

Johnson V. Milton - My Response to Judgment by Ontario Court of Appeal

Posting Date: 04 Jun 2008

Today marked the release of the judgment by the Ontario Court of Appeal with respect to the appeal of the judgment of Justice Gerald E. Taylor of the Superior Court of Justice dated July 28, 2006, regarding Johnson v. Municipality of Milton (Oakville).

This was a case involving the collision of a tandem bicycle against an embankment in Oakville, Ontario on September 13, 1992. Mr. and Mrs. Johnson were riding their tandem bicycle down a steep slope when they encountered a bumpy road surface just before crossing a narrow bridge. Their collision with a rock embankment resulted in fatal injuries to Mr. Johnson and major injuries to Mrs. Johnson.

I had prepared a report for the plaintiffs citing a number of deficiencies in the road character and signage. Defense did not respond to that report but instead attempted to discredit my qualifications at trial. Justice Gerald Taylor found the defendants 100% at fault for the collision and defense appealed resulting in today's ruling.

The decision, written by Justice Moldaver (and agreed to by Justices Cronk and Blair) approached the two parts of the appeal; 1.) that Justice Taylor failed to delineate the area or areas of expertise upon which I could properly give opinion evidence and 2.) that in finding the Johnsons blameless Justice Taylor misconstrued or ignored pertinent evidence which showed that Mr. Johnson was riding his bicycle too quickly.

One the first issue Justice Moldaver wrote:

"Thus in the present case, Mr. Gorski should not have been permitted to testify about the effect of rough or uneven road surfaces on tandem or other bicycles, nor about the way in which cyclists are likely to respond to such adverse road conditions. The reason is simple - he had no special training, knowledge or experience in either of these matters. Similarly, he should not have been permitted to testify about road design, pavement deterioration, or placement of road signs for the same reason."

I indicated earlier that the defense did not respond to my report. Therefore any objections they made to it or to my opinions were not heard until I was on the stand. If they had raised the issue of my lack of experience or qualifications then I would have had time to prepare some materials to dispute that. Lacking time to prepare a response was a tactic used by the defense that prevented my addressing the issue and the Court of Appeal failed to recognize that this strategic move was of significance.

In fact my experience was not limited to "...vehicle occupant restraint systems and their effectiveness in preventing injuries." as was indicated by defense counsel. I was never

given an opportunity to respond to that allegation. Of the 1500 or so collisions I have investigated a very large percentage of these involved examinations of collision sites. Very many of these examinations were conducted within a few days and sometimes just hours after the accident. My actions during these examinations were to explore all those roadway characteristics that might have had an impact on the collision. This would involve considerations of the roadway geometry, signage and any maintenance issues. The idea that I had to be employed by a roadway maintenance department in order to provide an expert opinion on the effect that a roadway irregularity might have on a vehicle is to say that this is the sole fountain of knowledge that can provide any useful guidance to the Trier of fact. Such a conclusion is wrong and frightening from the standpoint that roadway maintenance personnel do not have the specialized training to understand how a collision occurs or how to relate the evidence from one collision to the next simply because they do not perform accident reconstructions. The daily function of roadway maintenance personnel is to maintain roadways to specifications that they are provided.

In fact there was no information provided to the court that my experience involved examinations of the functioning of barrier systems, fixed objects, edge drop-offs, cross-slopes and all those other influences that accident reconstructionists must consider when they provide an opinion as to how and why a collision occurred.

With respect to my experience with tandem cycles this is a specialized area in which there are few experts simply because there are very few such vehicles on the road. This is why I had consulted with two bicycle experts who also participated in the testing I had devised to assess the critical issues that needed to be understood. Those being the braking and cornering capabilities of the specific tandem bicycle in question. As in any area of consideration the reconstructionist performs research and testing to come to an understanding of the issues. The results of that testing and research was what was provided at trial. The testing was relevant and it was sufficient to indicate that this particular tandem cycle was inferior in terms of braking capability and cornering to other bicycles and passenger cars. To say that the trial judge should have ignored that information and attempted to go it alone without that information would result in the judge simply guessing at what appeared to make sense. That cannot be viewed as a proper way to come to an understanding of the evidence.

Similarly on the issues of signage, if I had not been available to testify there would have been no expert evidence to explain where signs should have been placed and what type of signs are appropriate according to the standards or guidelines known and used consistently throughout North America. If I had not been available to provide the resource documents that showed the reasonings for those sign placements how would it benefit the court to go it alone without that information? Certainly the defense had the opportunity to present their experts at trial to refute my comments but they did not. That should have been an obvious red flag. The Court of Appeal failed to consider that this was a ploy used by the defense to make sure that no one of any expertise regarding proper procedures was there to testify under oath whether those procedures were properly in place.

The situation in which the Court of Appeal would have placed Justice Taylor can be examined by looking at how the defense explained the reason why vehicles travelling in the same direction as the Johnsons kept colliding with the rock embankment at nighttime. The defense claimed roadway personnel did not need to investigate those incidents because each police report kept claiming that the drivers were speeding, impaired or not paying attention. In fact, police are not roadway design or signage experts. What the defense failed to report is that the roadway in the immediate vicinity of the embankment contained a vertical sag curve that was too extreme for the posted speed. There are recommendations for how quickly in distance the roadway should change elevation in a sag for very good reason. Where such elevation change is excessive the headlights of vehicles point down into the ground instead of ahead to the potential dangers that will shortly be encountered. The analysis I carried out on this issue was brought to the court's attention. In contrast the defense would never have brought that matter forward. And if I was not there to present that evidence Justice Taylor would have been under the impression that there were no problems with the roadway on that issue. Because Justice Taylor allowed me the opportunity to explain the issue he could then refer to the resource documents that were presented to him and decide **for himself** whether this was an important matter. And he did just that, recognizing all too well what games the defense was up to.

Again, in the matter of the Roadway Appraisal sheets, I was there to explain their intent and the meaning of the inputs. Justice Taylor was provided with a copy of the coding manual that appraisers were to use when filling out those Roadway Appraisal sheets. I was not the one who maintained a personal opinion as to the accuracy of those sheets. Justice Taylor was given the source documents from which he was able to make that assessment on his own. I just provided him with the materials. Again, the Court of Appeal would have prevented Justice Taylor from knowing about those Appraisal sheets and their meaning. I cannot see how this would have helped to bring the case to a proper resolution.

With respect to the second issue of appeal, that of contributory negligence, the Court of Appeal found: " In arriving at those findings, the trial judge either ignored or misstated pertinent evidence".

One example of this cited by the Court of Appeal was that the embankment was visible to the Johnsons for a distance of 180 metres and "...if Mr. Johnson had been keeping a proper lookout, he would have seen the embankment and recognized the danger it presented long before he reached the bridge and began to cross it."

What the Court of Appeal appeared not to be aware of was that, in the sunny conditions and time of day, a dark shadow was cast onto the area of the embankment by the leaves of the surrounding trees. The difference in lighting was available to be recognized in my photographs as it was demonstrated on one of my visits to the site. The Johnsons were riding in a sunny area and partly against the position of the sun toward the embankment that was in dark shade. While it is true that eventually they

would become aware of the embankment it is not correct to say that awareness would be available from 180 metres.

Beyond that the Court of Appeal failed to understand what constitutes a danger. Hindsight is an oft-used strategy to suggest that there was a danger because obviously it resulted in a person's death. But at the particular time and distance of descent toward the bridge there was no immediate danger. I had stressed in my testimony, and as was illustrated in the testing with the tandem bicycle, that regardless of the poor braking capability of the cycle, Mr. Johnson could have easily brought it to a halt from the 60 metre distance north of the bridge where the greatest descent and roughness of the road was present. There was no immediate emergency up to that point. In fact, the Johnsons did not need to bring their cycle to a halt. They only needed to reduce its speed to about 15 to 20 km/h from which they could have negotiated the sharp right turn. The upslope on the other side of the bridge would have provided them with additional support toward reducing their speed. The question that should have been posed was why was Mr. Johnson so unsuccessful in reducing his speed and why did the cycle begin to tumble before it reached a position to commence the sharp right turn? Justice Taylor properly listened to my comments that the roughness of the road surface at the critical location where it began a greater down slope was the major factor that Mr. Johnson could not anticipate. Not only were these conditions unacceptable on their own but they existed in the immediate vicinity where an unprotected and narrow bridge existed. Not only this, but there was evidence of a sharp change in elevation immediately where the bridge deck met with the road at both ends of the bridge. I described how this sharp change in elevation would have caused an impact force onto the cycle. I used the example how an impact to an immovable, vertical wall would obviously be of major consequence. I then asked the court to consider the consequences if that vertical wall was positioned at 75 degrees, or 45, or 30. Progressively the impact force to the cycle would be reduced as the wall angle was reduced. However the force would still exist at lower angles of that wall. By this method I demonstrated that the very sharp change in elevation at both ends of the bridge deck could destabilize the cyclists.

The Court of Appeal indicated I had no experience in assessing how a bicycle would react to road roughness. In fact I was modest in describing my experience. In the years of being a high school and university student I practically lived on my 10-speed Peugeot bicycle. I performed all sorts of uninformed and foolish stunts of riding along city streets with no hands and attempting to mount curbs by jumping the front wheel at a precise instant. Like most such riders I learned my lessons with cuts and bruises without the misfortune of experiencing a roadway that gave me no option of escape without major injury or death. In those instances where I approached a rough section of road I looked down to search for a path of least effect. In my personal experience I had encountered many instances of downgrades and rough roads, just not to the same extent as what was encountered by the Johnsons.

In the years since my days of riding, I have conducted a number of reconstructions involving motorcycles and bicycles. If I had any significant deficiency in understanding it

would have been quickly exposed by opposing experts retained to review my analysis. It is a fact of work as a consultant in the private sector that much more training is gained through analysis of individual cases than through formal courses or writing of papers in reviewed journals. Having worked as a paid researcher in a university environment I know all too well how many more research papers are prepared in that context when your salary is guaranteed and a major reason for the continuance of your research contract is a demonstration of your expertise through presentation of research papers. In the private sector I have much less time to compile my individual cases into useful research papers. This is not only true of my experience but it is also true for most consultants in my field. That is the difference in these working environments that is sometimes misunderstood by the courts.

While I agree with the Court's need to be cautious I think the following comments about experts was uncalled for particularly when I was the only expert presented to testify:

"trial judges who fail to properly perform their gatekeeper function run the risk of having their decision-making function usurped or severely eroded by 'expert generalists' who profess to know something about everything and who are only too willing to provide the court with a ready-made solution for any contentious issue that might exist. The problem with such witnesses is that while they appear knowledgeable and generally come across well, upon closer scrutiny, their opinions may well turn out to be little more than concoctions consisting of guesswork, speculation, commonplace information and junk science, with a hint of valid science thrown in for good measure."

While worded in general terms I strongly object to the implied suggestion that, through my broad range of experience in accident analysis, I "profess to know something about everything" and "am only too willing to provide the court with a ready-made solution for any contentious issue that might exist". The broad range of my experience is not professed, it is a fact that is available for scrutiny. I have (at least some) records of essentially every one of the 1500 cases that I have examined. This includes what type of analysis was performed. If examined in proper detail it will reveal exactly what I reported to Justice Taylor. I find the comments of the Court of Appeal both offensive and prejudicial, particularly as the court had very little knowledge about my background but opted to make those comments knowing that they would be permanently enshrined as part of my court history. Frankly, for persons of responsibility for whom I had previously carried a great deal of respect, I would have expected far better.

I object to the suggestion that I "appear to be knowledgeable and generally come across well" while upon closer scrutiny my "opinions may well turn out to be little more than concoctions consisting of guesswork, speculation, commonplace information and junk science, with a hint of valid science thrown in for good measure." There was nothing in my testimony that the Court of Appeal could apply to suggest that I fit those comments. A professional survey was carried out by others who identified the positions of all signage and the geometric layout of the road in question and I provided a description of its contents. I referred to standard manuals such as the Ontario Geometric Roadway Design manual, Manual of Uniform Traffic Control Devices and

Inventory Manual for Municipal Roads to support my comments to Justice Taylor. I object if the Court of the Appeal suggests that my quoting of these resources was "guesswork", "speculation" or "junk science".

The Court of Appeal referred to the "much richer" evidence supporting a high travel speed of Johnsons that Justice Taylor erroneously did not take into account. In one instance the Court referred to Mrs. Johnson's comment that she "...thought her husband was going down the hill too fast and that she told him to "try to stop". The fact is, there was no foundation to establish at what point this observation or comment was made by Mrs. Johnson. Certainly if it was made near the point of 60 metres before the bridge then Mr. Johnson too might have made that same observation; that he was travelling too fast for the conditions and wished he could stop. But the point is that those conditions had changed without prior warning to Mr. Johnson. While expecting he could apply his brakes that expectation was nullified as his bike began to bounce over the uneven road surface. While the Court of Appeal criticized that Justice Taylor did not refer to this when addressing the issue of excessive speed this does not mean that he did not take it into consideration. It could mean that he understood there was no way of knowing at what point Mrs. Johnson made that comment/observation and that it was made at a point when it was too late to change the course of events.

Secondly the Court of Appeal also referred to the witness statement of Mr. Marshall who observed the riders were alternately pedaling and coasting and this should have indicated to Justice Taylor that the Johnsons were attempting to "increase speed". In fact I believe Justice Taylor heard me well when I stated a calculation of the effect of gravity alone while coasting (without pedalling) from an initial speed of 20 km/h would have resulted in a speed in the range of 78 km/h near the vicinity of the bridge. Yet the witness Marshall estimated that the speed of the cycle near the bridge was in the vicinity of 40 km/h. So how could one conclude that there was active pedalling to increase speed when the effect of gravity alone would have placed the speed of the cycle much higher than what was estimated by the witness. Justice Taylor was aware of this indisputable fact. Clearly some form of braking rather than pedalling to "increase speed" must have been occurring during the descent toward the bridge. Again the fact that Justice Taylor did not mention this in his assessment does not mean he did not take it into consideration. I think the role of the Court of Appeal should have been to assess Justice Taylor's decision based on what he said, not on what he did not say. Such conclusions based on what was not said is too much of an attempt to read into the mind of Justice Taylor without having the ability to do so.

The Court of Appeal placed the responsibility for the speed of the tandem bicycle fully upon the Johnsons without considering the role played by the defendant municipality. In effect it was the municipality that constructively said "Mr. and Mrs. Johnson, here is a challenging section of roadway and, whether we have your permission or not, we are going to make it so that you travel this route at an increasingly faster speed such that by the time you reach the most dangerous area you will be travelling 78 km/h". Instead the evidence shows that the Johnsons did not accept that input to their speed. The evidence shows that they chose a speed that was much less than the 78 km/h. In the 60

metres of distance before the bridge, if the Johnsons could not provide effective braking, the speed of the tandem bicycle would not simply stay at the same speed it was, the speed of the cycle would increase. The speed of the tandem bicycle would increase during that 60 metres in direct proportion to the excessive slope of approximately 17%. Considering some levelling off near the bridge, using the effect of a 15% down slope over a distance of 60 metres would increase an initial speed of 40 km/h to about 62 km/h. According to the Court of Appeal this acceleration should be the fault of the Johnsons. I say it was the fault of the road conditions that prevented effective braking while forcing an acceleration on the bicycle. That effect was not the fault of the Johnsons it was the fault of the municipality.

In the end the Court of Appeal ruled that the Town of Oakville (Milton) created a "trap" by not ensuring better warning signs, limiting the road grades, and removing surface undulations. Yet all those facts would not have been revealed had Justice Taylor prevented me from testifying. That evidence was revealed only through my testimony. So I fail to see how the Court of Appeal could criticize Justice Taylor for allowing me to bring that evidence before the court when, in the end, the Court of Appeal used the information I had reported to rule the trap was "a substantial contributing factor to Mr. Johnson's loss of control of the bicycle and the ensuing accident."

I think Justice Taylor was fully aware of all the evidence and the tactics employed by the defense. The plaintiff was a widow, undoubtedly with limited resources to retain a multitude of high-priced experts. If he barred my testimony Justice Taylor was unlikely to obtain the factual information needed to properly present her case. In the end Justice Taylor recognized that the defense had essentially no defense. The only option left to them was to discredit the only expert who was capable of providing the solid facts that they could not hide. While the defense was perfectly within their rights to minimize their losses they suffered the consequences of gambling to take a hard stance by failing to resolve the matter before trial when the facts were clearly against them. By finding them 100% at fault Justice Taylor was sending them the message that when you take on an unreasonable stance that wastes court resources you must suffer the consequences. Unfortunately the partial reversal of Justice Taylor's judgment by the Court of Appeal gives future defendants with deep pockets the green light to take those hard stances and use court resources to their furthest extent.