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ONCA: Single Vehicle Accident Caused Solely by Driver's "Recklessness"

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The Ontario Court of Appeal has just released a decision overturning the trial judge's findings of liability in a single car motor vehicle accident.

In *Morsi v. Fermar Paving*, Mark Morsi died in a single vehicle accident. His family sued the Regional Municipality of York and Fermar Paving, which the Region had retained to resurface the road upon which Morsi was driving. The parties agreed that damages were $1,700,000. The action proceeded to trial on the question of liability.

The salient facts at trial were that Morsi was driving alone in his Volkswagen Jetta on June 15, 2005. The weather was sunny and warm and the road was dry. He was travelling westbound on Major Mackenzie Drive, which was being resurfaced. Despite the number of warning signs about the curvy road and speed limit (40 kph advisory tab and 60 kph otherwise), Morsi apparently ignored the warning signs and drove through the area at a speed of roughly 117-120 kph. At the point where the road surface changed, Morsi's car slewed sideways, became airborne, flew over a ditch, and hit a telephone pole.

The trial judge found that Morsi was 50% liable for the accident. He also found that the Region and Fermar were each 25% liable. Of note, the trial judge's reasons contained the following statement:

> *The evidence of Detective Stock and the Varicom tests as well as the evidence of Constable Hebert and the various engineering experts establishes that* ***if Mark Morsi had operated his vehicle at the posted speed or even a speed modestly above it, he would have been able to successfully negotiate the transition area.*** **[emphasis added]**

The defendants appealed.

The Court of Appeal found that the trial judge erred by allocating any liability to the defendants. With respect to the Region (who owed a statutory duty of care), the Court of Appeal found that although the trial judge set out the proper test to determine whether the Region was liable, he failed to apply the test to the facts of the case. The Court of Appeal noted that the trial judge's statement (above) undermined his finding on liability as against the Region. The Court concluded:

> *[i]f Mr. Morsi had driven at or even modestly above the speed limit or, in other words, had used 'ordinary care' while negotiating the reverse curve on the road, there would not have been an accident. In short, the trial judge's own description of Mr. Morsi's driving places it squarely inside the language from Housen, Partridge and Raymond that would absolve York Region of liability.*

With respect to Fermar's liability, the Court of Appeal found that the construction company should not have been deemed to know that a driver would be so reckless on a curvy road with ongoing construction:

> *In my view, this statement by the trial judge [as above], grounded firmly in the evidence, precludes a finding of liability against Fermar. The cause of the accident was Mr. Morsi's reckless driving, not any negligent conduct or omission by Fermar.*

Accordingly, the Court of Appeal allowed the defendants' appeals and dismissed the plaintiffs' action.

Reasons are available at Morsi v. Fermar Paving Limited, 2011 ONCA 577