Case Briefs – A Finding of Non-Repair Results in Municipal Liability

Both of the following cases have very similar sets of facts and involve section 44 of the *Municipal Act*. This section creates a duty for municipalities to maintain their roads in a reasonable state of repair. If a municipality does not fulfil this obligation and injuries result, the municipality will be found liable for those injuries.

Further similarities in the cases include:

1. The absence of stop lines
2. Sightlines
3. Ontario Traffic Manual (OTM) is discussed
4. References to the four-part test established in *Fordham v. Dutton-Dunwich* for assessing a municipality's statutory duty of repair:
   a. **Non-repair**: The plaintiff must prove on a balance of probabilities (more likely than not) that the municipality failed to keep the road in a reasonable state of repair.
   b. **Causation**: The plaintiff must prove the non-repair caused the accident.
   c. **Statutory Defences**: Once non-repair has been established, the municipality can avail itself of three defences found in the *Municipal Act*:
      i. It did not know about the state of repair.
      ii. It took reasonable steps to prevent the default.
      iii. Minimum standards applied to the highway and those standards have been met.
   d. **Contributory Negligence**: The municipality can demonstrate that the plaintiff contributed to their own injuries.
5. Judge considered *Deering v. Scugog* - the applicable legal test is: "was the road at the material time sufficiently in repair that those users of the road, exercising ordinary or reasonable care, could use it in safety?". Although, "a municipality's duty of reasonable repair does not extend to making roads safe for negligent drivers."

In *Chiocchio v. Ellis & City of Hamilton* the City's actions were found to be reasonable where in *Smith v. Safranyos, McHugh & City of Hamilton*, they were not. Leave to appeal to the Supreme Court of Canada has been sought in both cases.

Smith v. Safranyos, McHugh & City of Hamilton

The Defendant Safranyos was driving her vehicle carrying four children as passengers when she failed to yield the right-of-way at an intersection where she had a stop sign. Defendant McHugh "t-boned" Safranyos' vehicle causing injury to the Smith children. The Smith family brought this claim alleging that non-repair of the intersection by the City contributed to the injuries.

Evidence was given that according to the OTM guideline for this intersection, a warning sign should have been located 335 metres from the intersection. The warning sign was 125 metres from the intersection. The stop sign was set 10 metres back from the intersection and the stop line that had previously been there had been removed and not repainted. The City had adopted an "as required" stop line policy.

The City was found to have contributed to the collision by not repainting the stop line and because the sightline was not appropriate.

The Superior Court Judge apportioned liability as 50% to McHugh, 25% to Safranyos and 25% to the City.

Both the City and McHugh appealed. The case was dismissed against McHugh but upheld against the City. The Appeal Judge found that the Trial Judge was entitled to make a finding of non-repair based on the solid stop line evidence and less solid sightline evidence.

The Appeal Judge stated that there was no question Safranyos was a negligent driver and contravened the *Highway Traffic Act* (HTA). He decided, however, that the fact that Safranyos was negligent was not a bar to a non-repair finding because the Trial Judge's finding of non-repair was based on a reasonable

driver and not a negligent driver. He indicated that Safranyos' negligence would only affect the apportionment of liability.

Notice of leave to appeal to the Supreme Court was filed on November 16, 2018.

Chiocchio v. Ellis & City of Hamilton

The Plaintiff was the passenger in a vehicle that was being driven by his girlfriend when their vehicle approached an intersection. The Defendant Ellis was stopped at a stop sign but then proceeded into the intersection colliding with the Plaintiff's vehicle. The Plaintiff was rendered quadriplegic as a result of the accident.

The Plaintiff commenced a claim against Ellis. The City of Hamilton was brought into the action due to allegations that the City failed to keep the roads in a reasonable state of repair.

The Superior Court Judge found the City and the Defendant Ellis each 50% liable. She decided that the absence of stop lines at the intersection constituted a hazard that should have been rectified by the City and caused the road to be in a state of disrepair.

The Court of Appeal dismissed the case against the City. The Judge relied heavily on *Fordham v. Dutton-Dunwich* when he reinforced that a municipality's duty of highway repair does not extend to negligent drivers. The Judge also referred to the HTA where drivers are obligated to stop before entering an intersection regardless of the presence of a stop line. Although Ellis had stopped once at the stop sign, the Judge decided that Ellis had been negligent in not stopping a second time to ensure he had an adequate sightline to determine if it was safe to enter the intersection. 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.

Notice of leave to appeal to the Supreme Court was filed on December 14, 2018.

Takeaways

The fact that there are negligent drivers does not decrease the municipality's responsibility to keep roads in repair.

When determining whether a road is in repair, factors considered include:

1. Number of accidents.
2. Compliance with the Municipality's own standards and policies.
3. Although OTM is a guideline and not mandatory, is there justification for deviation?
4. The absence of a stop line may constitute non-repair.
5. Was the road at the material time sufficiently in repair that those users of the road, exercising ordinary or reasonable care, could use it in safety?
6. Did road conditions that would imperil ordinary drivers constitute a "but for" cause of the accident? (This can be considered even though the driver in the case at hand was negligent.)
7. Were sightlines obstructed to the point that they constituted non-repair?
