

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *MacAulay v. Ali*, 2013 NSSC 271

**Date:** 20130823

**Docket:** Hfx No. 406023

**Registry:** Halifax

**Between:**

Heather MacAulay

Plaintiff

v.

Ahmad Ali

Defendant

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** August 20, 2013, in Halifax, Nova Scotia

**Decision:** August 23, 2013 (Orally)

**Written Release  
of Decision:** September 3, 2013

**Counsel:** Janus Siebrits, for the plaintiff  
Christine Nault, for the defendant

**By the Court: (Orally)**

[1] In this proceeding, the plaintiff alleges that she was injured as a result of a motor vehicle accident between a car driven by the defendant and a Metro Transit bus on which she was a passenger. According to the statement of claim, the collision occurred on the morning of May 7, 2012.

[2] On the motion of the defendant, an order was issued on May 13, 2013 requiring Halifax Regional Municipality to release a copy of the onboard video recording of the collision which occurred on May 7, 2012. In response to that order, Halifax Regional Municipality provided the defendant with a DVD containing six video clips.

[3] The defendant has brought a motion for summary judgment on evidence, pursuant to *Civil Procedure Rule 13.04*. I heard that motion on August 20, 2013.

[4] Each party filed an affidavit on the motion, attaching several exhibits. At the commencement of the hearing, I asked counsel whether there was an agreement that the various exhibits attached to the affidavits were properly admissible in evidence on the motion. It appeared to me that counsel had not really turned their mind to the evidentiary issues raised by the affidavits. The conclusion of the preliminary discussion with counsel was that there was no agreement on admissibility of any of the exhibits. Both counsel indicated that they wished to proceed with the motion on the basis of the record as filed, and each made submissions with respect to the admissibility of documents.

**EVIDENTIARY ISSUES**

[5] The affidavit filed by the defendant in support of the summary judgment motion was from Shawnda Taylor, who is a claims examiner with the insurer for the defendant driver. Attached as exhibits to her affidavit are the following:

Exhibit A                      The order for production of the video issued on May 13, 2013.

Exhibit B                      The DVD received from Halifax Regional Municipality.

- Exhibit C            A signed statement of the plaintiff, which had been given to the insurance adjuster for Halifax Regional Municipality.
- Exhibit D            A Functional Capacity Evaluation, co-authored by an occupational therapist and a physiotherapist, which had been produced in the plaintiff's affidavit disclosing documents.
- Exhibit E            Photographs of damage to the defendant's vehicle taken by an independent insurance adjuster.

[6]    The affidavit filed on behalf of the plaintiff in response to the summary judgment motion was from Jessica Landry, who is a paralegal employed at the office of the plaintiff's legal counsel. Attached to her affidavit are the following exhibits:

- Exhibit A            Two handwritten prescription notes from the office of Dr. Kevin Carbyn dated July 17, 2012. One refers to a TENS unit and the other refers to continuation of chiropractic care.
- Exhibit B            A Traffic Collision Abstract from Service Nova Scotia.
- Exhibit C            A letter report dated June 27, 2012 from a chiropractor, Dr. Bradley Lohrenz.

[7]    The deponents of both affidavits had no personal knowledge of the materials attached as exhibits. Their affidavits might be sufficient to prove that the documents were produced in the litigation; however, that is not sufficient to allow them to be admitted for the truth of their contents. *Civil Procedure Rule 22.15(1)* states that the rules of evidence shall apply to the hearing of a motion including any affidavits. Subsection (2) permits hearsay on certain motions, none of which are applicable in the present case.

[8]    The principle that only admissible evidence should be considered on a motion for summary judgment was reiterated by the Nova Scotia Court of Appeal

in the recent decision of *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2013 NSCA 66, where the Court stated at para. 159:

A judge hearing a motion for summary judgment should only hear admissible evidence. Here, the motions judge committed no error in striking the affidavit of Mr. O’Hearn. However, the motions judge did not articulate and apply the correct legal principles in determining if Ms. MacMillan’s affidavit was admissible.

[9] The position of counsel for the defendant was that the only admissible evidence was the HRM DVD. She submitted that the other materials attached to Ms. Taylor’s affidavit, such as the plaintiff’s statement and the Functional Capacity Evaluation were simply being provided for purposes of context and background, and not for proof of the facts and opinions which they contain.

[10] Counsel for the plaintiff responded that the only admissible evidence was the plaintiff’s statement, which was produced by the defendant. He argued that it was being relied on by the defendant as an admission, which made it admissible in its entirety.

[11] The chiropractic report and the Functional Capacity Evaluation have clearly not been proven. The factual statements in those documents are hearsay and any opinions require qualification of the author as an expert.

[12] The so-called referral notes of Dr. Carbyn are likewise not admissible. In any event, they do not appear to contain any information connecting the treatment suggestions to the motor vehicle accident giving rise to this proceeding.

[13] Although the Traffic Collision Abstract obtained from Service Nova Scotia might be admissible, it does not contain any information which is relevant to the summary judgment motion. In particular, it does not assist in determining whether the plaintiff was injured in the accident which is the focus of the defendant’s arguments on this motion.

[14] With respect to the HRM DVD, Ms. Taylor has no personal knowledge which would allow her to authenticate that exhibit; however, I believe it is in a somewhat different category than the other evidence. Here we have a court order directed to Halifax Regional Municipality requiring production of video recordings from the bus involved in the accident. I am satisfied, based upon the

affidavit of Ms. Taylor and the representations of counsel, that the DVD exhibit represents what was produced by HRM in response to the order. This authenticates that exhibit for purposes of admissibility. What use I can make of the contents of that exhibit is a different issue which I will consider in my assessment of the merits of the motion.

[15] The defendant chose to produce and rely on the written statement of the plaintiff. He was entitled to do so on the basis that this represents an admission of an adverse party. The use of admissions is described by Justice Paciocco in *The Law of Evidence* (6th ed.), (Irwin Law, 2011) at p. 146:

Admissions are acts or words of a party offered as evidence against that party. Professor Younger provides this rule of thumb: “Anything the other side ever said or did will be admissible so long as it has something to do with the case.” Often the phrase “admission against interest” is used. Beware. The phrase invites confusion between an admission made by a party and the completely different hearsay exception for “declarations against interest” made by non-parties. An admission does not require that a party knowingly make a statement against interest. The evidence is “against interest” simply because the opposing side has decided to introduce it at trial against the party. ...

[16] I have concluded that the only admissible evidence which I can consider in the summary judgment motion is the HRM DVD and the plaintiff’s signed statement. All other exhibits are inadmissible and will not be considered.

[17] As an aside, I would note that this case highlights the problems associated with the use of affidavits from administrative personnel on motions. For the most part, this will not constitute proof of the attached exhibits which would allow them to be admitted for the truth of their contents. In preparing for any substantive motion, counsel need to carefully consider the evidentiary record on which they intend to rely, and ensure that it is properly admissible.

## **MERITS OF THE SUMMARY JUDGMENT MOTION**

[18] The parties agree on the law relating to motions for summary judgment on evidence. The initial evidentiary burden is on the applicant to show that there is no genuine issue of material fact requiring trial. If this is met, then summary judgment must be granted unless the responding party is able to show that they have a real chance of success at trial.

[19] In light of my evidentiary rulings, I have determined that the plaintiff has not filed any admissible evidence in response to this motion. This means that if the defendant has met the initial onus of demonstrating that there is no genuine issue of material fact requiring trial, summary judgment will be granted.

[20] The position of the defendant is that the contents of HRM DVD are undisputed and show that the plaintiff was not injured in the accident. Counsel argues that observation of the plaintiff's movement and behaviour as shown on the video recording allows an inference to be drawn that she was not hurt. Since the plaintiff has not provided any evidence to say that she was, then summary judgment must be granted.

[21] The defendant's brief on the summary judgment motion points out alleged inconsistencies between the plaintiff's written statement and the video, and says that this raises "serious credibility issues". In particular, it is noted that the plaintiff's statement says that she was knocked unconscious as a result of the collision, when the video shows that she was not.

[22] Counsel for the plaintiff submits that the defendant has not met the threshold burden of proving that there is no genuine issue of material fact requiring trial. He says that the video is subject to interpretation and would require witness testimony before any inferences could be drawn. In particular, he suggests that technical information, such as frame speed, is required. He also points out that the plaintiff's statement includes comments suggesting that she was injured in the accident. In addition to saying that she was knocked unconscious, the statement indicates that she was "very dizzy" and that her "stomach was cramping", and that she was taken to the hospital. She also states that her body was "in shock".

[23] I have watched the HRM video and it appears to show views from six different cameras on a Metro Transit bus. One of these shows a woman identified by counsel as the plaintiff. That particular view does not show the motor vehicle accident. Assuming that the time stamp on all the videos is the same, it is possible to infer when the accident occurred by considering other video angles where the collision is shown. I would agree with counsel for the defendant that the video evidence does not show the plaintiff losing consciousness. In addition, she does

not seem to outwardly display any symptoms of pain and there does not appear to be any sudden or significant force event associated with the collision. The defendant asks me to interpret this evidence and come to the conclusion that the plaintiff was not injured and, more importantly, that there is no question requiring trial with respect to that issue.

[24] I agree with counsel for the plaintiff that some witness testimony is required in order to draw any firm conclusions from the video evidence. This could include a technical video person, the plaintiff, an expert or other passengers. I take judicial notice of the fact that not all persons who are injured demonstrate immediate symptoms of pain, particularly with respect to soft tissue injuries. It is not unheard of for someone to develop pain and stiffness several hours or more following an accident. I am not prepared to draw an inference from the video that the plaintiff was not or could not have been hurt in the accident. In addition, I have the plaintiff's statement where she says she was, in fact, hurt.

[25] I agree with counsel for the defendant that a comparison of the video and the statement raises serious credibility issues; however, those are the precise types of questions that cannot be resolved on a summary judgment motion. It will be up to the trial judge to assess the plaintiff's credibility on the basis of all of the evidence and her cross-examination.

## **CONCLUSION AND DISPOSITION**

[26] After considering the submissions of counsel and reviewing the admissible evidence, I am not satisfied that the defendant has met the initial burden of showing that there is no genuine issue requiring trial in relation to whether the plaintiff was hurt in the accident. As a result, I dismiss the motion for summary judgment.

[27] As required by *Civil Procedure Rule 13.07*, I will hold a conference with counsel for purposes of issuing directions in relation to the conduct of this proceeding. I will also receive submissions from the parties on costs.

---

Wood, J.