CITATION: Kou v. Karmah, 2025 ONSC 3815
COURT FILE NO.: DC-25-000001-00
DATE: 20250630

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Hebner, O'Brien and Muszynski JJ.

BETWEEN:	)	
NEDUSCHKE MARY-LOU KOU	)	*Lianne Sharvit,* for the Respondent
Plaintiff/Respondent	)	
– and –	)	
QAYS HASAN HADI KARMAH and AAYA SAAD YASEE AL-TU'MA	)	*Ryan Truax*, for the Appellant
Defendants/Appellants	)	
	)	**HEARD (at Brampton): June 9, 2025**

Muszynski J.

REASONS FOR DECISION

Overview

[1] The appellants appeal from the January 2, 2025 reasons for judgment of the Honourable Justice André following a motor vehicle collision trial.

[2] The plaintiff/respondent, Neduschke Mary-Lou Kou, commenced litigation against the defendants/appellants, Qays Hasan Hadi Karmah and Aaya Saad Yasee Al-Tu'Ma, the driver and owner of a vehicle involved in the collision. The collision occurred when Ms. Kou's vehicle rear-ended the vehicle driven by Mr. Karmah during midday traffic on Bloor Street in Mississauga.

[3] Ms. Kou claimed that the collision occurred because Mr. Karmah created a situation of emergency when he missed a turn and stopped his vehicle suddenly in front of her without warning. Ms. Kou alleged that Mr. Karmah should be held liable, at least to some extent, for his role in the collision. The appellants took the position that, generally, rear-end collision jurisprudence in Ontario places a reverse onus on the driver who collides with a vehicle from behind to demonstrate that they were not negligent. Unless the rear driver can rebut the presumption, they are 100%

liable. The appellants submitted the respondent failed to rebut the presumption and they accordingly denied any responsibility for the collision.

[4] The parties reached an agreement on damages and proceeded to a summary trial under the simplified procedure on the issue of liability only.

[5] Following a two-day trial, the trial judge released his reasons for judgment splitting liability for the collision between the respondent (65%) and the appellants (35%).

[6] The appellants allege that the trial judge erred in both fact and law by attributing liability to Mr. Karmah.

[7] For the following reasons, I would allow the appeal.

Jurisdiction / Standard of Review

[8] The Divisional Court has jurisdiction to hear the appeal of a final order of a judge of the Superior Court in particular circumstances, including when the final order involves payment of less than $50,000, exclusive of costs: *Courts of Justice Act*, R.S.O. 1990, c C.43, ss. 19(1)(a) and 19(1.2)(a).

[9] With respect to standard of review, the appellants allege that the trial judge made errors of both fact and law.

[10] The appellants correctly identify that the standard of review for factual errors is palpable and overriding error and that a correctness standard of review applies for errors in law. In my view, the appeal also raises questions of mixed fact and law. Like factual errors, questions of mixed fact and law attract a palpable and overriding error standard of review.

[11] For an error to qualify as palpable, it must be clear and obvious. For an error to be overriding, the error must be determinative to the outcome of the case.

Did the trial judge make a palpable and overriding factual error?

[12] The appellants take the position that the trial judge made a factual error by conflating the evidence of Ms. Kou with respect to how the collision occurred with the evidence of Mr. Karmah. They say that due to this error, the trial judge made a negative finding of credibility against Mr. Karmah.

[13] The evidence at trial was consistent that prior to the collision, Ms. Kou’s vehicle was directly behind the vehicle driven by Mr. Karmah in the left lane travelling westbound on Bloor Street. The evidence was also consistent that the collision took place in and around the intersection of Bloor Street and Queen Frederica Road. It is agreed that there are two westbound lanes at this location, there is no stop sign or signal for westbound vehicles at this intersection, and no designated left turn lane. It is further agreed that the collision occurred shortly before 2:00 p.m., that the weather was sunny, and the roads were dry.

[14] At trial, there was evidence from three witnesses as to how the collision occurred.

[15] Ms. Kou's evidence about the mechanics of the collision was as follows:

> I was travelling approximately 20 kilometres per hour when the accident occurred. The defendant's motor vehicle was ahead of me travelling approximately the same speed. It was about half a car length ahead of me. The defendant's motor vehicle made a sudden stop without any indication just passed Queen Frederica Road. Approximately two to three seconds later, I hit the defendant's motor vehicle. Given how suddenly the defendant's motor vehicle stopped, I didn't have enough time to … react to stop. In fact, I did not have any chance to press my brakes at all.

[16] Mr. Karmah gave the following evidence about how the collision occurred:

> As we approached Queen Frederica, I put on my left turn signal and began to slow down in a normal fashion. I then came to a complete stop at the intersection waiting for traffic to clear. Traffic was not busy going westbound on Bloor Street, traffic was also not busy going eastbound on Bloor Street, but there were cars coming eastbound that were spread out so I had to wait to make my turn. We were stopped for a minute or less waiting to turn when we were hit from behind. At the last second just before we were hit, I looked into my rearview mirror and I saw a car coming fast and then it hit us. I did not have any chance to get out of the way.

[17] Mr. Karmah's nephew, Hayder Al-Tu'Ma, also gave evidence about the collision based on his viewpoint as a back-seated passenger in Mr. Karmah's vehicle:

> We were travelling westbound on Bloor Street and planned on turning left on Queen Frederica to drop off Dr. Araf at his house. Qays put on his left turn signal and slowed down to a complete stop. There was nothing sudden or unusual with the way he slowed down. We were waiting for eastbound traffic to clear when we were hit from behind by a red car. We were stopped for at least 30 seconds before being hit.

[18] There were two clear versions of how the collision occurred placed before the trial judge. The appellants' version was that Mr. Karmah engaged his left turn signal, intending to turn onto Queen Frederica Road, and was stopped in the left lane for between 30 seconds and one minute waiting for eastbound traffic to clear when the vehicle was struck from behind by Ms. Kou. The respondent's version was that Ms. Kou was travelling at approximately 20 km/hr. and one half a car length directly behind Mr. Karmah's vehicle when Mr. Karmah stopped suddenly, and without signaling, leaving Ms. Kou with insufficient time to come to a stop and avoid the collision.

[19] The alleged factual error is contained in paragraph 11 of the trial decision, which states:

> The **defendant's version of events**, in my view, is problematic for the following reason. If the plaintiff was indeed following too closely at a speed greater than 20 KPH, it would have been impossible for the defendant to have been stopped for thirty seconds, let alone one minute, before the collision. The accident would have occurred much sooner after the defendant stopped his vehicle. The plaintiff's vehicle could not have taken thirty seconds to travel half a car length before the collision. To that extent, **I cannot accept the defendant's version of events**. [emphasis added].

[20] According to the appellants, the trial judge incorrectly attributed Ms. Kou's evidence, that she was driving 20 km/hr. and travelling one half a car length behind the lead vehicle, to the appellants. On this basis, the trial judge concluded that the appellants' version of events was "impossible" as Ms. Kou could not be following too closely at that speed while Mr. Karmah's vehicle was also stopped for 30-60 seconds before being struck.

[21] The respondent denies that the trial judge confused the collision accounts and points to the opening paragraph in the decision where the trial judge correctly described the competing versions:

> The plaintiff testified that the accident occurred because the defendant stopped the vehicle suddenly, leaving her little time to stop before rearending the defendant's vehicle. She was half a car length behind the vehicle when it suddenly stopped. The defendant however, testified that he had stopped his vehicle for one minute or less before the plaintiff rear-ended his vehicle.

[22] There is an inconsistency between the trial judge's review of the competing versions of the collision in the opening paragraph of the decision and his later comments in paragraph 11 that I cannot reconcile.

[23] I find that the trial judge attributed both versions of the collision to the appellants in paragraph 11. I find that this was a clear and obvious factual error. As a result of the error, the trial judge made negative credibility findings against Mr. Karmah due to the perceived implausibility of the appellants' conflicting versions of events. No other adverse credibility findings were made by the trial judge, nor was any other reason provided for preferring the respondent's version of events. As it appears that the principal reason for rejecting the appellants' version of events was grounded in this factual error, I find the error to be overriding.

<u>Did the trial judge make a legal error?</u>

[24] The appellants submit that the trial judge erred in not finding the respondent 100% liable for the collision given the trial judge's conclusion that Ms. Kou was following too closely.

According to the appellants, the trial judge failed to consider the reverse onus that applies in rear-end collision cases. The appellants state that the respondent had to disprove her own negligence before there could be any consideration of Mr. Karmah's liability. Further, the appellants allege that the trial judge's liability split reflects a departure from the well-established case law dealing with following too closely/rear-end collisions.

[25] The respondent firstly denies that the trial judge made a finding that Ms. Kou was following too closely and, regardless, submits that it was open to the trial judge to make a finding that Mr. Karmah was negligent based on the particular facts in this case.

Liability conclusion of the trial judge

[26] After finding that the appellants' version of events was problematic at paragraph 11, the trial judge set out his conclusion on liability in the two following brief paragraphs:

> [12] I accept the plaintiff's evidence that the accident happened partly because the defendant stopped suddenly because of his unfamiliarity with the area and the fact that based on her distance from the car, she had insufficient time to react when the defendant stopped his vehicle.
>
> [13] For these reasons, I conclude that the plaintiff was 65% at fault while the defendant is 35% at fault for the accident.

Reverse onus – rear-end collisions

[27] The jurisprudence related to rear-end collisions is well settled. Generally, liability will rest with the driver that collides with the rear-end of a vehicle: *Beaumont v. Ruddy*, [1932] O.R. 441 (C.A.). Over the course of decades, a common law reverse onus has developed whereby the driver that collides with the rear-end of a vehicle must rebut the presumption that they are negligent: see *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, at para. 19; *Ozimkowski v. Raymond*, 2018 ONSC 5779, at para 29, aff'd 2019 ONCA 435; *Chernet v. RBC General Insurance Company*, 2017 ONCA 337, at para. 10.

[28] In certain circumstances, the driver that rear ends a vehicle can discharge the onus to prove they are not negligent by proving that the conduct of the lead vehicle contributed to the collision: *Rahimi v. Hatami*, 2015 ONSC 4266, at para. 14.

[29] In this case, the trial judge did not specifically mention a reverse onus, or the presumption of negligence, that is involved in rear-end collision cases. However, he cited the prevailing authorities and noted: "[i]n assessing whether an apportionment of blame for the accident is appropriate in this case, I am mindful that the plaintiff bears the burden of proof on a balance of probabilities." When the reasons for judgment are viewed as a whole, particularly considering the comments made on the record, I am satisfied that the trial judge was aware of the reverse onus in rear-end collision cases and the respondent's burden. The appellants have not demonstrated that the trial judge made a legal error in this respect.

Following too closely jurisprudence

[30] The trial judge did not use the language "following too closely" to describe Ms. Kou's driving leading up to the collision. However, the trial judge concluded that Ms. Kou had insufficient time to react when Mr. Karmah stopped his vehicle given her distance from his car. I find that this conclusion, coupled with the 65% liability attributed to Ms. Kou, is the equivalent to making a finding that Ms. Kou was following too closely.

[31] The parties agree that following too closely is prohibited under Ontario's *Highway Traffic Act,* R.S.O. 1990, c. H.8, s. 158(1). Further, there is agreement that a driver found to have been following too closely will generally be held fully liable for a rear-end collision: *Beaumont*, at pp. 444 – 445; *Rahimi* at para. 14. This is because Courts have repeatedly held that drivers have an obligation to maintain "a safe distance behind the vehicle ahead, keep a lookout and maintain a reasonable speed, so that he or she has sufficient time to stop if the vehicle ahead suddenly stops": *Iannarella*, at para. 9.

[32] Sudden stopping of the lead vehicle within one's own lane of traffic has generally not been the source of liability in rear-end collision cases, but rather something that should be anticipated by the following driver: *Ozimkowski*, at paras. 29-30.

[33] In *Martin-Vandenhende* 2012 ONCA 53, 287 O.A.C. 250, there was evidence that the lead driver involved in a rear-end collision first signaled and drove off onto the shoulder, as if allowing the rear driver to pass, only to suddenly swerve back into the lane of traffic without signaling. The Court of Appeal distinguished the circumstances in that case, from traditional following-too-closely cases: "[t]his was not a case about a lead car simply stopping suddenly or engaging in some confusing maneuvers within its own lane, and the driver of a following vehicle not having proper care and control of the following vehicle sufficient to enable him or her to react to the sudden stop": at para. 39.

[34] Here, the trial judge does not explain what facts created an unusual circumstance that would justify departing from the standard presumption that a driver who rear-ends another while following too closely is 100% liable. Based on the weight of the authorities, even the sudden stopping of a lead vehicle without warning within one's own lane is not sufficient to dispel the presumption of negligence on the rear-ending driver: *Ozimkowski*, at paras. 29-30.

[35] The appellants submit that, even fully accepting the respondent's version of events and rejecting the appellants' version, there is simply no evidence that an unusual circumstance existed that would shift liability to Mr. Karmah.

[36] In oral submissions, the respondent argued that Mr. Karmah's vehicle departed from his lane of travel, which creates an unusual circumstance like the one that existed in *Martin-Vandenhende*. The respondent relies on one photograph that was taken of Mr. Karmah's vehicle following the collision that depicts the empty vehicle parked and straddling the centre line separating westbound and eastbound traffic.

[37] However, the trial judge did not make any findings of fact that would elevate Mr. Karmah's actions to be sufficiently unique or unusual to rebut the presumption that Ms. Kou is fully liable for the rear-end collision. In my view, the error is clear, and it is also overriding, as it was the source of the liability finding against Mr. Karmah. The trial judge therefore erred in finding liability against the appellants.

[38] Rather than remit the matter to the trial judge, I find that this is a proper case in which to draw inferences of fact from the evidentiary record pursuant to the authority set out in s. 134(4)(a) of the *Courts of Justice Act*. This was a summary trial under the simplified procedure. The affidavits of the key witnesses as to the mechanics of the collision and transcripts of their cross-examinations are contained in the appeal record. Based on the record, the evidence even on Ms. Kou's version of events, does not justify a finding that Ms. Kou discharged the onus to prove that she was not negligent.

[39] In particular, the evidence does not support the respondent's submission that Mr. Karmah's vehicle had departed the left, westbound lane prior to the collision. Mr. Karmah and his nephew both testified they could not recall whether the vehicle was moved before the photograph was taken. The trial judge did not make a finding that Mr. Karmah's vehicle departed from the left westbound lane before the collision. Most importantly, Ms. Kou did not testify that Mr. Karmah's vehicle had departed from the left westbound lane and there is no such allegation contained in the statement of claim.

[40] Taking the respondent's case at its highest, Mr. Karmah stopped suddenly without warning in his lane of traffic after missing a turn. This is not sufficient to disprove Ms. Kou's negligence and shift liability to Mr. Karmah. This is something that Ms. Kou ought to have anticipated by leaving adequate distance between her vehicle and Mr. Karmah's given the speed at which she was travelling and the traffic conditions.

Disposition

[41] Had the only error been the trial judge's conflation of the two versions of the collision resulting in the negative credibility finding against the appellants, the parties agree that the appropriate remedy would be to order a new trial.

[42] However, as set out above, even had the trial judge properly rejected the appellants' version of the events and wholly accepted the respondent's account, I am able to find clearly on this record there was no evidentiary basis for the trial judge to find liability on Mr. Karmah. For this reason, I would allow the appeal, set aside the judgment attributing 65% liability to the respondent and 35% to the appellants, substitute a finding that the respondent was 100% liable for the collision and would dismiss the claim against the appellants.

Costs

[43] In accordance with the agreement reached by the parties, costs are awarded as follows:

a. Costs of the appeal are payable by the respondent to the appellants in the amount of $5,000 inclusive of HST and disbursements; and

b. Costs of the trial are reversed and shall be payable by the respondent to the appellants in the amount of $40,000 inclusive of HST and disbursements.

____
Muszynski J.

I agree:___________________________________
Hebner J.

I agree:___________________________________
O'Brien J.

Date: June 30, 2025

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– **and** –

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Defendant/Appellants

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Date of Release: June 30, 2025