



Claim Case Study: *Wasylyk v. Simcoe (County)*, 2023 ONCA 781

Background

While travelling on one of the busiest roadways in Simcoe County during a winter snow event, the Plaintiff lost control of their vehicle. The Plaintiff's vehicle crossed over the centerline and collided with oncoming traffic. As a result, the Plaintiff was catastrophically injured.

On the day of the accident, Simcoe County was dealing with heavy snow squalls and drifting snow. The Plaintiff claimed that Simcoe County failed to take reasonable steps to remove snow and ice which accumulated on the relevant portion of the roadway during the late afternoon. It was claimed that this accumulation of snow and ice on the roadway caused the Plaintiff to lose control of their vehicle. The Plaintiff submitted that Simcoe County had therefore failed to keep the relevant portion of the roadway in a state of repair.

Issues

The Trial Judge was presented with the following issues to analyze:

1. What was the condition of the relevant portion of the roadway?
2. Was the relevant portion of the roadway in a condition of non-repair?
3. If the relevant portion of the roadway was found to be in a condition of non-repair, did the condition of non-repair cause the Plaintiff's injuries?

4. Did Simcoe County take reasonable steps to prevent or correct the state of non-repair?
5. Was the Plaintiff contributorily negligent?

Legislation

The Plaintiff argued that the relevant portion of the roadway was in a state of disrepair.

Pursuant to section 44(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25, "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 character and location of the highway or bridge."

Pursuant to *O. Reg. 239/02: Minimum Maintenance Standards for Municipal Highways (MMS)* (under *Municipal Act, 2001*, S.O. 2001, c. 25), section 5.1(1) states that "if a municipality declares a significant weather event relating to ice, the standard for treating icy roadways until the declaration of the end of the significant weather event is, (a) to monitor the weather in accordance with section 3.1; and (b) if deemed practicable by the municipality, to deploy resources to treat icy roadways, starting from the time that the municipality deems appropriate to do so."

Section 5.1(2) of the *MMS* states that, "if the municipality complies with subsection (1), all roadways within the municipality are deemed to be in a state of repair with respect to any ice which forms or may be present until the

applicable time in Table 2 to section 5 expires after the declaration of the end of the significance weather event by the municipality”.

Table 2 of the *MMS (Treatment of Icy Roadways)* confirms a time of 3 hours for a Class 1 Highway.

Simcoe County argued that they had taken all reasonable steps to maintain the roadway, and that the Plaintiff was partly responsible for the accident.

Specifically, Simcoe County relied on the following defences as set out in section 44 (3) of the *Municipal Act, 2001, S.O. 2001, c. 25*:

44 (3) “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 or could not have 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.

Analysis

The Trial Judge found that the relevant portion of the roadway was in a state of non-repair, meaning it was established that the road presented conditions which posed an unreasonable risk of harm for ordinary drivers exercising reasonable care.

The Trial Judge did not find the defences set out in section 44(3) of the *Municipal Act* to benefit Simcoe County. When considering section 44(3)(a), the Trial Judge found that Simcoe County had actual knowledge of the conditions of the relevant portion of the roadway through its employees. This knowledge came from the fact that the area had experienced severe winter weather for approximately two days prior to the accident, and the patrols that day had identified drifting snow and ice patches several hours prior to the accident. The Trial Judge also noted that Simcoe County knew this was one of the busiest roads in the County and had high traffic volume.

Finally, pursuant to section 44(3)(c), the Trial Judge found that Simcoe County could not establish that they met the minimum standards of treating icy roadways within three-

hours of learning of those conditions. Instead of continuing to maintain the roads on his route as other employee’s did, the employee in charge of maintaining the relevant portion of the road did not complete his second run until after a three-hour break. At this point, Simcoe County had knowledge of the condition of the road and by the time the employee returned during his second run, the relevant portion of the road had been left unattended for approximately four-five hours.

Simcoe County also submitted that the Plaintiff was contributorily negligent for the accident and relied on two facts; the evidence Simcoe County presented was that the Plaintiff was on the wrong side of the road when the accident occurred, and that the Plaintiff swerved onto the wrong side of the road twice, within a ten-second period. The second time the Plaintiff swerved, they collided with the oncoming vehicle. Simcoe County submitted that this was evidence that after the first swerve, the Plaintiff did not adjust the manner of driving.

The Trial Judge did not accept the contributory negligence claim, finding that when the Plaintiff lost control of the vehicle they were not distracted, they were driving under the speed limit, and they were also driving along a straight section of the road. The Trial Judge does make note that the Plaintiff’s vehicle was equipped with all-season tires. The Police Sergeant on scene did identify that the worn tires could be a causal factor in the collision, however, no evidence was led to support that the worn tires contributed to the Plaintiff’s loss of control.

The Trial Judge ultimately found that Simcoe County was liable, and that the relevant portion of the road was in a state of non-repair. Damages in this case amounted to an agreed upon \$16 million dollars.

The Appeal

Simcoe County appealed the Trial Judge decision alleging that the Trial Judge failed to consider material evidence with respect to the finding that the Plaintiff was not contributorily negligent, as well as factual errors arising from the Plaintiff’s expert’s testimony. Two legal errors were also presented by Simcoe County. The County claimed that the Trial Judge failed to apply the proper legal test when considering the state of non-repair, and that the Trial Judge failed to provide an explanation on the finding that the road condition had caused the collision.

Simcoe County argued that the Plaintiff would not fall into the category of an “ordinary non-negligent user of the road”, as there was an absence of any other driver losing control on the relevant portion of the road and the Plaintiff lost control of the vehicle twice. Due to this, Simcoe County claims the Plaintiff was at least in part negligent in causing the accident. However, the Court of Appeal found that the absence of evidence did not mean in fact, that other drivers did not have difficulty on the relevant portion of the road. Furthermore, the Court of Appeal found that there was sufficient evidence from Simcoe County employee’s and emergency responders that the portion of the road was in fact slippery and icy.

The Court of Appeal also specified that the fact the Plaintiff lost control of the vehicle twice could also indicate that the road was in fact slippery and hazardous. This would therefore render the road in a state of non-repair.

The Court of Appeal also found that the Trial Judge gave adequate reasons for causation. The Trial Judge considered factual findings surrounding the Plaintiffs driving manner, including not driving while being distracted, driving on a straight portion of the roadway, and travelling under the speed limit. The Trial Judge also considered the findings that the road was not adequately maintained according to Simcoe County’s procedure, as well as the reporting of the road conditions at the scene of the accident.

When it came to the expert testimony on behalf of the Plaintiff, the Court of Appeal found that the expert’s testimony provided explanation concerning how the road became icy. The Court of Appeal clarified that the Plaintiff was required to prove that the conditions of the road rendered it to be in a state of disrepair and was not required to demonstrate *how* the relevant portion of the road became icy. The Court of Appeal found that the Trial Judge’s findings were not based on a determination of how the road became icy and therefore, it was not relevant to the Trial Judge’s factual findings.

Finally, Simcoe County argued that the Plaintiff was contributorily negligent and was 50% liable for the accident. Simcoe County claimed that the Trial Judge did not consider the evidence surrounding the fact the Plaintiff did not adjust the manner of driving after losing control of the vehicle the first time. This failure was claimed to contribute to the second loss of control, resulting in the accident.

The Court of Appeal found that although the Trial Judge did not specifically reference this fact when considering the contributory negligence claim, does not mean that there was a failure to consider the evidence.

The Court of Appeal found no error in the Trial Judge’s conclusion. The Plaintiff was further awarded costs for the appeal.

Takeaways:

- Municipalities need to establish internal procedures that align with the MMS, however, it is important that municipalities ensure that these procedures are being followed through.
- Municipalities need to ensure that employees have appropriate training and understanding of internal procedures.
- Municipalities should ensure they have an adequate number of operators, especially in heavy weather conditions.
- Ordinary reasonable drivers are not perfect drivers; they make mistakes. (*Fordham v. Dutton-Dunwich (Municipality)*, 2014 ONCA 891).
- The absence of other drivers having difficulty controlling their vehicle on the road does not prove that in fact, they did not have difficulty.