very early age). This may have made her more prone to anaphylactic reactions to other drugs but there is nothing to suggest Ms. Mitchell would have known that. In any event, Ms. Mitchell knew that drugs, at least one to her specifically, could cause an anaphylactic reaction and was cautious about drugs in the past because of their potential reaction. In 2016 she only took ½ of one pill, which contained naproxen, because Ms. Mitchell was concerned it would make her drowsy. Yet, in 2017, one year later, she ingested two Aleve pills (which contain naproxen) without knowing the effect and got into her vehicle to drive.

[35] The evidence does not answer a critical question – would Ms. Mitchell still have had an anaphylactic reaction to Aleve if she had only taken one Aleve pill. None of the doctors could or did answer this question.

Onset of a reaction

[36] The timing of the onset of the “symptoms” and the collision are unclear.

Clearly there was some time between the onset of the symptoms and the collision because Ms. Mitchell remembers and describes the “symptoms”.

[37] The evidence does not clearly answer whether Ms. Mitchell could, when she felt the onset of these symptoms, not drive; stop her vehicle in the parking lot, or pull her vehicle over on the roadway and stop. Her speed (she recalls 20 kmph) would have been slow enough that she could have quickly stopped her vehicle.

[38] A much better and clearer evidence on this issue is essential.

Consciousness

[39] The Defence experts rely on Ms. Mitchell’s description that she was unconscious when the collision occurred.

[40] A clear determination on this issue cannot be made on the conflicting evidence. So much of the expert reports rely on Ms. Mitchell’s self reporting as to when the unconsciousness occurred.

[41] If the anaphylactic reaction resulted in unconsciousness before the collision, then that may assist the defence in establishing inevitable accident. However, if the unconsciousness is found to have been caused by the collision, then the

issue becomes whether Ms. Mitchell could or would have been avoided the collision by not driving or pulling her vehicle over and stopping.

[42] The lower blood pressure, an indication of anaphylaxis occurred well after the paramedics were on scene. The lower blood pressure cannot confirm when the unconsciousness occurred. I am not persuaded this post collision blood pressure drop answers the above questions except it is one more indicia that Ms. Mitchell suffered from an anaphylactic reaction at some point.

Competing Expert Reports

[43] The Defence seeks to have this court disregard Dr. Stein's expert opinion.

The Defence sets out various reasons:

- Dr. Stein relies on false and incorrect evidence;
- Dr. Stein's expertise is not specifically applicable to the issue before the court; and
- Dr. Stein's role was as an advocate not an independent expert.

[44] This court cannot possibly decide these issues without *viva voce* evidence.

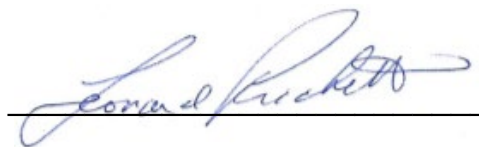
There are rebutting explanations (such as his qualifications in immunology) and insufficient evidence, at this time, to disqualify him as an expert and from testifying in this case.

CONCLUSION

[45] The motion is hereby dismissed.

[46] Counsel agreed that the successful party be awarded \$75,000 all inclusive costs.

[47] The Defendants shall pay to the Plaintiff costs of \$75,000 all inclusive forthwith.

A handwritten signature in blue ink, appearing to read "Ronald Ricchetti", is written over a horizontal line.

RSJ L. Ricchetti

Released: October 31, 2023

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