COURT OF APPEAL FOR ONTARIO

CITATION: Chiocchio v. Hamilton (City), 2018 ONCA 762
DATE: 20180919
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Simmons, Huscroft and Miller JJ.A.

BETWEEN

Michael Chiocchio Sr. and Michael Chiocchio Jr. by his Litigation Guardian Michael Chiocchio Sr.

Plaintiffs (Respondents)

and

Richard Ellis, Wendy Ellis and The Corporation of the City of Hamilton

Defendants (Appellant)

Christopher I.R. Morrison and Joel Cormier, for the respondents

David Zuber and James Tausendfreund, for the appellant

Heard: June 18, 2018

On appeal from the judgment of Justice Antonio Skarica of the Superior Court of Justice, dated December 7, 2016, with reasons reported at 2016 ONSC 7570, 4 M.V.R. 7th 55.

REASONS FOR DECISION

A. INTRODUCTION

[1] Michael Chiocchio Sr. was rendered a quadriplegic following a motor vehicle accident that occurred on April 29, 2006, at the intersection of Brock Road and the 5th Concession West in a rural area of the City of Hamilton (the "City").

[2] The accident occurred when a westbound Buick sedan driven by Richard Ellis accelerated away from a stop sign on the 5th Concession West and T-boned the minivan northbound on Brock Road in which Mr. Chiocchio was a passenger. At the time of the accident, Mr. Ellis and his 10-year-old son (a backseat passenger in the car) were heading across Brock Road to the Flamborough Speedway, which was a short distance away on the 5th Concession West. Following the impact, the minivan rolled over and struck a pole.

[3] Brock Road and the 5th Concession West are both two-lane roads. There was no stop sign governing the flow of northbound and southbound traffic on Brock Road. The posted speed limit on Brock Road was 80 kmph.

[4] It is undisputed that the stop sign governing the flow of westbound traffic at the intersection was between 8.4 and 9.4[1] metres behind a faded stop line, painted in 2004, which in turn was between 1.936 and 2.936 metres behind the easterly entrance to the intersection. (Put another way, the stop sign was between 10.336 and 12.336 metres from the east edge of Brock Road).

[5] Counsel conceded that Mr. Ellis, the driver of the westbound vehicle, was negligent in entering the intersection when it was unsafe to do so. Although at trial

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[1] This range was the result of differing measurements by different experts. Jason Young, the expert called by the plaintiffs to give opinion evidence concerning human factors and road design factors that play a role in collisions, testified that he measured the distance between the faded stop and a new stop line by photographic analysis as being between two to three metres. Another expert measured the same distance as four metres, which Mr. Young considered reasonable.

Mr. Ellis claimed he stopped at a stop line, he could not recall where it was located and he made statements at the time of the accident that he stopped at the stop sign. The trial judge found that Mr. Ellis stopped at the stop sign, but then accelerated into the intersection without seeing the northbound vehicle, thus causing the collision. Mr. Ellis had no explanation for why he did not see the northbound vehicle.

[6] Relying in part on expert testimony from Jason Young, a forensic engineer, the trial judge also found the Corporation of the City of Hamilton breached its duty to keep the roadway in a reasonable state of repair by failing to repaint a faded stop line that was no longer effective in guiding drivers concerning where to stop. He concluded the City was thus 50% responsible for the accident. On the trial judge's findings, had Mr. Ellis stopped at the faded stop line, which the trial judge accepted was his usual practice, he would have been able to see 270 metres south on Brock Road and the accident would never have happened.

[7] The City raises several issues on appeal. In our view, its argument that, in finding non-repair, the trial judge misapplied the ordinary reasonable driver standard is dispositive and it is unnecessary that we address the remaining grounds of appeal.

B. A MUNICIPALITY'S DUTY OF REPAIR AND THE ORDINARY REASONABLE DRIVER STANDARD

[8] Section 44 of the *Municipal Act*, S.O. 2001, c. 25, requires a municipality to keep highways under its jurisdiction "in a state of repair that is reasonable in the circumstances, including the character and location of the highway".[2]

[9] In *Fordham v. Dutton-Dunwich (Municipality)*, 2014 ONCA 891, 70 M.V.R. 6, at paras. 28-29, Laskin J.A. described the ordinary reasonable driver standard, the standard of care which governs a municipality's duty of highway repair. As described by Laskin J.A., a municipality is required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. Ordinary reasonable drivers are not perfect; they make mistakes. However, a municipality's duty does not extend to remedying conditions that pose a risk of harm only because of negligent driving.

C. RELEVANT PROVISIONS OF THE HIGHWAY TRAFFIC ACT

[10] The obligations of a driver approaching a stop sign are delineated by the *Highway Traffic Act*, R.S.O. 1990, c H.8 ("HTA"). Under s. 136(1) of the HTA, where there is no stop line or crosswalk, a driver who approaches a stop sign at an intersection is required to stop her vehicle "immediately before entering the intersection". Under s. 136(1)(b), a driver who approaches a stop sign at an

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[2] The full text of all relevant statutory provisions is reproduced in "Appendix A" of these reasons.

intersection "shall yield the right of way to traffic in the intersection or approaching the intersection on another highway so closely that to proceed would constitute an immediate hazard".

D. THE TRIAL JUDGE'S REASONS

[11] In his analysis of the non-repair issue, the trial judge recited the reasonable driver standard and acknowledged that an ordinary driver exercising reasonable care would be aware of s. 136 of the HTA.

[12] However, based on certain evidence from Mr. Young, he concluded that, on the facts of this case, the safe zone (the "green zone") for proceeding into the intersection could be anywhere from six to eight metres from the roadway. A driver stopped possibly as close as 7 metres from the edge of the roadway, but certainly 8.5 metres or more, would be in a danger zone (the "red zone") and not have an adequate sight line. According to the trial judge, absent a proper stop line, a reasonable driver would not know how to judge where to stop:

> Put simply, a person stopped eight metres back would be in the safe green zone but a person stopped 8.5 metres back would be in the dangerous red zone. How would an ordinary driver using reasonable care know how to make this judgment?

[13] After noting that the faded stop line was no longer effective, in contravention of the guidelines set out in the Ontario Traffic Manual, and deprived drivers of an

important guide as to where to stop, the trial judge re-iterated this point at para. 222 of his judgment:

> Without a stop line, drivers had to exercise their judgment as to where to stop safely. An ordinary reasonable driver stopping eight metres back from the intersection was in the green zone of safety and could proceed into the intersection safely; the same ordinary reasonable driver stopping 8.5 metres back from the intersection was in the red zone of dangerousness and could not proceed into the intersection safely.

[14] Based on the evidence of Mr. Young, the trial judge also noted that the Ontario Traffic Manual did not provide clear guidance on where drivers should stop in the absence of a stop line or crosswalk (the manual Mr. Young was actually referring to was the Ministry of Transportation Driver's Handbook). The text of the Manual states that the driver is to stop at the edge of the intersection while the accompanying diagram shows drivers stopped at stop signs just back from the intersection.

[15] The trial judge therefore concluded that the City was negligent in failing to paint and maintain the stop line.

E. DISCUSSION

[16] The City argues that the trial judge erred in applying the ordinary reasonable driver standard. The City contends that although the trial judge recognized that an ordinary reasonable driver would be aware of s. 136 of the HTA, he proceeded

with his analysis on the erroneous premise that an ordinary reasonable driver would not comply with that section.

[17] We do not accept this argument. As set out in *Fordham*, the ordinary reasonable driver standard is that of ordinary drivers exercising reasonable care who nevertheless sometimes make mistakes.

[18] Nonetheless, in our view, the trial judge erred in applying the ordinary reasonable driver standard. Mr. Young's red zone and green zone evidence was focused on sightlines for the intersection for northbound traffic. However, the question in this case was not whether an ordinary reasonable driver could be expected to know the exact length of the safe stopping distance in relation to northbound traffic (i.e., that if they stopped eight meters back from the intersection they would have adequate sightlines for northbound, traffic but if they stopped 8.5 meters back they would not). Rather, the question was whether, in the absence of a stop line, the intersection posed an unreasonable risk of harm for ordinary drivers exercising reasonable care who sometimes make mistakes.

[19] In our view, the trial judge erred by ignoring the fact that although drivers stopped at (or near) the stop sign would have had a 150-metre view of northbound traffic, their view of southbound traffic would be completely obscured by a house at the northeast corner of the intersection. The only clear evidence concerning southbound traffic was that, at the stop sign (where the trial judge found Mr. Ellis stopped), the sightline for southbound traffic was totally obscured by a house at

the northeast corner of the intersection – whereas, at the faded stop line, the southbound sightline was completely clear. There was no evidence at trial concerning what, if any, sightline of southbound traffic was available at, for example, the northeastern corner of the green zone. Ordinary reasonable drivers would not stop their cars in a location where their view of oncoming traffic from one direction would be completely obscured and then proceed into the intersection without stopping again. They would know to come closer to the intersection before stopping initially or before stopping again, in order to have a clear view of traffic from both directions.

[20] In *Kennerley v. Norfolk (County)* (2005), 16 M.P.L.R. (4th) 286 (Ont. S.C.), Killeen J. held, at para. 14, that it was an "act of folly" for a driver to stop 11.4 meters before an intersection without a stop line and proceed into that intersection without looking again.

[21] Similarly, there can be no doubt that drivers who stop in a position where their view of one line of oncoming traffic is completely obscured – and do not stop again before entering the intersection – fall well below the standard of an ordinary reasonable driver and are negligent. They are not simply drivers exercising reasonable care who have made a mistake.

[22] The only clear evidence in this case was that to gain a clear sightline of southbound traffic, drivers had to pull up to the vicinity of the faded stop line.

[23] Contrary to the reasoning of the trial judge, the obligation of reasonable drivers was not to determine whether they should stop 8 or 8.5 meters back from the intersection, so they would have an adequate sightline of northbound traffic. Rather – and particularly considered in the context of the obligation under s. 136 of the HTA to stop *immediately* before entering the intersection – it was to stop at a point close enough to the intersection so they would at least have sightlines in both directions. Drivers who fail to comply with the rules of the road established under the HTA and who also act in a manner that is contrary to common sense cannot meet the ordinary reasonable driver standard. The trial judge erred in failing to recognize that and in failing to recognize that the evidence in this case did not fully address the sightlines for southbound traffic – a necessary component to applying the ordinary reasonable driver standard on the facts of this case.

[24] The evidence before the trial judge did not support the conclusion that the intersection at issue posed an unreasonable risk of harm to ordinary reasonable drivers. As we have said, even if they did not stop immediately before entering the intersections as required by the HTA, such drivers would bring their vehicles to a stop, or stop again, within a zone in which they had sightlines in both directions.

[25] At the conclusion of the appeal hearing, counsel informed us that a case involving an ostensibly similar non-repair issue, Smith v. Safranyos, 2018 ONCA 760, had recently been heard by this court. No request to have the cases heard together had been made. The panels have now independently rejected the City's

argument that a city could not be liable for non-repair for failing to paint or maintain a stop line where a driver failed to comply with s. 136 of the HTA. The decisions in these cases are otherwise dependent on the unique facts of each case and the findings in the courts below.

[26] In the circumstances, the appeal is allowed, the trial judge's finding that the City failed to keep the roadway in a reasonable state of repair is set aside and the action as against the City is dismissed. Costs of the appeal are to the appellant in the amount of $15,000.

J.A.

J.A.

Appendix A

Municipal Act, S.O. 2001, c. 25

Maintenance

44(1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge. 2001, c. 25, s. 44 (1).

Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the Negligence Act, liable for all damages any person sustains because of the default. 2001, c. 25, s. 44 (2).

Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met. 2001, c. 25, s. 44 (3)

Regulations

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them. 2001, c. 25, s. 44 (4).

General or specific

(5) The minimum standards may be general or specific in their application. 2001, c. 25, s. 44 (5).

Adoption by reference

(6) A regulation made under subsection (4) may adopt by reference, in whole or in part, with such changes as the Minister of Transportation considers desirable, any code, standard or guideline, as it reads at the time the regulation is made or as it is amended from time to time, whether before or after the regulation is made. 2001, c. 25, s. 44 (6).

(7) Repealed: 2002, c. 24, Sched. B, s. 25.

Untravelled portions of highway

(8) No action shall be brought against a municipality for damages caused by,

(a) the presence, absence or insufficiency of any wall, fence, rail or barrier along or on any highway; or

(b) any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or on any untravelled portion of a highway, whether or not an obstruction is created due to the construction, siting or arrangement. 2001, c. 25, s. 44 (8).

Sidewalks

(9) Except in case of gross negligence, a municipality is not liable for a personal injury caused by snow or ice on a sidewalk. 2001, c. 25, s. 44 (9).

Notice

(10) No action shall be brought for the recovery of damages under subsection (2) unless, within 10 days after the occurrence of the injury, written notice of the claim and of the injury complained of, including the date, time and location of the occurrence, has been served upon or sent by registered mail to,

(a) the clerk of the municipality; or

(b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities. 2001, c. 25, s. 44 (10); 2017, c. 10, Sched. 1, s. 4.

Exception

(11) Failure to give notice is not a bar to the action in the case of the death of the injured person as a result of the injury. 2001, c. 25, s. 44 (11).

Highway Traffic Act, R.S.O. 1990, c H.8

136 (1) Every driver or street car operator approaching a stop sign at an intersection,

(a) shall stop his or her vehicle or street car at a marked stop line or, if none, then immediately before entering the nearest crosswalk or, if none, then immediately before entering the intersection; and

(b) shall yield the right of way to traffic in the intersection or approaching the intersection on another highway so closely that to proceed would constitute an immediate hazard and, having so yielded the right of way, may proceed.