Road rage in motor vehicle accidents and the “but for” test: Moran v Fabrizi, 2023 ONCA 21

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The Ontario Court of Appeal released its decision in *Moran v Fabrizi* on January 16, 2023, upholding the trial decision apportioning liability on a 50/50 basis between two drivers involved in “road rage” and confirming the “but for” test remains the general test for causation.

Background

The minor plaintiff was injured in a motor vehicle accident on October 9, 2008, when his vehicle was struck by the defendant, Ottavio Fabrizi’s (Fabrizi) vehicle. Fabrizi commenced a third party claim against Dennis G. K. Chu (Chu), who was involved in a verbal altercation with Fabrizi just prior to the accident. Fabrizi alleged that he was trying to get away from Chu when the accident occurred, and that Chu’s negligent operation of his motor vehicle caused the accident. The main action settled and the third party claim proceeded to trial.

Trial decision

At trial, the judge heard evidence that Fabrizi and Chu were involved in a “road rage” incident. Chu admitted that Fabrizi overtook his vehicle, after which Chu exited his vehicle and hit the top of Fabrizi’s vehicle, uttering verbal threats to Fabrizi and his passenger. Fabrizi then proceeded through the intersection in an effort to get away from Chu, at which point he collided with the plaintiff vehicle.

The court found that Chu verbally assaulted Fabrizi and threatened him with violence, amounting to intentional tortious conduct. The court considered the test for causation from *Clements* and held that, on the balance of probabilities, the accident would not have occurred “but for” Chu’s conduct, or that alternatively Chu would be found liable under the material contribution test. Liability was apportioned 50-50 between Chu and Fabrizi.

Appeal decision

Chu appealed the trial judge's decision on the basis that the trial judge erred in his understanding and application of the test for causation. First, Chu argued that there had to be a breach of the standard of care as well as causation for him to be found liable. The Court of Appeal rejected this argument and held that to trigger third party liability under the *Negligence Act*, there does not need to be negligence on the part of both parties; rather, one party's tort can be negligence while the other can be intentional.

Second, Chu argued that the trial judge's reference to the "material contribution" test as an alternative liability theory showed a lack of certainty in apportioning 50 per cent liability on Chu. The Court rejected this argument and held that this was simply a superfluous observation by the trial judge, as the "but for" test was not unworkable on the facts.

Chu further argued that Fabrizi's conduct was an intervening act absolving Chu from liability and that Chu's conduct was "an ancillary aspect" of Fabrizi's negligent decision. The Court of Appeal rejected this argument, holding that Chu had misunderstood the trial judge's findings, and that Chu's necessary role meant that Fabrizi's negligent decision was not the only cause of the minor's injuries. Alternatively, Chu relied upon the agony of the moment doctrine. This doctrine protects defendants from legal liability in emergency situations, provided they are otherwise acting reasonably. The Court of Appeal dismissed this argument, holding that Chu could not rely on this defence as he was the one who created the emergency.

The Court concluded by finding that, although Chu had argued the trial judge had many various errors in law, he was actually alleging errors of fact.

Key takeaways

This case confirms that the "but for" test remains the general test for causation. The material contribution test remaining alive and well in the law but is available only where the "but for" test is unworkable on the facts. The Court of Appeal would seem to dissuade courts from relying on both doctrines simultaneously in making a determination on liability.

Further, no breach of the standard of care has to be proven to trigger third party liability where a party has committed an intentional tort.

For more information, please reach out to one of the key contacts listed below.

By

Laura M. Day, Christine Kucey

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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