

CITATION: Zapata, Steve, et al v. Reid, David, et al., 2025 ONSC 594
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: STEVE ZAPATA and VERONICA GONZALEZ DUQUE, Plaintiffs

AND:

DAVID H. REID, DECEASED, by his LITIGATION ADMINISTRATOR,
BRUCE CHAMBERS, DARLENE DUNN and LORNE LOWE,
Defendants

BEFORE: Akazaki J.

COUNSEL: Ramendee Minhas, for the Plaintiffs

Frank A. Benedetto and Anthony Naples, for the Defendant, David H. Reid

HEARD: December 5, 2024

REASONS FOR JUDGMENT

OVERVIEW

- [1] On July 17, 2017, David Reid had a seizure and lost control of his pickup truck while driving home from work on Highway 427. His truck collided with two vehicles, before hitting the one carrying Steve Zapata and Veronica Gonzalez Duque. Mr. Reid had been treated for a brain tumour. An earlier seizure had led to the suspension of his driver's license in 2016 by the Ministry of Transportation of Ontario. Later the same year, the MTO acted on a doctor's letter about his fitness to drive and reinstated the licence. The parties' experts differ on whether his doctors ought to have stopped his licence again, once they were aware of the tumour's progression. However, the experts agree that Mr. Reid, a construction worker with no medical training, could not have done more to prevent the seizure beyond his adherence to medical advice and a regimen of anti-seizure medication.
- [2] Mr. Reid died of brain cancer, five months later.
- [3] Mr. Reid's estate brought this motion for summary judgment to dismiss the plaintiffs' personal injury suit, because no trial is required to prove the circumstances of the accident and Mr. Reid's measures to prevent the seizure. The plaintiffs oppose the motion. They argue that a heavy burden rests with the estate to disprove negligence and that a trial court could find that Mr. Reid ought to have eliminated the risk by not driving. The outcome of

the dispute depends on a choice between two approaches to the so-called defence of “inevitable accident.”

- [4] In *Rintoul v. X-Ray and Radium Industries Ltd.*, [1956] S.C.R. 674, the Supreme Court of Canada brought the inevitable accident defence within the rubric of general negligence law by settling on the reasonable care standard. Other decisions of that court have also rejected the idea of a reversal of a plaintiff’s burden of proving a defendant’s negligence. There is no onus on the defence, let alone a heavy one, to disprove negligence. Drivers losing consciousness and control of vehicles because of a sudden involuntary medical event cannot and should not be held to a higher duty of care than those whose conscious risk-taking or inattention can cause traffic accidents. A driver’s obligation to take precautions to prevent a medical condition from affecting his driving is no different in principle from the need to wear eyeglasses if he has trouble seeing and responding to traffic conditions. The experts’ agreement that Mr. Reid took reasonable care means he cannot be held liable.
- [5] The plaintiffs pin their argument on the vestiges of the earlier law that continue to animate the courts’ treatment of inevitable accident as an affirmative defence obligation, requiring the defendant to show they have done the utmost to prevent the accident. In their submission, that standard of care meant Mr. Reid should not have been driving if there remained some risk of recurrence of a seizure.
- [6] Inevitable accident is a concept handed down to negligence law from an obsolete *form* of action in trespass to the person, during the common law courts’ modernization of negligence law in the first half of the 20th century. Historically, trespass to the person was hard to prove. But once proven, its pleading rules required the defendant to prove an excuse. The effort to graft the formal defence of excuse onto the *cause* of action in negligence law has sowed confusion. In negligence law, reasonable care is the only standard, and the legal burden of proof never shifts from the plaintiff.
- [7] Some court decisions can be distinguished, because a reverse onus can arise from conventional treatment of rear-end collisions as breaches of the duty to keep a safe speed and distance. Other decisions describe defendants’ medical risk-taking *en route*, such as a diabetic driving without keeping a source of sugar on hand. Still others could simply have been wrongly decided, in the sense of misreading the Supreme Court jurisprudence. This court can avoid the confusion arising from the wording of the inevitable accident defence in these authorities by applying basic principles of negligence law.
- [8] In reaching the conclusion that the court must grant the motion and dismiss the action, my reasoning navigates the following topics:
 - 1. Mr. Reid’s Relevant Medical History and the Accident
 - 2. Risk of Seizure Prior to the Accident
 - 3. Summary Judgment Principles
 - 4. Was the July 17, 2017, Motor Vehicle Accident an “Inevitable Accident”?

(a) Defendant's Burden of Proof

(b) Applicable Standard of Care

(c) Burden of Proof and Standard of Care Applied to Mr. Reid

1. MR. REID'S RELEVANT MEDICAL HISTORY AND THE ACCIDENT

- [9] Mr. Reid had a history of seizures in July and November of 2015, leading to the diagnosis of a brain lesion caused by a tumour. His physicians placed him on a course of Keppra, an anti-seizure medication, to stabilize his condition and to suppress the risk of reoccurrence.
- [10] The MTO suspended his driver's licence in March 2016 and reinstated it in May 2016. The reinstatement followed his family doctor's opinion that he was making an excellent recovery and would be fit to return to work and drive. By June 2016, the neurosurgeon, Dr. Marmor, reported to Mr. Reid's family doctor, Dr. Wilansky, that the tumour was growing. Dr. Wilansky inquired with Dr. Marmor whether growth of the tumour indicated another driving suspension. Because Dr. Wilansky did not hear back from Dr. Marmor, she followed up in July 2016 with the neurologist, Dr. Temple. Dr. Temple advised her that Mr. Reid had been "seizure-free for the amount of time required in order to drive by the MTO. His seizure risk is low."
- [11] The management of this driving risk informs the dispute in the action. The estate relies on the treating physicians' opinions that Mr. Reid was fit to drive and on his compliance with driving suspensions before and after the accident. The plaintiffs contend that the growth of the tumour meant the risk had increased and he should have eliminated the risk by refraining from driving. They maintain this position, despite their own expert's opinion that Mr. Reid was not at fault for his doctors' failing to warn him of the recurrence of the risk. Mr. Reid's absence of fault in terms of reasonable care means that the motion must be granted if the general law of negligence applies. I need not decide whether acceptance of the plaintiffs' position would impose strict liability or a form of driving ban on every Ontario driver with a brain tumour. However, their legal submission requires the court to depart from ordinary negligence law and impose both a reverse onus of proof and a standard of care approaching strict liability.
- [12] An August 2016 biopsy confirmed anaplastic astrocytoma, a type of brain cancer. Mr. Reid started receiving concurrent chemotherapy and radiotherapy at the neuro-oncology unit at Sunnybrook Hospital. The prescribing neuro-oncologist, Dr. Perry, recorded a history that included full-body tingling without loss of awareness or clonic-tonic (i.e., seizure-related) movements. He recommended that Mr. Reid continue anti-seizure medication. I pause to observe that management of the risk of seizure was not focally a driving issue, but a medical one, concerned with avoidance of brain injury. In September, the oncology nurse assessed Mr. Reid neurologically and described him as appearing "quite well" in terms of gait and speech. The nurse provided strategies for pacing his activities and instructed his wife to call her, "should he have any sudden or severe changes in his neurological status."

- [13] In April 2017, the chemotherapy was changed from Temozolomide to Lomustine. The progression of the tumour indicated that the Temozolomide's effectiveness could have run its course. Nevertheless, in May 2017, Dr. Marmor noted that Mr. Reid was doing well. An MRI performed in April showed "some slight disease progression." The hospital staff assessed Mr. Reid again in June and July, just prior to the motor vehicle accident. Both the staff nurse practitioner at Sunnybrook and Dr. Marmor found Mr. Reid to have been tolerating chemotherapy.
- [14] The parties agreed that the July 17, 2017, accident occurred after Mr. Reid blacked out from a seizure. Mr. Reid's pickup struck two other vehicles before continuing and hitting the plaintiffs' car. The occupants of one of the other vehicles appear to have fled the scene. It was not clear from the record why they did so. The police report recorded Mr. Reid as the only person in the multi-vehicle collision taken by ambulance to Credit Valley Hospital, the nearest facility. This did not mean others, including the plaintiffs, were not injured. For the purposes of the motion, I assume the plaintiffs suffered injuries for which damages can be assessed at trial.
- [15] According to the police report, Mr. Zapata followed the runaway pickup and forced it off the road to rest in a safe position. The clear inference to be drawn is that Mr. Zapata put himself and his passenger at further risk, to protect Mr. Reid and other highway users.
- [16] After the accident, a CT scan of Mr. Reid's brain showed worsening of the tumour and identified it as the likely source of the seizure. On July 25, 2017, an MRI confirmed significant growth of the tumour. Dr. Ironside of the Sunnybrook neurological team stated that, "all of these changes are concerning for, of course, further tumor progression." Dr. Ironside's history for the visit contained the following synopsis:
- Since his last clinic visit, he unfortunately had an event while driving that was likely a seizure. He had been seizure-free for several years on Keppra but reports he was driving and experienced a loss of consciousness which resulted in a minor motor vehicle crash. He sustained some injuries including to the chest wall initially thought to be possible rib fractures and had some additional investigations to exclude intra-abdominal injury. He fortunately has recovered well from this and no one else was injured in the incident. He has, of course, stopped driving and been reported to the Ministry of Transportation again. His Keppra was increased and he is now on Dexamethasone.
- [17] On December 13, 2017, Mr. Reid passed away. The cause of death recorded on the death certificate was "malignant brain tumor."
- [18] The police and ambulance notes and reports from the accident all found Mr. Reid in a state of confusion and lacking memory of the accident. No one, not even the plaintiffs, had any knowledge or recollection of Mr. Reid's driving before the first impact. Seven years after the event, the chances of any eyewitness coming forward to shed light on Mr. Reid's pre-collision driving between now and a trial are remote, if not implausible. Therefore, I was satisfied that neither the medical treatment evidence nor the evidence from the accident

scene would likely change between now and trial. The primary facts are therefore fixed. The only factual question for the court on this motion is the materiality of the expert evidence in the context of the risk of seizure while driving. I will explain why the experts' disagreement about the treating physicians' duty to stop Mr. Reid from driving is immaterial and why their agreement about Mr. Reid's observance of reasonable care is determinative.

2. RISK OF SEIZURE PRIOR TO THE ACCIDENT

- [19] The parties to the motion submitted expert reports regarding the risk of the accident prior to its occurrence. There was no evidence that Mr. Reid had any immediate foreknowledge of the seizure, requiring him to slow down, stop, or seek refuge in a breakdown lane. Moreover, the parties submitted no evidence of the geometry of the stretch of highway where the accident occurred for such factual issues to impact the motion. The police evidence consisted of rudimentary investigation and reporting of the sequence of collisions.
- [20] The estate of Mr. Reid presented the opinion of Dr. Marmor, the neurosurgeon. He testified, on cross-examination, that he was "not a seizure expert" (Dr. Marmor, q. 19). He later stated that he could report to MTO about a patient's fitness to drive if there was an "unacceptably high risk to have a seizure," but he would defer such a decision to a neurologist. The plaintiff also retained a neurosurgeon, Dr. Jha. Both doctors appeared qualified, at least to testify about brain tumours and about the regulatory duty to report unfit drivers.

To determine whether there is a genuine issue requiring trial under r. 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, I will assume that they are both capable of being qualified as trial experts.

Dr. Marmor

- [21] Dr. Marmor provided a brief medico-legal opinion. His contribution was mostly as a participant expert, as described by the Court of Appeal in *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at paras. 60-64. In fact, his report consisted mainly of a summary of the various doctors' notes and reports. Based on Mr. Reid's clinical history of over 18 months of being seizure-free after his return to work and driving, Dr. Marmor concluded that Mr. Reid would not have had reason to know that he had been at increased risk of having a seizure, "as long as he remained compliant with his medication."
- [22] On cross-examination, Dr. Marmor testified that "any patient with an abnormality in their brain is at risk to have a seizure whether they are on medication or not" (q. 37). He later stated: "There are lots of different things that can lead to seizures. Not everyone with a brain tumor has a seizure, but sometimes a patient with a brain tumor can present with a seizure" (q. 64). He could not comment on whether an increase in the size of a tumour results in an increased risk of seizure (q. 66).

Dr. Jha

- [23] In Dr. Jha's opinion, Mr. Reid was at an increased risk of having a seizure while driving, because of the progression of his cancerous tumour. The change in his chemotherapy from Temozolomide to Lomustine indicated that the cancer was not responding adequately to the earlier drug. This meant an increase of the risk of a recurrence of seizure.
- [24] Dr. Jha stated during his cross-examination that, in a brain cancer case involving numerous disciplines, "sometimes there's a lot of miscommunication as to who is quarterbacking the care of the patient" and "the issue of whether that patient is driving or not may not even come up in the consultation" (qq. 22-23). However, he added: "I'm sure you appreciate from my report I don't agree with Dr. Temple," referring to Dr. Temple's advice to the family doctor in July 2016 that the tumour growth was not a reason to take away Mr. Reid's driver's licence (q. 39).
- [25] Dr. Jha generally agreed with Dr. Marmor's opinion regarding the coincidence of tumours and seizures. However, how Mr. Reid felt on any given day was irrelevant to the risk of seizure (q. 53). Rather, the question of risk entailed the progression of the tumour: "The seizure was controlled but the imaging showed progressive growth of the tumor. Eventually the tumor was multifocal in different regions of the brain, and it was highly predictable that he was at risk for another seizure" (qq. 56, 81 and 95).
- [26] On further cross-examination, Dr. Jha stated that it was predictable "to an expert retrospectively reviewing the records" (q. 57). Mr. Reid, as the patient and lay person, would not have had the benefit of a review of clinical records available to Dr. Jha (qq. 82-83). He also agreed that, despite Dr. Wilansky's note of a call with Dr. Temple in July 2016, the medical records contained no communication with Mr. Reid about driving (qq. 98-99).
- [27] Most importantly, Dr. Jha stated his opinion that, "by no fault of the patient," who "did everything he was supposed to do ... the tumor was growing, and the treatment team ought to have known to have advised him not to drive" (q. 100).

Conclusions Regarding the Expert Evidence

- [28] Insofar as the plaintiffs' expert questioned the reinstatement of Mr. Reid's driving licence, the issue must be framed by the physicians' regulatory obligation and their understanding of what it entailed. The *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 203(2), regulates reporting of patients to the MTO:

Mandatory reports

203 (1) Every prescribed person shall report to the Registrar every person who is at least 16 years old who, in the opinion of the prescribed person,

has or appears to have a prescribed medical condition, functional impairment or visual impairment.

Discretionary reports

(2) A prescribed person may report to the Registrar a person who is at least 16 years old who, in the opinion of the prescribed person, has or appears to have a medical condition, functional impairment or visual impairment that may make it dangerous for the person to operate a motor vehicle.

- [29] A prescribed person includes a physician or nurse, but in Mr. Reid's case the focus will be Dr. Temple, whom the family doctor consulted about Mr. Reid's fitness to drive. For the purposes of mandatory reporting of prescribed medical condition under s. 203(1), s. 14.1(3) of the applicable O.Reg. 340/94 includes:

Sudden incapacitation: a disorder that has a moderate or high risk of sudden incapacitation, or that has resulted in sudden incapacitation and that has a moderate or high risk of recurrence.

- [30] Because sudden incapacitation is a prescribed condition, I need not consider the discretionary reporting under s. 203(2). There are no criteria for reinstatement, but I assume the Registrar at the MTO will review a physician's letter before lifting a licence suspension based on the same criteria.

- [31] Dr. Marmor's "unacceptably high risk" in describing the risk of recurrence would set the threshold for mandatory reporting higher than "moderate or high risk." Subject to his deference to the neurologist, Dr. Temple, I could infer that, at trial, the door has been left open for Dr. Marmor to describe the risk as moderate, at trial. Dr. Jha did not express a view that the risk was at least moderate. However, I infer from his disagreement with Dr. Temple's opinion of the risk being low that, at trial, he could clarify his opinion to state that the progression of the tumour had raised the risk from low to moderate some point prior to the accident. One might also construe the increase of Mr. Reid's medication dosage and supplementation with Dexamethasone after the accident as confirmation, in hindsight, of Dr. Jha's opinion that the growth of the tumour had increased the risk of a seizure. In sum, the expert evidence in the summary judgment record does not preclude a judge or jury from finding that Dr. Temple was wrong to advise the family doctor of no need to re-notify MTO.

- [32] Ontario jurisprudence arising from s. 203 generally deals with appeals from licence suspensions: e.g., *8954 v. Registrar of Motor Vehicles*, 2014 CanLII 53664 (ON LAT). Because s. 203(5) indemnifies physicians from a failure to report a patient, there appear to be no reported cases dealing with an injured plaintiff's suit against a physician for allowing a driver to keep his licence. Since the action is not against Dr. Temple or other members of Mr. Reid's treatment team, I must consider whether a genuine issue requiring trial arises from the possibility that Dr. Temple's advice to the family doctor of the low risk of seizure recurrence was clinically wrong.

- [33] I found Dr. Jha's evidence of the likelihood of seizure increasing because of the multifocal progression to be persuasive. Dr. Marmor's understanding of the regulation could have been incorrect. Nevertheless, courts generally do not engage in forensic criticism of medical professionals' clinical judgment, even in medical malpractice cases: *Wilson v. Swanson*, [1956] S.C.R. 804, at p. 811. Thus, Dr. Temple's *ex ante* assessment of risk is not necessarily to be questioned, even if he turned out to be wrong.
- [34] Dr. Jha opined that the doctors should have exercised greater caution before writing to MTO to reinstate Mr. Reid's licence and should have more aggressively moved to have it suspended again. His opinion, even if accepted at trial, is somewhat of a *non sequitur* in the piece. The issue of Mr. Reid's conduct in driving while medicated for epileptic seizures arising from his tumour does not depend on the doctors' opinions on whether they should have advised him not to drive. Rather, every driver's self-assessment of safety must depend on individual knowledge and responsibility. This is no different from driving while intoxicated, or heading onto the road without eyeglasses because one is in too much of a hurry to go back into the house to retrieve them.
- [35] If Mr. Reid's physicians wrote to reinstate his licence, he had no basis to question the medical advice to MTO about his ability to drive safely. The importance of this point is that the countless drivers on the road at any given moment, who have physician-managed heart conditions, epilepsy, and other potential causes of loss of vehicle control, cannot be deemed unfit to drive simply because of the possibility that a medical event leading to loss of vehicle control could occur or that a prescribed medication could fail to prevent it.
- [36] Mr. Reid's medical history was not about driving. It was not a preoccupation of his neurological consultants at Sunnybrook. They were more concerned about treating the cancer. His family doctor was diligent in following up with Dr. Temple, after she did not hear back from Dr. Marmor. She cannot be faulted for accepting Dr. Temple's advice that Mr. Reid was fit to drive.
- [37] The action is against Mr. Reid or his estate. It is not a medical negligence case against Dr. Marmor or any other treating physician. Both the plaintiffs' position that Mr. Reid ought not to have been driving, and the defence's position that he took reasonable steps by abiding by medical treatment and advice and the regulatory licensing rules, depend on Mr. Reid's state of knowledge. Had Dr. Temple's advice been to stop driving and had the family doctor communicated the advice to Mr. Reid, the patient's knowledge of the risk could inform his observance of reasonable care, even if none of his physicians reported him to MTO. But that was not Dr. Temple's advice.
- [38] The chance that a trial court might find Dr. Temple's clinical judgment to have been wrong does not amount to a genuine issue. Indeed, such a finding would reinforce the full appreciation of Mr. Reid's situation that the clinical error impaired his ability to make an informed decision about his fitness to drive. Dr. Jha's statement that Mr. Reid was without fault fits hand and glove with the opinion that Dr. Temple gave the wrong advice.

- [39] The experts' disagreement over Mr. Reid's medical fitness to drive therefore does not affect the potential trial outcomes, no matter which opinion prevails. This logic informs the court's summary judgment obligations under r. 20.04, which I will address next.

3. SUMMARY JUDGMENT PRINCIPLES

- [40] The summary judgment motion is governed by r. 20.04 of the *Rules of Civil Procedure*, the relevant provisions of which I reproduce below:

Disposition of Motion

General

20.04 (2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

- [41] Rule 20.04(2) requires the court to grant summary judgment if there is no genuine issue requiring a trial. Prior to the current wording of the rule, there was considerable uncertainty about whether "for trial" meant "requiring a trial," and whether any single issue, such as one of credibility, necessitated a trial: *Irving Ungerman Ltd. v. Galanis (C.A.)* (1991), 4 O.R. (3d) 545 (Ont. C.A.), at p. 551. The rule was amended in 2010 to now require the court to consider whether the case can be determined more expeditiously and preserve a "fair and just adjudication": *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 47-51.

- [42] Because of the *Irving Ungerman* interpretation of the rule, motions judges often sent cases to trial because of genuinely disputed facts, such as the opinions of the doctors in this case, even if the resolution of such disputes did not affect the legal outcome and the construction of “for trial” offended the rule against mootness. Since the replacement of “for” with “requiring,” rule 20.04 has eliminated the need for many lengthy and expensive trials and has enhanced access to justice.
- [43] The Supreme Court’s guidance in *Hryniak*, at paras. 66-68, requires the court to first determine whether there is a genuine issue requiring trial, based on the evidence in the motion records, without resort to the three fact-finding powers in r. 20.04(2.1).
- [44] If the governing law is the general law of negligence, the court can determine the absence of a genuine issue without resort to the additional fact-finding powers. On the face of the expert evidence, the only difference of opinion is whether Mr. Reid’s *doctors* ought to have taken steps to prevent the accident. They agree it was reasonable for Mr. Reid to have followed medical advice and to have continued to drive while taking anti-seizure medication. Therefore, the outcome of the motion depends on the applicable law. If the estate’s legal position is correct, the court must dismiss the action.
- [45] If, as the plaintiffs submit, inevitable accident requires a substantive departure from ordinary negligence law, the summary judgment procedure could lead to two outcomes.
- [46] First, the court could dismiss the motion and then consider whether to resume the hearing under r. 20.04(2.1) or to send the case to trial to determine whether Mr. Reid ought to have stopped driving altogether until the treatments eliminated the risk of seizure. The difficulty with this approach is that the only live factual dispute, whether the doctors ought to have given different advice about driving or reinitiated the licence suspension, would not alter the trial outcome. If there is no genuine issue requiring a trial, the rule states the court “shall grant judgment.” Perhaps the operative word is “grant” in that the moving party is the only one requesting judgment.
- [47] The second outcome could be summary judgment for the plaintiffs, if the law required Mr. Reid to abstain from driving while he was being medicated for seizures. The plaintiffs did not bring their own motion, and the estate’s counsel objected to a reading that the rule requires the court to rule in the opposite direction. I do observe that another subrule, r. 20.04(4), states that “Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.” These rules have given rise to the so-called “boomerang summary judgment”: *Maisonneuve et al. v. Langlois et al.*, 2021 ONSC 3587, at para. 41; *9491716 Canada Inc. v. Gore Mutual Insurance Co.*, 2022 ONSC 6042, at para. 26. The Court of Appeal has frowned on this reading, as a denial of procedural fairness to the moving party, if the motion judge failed to draw the parties’ attention to it: *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, at paras. 9-14.
- [48] Because of my analysis of the inevitable accident jurisprudence in favour of the moving party, I need not consider the appropriate remedy if the motion is not successful.

4. WAS THE JULY 17, 2017, MOTOR VEHICLE ACCIDENT AN INEVITABLE ACCIDENT?

- [49] Mr. Reid's estate's summary judgment motion relies on an affirmative answer to the above question. Relying on *Rintoul*, it argued in its factum that where the circumstances establish a *prima facie* case of negligence against the defendant, the defendant can discharge the burden of proving that the accident was not caused by his negligence by showing the accident was an inevitable accident.
- [50] *Rintoul* remains the leading authority on the meaning and application of the inevitable accident principle. Cartwright J., for a unanimous Supreme Court, began with the axiom that the driver of a car running into a stationary vehicle in broad daylight "must satisfy the Court that the collision did not occur as a result of his negligence": *Rintoul*, at p. 677. Cartwright J. did not employ the phrase "*prima facie*," but I can see how the estate interpreted his statement as shifting the substantive burden of proof from the plaintiffs to the defendants. A reading of the whole of the case does not support such a conclusion.
- [51] During the estate's submissions, I drew to counsel's attention the Court of Appeal's statement in *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697, at p. 703, while interpreting *Rintoul*, that a plea of inevitable accident was simply a denial of negligence. A denial of negligence is not an affirmative defence or a requirement to disprove negligence, although it can carry evidentiary burdens depending on inferences to be drawn from the evidence tendered by the plaintiffs. The estate's counsel agreed, as defence counsel conceded in *Graham*. However, he argued that even if the legal burden shifted to the defence to disprove negligence there was ample evidence of Mr. Reid's lack of negligence on a reasonable care standard. This exchange ultimately did not affect the plaintiffs' legal position, that the circumstances of the case cast a burden on the defence to disprove negligence, and that the standard of care was elevated to the point of having required Mr. Reid to refrain from driving.
- [52] The trial judge in *Rintoul* had found that the unexpected failure of the service brakes of the car driven by the owner's employee presented an unavoidable emergency in which he acted without negligence. The Court of Appeal affirmed the trial decision, without reasons. The Supreme Court allowed the appeal and found the defendant liable in negligence.
- [53] The reasoning in *Rintoul* entailed three subsidiary issues arising from inevitable accident:
- (a) defendant's burden of proof
 - (b) applicable standard of care
 - (c) application of the burden of proof and standard of care to Mr. Reid

(a) Defendant's Burden of Proof

- [54] The temptation to shift the legal or persuasive burden of proof from the plaintiffs to Mr. Reid in this case arises from the initial circumstantial evidence of the defendant's loss of control of a motor vehicle and of the plaintiffs' innocence. Cartwright J.'s reasons in *Rintoul* refer to a defence burden, but they do not transfer the common law legal burden from the plaintiff to the defendant.
- [55] In *Rintoul*, the defendant applied his service brakes from a safe distance away from the traffic halted at an intersection but found they did not work. He then applied the hand brake, but it did not stop his car from rear-ending the plaintiff's car. A mechanic had serviced the brakes the previous day. The investigating police officer tested the service brakes at the scene and found them inoperative. Oddly, the officer then drove the car to the police station instead of having it towed. During the ride to the station, he found the brakes worked again. After a professional "Brake Tester" confirmed his finding, the police allowed the defendant to drive the car away.
- [56] At pp. 678-79, Cartwright J. described the defence burden as one of explaining an improbable event:
- [The defence] called no witness to explain the extraordinary fact that the service brakes which were working properly immediately before and immediately after the accident and passed satisfactorily the test prescribed in the regulations failed momentarily at the time of the accident. Without going so far as to say that such a story appears to be intrinsically impossible, it is clear that its nature was such as to cast upon the defendants the burden of furnishing a clear and satisfactory explanation of so unusual an occurrence.
- [57] There can be no doubt that the burden cast on the defendants was an evidentiary one within the factual narrative and not a legal one. In the next paragraph, he referred to the mysterious event in terms of whether "the defect, whatever it was," could reasonably have been discovered by reference to the ownership and service history and inspection by the mechanic the day before the accident. At p. 680, he cited the *Highway Traffic Act* and regulations requiring brake maintenance and functionality. At p. 681 he concluded:
- In my opinion, on the evidence the respondents have not only failed to show that the alleged failure of the service brakes was inevitable, they have also failed to show that after such failure occurred Ouellette could not by the exercise of reasonable care have avoided the collision.
- [58] The unexplained loss and return of braking power proved that the car was not roadworthy if the brakes were going to malfunction without warning. The obvious inference that the defendants had operated an automobile with unreliable brakes simply turned the spotlight on the defendants' failure to tender evidence of the service history and the instructions to the mechanic. The court did not shift the legal burden, on principle or on policy grounds.

- [59] Returning to the estate's factum, describing inevitable accident as rebuttal to a plaintiff's *prima facie* case, the phrase "*prima facie*" can mean either a permissible factual inference from the evidence or a plaintiff's substantive proof of a cause of action: Sidney N. Lederman et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022), at p. 121. The Supreme Court in *Rintoul* did not use the words "*prima facie*," and neither did the Court of Appeal in *Graham*. The estate's use of those words to articulate its position regarding the burden of an inevitable accident defence, as described in the case law, illustrates the importance of distinguishing between evidentiary and legal burdens in tort law.
- [60] Authors and courts often refer to the shifting of evidential or persuasive (legal) burdens of proof. Except by operation of legal presumptions or statutory provisions, the burdens do not shift: *Sopinka*, at pp. 122-23. Such a legal presumption arises in rear-end accidents, if there is no credible and objective evidence of excuse (such as a seizure): *Beaumont v. Ruddy*, [1932] O.R. 441 (C.A.), at p. 442. The presumption arises from the natural inference that the following driver followed too closely, and from the positive obligation not to follow too closely, under s. 158(1) of the *Highway Traffic Act*: *Martin-Vandenhende v. Myslik*, 2012 ONCA 53, at paras. 25-31.
- [61] In many instances, the distinction between the evidentiary and legal meanings of *prima facie* has no practical effect on the outcome of a case. The distinction matters here. Without a statutory reversal of the legal burden of proof, the simple occurrence of the accident despite the driver's and owner's reasonable care leads to dismissal of the plaintiff's action because of the plaintiff's failure to prove the case. If the legal burden were reversed, as in the case of a collision with a pedestrian, the very same evidence could lead to the motorist's liability because of the defendant's failure to prove how the accident occurred despite the taking of reasonable care. That reverse onus is not a shifting onus. By operation of statute, it is always the driver's: *Feener v. McKenzie*, [1972] S.C.R. 525, at p. 537.
- [62] Applying this reasoning to Mr. Reid's seizure while driving on Highway 427, the combination of the absence of a statutory ground for reversing the legal burden of proof and of the fact that the seizure could occur despite his reasonable steps to prevent it, leads to the conclusion that the plaintiffs cannot prove Mr. Reid's negligence. The inevitable accident defence is therefore not an affirmative defence in the sense of a legal rebuttal of a *prima facie* case in negligence. Rather, inevitable accident describes a defence in the sense of a defendant negates the inferences the court is free to draw from the plaintiff's case. If the inference of negligence is strong, as in a rear-end collision, or if the risk is serious, such as sudden incapacitation, the weight of the evidentiary burden described in the case law only reflects the facts. This is an evidential burden: *Reid v. Bradley*, 2005 CanLII 11785 (ON CA), at para. 2.
- [63] This reading of *Rintoul* is also consistent with a concurrent line of cases treating runaway vehicle cases through the lens of *res ipsa loquitur*, the now obsolete rule of circumstantial evidence in tort cases where the event "speaks for itself." The original use of the *res ipsa* maxim in the English case of *Scott v. London & St. Katherine Docks Co.*, [1861-73] All E.R. Rep. 248, involved the injury of a customs officer when bags of sugar fell from a crane. The rule of evidence allowed the plaintiff to meet the burden of proof by showing

the accident would likely not have occurred if the person operating the equipment used it without exercising reasonable care. The defendant could rebut the *prima facie* case with proof of an equally probable explanation of the occurrence without negligence. See also *United Motors Services, Inc. v. Hutson et al*, [1937] S.C.R. 294, at pp. 303-04.

[64] The Supreme Court in *Rintoul* did not refer to its earlier decision in *Gootson v. The King*, [1948] 4 D.L.R. 33 (SCC). In *Gootson*, the driver's epileptic seizure caused him to hit a pedestrian on private property (not on a street, meaning the plaintiff bore the ordinary burden of proving the driver's negligence). Two months before the accident, the driver had fainted at work and was taken to hospital. He had then been cleared to return to work and drive his car. Previously, he had been driving for 20 years without incident.

[65] The Supreme Court, in separate reasons, found that the defendant had met the burden of explanation in a *res ipsa loquitur* case. Kellock J. went further at p. 38 by saying,

I think it cannot be said that [the defendant] was chargeable with any negligence in driving his car...having been discharged after treatment following the March illness with the advice from the attending doctors that he was competent to drive. The respondent is liable only if negligence on the part of [the defendant] is shown.

[66] I read "is shown" to mean "by the plaintiff." Locke J. affirmed the trial judge's finding that the defendant was not driving with knowledge of the possibility of a further attack. The court's approach in *Gootson* was informed by negligence law and resisted the idea that persons with neurological conditions or other conditions with sudden loss of bodily control should be barred from driving.

[67] *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, at paras. 26-27, marked the formal end of the *res ipsa* principle in Canadian law. The Supreme Court replaced it with the more plainly stated approach to the use of circumstantial evidence in negligence cases:

That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[68] Although the court in *Rintoul* made no reference to *res ipsa*, the reference at p. 679 to the defendant's burden of explanation either suggests the hidden operation of that maxim or proved that the proper use of circumstantial evidence should lead to an identical conclusion regardless of the maxim. The duty of explanation is no more than filling gaps in the plaintiff's case with additional facts to preclude an inference adverse to the defendant.

[69] Proof of such an explanation is not tantamount to a reverse onus to disprove negligence. Rather, it simply restores the evidentiary record to one in which the plaintiff has not yet proven the defendant's liability. Even when courts employed the *res ipsa* maxim, the

plaintiff always bore the burden of proving negligence, and the inference of negligence arose only from the lack of likelihood that the event could have occurred in the absence of fault: *Eady v. Tenderenda*, [1975] 2 S.C.R. 599, at p. 603; and *Hellenius v. Lees*, [1972] S.C.R. 165, at p. 172.

- [70] The retirement of *res ipsa* in *Fontaine* coincided with common law courts' return to basic tort principles and elimination of artificial reverse onuses to resolve difficult cases. In a similar vein, many courts and authors had interpreted *McGhee v. Nat. Coal Bd.*, [1973] 1 W.L.R. 1, as shifting the onus of causation in negligence cases from the plaintiff to the defendant if the defendant had increased the risk of injury. However, that reading was put to rest by the House of Lords in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557, as imported to Canadian law by the Manitoba Court of Appeal in *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.* (1989), 59 Man. R. (2d) 37, at p. 46. In *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 326-32, the Supreme Court upheld the adoption of *Wilsher* in *Westco* and other provincial appellate decisions. Justice Sopinka, at p. 325, cited the following passage from Lord Bridge's speech in *Wilsher*:

[W]hether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.

- [71] The phrase "proof of fault causing damage," makes the statement regarding the onus of proof applicable not only to causation but also to negligence. The reference to Parliament is apposite, because provincial legislatures have enacted substantive reverse onuses for certain categories of accidents, such as cars hitting pedestrians on public highways. Indeed, the phrase "inevitable accident" also makes a cameo in the law of causation, referring to the affirmative pleading that the injury would have occurred despite the defendant's negligence. There is no need to consider the defence until the plaintiff has proven the defendant's negligence: *Ketler v Nova Scotia (Attorney General)*, 2016 NSCA 64, at paras. 33-35.
- [72] I return to the estate's premise that the accident entailed a *prima facie* case casting on the defendant a burden of proving it was not caused by Mr. Reid's negligence and to its argument that it can discharge the burden by showing it was an inevitable accident. If the estate meant *prima facie* referring to the persuasive burden, I would demur with this framing of the case. If a plaintiff has met the persuasive burden by proving the defendant's liability in negligence, the defendant has failed to prove the accident occurred despite observance of reasonable care. The inevitable accident defence has no place in this equation. Inevitable accident cannot act as an affirmative defence such as the plaintiff's contributory negligence or voluntary assumption of risk.
- [73] If *prima facie* referred to the evidentiary burden, the estate would be correct in framing the case as the driver's loss of control for which the estate bears the burden of showing loss of control was unavoidable because of the seizure. Such an evidentiary rebuttal would suffice if, at trial, all the plaintiffs proved was injury by impact by Mr. Reid's vehicle and left the

court to draw the inference that his loss of control was negligence. This would only mean that any gap in evidence giving rise to the inference would vanish when replaced with the evidence that he lost control because he had a seizure. Because driving with a brain tumour is not negligence, the plaintiffs would need to rely on a further inference that the seizure occurred because Mr. Reid did not adequately prevent it. The estate would then need to displace the inference with evidence that Mr. Reid followed medical advice and took his anti-seizure medication.

- [74] This reciprocating evidentiary dance would only reflect the knowledge imbalance when the plaintiffs started their action. The court's task here is to envisage the case at trial. As in any motion, the court discharges the task based on the facts existing at the motion was launched: *Thibodeau v. Thibodeau*, 2011 ONCA 110, at para. 65. Currently, there are no evidentiary gaps giving rise to a rebuttable case for finding Mr. Reid negligent. One cannot draw from the absence of knowledge about his driving prior to the seizure any inference that he was driving negligently. His driving with the risk of seizure is the issue that governs this case.
- [75] The legal burden remains with the plaintiffs to prove that Mr. Reid breached his duty of care while driving with the risk of a seizure. If the seizure were the only fact introduced at trial, the estate could risk an inference of negligence in the way the defendants in *Rintoul* failed to explain or account for the defective brake. Since the undisputed evidence is that Mr. Reid was faultless in his observance of medical advice and anti-seizure medication, the defence evidentiary burden would be satisfied. What is left to decide is the standard of care in "inevitable accident" cases. Is it reasonable care, or something approaching strict liability?

(b) The Applicable Standard of Care

- [76] The estate argued that the accident was inevitable in the sense that Mr. Reid lost control of his vehicle despite having taken reasonable care; accordingly, their argument is that the defence prevails, and the action must be dismissed. Mr. Reid was taking his anti-seizure medication, keeping fit and active, working with heavy equipment, and attending required medical appointments. Only after the accident did the treatment team increase the dosage of his medication.
- [77] The plaintiffs argued that Mr. Reid knew or ought to have known that the 2016 reinstatement of his driver's licence did not "erase his knowledge of the risks associated with his medical condition." The plaintiffs submitted that Mr. Reid knew or ought to have known he was at risk of another seizure and it was up to him to prevent harm to other highway users "by not driving." The opinion of the plaintiffs' expert is that the treating physicians ought to have advised Mr. Reid against driving, either in 2016 or shortly prior to the 2017 accident. These circumstances triggered "a heightened duty to assess their fitness to drive."

- [78] The plaintiffs have not brought their own summary judgment motion. Instead, they submit that a trial is necessary to determine whether Mr. Reid ought to have known of the increased risk of seizure, “despite medication compliance.”
- [79] In *Rintoul*, at p. 678, the Supreme Court lowered the standard of care from one of “greatest care and skill,” to a standard requiring “exercise of reasonable care,” but without explaining why (underlining mine):

The defence of inevitable accident has been discussed in many decisions. A leading case in Ontario is *McIntosh v. Bell*, which was approved by this Court in *Claxton v. Grandy*. At page 187 of the report of *McIntosh v. Bell*, Hodgins J.A. adopts the words of Lord Esher M.R. in *The Schwan*, as follows:—

...In my opinion, a person relying on inevitable accident must shew 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.

In my view, in the case at bar the respondents have failed to prove two matters both of which were essential to the establishment of the defence of inevitable accident. These matters are (i) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part, and (ii) that, assuming that such failure occurred without negligence on the part of the respondents, Ouellette could not, by the exercise of reasonable care, have avoided the collision which he claims was the effect of such failure.

- [80] In 1983, the Ontario Court of Appeal interpreted *Rintoul* to have lowered the “onerous” burden in Lord Esher’s decision to a “lesser” obligation to show the defendant could not have avoided the accident by the exercise of reasonable care: *Graham*, at p. 703. Nevertheless, one could not be faulted for reading the above passage from *Rintoul* as the Supreme Court’s affirmation of Lord Esher’s reverse onus and “greatest care and skill” standard, consistent with *Claxton* and *McIntosh*. For example, in *Ingratta v. McDonald*, 2024 ONSC 371, at para. 18, this court read the same passage as clearly meaning that “the burden on a defendant seeking to establish the ‘defence’ of inevitable accident is high.”
- [81] The absence of rationale in *Rintoul* for departing from the Supreme Court’s adoption in *Claxton* of Lord Esher’s formulation has fueled subsequent attempts to reconcile the two approaches, often with the effect of reverting to Lord Esher’s. The futility of this exercise is baked into the logic that Lord Esher’s speech in *The Schwan*, [1892] P. 419 at 429, was grafting onto negligence law a formal defence originating in the procedural rules of pleading in English trespass law. Those pleading rules differentiated “forms of action” in trespass and “trespass on the case,” the latter form of action used interchangeably with “negligence” during much of the 20th century.

[82] In the history of negligence in the common law, *Letang v. Cooper*, [1964] EWCA Civ 5, [1965] 1 Q.B. 232, [1964] 2 All E.R. 929 was pivotal in freeing negligence law from arcane rules for pleading trespass. At pp. 934-35 of *Letang*, Lord Diplock described the development of forms of action as efforts of early common law courts to categorize causes of action into standard pleading rules applicable to claims and defences. The pleader's choice of the form of action could create procedural consequences. The 1873 *Judicature Act* abolished forms of action, but lawyers' reliance on precedent books such as *Bullen & Leake* ensured the old pleadings rules continued to animate litigation practice. In Ontario, as late as 1976, Grange J. of this court relied on *Letang* to explain that an alternative pleading arising from the same facts did not constitute a new cause of action for the purpose of an amendment after the expiry of the prescription period: *Denton v. Jones* (1977), 14 O.R. (2d) 382, 1976 CarswellOnt 363, at para. 8.

[83] Inevitable accident was a combination of a negation of duty and causation, often described as excuse. Excuse was the primary affirmative defence to an ancient form of action called trespass to the person. Trespass, based on intrusion on formal rights and not allocation of fault between autonomous actors, was difficult for plaintiffs to plead and prove because it did not recognize unintentional, indirect, or consequential harm. However, once proven, it was harder for defendants to escape liability. The affirmative defence of excuse required accident had to have been impossible to avoid: hence the defence of "inevitable" accident and the idea of a reversal of the burden of proof. Professor Gilles described defence as a component of pre-negligence tort law:

The structure of classical tort liability was thus determined by two principles – a principle of responsibility and a principle of excuse. The principle of responsibility, expressed in the maxim *sic utere tuo ut alienum non laedas*, imposed an obligation to avoid acting in ways that injured others. The principle of excuse, expressed in the inevitable accident defense, held that a person whose act resulted in injury to another would not be treated as responsible if the presence of another cause made avoidance impractical (meaning impossible as a practical matter). The implicit standard of care was consequently higher than a standard of reasonable or customary care, but lower than a standard of literal physical impossibility.

Stephen G. Gilles, "Inevitable Accident in Classical English Tort Law" (1994) 43 Emory L. J. 575, at p. 578. [Internal citations omitted.]

[84] In contrast, the modern formulation in negligence law describes an inevitable accident as "one that reasonable care by the actor would not have avoided": Gilles, at p. 576. Put more simply, it is an accident that occurred despite the defendant's exercise of reasonable care. The fact that the defendant could have done more than what was objectively reasonable could not form the basis of liability.

[85] Forms of action such as trespass to the person were abolished by judicature acts in common law jurisdictions in the 1800s. However, in the words of Lord Denning, they continued to "rule us from their graves": *Letang*, cited by the Supreme Court in *Cahoon v. Franks*, [1967] S.C.R. 455, at p. 459. Even after provincial highway traffic legislation provided that

liability for automobile accidents was governed by negligence law, the form of action called “trespass on the case,” or simply, “case,” remained a valid pleading into the 1950s: *Eisener v. Maxwell*, [1951] 3 D.L.R. 345 (N.S.S.C.), at p. 348-349. Actions “upon the case” became synonymous with torts, including negligence and fraud: *Schwebel v. Telekes*, [1967] 1 O.R. 541 (Ont. C.A.), at pp. 543-544; and *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.*, 2001 CanLII 5678 (ON CA), 54 O.R. (3d) 131, at paras 21-23.

- [86] One important distinction between trespass and case was in the onus of proof of negligence. In negligence or case, the legal burden remained with the plaintiff. This contrasted with trespass to the person. Once the plaintiff proved a trespass, the burden fell on the defendant to show it “was utterly without his fault”: *Cook v. Lewis*, [1951] S.C.R. 830, at p. 839. *Cook* was the case of the grouse hunter shot in the eye after two others fired their rifles in the same direction. Known better for the reversal of the burden of proof of causation where the plaintiff could not show who had shot the plaintiff, the case also illustrated how the reversal of the burden of proof in trespass led to a different liability result than in negligence, on the same facts.
- [87] Justice Cartwright, who wrote the majority opinion in *Cook*, went on to write the Supreme Court’s decision in *Rintoul* five years later. In *Rintoul*, the change from Lord Esher’s “greatest care and skill” standard in *The Schwan*, [1892] P. 419, to Cartwright J.’s “reasonable care” test reflected common law courts’ attempts to shed trappings of formalism. In her analysis of *The Schwan*, *Cook*, and *Rintoul*, Professor Sullivan described how common law courts tried to fit negligence into obsolete forms of pleading: Ruth Sullivan, “Trespass to the Person in Canada: A Defence of the Traditional Approach” (1987) 19:3 Ottawa L. Rev. 533, at p. 558:

[A] debate concerning the defence of inevitable accident [was] carried on by the courts ever since the abolition of the forms of action in the mid-nineteenth century. One side of the debate is represented by Lord Esher M.R. who writes that to make out the defence of inevitable accident, a defendant must prove that the plaintiff’s damage was caused by something over which he “had no control” and which could not have been avoided “by the greatest care and skill.” This view of inevitable accident obviously embodies the simpler conception of negligence associated with old style trespass. However, most modern courts have rejected this view. In recent cases the courts have held that the defence of inevitable accident is made out if the defendant proves that the damage could not have been avoided by “due diligence” or the exercise of “reasonable care.” [Footnote citing *Rintoul* omitted.]

...

To speak of the defence of inevitable accident in the context of a negligence action is peculiar, of course, for in negligence it is up to the plaintiff to prove fault, not the defendant to prove absence of fault. [Internal citations omitted.]

- [88] This debate should be wholly irrelevant to current motor vehicle litigation, if only because the driver of a motor vehicle is liable for loss or damage “by reason of negligence”: s. 192(1) of the *Highway Traffic Act*. Section 193(2) also states that the driver involved in a collision between motor vehicles does not bear an onus of disproving negligence in s. 193(1). In other words, remnants of trespass law have no place in motor vehicle accident litigation, where the accident occurs on a public highway.
- [89] Therefore, Mr. Reid’s driving was to be held to the same reasonable care standard applicable to every other driver on Highway 427 on the day of the accident. Nevertheless, continuing trial and appellate jurisprudence employing the phrase “inevitable accident” to describe an affirmative defence suggests a special category of negligence with an elevated standard. Robert Kligman, in “Inevitable Accident and the Infirm Driver: What You Do Know Can Kill You,” (1987) 8:3 Adv. Q. 311, described Canadian case law between the 1950s and 1980s and concluded:
- Thus, in order to avoid liability with respect to a “black-out” or similar disabling event, the *defendant* must prove that his condition was *totally* unanticipated or unexpected: at p. 319. [Emphasis added.]
- [90] A similar description of the inevitable accident defence as only available when “an accident is purely inevitable” appeared in a more recent survey of the law: Marel Katsivela, “Canadian Contract and Tort Law: The Concept Force Majeure in Quebec and its Common Law Equivalent” (2011) 90 Can. Bar Rev. 69, at p. 97.
- [91] One explanation for the confusing treatment of the inevitable accident defence as carrying a high burden on the defence is that the issue arises typically in cases already involving a reverse onus on the defendant to disprove negligence: *Ingratta*, at para. 19, citing *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523. *Ingratta* and *Iannarella* both involved rear-end collisions in snowy and icy road conditions. This observation contrasts with the Court of Appeal’s seminal decision in *Beaumont*, in which the court clearly would have accepted the excuse of a sudden blackout if it had been corroborated or proven objectively. In *Iannarella*, at para. 19, Lauwers J.A. referred to the shift to the defendant of an evidentiary burden, including the defendant’s explanation to rebut an inference of negligence resulting from the circumstantial evidence of a rear-end collision.
- [92] The inference in the reverse onus cases is simply that the rear-end collision is itself evidence that the following vehicle was following too closely or too fast in a circumstance in which the lead vehicle had no means of escape. No such inference arises in a case in which proximity or speed, or other elements of driving, had no bearing on the outcome. I do not construe cases such as *Iannarella* as incorporating a substantive reverse onus on motor vehicle actions framed in negligence. Indeed, Cory J.A.’s comment in *Graham*, that the plea of inevitable accident is simply a denial of negligence, resembles judicial commentary before *Fontaine* that *res ipsa loquitur* was simply a practical approach to circumstantial evidence that does not shift the burden of proof: *Snell*, at p. 322.
- [93] Applying *Rintoul* as bringing inevitable accident cases into the negligence framework does not do away with the natural inference that loss of control of a vehicle is ostensibly a breach

of the driver's duty to exercise care of the vehicle – provided the loss of control resulted from a cause within the driver's control, such as speed or intoxication.

- [94] In *Graham*, the Court of Appeal rejected the defence where the driver lost control of her vehicle after her dog leapt forward and struck her head. The principal negligence was the failure to secure the dog leash to the car, instead of being held by a seven-year-old boy. The sudden movement of the dog, however unpredictable, was foreseeable.
- [95] Similarly, fainting from an insulin reaction did not absolve a diabetic driver from negligence if he had known to keep a source of sugar with him but failed to do so: *Boomer v. Penn*, [1966] 1 O.R. 119 (Ont. C.J.). In *Boomer*, Evans J. stated the following, at pp. 123, 125, before citing as support various cases, including *Gootson*:

The onus of establishing that the acts or omissions were not conscious acts or omissions of the driver rest upon that driver, and it is not discharged if the Court is left in doubt on that subject. The evidence must disclose the probability that the driver's acts and omissions were not conscious acts of his volition and that what he did or failed to do was not done or omitted by him as a conscious being.

...

The defendant was aware of his diabetic condition. He had been advised by his physician to always have glucose or chocolate available and his failure to have the same at hand on the day of the accident was, in my opinion, negligence. A motorist, who suffers from a disability of which he is aware, is under a very heavy duty to take the necessary precautions to avoid the possibility of his disability causing him to fall into a condition which would make it impossible for him to discharge the duty of care imposed upon him.

- [96] Here, the plaintiffs relied on the above passage to mean that Mr. Reid would not have discharged a heavy burden to take precautions to avoid risk to other users of the highway. I do not read *Boomer* to mean that the motorist had to eliminate the risk by abstaining from driving. Rather, the words “very heavy duty” only meant the diligence with which a diabetic person at risk of fainting had to keep a source of sugar with him while on the road. The statement of a circumstantially proportionate duty is no different from the duty to pay closer attention while driving at night or during heavy rain. The defendant in *Boomer* had a conscious or voluntary precaution available to him to reduce the risk of fainting. Had he taken such a precaution and it failed to prevent him from fainting, it is clear from Evan J.'s reasoning that the action would have been dismissed.
- [97] In *Telfer v. Wright* (1979), 23 O.R. (2d) 117 (C.A.), the driver had felt hot and dizzy and stopped briefly until the dizziness went away. Approximately 2,000 feet later, he passed out and collided with another vehicle. Approximately six months previously, he had felt hot and dizzy on two occasions and may have blacked out on the second occasion. The Court of Appeal, in overturning the trial judge's acceptance that the blackout was an inevitable accident, stated at pp. 119-20:

A motorist has the duty of making sure that he is in a proper state of health to operate a motor vehicle. He must not expose other persons to the risk or the possibility that he may suffer an attack of a kind that would impair his ability to control his motor vehicle as he proceeds on the highway. *A motorist who is aware he suffers from a disability is under a very heavy duty to take the necessary precautions to avoid the possibility of this disability implicating him as the cause of an accident.* [Emphasis added.]

...

With respect, the question was not whether the defendant might foresee the likelihood of a blackout, but whether the reasonable person might do so. This was not a medical problem to be resolved by the opinions of doctors. It was a problem to be resolved by the application of ordinary principles of negligence.

- [98] The words I italicized above do not amount to a blanket driving ban against persons with medical conditions. Rather, the facts of *Telfer* made it clear that the driver ought reasonably to have considered that the dizziness, including the one shortly prior to the accident, was a reason not to resume driving.
- [99] In *Sheldon v. Gray* (1994), 75 O.A.C. 350 (Ont. C.A.), the Court of Appeal upheld the dismissal of an action against a driver who lost control of his vehicle after a heart block caused him to faint. The case turned on the difference of medical expert opinion as to whether the heart block was a cause or effect of the accident.
- [100] In *Dobbs v. Mayer* (1985), 32 C.C.L.T. 191 (Ont. Div. Ct.), at para. 14, this court, sitting on appeal from the Small Claims Court, dealt with a deceased driver who had suffered a heart attack while behind the wheel of his taxicab. The medical history included a “normal” physical examination two years prior to the accident. There was no medical evidence for the intervening period. Craig J. granted the appeal and found the defendant’s estate liable, principally on the failure of the defence to meet the burden of proof of showing that the defendant had no symptoms prior to the accident. On its facts, the case imposed on the defendant an evidentiary burden of filling in the medical history. However, it cannot be interpreted as meaning that a patient’s awareness of the progression of a disease will impose on the patient a duty of self-assessment for fitness to drive.
- [101] One would not be faulted for gleaning from a survey of cases dealing with medical causes of drivers’ loss of control of vehicles the impression that courts often place an especially high onus of proof on defendants invoking the inevitable accident defence. The choice of language tends to reflect the difficulty of the circumstantial evidence and the logic that the plaintiffs’ injury, through no fault of their own, compels the court to look for a liable party. Closer examination of the facts of these cases tends to reveal a conscious or voluntary aspect to the risk of harm to which the defendants expose other users of the highway, such as the failure to secure a large dog or the decision to drive without protection against an insulin reaction. These conscious or voluntary acts or omissions are driving-related in the way of a rear-ending driver who drives too fast or too closely in inclement weather.

[102] In Mr. Reid's case, there was no negligence in his driving. The fact that he lost control of his truck and struck other vehicles in circumstances beyond his control did not give rise to a higher duty than other users of the road. Negligence law manages and allocates reasonable risk but does not eliminate it or impose strict liability.

[103] In my view, the reasonable care standard in the Supreme Court's decision in *Ritoul* is binding on this court. The *Highway Traffic Act* applies the principles of negligence law to accidents on a public highway and precludes a defence onus of disproving negligence in a collision between motor vehicles. The court cannot impose a heavier standard or impose on the defendant an onus of disproving negligence.

(c) Burden of Proof and Standard of Care Applied to Mr. Reid

[104] The estate framed the crucial factual question the court must consider, as follows:

Did David Reid know, or should have known, that he could suffer a seizure, including a seizure while driving, on July 17, 2017?

[105] The estate supported the argument that he could not have known of the risk by citing the following facts:

1. his medical and regulatory clearance to drive in May 2016
2. his work full-time in construction, including operating heavy equipment
3. he was fully independent in daily activities
4. 18 months of seizure-free living prior to the motor vehicle accident
5. his treatment team were aware of his driving and did not advise him not to drive
6. 10 days prior to the motor vehicle accident, Dr. Marmor assessed him and found him seizure-free while on medication, without neurological problems or complaints
7. he was fully compliant with all medical recommendations, and obeyed the 2016 suspension of his driver's licence
8. none of his medications would have increased his risk of seizure or counteracted his anti-seizure drug

[106] The estate pointed out that as between the parties' experts, there was no dispute that the doctors did not inform Mr. Reid that his risk of seizure had increased because of the progression of the tumour. On the face of the record, I agree with the estate's submission

that the record of his awareness of his condition and his compliance with doctors' advice was fixed and unlikely to change at trial.

- [107] The plaintiffs bear the legal burden of proof to prove Mr. Reid's negligence. The allegation against him is that he chose to drive despite the managed risk of seizure. The medical evidence indisputably supports the finding that he suffered a sudden loss of consciousness despite having taken the reasonable precautions of following physician advice and medication. Therefore, no issue of a defence evidentiary burden to prove the excuse or explanation applies. Since the legal burden of proof always remains with the plaintiff, the estate is under no obligation to disprove Mr. Reid's negligence. The ordinary burdens of negligence cases apply. This means that the plaintiffs are effectively limited to the argument that Mr. Reid's knowledge that his risk of seizure was managed by medical treatment and medication should have kept him off the road.
- [108] Once Mr. Reid suffered his 2015 seizure, he was obviously aware of a neurological condition. From the time it was diagnosed as a brain lesion caused by a tumour, and then as a cancerous tumour, a reasonable person in his position would have had grave concern about his health and longevity. The medical advice was to keep active and to keep working. In his line of construction work, that entailed driving and using heavy machinery. Mr. Reid had no cause or basis to question the dosage of the anti-seizure medication. There was no evidence from either expert that the upping of the dose after the crash indicated that the physicians had been titrating the dose or that Mr. Reid knew of any insufficiency.
- [109] The fact that a reasonable person knows or ought to know that medications can stop working does not make it unreasonable to drive with that risk. To impose liability on such drivers when the legislature has limited licence suspension to moderate or high-risk individuals would effectively operate as a judge-made ban or strict liability regime for low-risk cases. Since the plaintiffs' expert offered no strategy for avoiding the accident apart from refraining from driving, I find in the circumstances of Mr. Reid's physical condition that there was no reasonable precaution he could have taken to avoid the accident. Since the case is against Mr. Reid and not his physicians, there can be no liability on his part for the decision to resume driving after the MTO lifted the suspension of his licence.
- [110] The estate has satisfied the conditions of r. 20.04 for an order for summary judgment dismissing the action. The action against the estate of David Reid, by his litigation administrator Bruce Chambers, is therefore dismissed.
- [111] The statement of claim was never served on the other defendants. By operation of r. 14.08, there is currently no action against the other defendants.

COSTS

- [112] The plaintiffs started the lawsuit and are presumptively liable to the defendant for the costs of the proceeding. They were not to know that Mr. Reid had died. It was the defendant estate, instructed by the automobile insurer, who revived the action and brought the summary judgment motion. Beyond these opposed arguments for and against the allocation

of costs of the motion and the action, the parties reserved the opportunity to make costs submissions. I will therefore invite costs submissions of no longer than three pages in length from the estate, within 20 days of the release of this decision. The plaintiffs will have 20 days after the service of the estate's submissions to provide theirs. A copy of the submissions should be filed with the court in the usual manner, and another copy should be sent to my judicial assistant, who will release this decision.

[113] Costs outlines and bills of costs have already been uploaded to Case Center and do not need to be attached to the submissions.

Akazaki J.

Date: January 29, 2025