CITATION: Sun v. Ferreira, 2020 ONSC 4316
COURT FILE NO.: CV-12-454688
DATE: 20200812

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: OSCAR SUN ~~by his Litigation Guardian XIN SUN~~, QI LING CHEN and XIN SUN, Plaintiffs

AND:

SERGIO M. FERREIRA, DONALD CARTER, THE TORONTO TRANSIT COMMISSION and THE CITY OF TORONTO, Defendants

BEFORE: Pollak J.

COUNSEL: *M. Kesebi & H. Parsekhan*, for the Plaintiffs

Michelle Farb, for the Defendant Sergio M. Ferreira

Justin Lim, for the Defendant TTC and Donald Carter

Robert Traves, for the Defendant City of Toronto

HEARD: March 12-13, 2020

ENDORSEMENT

[1] Oscar Sun, the 13-year-old Plaintiff, was in a serious accident on February 10, 2011 when he was hit by a car driven by the Defendant, Sergio Ferreira, right after he got off a TTC bus at a TTC stop. He tried to cross a busy street near the intersection of Dufferin and Gordon Streets in the city of Toronto on his way to school. He suffered catastrophic injuries as a result of the accident.

[2] Through the litigation guardian, Xin Sun ("Xin"), the Plaintiffs commenced an action against the Defendant Mr. Ferreira, the driver of the car that hit him on May 29, 2012 (he was served on June 5, 2012). In a separate action the Plaintiffs claimed damages against the TTC and the bus driver on November 16, 2015. On December 21, 2017, the City of Toronto and the TTC were added as defendants in the first action against Mr. Ferreira, with the defendant City of Toronto and the TTC reserving the right to plead and argue any limitation defence. The third-party action was brought on March 30, 2015 by the Defendant, Mr. Ferreira, against the TTC and the City of Toronto.

[3] There are two motions for summary judgment seeking dismissal of the action brought by the Plaintiff against the City of Toronto and the TTC defendants and to dismiss the third-party action brought by the defendant Mr. Ferreira against the City of Toronto and the TTC.

[4] These motions are based on the legal submission that the proceedings have been commenced outside of the applicable limitation periods.

[5] The issue on these motions is whether there is genuine issue requiring a trial with respect to the discoverability of the Plaintiffs' claims and the Third-Party claim against the TTC and/or against the City of Toronto.

[6] The Plaintiffs' claims against the City and TTC are primarily that the location of the TTC bus stop and the cross-walks, without any traffic signals in a school zone contributed to or caused the injuries suffered by the minor Plaintiff.

[7] The Third-Party claim is described by the Defendant, Mr. Ferreira, in "pith and substance" as being with respect to an "alleged design deficiency with respect to the location of the TTC stop and the cross-walks". It is alleged that the Third-Parties were responsible for the design of "an inherently dangerous situation affecting TTC passengers, many of which are children, in a school zone". These children exit the TTC bus and cross a busy highway to get to their school. Further, it is alleged that the Third-Parties were negligent as they did not take the appropriate steps to correct the hazard they created and failed to adequately warn the minor Plaintiff of the hazards they designed and created.

[8] The moving Defendants have similar positions on these motions and submit that pursuant to s. 5(2) of the *Limitations Act*, 2002, the Plaintiffs and the Defendant Mr. Ferreira have discovered their claims on the date of the accident, February 10, 2011 for the Plaintiffs and on the date he was served with the Plaintiffs' claim for Mr. Ferreira, or alternatively, through the application of the discovery principles for each party. It is submitted that the Plaintiffs discovered the material facts supporting a cause of action against the moving parties several days after the accident when the Plaintiffs were made aware of the safety concerns expressed by persons in the neighbourhood in which the school is located by Lina who advised that there was a safety concern regarding the fact that children were often crossing the busy street to get to the school and would not use the cross-walks which were located a significant distance away (118 meters south and 87 meters north of the TTC bus stop).

[9] A traffic signal was installed by the City at the accident's intersection around September 13, 2012.

[10] The moving parties submit that the limitation period for the Plaintiffs' claim against them expired on May 29, 2014. As the action was not commenced until November 16, 2015, it must be dismissed. With respect to the Defendant, Mr. Ferreira's Third-Party claim, the position of the moving parties is that the limitation period expired within two years of the date that he got served with the Statement of Claim on June 5, 2012, which is on June 4, 2014. As Mr. Ferreira issued the Third-Party claim against the moving defendants on March 30, 2015, after the expiration of the limitation period, it must be dismissed. Alternatively, it is submitted that

through the application of the discovery principles, he would have known of a potential cause of action against the moving parties on the date of receipt of his investigator's report.

[11] The parties agree that the issues for the court to consider on these motions for summary judgment are:

1. Is there a genuine issue requiring a trial with respect to the Plaintiffs' failure to commence their claim within the applicable limitation period?

2. Is there a genuine issue requiring a trial with respect to the Defendant Mr. Ferreira's failure to commence the Third-Party claim within the applicable limitation period?

3. Is there a danger of an inappropriate partial summary judgment in these proceedings?

[12] The Plaintiffs submit that their claim was discoverable on November 7, 2014 or January 5, 2015. The Defendant Mr. Ferreira's position is that there is a genuine issue requiring a trial with respect to when his Third-Party claim was discoverable.

The Law

[13] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] S.C.R. 87, the Supreme Court of Canada provided a roadmap to follow on a summary judgment motion. At para. 66, the court states:

> "On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers**. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).**
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> If there appears to be a genuine issue requiring a trial, **she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2)**. She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness…"

[14] The Supreme Court of Canada in *Hryniak* attempted to create a procedure designed to be expeditious and affordable. However, the process must also ensure that the dispute is resolved fairly and justly.

[15] In the case of *Shukster v. Young*, 2012 ONSC 4807, 2013 Carswell Ont. 504, the Court summarized the requirements for summary judgment motions on limitation periods as:

> Pursuant to Rule 20, a party moving for summary judgment retains the overall burden of showing that there is no genuine issue requiring trial. However, where

> a defendant moves for summary judgment in relation to a statutory limitation period, the evidentiary burden as to the discoverability issue and under Rule 20 effectively shifts to the responding party under section 5(2). **In particular, the plaintiff must adduce evidence sufficient to demonstrate that there is a genuine issue, requiring trial, concerning operation of the limitation period pursuant to subsections 5(1) and 5(2). In particular, a plaintiff seeking to defeat operation of the limitation period on such a motion has the onus to rebut the presumption in s.5(2), or at least demonstrate that there is a genuine issue requiring trial as to whether that presumption is rebutted**.
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> Such determinations are fact driven, and must be decided based on the particular circumstances of each case

[16] With respect to the submissions that these motions to dismiss the action and the Third Party claim are inappropriate or they raise concerns expressed by the Ontario Court of Appeal stated in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at paras. 35 and 37, that the advisability of a staged summary judgment process must be assessed in the context of the litigation as a whole. The Court noted that in a staged summary judgment process there was a risk that a trial judge would develop a fuller appreciation of the relationships and the transactional context than the motion judge. This difference in appreciation could lead to a trial decision that would be implicitly inconsistent with the motion judge's finding, even though the parties would be bound by the motion judge's finding. This difference in appreciation could lead to inconsistent findings and substantive injustice. At paras. 44-45 the court stated:

> "…Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context**. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.**
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> **Judges are aware that the process of preparing summary judgment motion materials and cross-examinations, with or without a mini-trial, will not necessarily provide savings over an ordinary discovery and trial process, and might not "serve the goals of timeliness, affordability and proportionality"** (*Hryniak* at para. 66). Lawyer time is expensive, whether it is spent in court or in lengthy and nuanced drafting sessions. I note that sometimes, as in this case, it will simply not be possible to salvage something dispositive from an expensive and time-consuming, but eventually abortive, summary judgment process. That is the risk, and is consequently the difficult nettle that motion judges must be prepared to grasp, if the summary judgment process is to operate fairly."

[17] The Ontario Court of Appeal considered **the appropriateness of motions for summary judgment that will determine some of the issues, but will not dispose of the action as a whole. The Ontario Court of Appeal reviewed the problems associated with partial summary judgment motions.**

[18] In particular, the partial summary judgment motions tend to defeat the stated objectives of **proportionality, timeliness, and affordability** set out in the *Hryniak* case.

[19] The Court of Appeal held in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34, that a **partial summary judgment motion should be considered a "rare procedure" that is reserved for issues that can be easily bifurcated from the main action and that can be dealt with expeditiously and in a cost-effective manner.**

[20] The Court, at paras. 26-34, reasoned that this approach is entirely consistent with the Supreme Court's comments in *Hryniak*:

> "[26] The pre-*Hryniak* appellate jurisprudence on partial summary judgment limited its availability. At para. 3 of *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437 (C.A.), this court applied *Gold Chance International Ltd. V. Daigle & Hancock*, [2001] O.J. No. 1032 (S.C.J.) to state that:
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> [P]atrial summary judgment ought only to be granted in the celarest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim.
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> [27] Since *Hryniak*, this court has considered partial summary judgment in *Baywood homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 and in *Canadian Imperail Bank of commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3D) 561. *Baywood* was decided in the context of a motion for summary judgment on all claims, but where only partial summary judgment was granted. *CIBC* involved a motion for partial summary judgment.
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> [28] **In both *Baywood* and *CIBC*, the court analyzed the issue from the perspective of whether (i) there was a risk of duplicative or inconsistent findings at trial and whether (ii) granting partial summary judgment was advisable in the context of the litigation as a whole.** In both cases, the court held that partial summary judgment was inadvisable in the circumstances.
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> [29] The caution expressed pre-*Hryniak* in *Corchis* is equally applicable in the post-*Hryniak* world. In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC*, partial summary judgment raises further problems that are anathema to the stated objectives in *Hryniak*.

[30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the actions and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is always the possibility of an appeal.

[31] Second, a motion for partial summary judgment may be very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.

[32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since Hryniak, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.

[33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial therefore increasing the danger of inconsistent findings.

[34] When bringing a motion for partial summary judgment, the motion be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits." [*emphasis added*]

[21] The *Limitations Act, 2002,* provides that:

- when a limitation period has expired, a party shall not be added to any existing proceeding (Section 21(1) of the *Act*).

- no proceeding shall be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered (Section 4 of the *Act*).

- (1) A claim is discovered on the earlier of,
  (a) the day on which the person with the claim first knew,
    (i) that the injury, loss or damage had occurred,
    (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
    (iii) that the act or omission was that of the person against whom the claim is made, and

> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a) (Section 5(1) of the *Act*).

[22] The presumed date of discovery of a claim is the date on which the act or omission on which the claim is based took place, unless the litigant proves the contrary. Section 5(2) of the *Act* creates a rebuttable presumption that the litigant did know of such matters on the day the underlying act or omission took place.

[23] To rebut this presumption, it must be established that the claim was not discovered until some other date, **based on a consideration of all four criteria set out in subsection 5(1)(a)**. The responding parties have the burden of rebutting the presumption in s. 5(2), or to show that there is a genuine issue requiring trial as to whether that presumption is rebutted. There must be a genuine issue, requiring trial, about the operation of the limitation period pursuant to subsections 5(1) and 5(2), for the respondents to succeed on these motions.

[24] The parties agree that discovering a cause of action for the purposes of a limitation period occurs when the material facts on which it was based have been discovered, or ought to have been discovered, by the exercise of reasonable diligence. This is a fact-based analysis.

The Plaintiffs' position

[25] The Plaintiffs submit that the material facts giving rise to the cause of action against the moving defendants were not discoverable until November 7, 2014 (the date of receipt of the detailed police report), or on January 5, 2015 (the date they found out traffic lights had been installed at the scene of the accident).

[26] On November 7, 2014 the Plaintiffs received a copy of the complete police file. It is submitted that before then, there was no persuasive evidence to suggest that the moving parties would have any liability for the Plaintiffs' damages. The Plaintiffs submit that the complete file included documents that were not previously provided to them and in particular, a document entitled "*Event Details Report-Generated By; b88622*", which disclosed that the police may have obtained video tapes from the bus, and the handwritten notes of Police Constable, Richard Hopton, which indicated that there was video evidence taken from a camera in a convenience store. The file also included the investigation notes of an Officer, who noted that he had attended at Oscar's school and advised the principal of the accident and recorded the following, "*community safety and p/traffic?*".

[27] Further, on January 5, 2015, the Plaintiffs were advised by the Defendant, Mr. Ferreira, that traffic lights had been installed at the scene of the accident.

[28] The Plaintiffs submit that there is no investigation they could have reasonably performed before these events to conclude that any action against the City of Toronto or the TTC was warranted. In particular, the Plaintiffs rely on documents provided to them by the City which

indicated that the accident location did not satisfy the criteria established by the City for the installation of traffic lights.

[29] The Plaintiffs, therefore, argue that even if all the appropriate records of the investigation had been disclosed, they would not have provided the facts to alert them to claim against the moving defendants.

[30] The Defendant Mr. Ferreira submits that based on a consideration of the factors set out in s. 5(1)(iv) of the *Act*, which requires a consideration of whether the Defendant knew that "having regard to the nature of the injury, loss or damages, a proceeding would be an appropriate means to seek a remedy" the evidence establishes a genuine issue requiring a trial on that issue.

[31] The Defendant Mr. Ferreira, emphasizes that our jurisprudence by the Court of Appeal has held that the four criteria listed in section 5(1) of the *Act* must be considered and evaluated. It has been held that the consideration of "whether a proceeding is an appropriate means to remedy a Claim" is an essential element in the discovery analysis (*Frederick v. Van Dusen*, 2019 O.J. No. 449). In the *Frederick* case, the Court held that the threshold to displace the presumption in section 5(2) is relatively low and that, in the circumstances of that case, the Plaintiff did not know and was not required to know, as a person in their situation would not reasonably have known, that a proceeding would be an appropriate means to seek a remedy.

[32] The moving parties argument is that the Plaintiffs and the Defendant Mr. Ferreira knew or ought to have known the material facts surrounding the Claims against them on that date of the accident and on the date of the service of the Claim. They knew the location of the TTC bus stop; the Plaintiffs had taken the bus to that location before the accident and the Defendant Mr. Ferreira was familiar with the accident location as he used that intersection frequently. At the time of the accident when the police officers spoke to the minor Plaintiff's father and litigation guardian, they noted he was upset because the area of the accident was in a school zone. The moving parties emphasize that the location of the bus stop has not changed since the date of the accident.

[33] Alternatively, the moving defendants submit that the Plaintiffs knew or ought to have known the material facts giving rise to the cause of action when they were advised by a woman named Lina that many children would cross the street at the bus stop instead of walking to the traffic light and that the residents in the neighbourhood were upset and had petitioned the City of Toronto to install traffic lights.

[34] The moving parties rely on the fact that the Plaintiffs did not conduct any investigations regarding the accident for almost three years until March 24, 2014 when Plaintiff's counsel requested production of the Toronto Police Services file. The moving defendants submit that the Plaintiffs have not provided an adequate explanation as to why, on review of the police file on June 30, 2014, they did not commence an action against them. It is submitted that a reasonably prudent person in the circumstances of the Plaintiffs would have conducted further investigations after receipt of the police file. As the Plaintiffs have not led any evidence with respect to attempts they made to investigate, the court may conclude that there were no further attempts

made. Similar arguments are advanced on behalf of the moving defendants with respect to the Third-Party Claims of the defendant Mr.Ferreira.

[35] It is submitted that at the time of the accident the defendant Mr. Ferreira had the following knowledge:

> "It is clear from Defendant Ferreira's evidence at his Examination for Discovery that he knew of the presence of a TTC bus and bus stop at the Accident and that he was familiar with the area of the Intersection before the Accident. The Defendant Ferreira stated at his Examination for Discovery:
>
> a. As to the presence of the TTC:
> i. He stated that he noticed that a TTC bus was stopped in the curb area;
> ii. He knew that the TTC bus had stayed in the same spot the whole time;
> iii. It was the understanding of counsel for the Defendant Ferreira that one of the witnesses listed in the police file was the TTC driver.
> b. As to his familiarity with the intersection:
> i. He was taking one of his normal routes to work on the date of the Accident;
> ii. He knew that route well;
> iii. He had been taking that route to work for a minimum of four years;
> iv. He was aware, prior to the Accident, that there were children in that area;
> v. He was aware that it was a school zone;
> vi. He knew that there was a school nearby;
> vii. He knew that children crossed at the crosswalks nearby."

[36] Further, the moving defendants rely on the fact that a copy of an August 2012 report conducted by the defendant Mr. Ferreira's liability insurer retained to investigate the accident contained the following:

> The August 2012 Report contained a number of observations and conclusions that would form the material facts of a claim against the TTC Defendants, including:
>
> a. "Page 3: no traffic controls were present at the collision site;
> b. Pages 4-5 and 9: the investigator noted that the position of the stopped TTC bus would have obstructed the Nissan driver's field of view;
> c. Pages 5-6: references a statement from the Defendant Ferreira to his liability adjuster. Ferreira stated that witnesses, including the driver of the TTC bus, told the police that he was not at fault;
> d. Pages 6-7: mentions the investigator's interview with P.C. St. Clair; the investigator's notes from this interview contain the name of the TTC driver, Don Carter; and
> e. Pages 7-8: specifically mention a statement from the TTC bus driver."

[37] Further, it is submitted that the fact that the defendant Mr. Ferreira continued to drive through the intersection following the accident and after the traffic lights were installed around September 2012, must lead to the court's conclusion that he knew or ought to have known of the key changes to the intersection at that time. Notwithstanding the fact that previous counsel for

the defendant Mr. Ferreira received the report on August 2012, no further steps were taken to investigate a potential claim against the moving defendants until February 2014.

[38] The moving defendants also rely on the content of the following notes of the investigating officer on the date of the accident as follows:

> "PC. St. Clair also completed Supplementary notes which indicate as follows:
>
> > Regarding pedestrian struck. P.I. accident, child struck by a car. The child was crossing midway between two cross overs.
> >
> > The first to the north of his location: 87 m walking wheel [*i.e. at Bank St.*]
> >
> > The second to the south of his location 118 m [*i.e. at Florence St.*]
> >
> > He crossed exactly at the location of the bus stop.
> >
> > All the lights for the cross over work.
> >
> > Button to activate cross over.
> >
> > Coming both north and south there are cautionary signs warning drivers to watch for children [*sketches of sign provided*].
> >
> > All lines are painted on the road and are visible to both drivers and pedestrians.
> >
> > Attended the school, spoke to the principal who advised they constantly warn their students about the dangers of not using the safety of the cross over."

[39] The issue in the Claims with respect to the intersection of Gordon and Dufferin Street, was raised by police constable St. Clair and was referred to in the report which was provided to counsel for the Defendant, Mr. Ferreira on or about October 8, 2014. In this report of John Slattery, dated October 8, 2014, Officer St. Clair notes that there were crosswalks at the time of the incident 118 meters south and 87 meters north of the TTC bus stop. That was known, or at least knowable, on the date of loss. In that report, Officer St. Clair notes that this had been a problem at the School, and that there had been an ongoing issue with respect to students crossing Dufferin Street at the TTC stop. The Officer also noted that the school had attempted to stop children from doing so by installing a fence, and that the principal had advised the officer that the school had to remind the students about the hazardous nature of crossing the street at the TTC stop.

[40] The Plaintiffs submit that when they first received the Toronto Police Services file on June 30, 2010, they were not aware of any potential video footage of the accident being reviewed

by the police until the examination for discovery of the minor plaintiff on January 28, 2014, when counsel for the defendant Mr. Ferreira referred to surveillance video that police had reviewed. As a result, counsel made a request for further production and received further materials from the police including Officer Tinney's investigation notes referring to the fact that he spoke with the principal of the minor plaintiff's school and recorded the "*Community Safety and P/Traffic*". As well, the Plaintiffs rely on the fact that they only became aware on January 23, 2015 that traffic lights had been installed at the intersection where the accident occurred.

[41] It is submitted that the Plaintiffs have not provided any explanation as to how the Officer's notation of "Community Safety and P/Traffic" caused Plaintiffs counsel to question whether the police viewed the City of Toronto and the TTC to what caused or contributed to the accident.

[42] However, in applying the analysis of the law which I have referred to above on these motions for summary judgment, it is important to note that the question that is before the court to answer, is, does the evidence before the court raise a genuine issue for trial with respect to the discoverability issues?

[43] In the case of *Frederick v. Van Dusen*, 2019 O.J. No. 449, the court has set out that the test to establish when the limitation period commenced as "whether the claimant had knowledge of all of the material facts of the claim and that a legal action would be "appropriate" in the circumstances". The question of "appropriateness" was critical to the Court's decision. The issue is, when was it appropriate for the Plaintiffs and the Defendant, Mr. Ferreira, to seek legal remedies against the Moving Parties.

[44] Whether litigation would be appropriate depends on the specific facts of each case, including the particular circumstances of the Plaintiffs and the Defendant Mr. Ferreira.

[45] The Claims, in these proceedings against the moving parties are that there was an alleged design deficiency with respect to the TTC bus stop, and the adjoining crosswalks. Were the Moving Parties, by designing an allegedly inherently dangerous situation, involving passengers, many of which would be children exiting a TTC bus, and crossing a busy highway to get to school, negligent as they did not take the appropriate care required in designing and constructing and whether the Moving Parties failed to warn of the hazard their design and construction created. The main argument of the moving parties is that the responding parties were familiar with the accident location, the location of the TTC stop and location of the cross-walks adjacent to the School, and the absence of a traffic light or cross-walks.

[46] The moving parties submit that the fact that the City or the TTC or both changed the configuration of the intersection following the accident "is not actionable". The respondents, however, submit that the change raised the question of whether the change was made to remedy the negligent design of the accident location, and if so, whether the City and the TTC were aware of this negligent design, or ought to have been aware of this negligent design, prior to the accident. If they were aware of the negligent design, what steps, if any, did the Moving Parties take to rectify this deficiency before the accident occurred. These will be the issues at trial.

[47] The issue for this court is when did the Plaintiffs or Defendant know or ought to have known of the alleged deficient design, and the consequent failure to warn of the deficiency on the date of the accident.

[48] Applying the analysis of the court in the cases of *Shukster and Frederick*, I find that there is a genuine issue requiring a trial on when the alleged deficiency with the intersection was known or ought to have been known by the responding parties. They knew of the accident location, but did they have the knowledge required to question if the intersection was defectively designed? Further, when did they know that it was appropriate to take legal action against the moving parties?

[49] The position of the Moving Parties is that the Respondents should have concluded that legal action would be appropriate to commence an action on the basis of their own observations and opinions of the alleged negligent design of municipal infrastructure or the configuration of the street and without the benefit of expert advice and the knowledge that the alleged design defect of the accident location had been corrected. I do not agree that such is a reasonable conclusion for the court to reach. In my view, such personal observations would not be sufficient for the Respondents to conclude that legal action would be appropriate, especially in light of the position taken by the City of Toronto that the intersection did not meet its criteria for the installation of a traffic light.

[50] Rather, I am of the view that I can not make the findings that would be required to satisfy the test set out in *Hryniak* by our Supreme Court of Canada, namely, does the evidence allow me to fairly and justly adjudicate this dispute?

[51] I find that following the guidance of our Courts, which I have referred to above, the respondents have established that there is a genuine issue requiring a trial on the discoverability of these causes of action, as it may not have been legally appropriate for the responding parties to commence litigation without any evidentiary basis, other than their own observations and opinions. This issue requires a trial and for this reason, the motions must be dismissed

[52] The Plaintiffs and the Defendant Mr. Ferreira also submit that it would be improper for this court to provide a "partial summary judgment" on the limitations defence by reason of the concerns raised by the Court of Appeal in the case of *Butera v. Chown, Cairns LLP*, 2017 ONCA 783.

[53] As I have found that the responding parties have established that there are genuine issues which require a trial with respect to when the causes of action were discoverable, it is not necessary for the court to adjudicate on the issue of whether the concerns raised by our Court of Appeal are applicable and the appropriateness of this motion. Rather, I have found that the moving parties have not met their burden of establishing that summary judgment should be granted dismissing the Action and the Third-Party Claim.

[54] The motions for summary judgment are therefore dismissed.

[55] There is one further practical issue. The Supreme Court of Canada in *Hryniak* also held, at para. 78, that:

> Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

[56] In my view, this is an appropriate case for me to follow the Supreme Court's direction. I must, however, qualify this to be subject to the practical reality of our court's ability to schedule trials in a timely and expeditious manner. I will not be seized of this trial if the effect of my unavailability would be to delay the hearing of the trial between the parties. If it is possible to do so without adverse delay or consequences to the parties, I seize myself of the trial of this matter as directed in *Hryniak*.

Costs

[57] The parties have reached an agreement on costs to be awarded on a partial indemnity basis to the successful parties on this motion at the hearing of this matter. The successful parties, the Plaintiffs and the Defendant Ferreira, are therefore awarded costs on a partial indemnity basis in accordance with the agreement of the parties.

[58] Notwithstanding Rule 59.05, this Order is effective from the date it is made and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Order may nonetheless submit a formal Order for original signing, entry and filing when the Court returns to regular operations.

Pollak J.

Date: August 12, 2020