COURT OF APPEAL FOR ONTARIO

CITATION: Fordham v. Dutton-Dunwich (Municipality), 2014 ONCA 891
DATE: 20141211
DOCKET: C56404

Laskin, Rouleau and Lauwers JJ.A.

BETWEEN

Andrew James Fordham

Plaintiff (Respondent)

and

The Corporation of the Municipality of Dutton-Dunwich

Defendant (Appellant)

T.R. Shillington and Jonathan de Vries, for the appellant

Jim Virtue and Jim Mays, for the respondent

Heard: April 30, 2014

On appeal from the judgment of Justice Johanne N. Morissette of the Superior Court of Justice, dated November 27, 2012, reported at 2012 ONSC 6739.

Laskin J.A.:

A. OVERVIEW

[1] This case is about whether a municipality met its statutory duty to keep one of its roads in a reasonable state of repair. By any measure, it is a sad case.

[2] On a January night in 2007, 16-year-old Andrew Fordham drove from one friend's house to another. He took a route through Dutton-Dunwich on rural roads

that were unfamiliar to him. He came to an intersection with a stop sign. As he saw no approaching cars, he ignored the stop sign and drove through the intersection at or near the speed limit of 80 km per hour.

[3] Unfortunately the road Fordham was driving on curved to his right just after the intersection. In trying to navigate the curve, he lost control of his car and crashed into a concrete bridge abutting the road. He suffered brain damage and has no memory of the crash.

[4] Fordham sued the municipality of Dutton-Dunwich for non-repair of the road. He claimed Dutton-Dunwich had breached its statutory duty because it had failed to post a checkerboard sign warning of the change in the road's alignment.

[5] The trial judge agreed. She held that "[c]learly, it is a local practice in this rural area for drivers to go through stop signs if they consider it safe", and "[o]rdinary rural drivers do not always stop at stop signs and the defendant knew that." In her opinion, the change in the road's alignment was a "hidden hazard". Thus, she found "that the circumstances of this intersection require more than a stop sign to give ordinary 'rural' motorists reasonable notice of [a] potentially catastrophic hazard ahead." But the trial judge also found Fordham negligent because he had failed to stop at the stop sign. She concluded that both the plaintiff's failure to stop and the defendant's failure to install a warning sign had

caused the crash. She apportioned liability for Fordham's damages equally: 50 per cent to the plaintiff and 50 per cent to the defendant.

[6] Dutton-Dunwich appeals. The principal question on the appeal is this: Did the trial judge misapply the test for assessing a municipality's statutory duty of repair? I conclude she did, and therefore the judgment against the municipality cannot stand.

[7] A municipality's duty of repair is limited to ensuring that its roads can be driven safely by ordinary drivers exercising reasonable care. A municipality has no duty to keep its roads safe for those who drive negligently. Running a stop sign at 80 km per hour is negligent driving. The undisputed evidence is that the road Fordham was driving on posed no hazard to a driver who stopped at the stop sign, or even to one who slowed to 50 km per hour at the intersection.

[8] The trial judge's finding that "[o]rdinary rural drivers do not always stop at stop signs" has some modest support in the evidence, in that some rural drivers will not always come to a full stop at a stop sign. But there is no credible evidence that ordinary rural drivers go through stop signs at or near the speed limit. More important, the trial judge's finding is legally irrelevant. There cannot be one standard of reasonable driving for "rural drivers" and another for "city drivers". There is but one standard of reasonable driving. That standard requires

drivers to obey traffic signs. Thus Dutton-Dunwich had no duty to install an additional sign on its road.

[9] I would allow Dutton-Dunwich's appeal, set aside the judgment at trial and dismiss the action against it.

B. ADDITIONAL FACTUAL BACKGROUND

(a) Andrew Fordham

[10] The accident occurred on January 20, 2007. About three months before the accident, Fordham had obtained his G2 driver's licence.[1] However, he had driven more than most 16-year-olds. His father sponsored a car at the Delaware Speedway and Fordham had been racing cars at the track since the summer of 2005. The trial judge found "that Andrew had more experience operating a motor vehicle than an average 16-year-old with a G2 licence."

(b) The road alignment

[11] The accident occurred in the municipality of Dutton-Dunwich on Willey Road just south of where it intersects with Erin Line. Dutton-Dunwich is located in Elgin County in southwestern Ontario. Willey Road is a gravel road in the rural part of the county and typically has little traffic.

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[1] Ontario has a graduated licensing system. To get a G2 licence, a driver has to finish two learning levels.

[12] At the time of the accident, stop signs controlled northbound and southbound traffic on Willey Road at the intersection with Erin Line. The municipality had recently replaced yield signs with stop signs because it had received complaints that some drivers did not properly yield the right-of-way at intersections controlled by yield signs.

[13] Willey Road has a small S curve beginning just north of the intersection with Erin Line and continuing through it. To the south of the intersection, the curve deviates about nine metres from a straight line. In the evidence, this deviation was characterized as an "offset". Along the offset, a concrete bridge abuts the road. When the accident occurred, the intersection had no warning sign alerting drivers to the offset.

[14] At Appendix A to these reasons, I have included a sketch depicting the alignment of Willey Road at the intersection with Erin Line.

(c) The accident

[15] The accident occurred sometime before 9:00 p.m. That evening, Fordham had planned to meet up with some friends and then stay overnight with one of his friends, Dustin Drouillard. He left his own home around 6:00 p.m. and first drove to the house of Cassandra Tomczyk in Dutton-Dunwich. He was driving his father's 1999 Pontiac Grand Am car. He stayed at Tomczyk's house for about ten

minutes. Then he and a friend left around 8:00 p.m. for Drouillard's house. The distance between the two houses is about 30 km.

[16] Fordham drove, and his friend sat in the front passenger seat. During the trip, Fordham drank about two beers. Later blood alcohol testing showed his readings were below the legal limit.[2] Fordham drove southbound on Willey Road, a road he had never driven on before. The weather that evening was clear. And as Fordham approached the Erin Line intersection, the stop sign was clearly visible. However, no cars were approaching the intersection from either direction, so Fordham drove straight through it without stopping. An accident reconstruction expert estimated he was driving at or near the speed limit of 80 km per hour.

[17] Fordham apparently saw the offset too late to navigate it safely. He turned the car sharply to the right, lost control and crashed into the concrete bridge abutting the road.

[18] At the beginning of the trial, Fordham admitted he was negligent. He agreed that if he had stopped at the intersection, the accident would not have happened.

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[2] Although his blood alcohol readings were below the legal limit for fully licenced drivers, G2 licence holders must have a blood alcohol concentration of zero when driving.

(d) The expert evidence

[19] The plaintiff called two experts: James Hrycay, a road design and maintenance engineer, specializing in accident reconstruction; and Alison Smiley, a professor at the University of Toronto in the Department of Mechanical and Industrial Engineering, specializing in the relationship between highway safety and human factors, including reaction times. The trial judge accepted their evidence.[3] Both Hrycay and Smiley testified that the signage at the intersection was inadequate because it did not warn of the offset. But both admitted that their opinions assumed drivers would not obey the stop sign. Indeed Hrycay admitted that additional signage was not needed for drivers who stopped at the stop sign.

[20] Smiley testified that drivers who approach the intersection at 80 km per hour and ignore the stop sign would not have enough time to perceive and react to the offset without a warning sign to alert them. But she acknowledged that drivers who stop for the stop sign would have more than enough time to perceive and react safely to the change in the alignment of the road. She also acknowledged that ignoring stop signs was not reasonable driving. She maintained, however, that "we need to design for more than just the reasonable driver who's sober, wearing a seatbelt and obeying all the traffic laws."

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[3] The defendant also called an expert who specialized in road design, traffic control and signage, but the trial judge rejected his evidence.

[21] Hrycay believed roads should be designed for the 95th percentile of drivers: "[W]ithin five per cent of the very worst drivers out there." Like Smiley, Hrycay testified that drivers who stop at the stop sign would have no difficulty in perceiving and navigating the offset. He also testified that drivers who do not obey the stop sign but slow to 50 km per hour or less would still be able to perceive the offset in time to navigate it safely.

(e) The Ontario Traffic Manual

[22] The Ontario Traffic Manual (the "Manual") was filed in evidence. The Manual includes guidelines for signage. In the warning signs section, it discusses the use of checkerboard signs.

[23] Under the heading "Purpose and Background", the Manual states:

> The purpose of the CHECKERBOARD sign ... is to warn vehicular traffic of the termination, or abrupt change in direction, of a segment of road.

[24] Under the heading "Guidelines for Use", the Manual states:

> The CHECKERBOARD sign (one direction) and the CHECKERBOARD sign (both directions) should be used only for a sharp change in road alignment.

C. ANALYSIS

(a) Statutory cause of action

[25] Fordham sued under s. 44 of the *Municipal Act, 2001*,[4] which provides a cause of action against a municipality that fails to keep its highways (including roads) and bridges in a reasonable state of repair. The cause of action is in subsections (1) and (2); defences for the municipality are in subsection (3):

> 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.
>
> (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.
>
> (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.
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> ...

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[4] S.O. 2001, c. 25

[26] Case law has established a four-step test for analyzing this statutory cause of action against a municipality.[5]

1. Non-repair: The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.

2. Causation: The plaintiff must prove the "non-repair" caused the accident.

3. Statutory Defences: Proof of "non-repair" and causation establish a *prima facie* case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.

4. Contributory Negligence: A municipality that cannot establish any of the three defences in s. 44(3) will be found liable. The municipality can, however, show the plaintiff's driving caused or contributed to the plaintiff's injuries.

This appeal turns on the first step: was Willey Road in a state of non-repair because Dutton-Dunwich failed to put up a sign warning of the offset?

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[5] I have taken the test from Dutton-Dunwich's factum, where it is accurately summarized. See e.g. *Morsi v. Fermar Paving Ltd.*, 2011 ONCA 577, 86 M.P.L.R. (4th) 30, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 487; and *Deering v. Scugog (Township)*, 2010 ONSC 5502, 3 M.V.R. (6th) 33, aff'd 2012 ONCA 386, 33 M.V.R. (6th) 1, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 351.

(b) The municipality's standard of care and the reasonable driver

[27] More precisely, this appeal turns on the standard of care a municipality must meet in fulfilling its duty of reasonable repair, and the application of that standard to the facts. A municipality's standard of care has been thoroughly canvassed in two cases: the Supreme Court of Canada's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 35, a case perhaps better known for its discussion of the standard of appellate review; and Howden J.'s decision in *Deering v. Scugog (Township)*, 2010 ONSC 5502, 3 M.V.R. (6th) 33, which this court affirmed in a brief endorsement: 2012 ONCA 386, 33 M.V.R. (6th) 1, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 351.

[28] In brief, a municipality has a duty to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. In other words, a municipality's standard of care is measured by the "ordinary reasonable driver". Ordinary reasonable drivers are not perfect drivers; they make mistakes. As Howden J. wrote in *Deering*, at para. 154:

> In conclusion, I accept what have become the submissions of all counsel that road authorities have a duty to ordinary motorists to keep their roads in reasonable repair, including the type and location of the road. The standard of care uses as the measure of reasonable conduct the ordinary reasonable driver and the duty to repair arises wherever an unreasonable risk of harm exists on the roadway for which obvious cues on or near the road are not present and no warning is provided, subject to the defences of no knowledge and

> reasonable steps to prevent and minimum standards compliance. The ordinary motorist includes those of average range of driving ability – not simply the perfect, the prescient, or the especially perceptive driver, or one with exceptionally fast reflexes, but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes.

[29] But – and this is the important point for this appeal – a municipality's duty of reasonable repair does not extend to making its roads safer for negligent drivers.[6] In *Deering*, Howden J. made this point succinctly, at para. 142: "The standard of care of road authorities rests on the notion of the ordinary motorist driving without negligence".

[30] And again, at para. 155:

> It is not the law in Canada that the duty of road authorities goes beyond the duty to keep their roads in reasonable repair for the ordinary driver exercising reasonable care, to include drivers who, for instance, do not pay attention, drive at excessive speeds, drive too close to the vehicle in front and who are otherwise negligent.

[31] A municipality's duty of repair includes erecting and maintaining proper signs: see *The Queen v. Jennings*, [1966] S.C.R. 532. And, where hazards are hidden or "not readily apparent to users of the road",[7] a municipality may have a

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[6] In *Rider v. Rider* (1972), [1973] Q.B. 505 (C.A.), the English Court of Appeal suggested that a municipality's duty of repair extended to drivers whose conduct fell below the standard of reasonable care. In *Deering*, however, Howden J. accurately stated, at para. 140: "The notion from *Rider* that the standard for road authorities is to be measured by drivers whose conduct falls below the standard of reasonable or ordinary care is not the law in Canada."

[7] *Housen*, at para. 42.

duty to install warning signs. A municipality's duty to install signs, however, is simply an application of the general standard of care. Signs are required only if without them, an ordinary driver exercising reasonable care would be exposed to an unreasonable risk of harm. Thus, the mere presence of a hazard does not require a municipality to put up a warning sign; the hazard must be one that puts reasonable drivers at risk. See e.g. *Greenhalgh v. Douro-Dummer (Township)*, [2009] O.J. No. 5438 (Sup. Ct. J.), at para. 17; aff'd 2012 ONCA 299.

(c) Positions of the parties

[32] On the question whether Dutton-Dunwich met its duty of repair, the municipality makes two related submissions. First, the trial judge failed to apply the reasonable driver standard to assess whether Dutton-Dunwich met its duty. And, second, she instead created a new standard of the ordinary rural motorist who disregards stop signs – a standard Dutton-Dunwich contends neither the law nor the evidence in this case supports.

[33] In response, Fordham submits that the trial judge's decision should be upheld: first because Dutton-Dunwich's failure to put up a sign warning of the offset was contrary to the Manual's guidelines; and second because Dutton-Dunwich knew rural drivers routinely go through stop signs. The decision to apportion liability equally was the trial judge's to make, and no basis has been shown to interfere with her decision.

[34] For reasons I discuss, I agree with Dutton-Dunwich's submissions. And I do not accept that either the Manual or the municipality's "knowledge" that rural drivers do not stop at stop signs supports the trial judge's decision to impose liability on the municipality.

(d) Discussion

(i) The trial judge did not apply the reasonable driver standard

[35] The trial judge correctly stated the municipality's duty of repair and the standard of care. But then she misapplied the standard. She held that the municipality should have put up a sign warning of the "hidden and unknown change in the road alignment" – that the offset was a "hidden hazard" calling for a warning sign for drivers to slow down.

[36] The trial judge's holding was an error because the offset posed no hazard, no risk at all to the reasonable driver – the ordinary driver exercising reasonable care. It posed a hazard only to drivers such as Fordham who ignored the stop sign. Drivers who run a stop sign at 80 km per hour are not driving reasonably; they are driving negligently. The following two decisive facts were uncontested:

- On the night of the accident, the stop sign was clearly visible from hundreds of metres away.

- A driver who stopped at the stop sign – even indeed one who slowed to 50 km per hour – would have adequate time to perceive the offset and navigate it safely.

The trial judge's finding of liability would be supportable only if the offset posed a hazard to the reasonable driver. But that was not the evidence.

[37] The expert opinions of Hrycay and Smiley that Dutton-Dunwich should have installed a warning sign assumed that the municipality ought to maintain its roads for "more than just the reasonable driver". That assumption is not the law of Canada. Municipalities owe no duty to warn of hazards that present an unreasonable risk of harm only to drivers who do not drive with reasonable care. And no one can seriously question that drivers who ignore important traffic signals, such as stop signs, are not driving with reasonable care. Our *Highway Traffic Act*[8] requires all drivers to obey posted road signs and come to a complete stop at a stop sign. In *Chaschuk (Hurlbert) v. Lebel* (1981), 12 M.V.R. 228 (Ont. C.A.), at p. 232, this court held that to miss, even momentarily, a visible traffic signal is negligent.

[38] The present case may be contrasted with *Housen*. In *Housen*, the majority of the Supreme Court affirmed the trial judge's ruling that a municipality had breached its duty of repair because it had not put up a sign to warn drivers to

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[8] R.S.O. 1990, c. H.8, ss. 136(1), 182(2).

reduce their speed as they approached a sharp curve in the road. The severity of the curve was not readily apparent and thus was a "hidden hazard", even for reasonable drivers who would have continued driving at the speed limit, unaware that they had to slow down. In the case before us, the municipality did put up a sign, not merely to slow down, but to stop altogether.

[39] The distinction between the two cases is obvious. In *Housen*, without a warning sign, the curve in the road posed an unreasonable risk of harm to ordinary drivers exercising reasonable care. In the present case, with a stop sign in place, the offset was not a "hidden hazard"; it posed no risk of harm to reasonable drivers. Because it did not do so, the trial judge was wrong to find that Dutton-Dunwich had a duty to put up an additional warning sign.

[40] Perhaps, however, to avoid this inevitable conclusion, the trial judge created a new category of driver: the ordinary rural driver who does not always stop at stop signs.

(ii) "Ordinary rural drivers do not always stop at stop signs"

[41] The trial judge found that "[c]learly, it is a local practice in this rural area for drivers to go through stop signs if they consider it safe." Later in her reasons, she repeated this finding: "Ordinary rural drivers do not always stop at stop signs and the defendant knew that." Relying on this finding, the trial judge concluded that "the circumstances of this intersection require more than a stop sign to give

ordinary 'rural' motorists reasonable notice of [a] potentially catastrophic hazard ahead."

[42] The trial judge's new and general category of driver – the ordinary rural driver who does not always stop at stop signs – was not supported by the evidence at trial, and is not supportable in law.

[43] First, the evidence. In finding a local practice "in this rural area" for drivers to go through stop signs and the municipality's knowledge that they did, the trial judge appeared to rely on the following evidence:

- Two of Fordham's teenaged friends testified that they and other drivers would go through stop signs if no one was around.
- Dutton-Dunwich's road engineer, Michael Hull, agreed that in rural areas drivers do not always obey stop signs or yield signs.
- Smiley testified that in rural areas, drivers often run through stop signs if they can see no other cars are approaching.

[44] At best, the evidence suggests that some drivers in rural areas disobey stop signs. Some may not come to a full stop; some may come to a "rolling stop", while driving at a slow rate of speed; and perhaps some may, as the trial judge effectively found, go through the intersection at or near the speed limit, without slowing down at all. This generic evidence, however, does not support the trial judge's finding of a local practice – a practice in Dutton-Dunwich – for ordinary

rural drivers to go through stop signs, or her finding that the municipality knew about this practice.

[45] Moreover, liability for non-repair must be based on the condition of the road in question. Apart from the evidence of one of Fordham's teenaged friends, no evidence was led at trial to suggest that drivers ran the stop sign at the Willey Road–Erin Line intersection or that they did so at a high rate of speed, or that accidents had occurred at that intersection, or even that the municipality itself had experienced problems with drivers running stop signs. Indeed, evidence of that kind could hardly have been available because most of Dutton-Dunwich's intersections – including the Willey Road–Erin Line intersection – were controlled by yield signs until a month or two before the accident, when they were replaced by stop signs.

[46] I conclude that the trial judge's finding of a local practice of running stop signs, which Dutton-Dunwich knew about, was an unreasonable finding.

[47] Second, and more important, the law. Even if the evidence did support the trial judge's finding of a local practice, this finding cannot be used to impose liability on Dutton-Dunwich for two reasons. First, the local practice the trial judge endorsed nonetheless amounts to negligent driving. As Iacobucci J. said in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at p. 473: "[N]o amount of general community compliance will render negligent conduct 'reasonable'".

[48] Second, the trial judge in effect created two categories of drivers: ill-defined ordinary rural drivers who frequently run stop signs, and all other ordinary drivers who habitually obey stop signs. In the trial judge's opinion, a municipality's duty of repair extends to both categories of drivers. This is, as Dutton-Dunwich says in its factum, "an invitation to traffic chaos." It is also not the law in this country.

[49] The *Highway Traffic Act* establishes a uniform set of rules of the road, which applies to all drivers, whether they drive on city roads or rural roads. It could hardly be otherwise. As I said earlier, a municipality's duty to keep its roads, city or rural, in a reasonable state of repair extends only to making its roads safe for reasonable drivers, not negligent ones. If a road is safe for a reasonable driver – as was the Willey Road–Erin Line intersection – then a municipality has no duty to put up additional signs or take other precautions to prevent accidents that will occur only if a driver is negligent.

[50] If this is the law on a municipality's standard of care, the trial judge's reasons contain an irreconcilable conflict. The trial judge could impose liability for non-repair only by finding that in rural areas driving through stop signs was reasonable driving. Yet, when she came to apportion liability, she found that in running the stop sign, Fordham was negligent. These two findings cannot be reconciled. Running stop signs, even on rural roads, is negligent driving. A

municipality has no duty to install warning signs that are unnecessary for reasonable drivers.

(iii) The Ontario Traffic Manual

[51] As I have said, the Manual recommends a checkerboard warning sign for "a sharp change in road alignment". The plaintiff contends that the offset at the Willey Road–Erin Line intersection was a "sharp change" and required a warning sign. Hrycay testified that the offset was a "substantial change in alignment", and Smiley testified that "the road turn[ed] sharply". As the trial judge accepted their evidence, she found, implicitly if not expressly, a "sharp change" in the alignment of Willey Road.

[52] Did Dutton-Dunwich thus have a duty to put up a checkerboard warning sign? I do not think that it did. In *Deering*, at para. 243, Howden J. suggested that a court ought to have good reason for departing from the Manual. However, he distinguished guidelines that say "must" from those that say "should":

> But in my view, where a road manual is one respected within the road engineering community as the [Ontario Traffic Manual] is, and the guideline in question uses the word "must", the court should approach it in the sense that there should be some compelling reason not to follow it in the circumstances and context within which the transportation engineer is working. This approach would provide some distinction from a guideline reading "should".

[53] For checkerboard warning signs, the Manual uses the word "should", not "must". Moreover as Lauwers J. said in *Greenhalgh*, at paras. 66-68, the guidelines in a traffic manual are just that, guidelines. They do not establish a legally enforceable standard of care for civil liability. The overriding question is always: Does the condition of the road pose an unreasonable risk of harm to reasonable drivers? In this case, the answer to this question is no. Thus, I would not give effect to the plaintiff's contention on the Manual.

D. CONCLUSION

[54] I would allow Dutton-Dunwich's appeal, set aside the judgment at trial and dismiss the plaintiff's action. Dutton-Dunwich is entitled to its costs on this appeal in the agreed amount of $35,000, inclusive of disbursements and applicable taxes.

Released: DEC 1 1 2014

I agree Paul Rouleau J.A.

I agree K. Lauwers J.A.

APPENDIX A - Wiley Road Sketch