

CITATION: Jamieson v. Kapashesit, 2018 ONSC 7147
COURT FILE NO.: C-2969/13
DATE: 20181128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
TINA JAMIESON and MICHAEL)
JAMIESON) John Michael Bray, for the Plaintiffs.
)
Plaintiffs)
)
- and -)
)
ROSANNE JOCELYN KAPASHESIT,)
LESTER SMALL, KYLE ABITONG, T.) Brian Monteiro and Michelle Farb, for the
BELL TRANSPORT INC. and) Defendants Kyle Abitong and T. Bell
FINANCIAL LTD. / SERVICES) Transport Inc.
FINANCIERS LTEE)
)
Defendants)
)
)
)
) **HEARD:** November 26, 2018

R. D. GORDON, R.S.J.

- [1] Counsel for the Plaintiff asked for a ruling, mid-trial, of the Defendants’ entitlement to cross-examine witnesses, lead evidence and argue before the jury, the defence of inevitable or unavoidable accident. He argued that it was not pleaded in the Statement of Defence as required by Rule 25.07(4) and that to allow the Defendants to pursue the defence at this stage would be unfair because the Plaintiff will not have the opportunity to properly martial evidence to counter that defence. I gave a brief oral ruling indicating that the Defendants would be entitled to assert the defence of unavoidable accident and that I would provide these written reasons.
- [2] Rule 25.07(4) provides that in a statement of defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party’s pleading.
- [3] The Defendants’ Statement of Defence pleads a denial of any negligence on their part. It pleads that the accident was caused by the negligence of Roseanne Jocelyn Kapashesit,

who, it is stated, crossed the center line and drove directly into the path of the vehicle in which the Plaintiff was a passenger when she knew or ought to have known that to do so would cause a collision or injury to the Plaintiff.

- [4] In my view, in the circumstances of this case, there is no real difference between a denial of liability on the basis there was no negligence and a denial of liability because the accident was unavoidable.
- [5] When unavoidable accident is pleaded, a Defendant is essentially saying: “There is nothing I could do to avoid the accident.” That is, I did nothing wrong and the accident happened in any event.
- [6] When negligence is denied, the Defendant is essentially saying: “I did nothing wrong, and the accident happened in any event”.
- [7] Moreover, whether it is termed unavoidable accident or a lack of negligence, in the circumstances of a rear-end accident such as this one, the onus will be on the Defendant to prove that he could not have avoided the collision.
- [8] So, the test is the same. The onus is the same. In my view the pleading by the Defendants that they were not negligent allows them to frame the issue as unavoidable accident if they so choose.
- [9] This analysis seems to have found favour in commentary [see *Canadian Tort Law*, 10th Edition, Linden and Feldthusen, p. 298] and in precedent [see *Hogan v. McEwan*, 1975 CarswellOnt 515, paras. 34 and 35].
- [10] In the event this analysis is incorrect and unavoidable accident is an affirmative defence that must be specifically pleaded, I am of the view that the failure to specifically plead it in this instance should not prevent the Defendants from now raising it because the pleadings are framed in such a manner as to give the Plaintiffs adequate notice that the defence would be asserted. That is, the pleadings contain a denial of negligence along with particulars of how, in the Defendants’ view, the accident occurred without them being at fault in any way. A fair reading of the Statement of Defence provides adequate notice to the Plaintiffs of the nature of the defence being asserted, whether it is termed a denial of negligence or unavoidable accident.

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Plaintiffs

– and –

ROSANNE JOCELYN KAPASHESIT, LESTER
SMALL, KYLE ABITONG, T. BELL TRANSPORT
INC. and FINANCIAL LTD. / SERVICES
FINANCIERS LTEE

Defendants

MID-TRIAL RULING

R. D. GORDON, R.S.J.

Released: November 28, 2018