Court file No. TO-64013/02

ONTARIO COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT

B E T W E E N :

HANNAH EVANS

Plaintiff

and

CITY OF TORONTO/JASON ROBINSON

Defendant

****

R E A S O N S F O R J U D G M E N T

BEFORE HIS HONOUR DEPUTY JUDGE WINER
On July 5, 2004 at TORONTO, Ontario

****

APPEARANCES:

Mr. T. Gleason	Counsel for the Plaintiff
Ms. A. Denovan	Counsel for the Defendant City of Toronto
Ms. C. Chu	Counsel for the Defendant City of Toronto

SUPERIOR COURT OF JUSTICE

TORONTO SMALL CLAIMS COURT

T A B L E O F C O N T E N T S

****

Transcript Ordered: October 1, 2004

Transcript Completed: November 8, 2004

Ordering Party Notified: November 8, 2004

MONDAY, JULY 5, 2004

R E A S O N S F O R J U D G M E N T

WINER, D.J. (Orally):

This is an action by the Plaintiff, bicyclist, against the City of Toronto for injuries allegedly caused by non-repair of the north side of Queen Street West, Toronto, near Beverley Street, Sunday, April 14, 2002.

The Defendants have informed me that the Defendant's claim has been settled. The damages, which are all non-pecuniary, are agreed at $4,500.

The Plaintiff's bike was struck by a car door opened by the Defendant, Jason Robinson, and the car was owned by the Defendant, GE Capital Canada. It is common ground that, because of the Insurance Act and recent case law, I have to determine the percentage of liability, if any, of each party, but the City would only be liable for its percentage.

The Plaintiff gave evidence herself and filed affidavit evidence, Exhibit 1, by Mary Smith Lea, an urban cycling expert. Attached to Ms. Lee's affidavit were major studies on urban cycling. The Defendant, City, provided

evidence through City engineer, David Crichton, Steven Benjamin, manager of traffic operations of the City, and David Egan, bike safety educator and the City of Toronto bicycle planner.

The issues are: One, has the Plaintiff proved non-repair of Queen Street West, at or near 260, and if so, two, did the non-repair cause the Plaintiff's injuries; three, was the Plaintiff contributorily negligent in causing her own injuries; four, were the Defendants by the Defendant's claim negligent in causing or contributing to injuries of the Plaintiff; five, the percentage of negligence of the parties.

Queen Street West, an east-west running east, is a four-lane, major arterial road with cars often parked in the curb lanes. Number 260 Queen Street West is very close to the intersection of Beverley and Queen Street West. The street has multiple uses, with cars, trucks, streetcars, bicycles and pedestrian traffic. It is a trendy, commercial, residential, entertainment, restaurant and bar, club area. Cars and delivery vehicles frequently park and stop, and go in and out of the curb lanes. There are streetcar tracks in the middle of the road. The City designated some streets, such as Beverley Street/St. George, as a north-

south lane route with specificly marked bike lanes restricted to bicycles. The City also had designated the various bike routes on various roads presumably suitable for bicycle riding. There were no markings on them, but there were signs on posts, as shown in the photographs, indicating a bike route with an arrow.

Queen Street West had been designated as a bike route, but that designation was cancelled in the late 90's. The Plaintiff did not know about the cancellation. She was aware of signs on Queen Street, showing a bike route leading to the bike lanes on Beverley. By mistake, the signs at York, Osgoode, University, Simcoe and McCaul remained until after the Plaintiff's accident. The signs are shown on Exhibit 1, tab six. Actually, she would not have seen these signs on her way home that night, but she was aware of a bicycle route running west along Queen Street. She had ridden her bicycle on Queen Street West many times before. She also had an old commercial bicycle map, which showed the area bike route.

The Plaintiff believed that she was traveling on assigned bike route. The witness, Ms. Mary Smith Lea, deposed that Queen Street West at the location was a signed bike route.

In fact, it was not. However, I conclude, because of the signs along Queen Street West, the Plaintiff was led to believe and was justified in believing that Queen Street West was a City approved bike route.

The Plaintiff is a member of a group called Advocacy for Respect for Cyclists, and so is Ms. Smith Lea. Ms. Evans is an experienced cyclist, who has been riding bicycles since she was five-years-old. She came to Toronto in 1998. She is a provincial, civil servant in her 30's. The Plaintiff had been to a Raptor game at the Air Canada Centre. It was dusk, and she had her light on. She always tried to use City bike lanes and routes. She was heading for the Beverley-St.George bike route lanes to get to her own home on Vermont Avenue in the Bathurst-Dupont area. The Plaintiff traveled north on John Street to Queen and turned left and rode west on the north side of Queen, a short block towards Beverley. She had no other way to go. She almost got to Beverley when Mr. Robinson opened his car door, the driver's side, and struck her handlebar, causing her to fall off of her bicycle, resulting in injuries to her leg, shoulder and a concussion. She was well within three weeks. She was very fortunate.

Mr. Robinson was charged and convicted on a plea of guilty with the Highway Traffic Act

offence of opening a car door into traffic. The Plaintiff was not wearing a helmet. She did not look into cars, as she was traveling along Queen Street West, to see if there were occupants attempted to exit. She said that she could not move to left of the cars because of the concerns for streetcar tracks.

Queen Street is one of the busiest streets in the City for bicycle traffic, indeed, for all traffic. It is also one of the worst streets for bicycle accidents, both from "dooring" and from overtaking by cars. The use of bicycles has multiplied over the years, as has the use of cars and trucks. Motor vehicles have become larger. The City of Toronto has a program, in which it encourages its citizens to get out of their cars and use public transit or cycle.

The group calling itself Advocacy for Respect for Cyclists wrote to the City July 25, 2001, complaining about "the unsafe, on-street parking facilities" on Queen Street and other east-west streets in the downtown core, referring to various studies indicating how dangerous these streets are for cyclists.

Ms. Smith Lea's evidence involved unchallenged measurements that she took and studies that she collected regarding the minimum or desired width of bicycle

allowances on bike routes with parking facilities. The studies indicate that the minimum width of the curb lane should be four metres, but the desirable would be 4.3 metres. She found that the curb lane, in this case, is 0.675 metres less than the minimum, and one metre less than the desirable. I would add that there are streetcars and tracks to the left of a cyclist. A vulnerable cyclist must contend with the possibility of cars opening doors or pulling out, on one side, and streetcars with limited manoeuvrability, on the other, this along with the usual passing traffic.

The Plaintiff's position is that parked cars should either have been removed or warning signs put up to warn of a dangerous situation. Indeed, the City of Toronto bicycle study, Exhibit 1, tab three, page 85, shows that the vast majority of door crashes occur on east-west streets, such as Queen and Dundas.

The Defendant's bicycle planner, Mr. Egan, testified that if the parked cars were moved, this would increase the likelihood of overtaking accidents caused by cars. The City must balance all competing interests. He said that merchants on Queen Street would complain if parking was removed. I believe that the removal of parked cars would lessen

the risk of bicycle accidents.

The Plaintiff takes the position that cyclists have a higher right to use the highway than the use for parked or stopped motor vehicles, or at least an equal right with all other users of the highway. The position of the Plaintiff is that the primary use of a highway is for the movement of traffic. I agree that cyclists should have an equal share of the road that is safe, especially when the City has adopted a bicycle-friendly policy and encourages cycling.

The designation as a bike route must mean something, some indication that the street is somewhat safer than the unsigned streets. The road, at this location, is not bicycle friendly. It leaves very little room for a cyclist to maneuver, very little margin for error. Sure, a skilled cyclist can pass in safety, but roads should be safe for the ordinary cyclist. At one time, cycling was quite rare in the City, but with the proliferation of bicycles and the City's encouragement for health reasons, reducing congestion, less burning of fossil fuels, the City should have done something more positive about bike safety at this location. The Plaintiff had no choice but to use Queen Street to get to the bike lanes. The City

must have known that many cyclists converge in that area to get to the exclusive bike lanes.

The Municipal Act provides as follows, section 44(1): "The municipality that has jurisdiction over a highway or a bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway."

(2), "A municipality that defaults in complying with sub-section (1) is subject to the Negligence Act, liable for all damages any person sustains because of the default."

In a case of Big Point Club v. Lozon, [1943], O.R., 491, a decision of the Ontario Supreme Court, Hope J. held as follows: "Ownership of highways is held by the municipalities in trust for all such of the King's subjects as have occasion to make use of them for the purpose of communication, or other lawful purpose, or in order to gain access or egress from adjacent lands."

"In the absence of express statutory authority, a municipality would appear to have no right to use or permit the use of a highway for any purpose, which would substantially interfere with or obstruct its primary use for such purposes." Then again,

"But I believe it must be recognized that," as stated by Meredith, C.J.C.P., "the highest right in highways is the right of the public to travel over them." In the Big Point case, the Court enjoined the Defendant from engaging in hunting on a highway. I believe that parking and stopping of cars and trucks is per se a "lawful purpose", equal to cycling.

In the case of Groves v. Ventworth County, [1939], 2 D.L.R., page 375, a Court of Appeal decision, the following statement is made by Chief Justice Robertson: "As the ordinary traffic expanses or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change." The Court also stated the off-quote test of non-repairs as follows: "The duty of a municipality, under the section referred, to is to keep highways in such a condition that travelers using with ordinary care may do so with safety."

The Defendant contends that in any event the City did not cause the accident, and refers to the case of Ryder v. Grey Coach Lines, [1951], O.J. 144, a decision of the Court of Appeal. In that case, the Plaintiff was on a bicycle and was hit by an opening door. He fell and a bus ran over him killing him. The Court of Appeal reversed the trial jury

judgment and held that there was no causal connection to connect the bus with the injuries to the Plaintiff, and that the sole cause of the death was a person who opened the door.

In the case at bar, the street in question, perceived as a bike route, was part of the cause of the accident. The Ryder case is quite distinguishable because there was no finding that could be made that the bus driver was negligent.

For reasons given, taking all factors into account, including the signs, I find that Queen Street at the location of the accident was not in the condition of repair. The City should have done something to make the road safer. I find that Mr. Robinson was contributorily negligent in opening the door into traffic without ascertaining that it was safe to do so. I find that the Plaintiff was negligent by not wearing a helmet. She may have avoided a concussion. She also failed to check the interior of cars to see if someone was about to exit. She also could have moved to the left. There was no evidence of streetcars traveling to her left, and she was familiar with the area.

Having found that all three of the parties are in some way responsible for the damages,

I would apportion the fault as follows: Plaintiff 25%, City 25%, Jason Robinson and GE Capital Canada 50%. I believe that Jason Robinson was the main cause of the accident. There will be a judgment against the City for $1,125.

****

THE COURT: The Defendant, City, to pay the Plaintiff counsel fee of $500, pleadings fee of $50 and the usual court costs. I went a little over the $300 because it was a long trial, and I believe I am entitled to, because of section 29 of the Courts of Justice Act. The rules provide for $300 counsel fee, but I can go a little higher than that.

****