

## EXECUTIVE SUMMARY

Mr. Bryant is charged with criminal negligence causing death and dangerous driving causing death. These charges arise out of an incident that occurred in the late evening of August 31, 2009, when a fatal motor vehicle incident resulted from the interaction of Mr. Bryant and the deceased, Darcy Allen Sheppard.

When the charges were laid on September 1, 2009, there were reasonable grounds for the charges based on the information then in the possession of the police. Since then, a great deal of information has been obtained through an ongoing extensive investigation. Part of that investigation examined information provided to the Crown by the defence.

In addition to the many police and civilian witnesses who were interviewed, a number of forensic experts examined aspects of this case, including detailed analyses of two videotapes from nearby buildings that capture part, but not all of the interaction between Mr. Bryant and Mr. Sheppard. Defence disclosure included giving the Crown access to the defence expert materials (which were independently evaluated by the Crown), as well as permitting the Crown to interview both Mr. Bryant and his wife, Ms. Abramovitch.

In this province, the Crown is required to screen all charges to determine whether there is a reasonable prospect of conviction. This obligation is ongoing as new information is received. If there is no reasonable prospect of conviction, the prosecution must be discontinued. The charge screening policy requires consideration of the available evidence, including some assessment of the credibility of witnesses and consideration of any defences that should reasonably be known to the Crown or that have come to the Crown's attention.

Here, there is no reasonable prospect of conviction in relation to either of the charges before the Court. Accordingly, the charges must be withdrawn.

The objective and credible evidence available to the Crown in this case demonstrates the following. On the evening of August 31, 2009 and before the encounter with Mr. Bryant, the deceased arrived intoxicated at the apartment of his girlfriend. At about 9:12 p.m., the police received a call from the resident of another apartment in the same building. The police were advised of a possible domestic assault in the girlfriend's apartment (which the occupants denied and which the Crown makes no determination about) as well as another alleged assault outside the apartment building.

Mr. Sheppard departed the area on his bike. Not long afterwards, he was at the intersection of Bloor and Yonge Street throwing objects onto the road to impede traffic. We know that he had been belligerent and aggressive shortly before. Intoxication may well have played a role. At the time of death, his blood alcohol level was 0.183.

Because there is an allegation in this case that Mr. Sheppard acted as the aggressor in the confrontation with Mr. Bryant, the law requires us to consider the prior conduct of the deceased. Some of that relevant prior conduct resulted in criminal convictions.

No one is entitled to commit a criminal offence because the victim of that offence has a prior criminal record or has engaged in past aggressive conduct. No one "deserves" to have a criminal offence committed against him, regardless of his background or prior conduct. The deceased's propensity for aggressiveness or violence, however, is relevant to considering whether the accused was attacked by the deceased and to show the probability that the deceased was the aggressor in the altercation.

Mr. Sheppard had at least six altercations with other motorists prior to and even on the afternoon of August 31, 2009 before the interaction with Mr. Bryant. These altercations involved Mr. Sheppard aggressively confronting drivers and often involved threats or violence. In some cases, it involved Mr. Sheppard accosting drivers in their cars, reaching into the car, and damaging vehicles.

Several years prior, a 76 year old female motorist was confronted by Mr. Sheppard, who swore and yelled at her for, in his perception, cutting him off. He followed her as she turned off a main street to get away from him. He passed her on his bicycle, slammed his bicycle in front of her, and started advancing towards her, telling her to get out of the car. She felt compelled to "gun it" out of there. Indeed, she thought she went up on onto the sidewalk to get away. He followed her, though she was able to drive away. She described him as "like a mad man."

In a June 2009 incident, a sales representative in his 30s was confronted by Mr. Sheppard when he complained about Mr. Sheppard passing too closely by him on his bicycle. Mr. Sheppard took out a bicycle lock and challenged the man to fight him. The situation was diffused, probably due to the presence of others.

In late July 2009, a 23 year old woman observed a cyclist, who she later believed to be Mr. Sheppard, swerving in and out of traffic in downtown Toronto in an aggressive way. He alleged that she had cut him off in his vehicle, passed her on his bicycle, pulled in front of her and did a half turn parallel to the front bumper of her car. He threw his bicycle down, came at her, completely enraged. He called her a "whore" and "stupid bitch". She was terrified. He repeatedly spat on her vehicle and then on her through her partially open window. She reversed her car. He pursued her, but was diverted by another driver.

In August 11, 2009, a motorist returned to his BMW and proceeded along Sheppard Street. Suddenly, a man, later identified as Mr. Sheppard, was screaming and yelling at him, saying that "Just because you drive a fancy car,

you think you can drive down the wrong side of the road.” The driver had edged into the oncoming lane to avoid parked delivery vehicles. At one point, the individual reached into the car, trying to grab the keys, trying to smack the driver and grab his earpiece. The man shoved Mr. Sheppard out of the car who responded by saying that he'd beat the driver's head in. Mr. Sheppard spat on the car, banged his fist on it and jumped onto the car, holding onto the window. The motorist was finally able to escape. Four photographs of the incident were taken by an onlooker in an office overlooking the incident. The photographs clearly show Mr. Sheppard angrily confronting the driver of the vehicle and at one point, hanging onto the car with his hands inside the driver's window and his feet on the car's running board.

In late August 2009, a man was driving eastbound on Bloor Street on the way to work. A cyclist, later identified as Mr. Sheppard, was angered apparently by the motorist's actions in honking his horn at Mr. Sheppard who was in the centre of a driving lane. Mr. Sheppard slapped the driver's side window of the car, spitting and salivating. Later on, Mr. Sheppard damaged the car's left side view mirror and after the motorist had contacted 911, threw something at the car, damaging it.

On August 31, 2009, the day of the incident with Mr. Bryant, at about 6:20 p.m., another motorist observed a cyclist weaving in and out of traffic and doing figure eights. She was frightened by the cyclist who was acting erratically and had to slam on her brakes several times to keep from hitting him. The cyclist changed directions and put his hand through the open driver's side window of another driver's car, appearing to reach for the steering wheel or scare the driver. He had been banging on many car windshields and was yelling at drivers. The motorist saw pictures of Mr. Sheppard in the media the following day and identified him as the cyclist she had seen the day before, although she was not absolutely certain.

Mr. Sheppard's criminal record also reveals offences involving violence or threatened violence, including two assaults and a threat, while armed with imitation firearms, to kill a cab driver in a cab he had hailed and a lady who could be observed from the window of the cab. The evidence presented in court at the time of his sentencing, showed that Mr. Sheppard had suffered, particularly as a young person, from abuse, serious drug and alcohol issues, and was assessed as a high risk to re-offend. Psychiatric issues, imperfectly understood, had also undoubtedly contributed to his misconduct.

This prior history circumstantially supports the events as described by Mr. Bryant and his wife.

Mr. Bryant maintained that he and his wife were driving westbound on Bloor Street in a 1995 Saab convertible. The top and windows were down. Near the intersection of Bloor Street and Yonge Street, an individual later identified as Mr. Sheppard was throwing objects onto the roadway. Cars were maneuvering around a misplaced traffic cone obstructing westbound traffic. Mr. Bryant left his vehicle to move the cone to the side. Shortly thereafter, he observed a vehicle's progress impeded by a cyclist doing figure 8s in front of it. This appeared to be the same man who had been throwing debris onto the roadway.

While continuing westbound on Bloor Street, Mr. Bryant came to a red light at a pedestrian crossing between Bay and Avenue Road. West of the pedestrian crosswalk, construction vehicles had taken up the two lanes adjacent to the centre line. Westbound traffic on Bloor was funnelled into one driving lane on the north side of Bloor, while eastbound traffic was funnelled into one driving lane on the south side of Bloor.

Mr. Sheppard cycled past Mr. Bryant's vehicle along the driver's side and then cut in front of the vehicle, stopping his bike directly in front of the Saab and

blocking its way. This movement was captured by a video camera at 102 Bloor Street.

Mr. Bryant hit his brakes. He stated that his vehicle came to a stop and stalled. The video shows changes in the luminosity of the Saab's headlights on a number of occasions. The expert evidence confirms that one explanation for this is that the headlights dimmed as a result of the vehicle stalling and then being re-started.

The police took statements from numerous eyewitnesses in the area. No single witness appears to have observed the events from start to finish. There are both consistencies and inconsistencies in their evidence. One of the largely consistent themes is that Mr. Sheppard loudly and aggressively confronted Mr. Bryant while he and his wife remained passive.

Mr. Bryant stated that he wanted to get away. He attempted to get his car started and it stalled again, causing it to lurch forward. Mr. Bryant's vehicle came close to or in contact with the rear wheel of Mr. Sheppard's bike. The video experts have found that the video does not show contact with Mr. Sheppard himself at this point. The bicycle has been examined by the police and the Crown, and there does not appear to have been any damage to the rear wheel rim of the bicycle.

At this point Mr. Bryant describes himself as being in a state of panic. He says that Mr. Sheppard was becoming enraged. Mr. Bryant was trying to get his car started and concentrating on that task. The Saab has a sensitive and tight clutch, which has been confirmed by the investigation.

When the vehicle re-started it accelerated into Mr. Sheppard causing him to land on the hood. Mr. Bryant stated that he had been looking down while trying to re-start the vehicle. When he looked up he saw Mr. Sheppard on the hood of the

car and immediately hit the brakes. He said that the acceleration was unintentional, and that he was trying to start the engine which had stalled a number of times.

The expert evidence demonstrates that approximately 2.5 seconds elapsed from the time the vehicle started its forward motion to the time it came to a stop. The brake lights were visible approximately one second into this forward movement. By the time the brakes were applied, the vehicle had reached a speed of somewhere between 9 kph and 13.4 kph (6 to 8.3 mph) and travelled a total distance of approximately 30 feet (2 car lengths).

When the vehicle stopped, Mr. Sheppard fell off the hood and then stood up within about 2 seconds. He was clearly not seriously injured at that time. Mr. Bryant reversed the vehicle and then proceeded forward, turning to manoeuvre around the bicycle.

Mr. Sheppard threw his backpack which struck either the hood or windshield and bounced onto Bloor Street. Mr. Sheppard then jumped onto the vehicle as it drove away.

Several of the eyewitnesses describe Mr. Sheppard acting very aggressively and angrily throughout the incident. When Mr. Sheppard leapt onto the car both Mr. Bryant and Ms. Abramovitch described him as trying to get into the vehicle. The accounts of the eyewitnesses coupled with the forensic examinations suggest that Mr. Sheppard was attempting to enter the vehicle and attack Mr. Bryant at this time.

After Mr. Sheppard latched onto the vehicle, it veered to the left and then continued west in the oncoming (eastbound) lane towards Avenue Road.

Mr. Bryant and Ms. Abramovitch stated that they believed that Mr. Sheppard was trying to get into the car to attack them. Mr. Bryant said that he believed that stopping the car would lead to further attack. He said that his intent was to get away from Mr. Sheppard. He described himself as being in a state of fear and panic. At one point during the drive he was struck in the forehead by Mr. Sheppard.

The movements of the vehicle as it moved westbound with Mr. Sheppard latched onto the driver's side were observed by a number of witnesses. The accounts given by these witnesses vary considerably. Although certain eyewitnesses believed that the vehicle was driving at speeds of 60-100 km/hr, expert analysis conducted by both the Crown and defence has determined that the average speed of the vehicle was somewhere in the range of 34 kph (21 mph). It appears that the vehicle never left first gear. Although certain eyewitnesses described the vehicle as swerving and driving onto the sidewalk in an attempt to dislodge Mr. Sheppard, forensic examination has demonstrated that the Saab did not rub against the curb or mount the curb at any time.

A fire hydrant was located close to the south curb in the area of 131 Bloor Street. The distance from the fire hydrant cap to the curb was one foot. This fire hydrant caught Mr. Sheppard on the left side of his torso. This caused Mr. Sheppard to dislodge from the car, ultimately striking his head, either on the curb or a raised portion of the roadway. The impact was fatal.

Mr. Bryant turned the corner onto Avenue Road, stopped his vehicle at the Hotel Hyatt and called 911. He reported that he had been attacked by someone who had tried to climb into his car. He then waited for the police to arrive.

The distance from the point where Mr. Sheppard jumped onto the car to the point where he fell was approximately 100 metres. The entire incident, from the time



that Mr. Sheppard blocked the vehicle to the time he fell, took less than 30 seconds.

Based on all of the evidence, the account provided by Mr. Bryant and his wife cannot be discounted or rejected when viewed in the context of the prosecution's burden of proof. In fact, Mr. Bryant's account finds circumstantial support in other reliable evidence.

### **The Law**

Dangerous driving requires proof of a marked departure from the standard of a reasonably prudent driver having regard to all of the circumstances, including the accused's reasonable perception of the facts.

Mere civil negligence, carelessness or errors in judgment that fall short of the above standard are insufficient to establish criminal liability. The offence of criminal negligence causing death, the second offence facing Mr. Bryant, imposes an even heavier burden on the prosecution, requiring proof of a reckless or wanton disregard of the lives and safety of others.

An accused's fear is a relevant consideration in determining whether the driving constitutes a marked departure and as part of an affirmative defence such as self-defence. To be clear, where an affirmative defence such as self-defence is raised, the Crown is required to negate that defence beyond a reasonable doubt.

The law with respect to the offence of dangerous driving recognizes that momentary acts of panic in reaction to an unexpected situation will often fall short of proving an offence of dangerous driving. A person faced with a threatening situation may not be criminally liable for driving in a way that would normally constitute a criminal offence.

## Analysis

The evidence establishes that Mr. Sheppard was the aggressor in the altercation with Mr. Bryant. He was agitated and angry, without any provocation from Mr. Bryant or his wife. The defence position that Mr. Bryant was deeply frightened and panicked is supported by the available evidence including Mr. Sheppard's history of aggressiveness towards motorists and others. Mr. Bryant and his wife were in an open convertible, adding to their vulnerability. Mr. Sheppard jumped onto the vehicle. Mr. Bryant could reasonably perceive that Mr. Sheppard was intent on doing Mr. Bryant and his wife serious harm.

In the circumstances, there is no reasonable prospect of establishing that the driving (albeit contributing to Mr. Sheppard's death) constituted a marked departure from the standards of a reasonable, prudent driver faced with the exceptional circumstances presented here.

Nor would the evidence have supported a charge of failing to remain at the scene, having regard to Mr. Bryant's explanation, and his 911 call from the nearby Hotel Hyatt shortly after the material events.

Prior to Mr. Sheppard jumping onto the Bryant vehicle, Mr. Bryant moved his vehicle forward several times. These movements are captured on the videos and were carefully considered by the Crown in determining whether the offences charged or other offences could be proven. The first movement forward, after Mr. Sheppard had closely passed by Mr. Bryant's vehicle, was obstructed by Mr. Sheppard moving directly in front of the Bryant vehicle, causing Mr. Bryant to suddenly brake. The second movement forward, based on a minute examination of the videotapes, may not have even come into contact with Mr. Sheppard. The evidence in that regard is inconclusive. The next movement forward was more significant, and caused Mr. Sheppard to fall onto the hood of the vehicle. There is no evidence that Mr. Sheppard was seriously injured at that time.

The Crown considered whether the available evidence could justify a separate charge of dangerous driving based on this aspect of Mr. Bryant's driving alone and concluded that it could not, having regard to the totality of circumstances, including his explanation for that momentary driving, and his level of panic and disorientation surrounding the stalling and re-starting of his vehicle. He said that the last thing he wanted in the circumstances was to exacerbate the situation by angering Mr. Sheppard. The available evidence does not support rejection of that explanation. It finds support in independent evidence. The Crown not only considered this aspect of Mr. Bryant's driving as a stand-alone piece, but cumulatively with his other driving in determining whether charges were warranted.

### **Conclusion**

Given all of the evidence, in particular new information that has been discovered since the charges were laid, the charges must be withdrawn.