Claim Case Study: MMS Section 10 Morris v. Prince, 2023 (ON SC)

The Plaintiff brought an action against the City for damages due to a motor vehicle incident at a pedestrian crosswalk. The Plaintiff was crossing the pedestrian crosswalk when they were struck by a pick-up truck who was making a left-hand turn.

On the day of the incident a pole that supported a traffic signal and two overhead lights (luminaires), which was ordinarily present at the center median of the pedestrian crosswalk, were missing due to a motor vehicle accident a month prior. At the time the Plaintiff was hit, the sun had set, there was a light rain falling and the pick-up truck's driver side window was tinted.

The driver of the pick-up truck admitted his guilt in breaking the law which required that he execute turns safely.

The Plaintiff claims that the City had a duty to ensure the road was in a state of repair in a timely manner. The Plaintiff also claims that if there was more light at the intersection, it would have allowed the Defendant to detect the Plaintiff in the median in a timely manner.

Issues

The court was presented with the following issues:

- Issue #1: By virtue of the two missing luminaires on the median, did the City fail to maintain the intersection in a state of repair thereby breaching its duty of care owed to users of its roads?
- Issue #2: If the intersection was in a state of disrepair because of the missing luminaires on the median, was the intersection deemed to be in a state of repair by virtue of the Minimum Maintenance Standards provided for in regulations enacted under the *Municipal Act*, 2001?
- Issue #3: Did the state of non-repair of the intersection cause the Plaintiff's injuries?
- Issue #4: Is Guild liable for any portion of the damages for which the City is liable?
- Issue #5: If the City and/or Guild are liable for the losses suffered by the Plaintiff, what is the apportionment of liability between and among the Defendant, the City and/or Guild, as the case may be?

Legislation

Section 44 of the *Municipal Act* sets out a duty of care owed by the municipality. It reads as follows:

"44. (1) The municipality that has the 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:

- It did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
- It took reasonable steps to prevent the default from arising; or

- 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."

The Minimum Maintenance Standards (MMS) for Municipal Highways were enacted as a regulation under the *Municipal Act*, effective November 1, 2002. Section 10 of the Municipal *Maintenance Standards for Municipal Highways, O Reg 239/02* sets out the minimum standards for luminaires (i.e., streetlights). S. 10(1) of the MMS read as follows on December 21, 2015:

"For conventional illumination, if three or more consecutive luminaires on a highway are not functioning, the minimum standard is to repair the luminaires within the time set out in the Table to this section after becoming aware of the fact."

In 2015, clause 10(5)(a) of the MMS noted that for the purposes of subsection (1), luminaires are deemed to be in a state of repair if the number of non-functioning consecutive luminaires does not exceed two.

Effective May 3, 2018, the MMS were amended to read as follows:

"(6) Luminaires are deemed to be in a state of repair,

(a) for the purpose of subsection (2), if the number of non-functioning consecutive luminaires on the same side of a highway does not exceed two…"

Analysis

Pursuant to *Ferguson v. The Corporation of the County of Brant, 2013 ONSC 435* ("Ferguson"), a duty of care is owed by the municipality to the ordinary driver, not the negligent driver. The driver of the pick-up truck is required by law to be an attentive driver, exercising reasonable care.

If the Judge found the driver of the pick-up truck to be an ordinary driver exercising reasonable care, the City would owe a duty of care to replace the missing luminaires within a reasonable time.

Notwithstanding the negligence of the driver, the Plaintiffs submitted that the absence of median lighting created a state of unrepair.

The Judge found that the driver of the pick-up truck was a negligent driver and therefore, the Municipality did not owe a duty of care. Notwithstanding the negligence of the driver of the pick-up truck, the Judge accepted the city's City's submission that "an unlit road does not excuse poor driving", noting that the driver owed a duty to the Plaintiff to exercise reasonable care before executing the turn.

While the Judge agreed with the Plaintiff's proposition that "more light is better", the City is not responsible unless the absence of lighting equates with a "state of non-repair". The Judge found that the crosswalk was lit by multiple sources of illumination, including an overhead luminaire at each end of the crosswalk, the headlights of the stopped traffic, natural atmospheric light, the temporary traffic signal on the median and the headlights of the driver of the pick-up truck.

The Plaintiffs also submitted that the amendments to the MMS in 2018 are a substantive change which the City should not be allowed to rely upon in its position they have met the minimum standard for the repair of luminaires.

Highlighting the changes to the MMS in 2018, the Judge found that the addition of the language "on the same side of the highway" merely expanded on the interpretation of the word "consecutive" in clause 10(5)(a). The Judge found this additional language to be consistent with the definition of "consecutive" as it read in 2015, meaning "following one after the other without interruption".

The Plaintiffs relied on additional non-functioning luminaires located at the west end of the median. However, the Judge found that theses luminaires were not subject of this litigation, that they have not been considered by expert witnesses, and that the "highway" under consideration ran north/south, which was consistent with the direction of the crosswalk for the purposes of determining compliance with the MMS. In this case, there were not more than two consecutive non-functioning luminaires running north/south.

Decision

Ultimately, the Judge found that the low lighting due to the missing luminaires in the crosswalk was an obvious potential hazard to a driver paying attention to their surroundings. The Judge determined that there was sufficient lighting from all other sources to have allowed an ordinary driver to

exercise reasonable care. Therefore, the Judge found the intersection to be in a reasonable state of repair.

The Judge found that the there was not more than two consecutive non-functioning luminaires and therefore, there was no MMS minimum standard of time to repair.

The City was not found liable in this action and the driver of the pick-up truck was responsible for substantial damages awarded to the Plaintiff.

Takeaways

The amendments to the MMS section 10(6) are not a substantive change that affects the rights of the parties and merely expands upon the proper interpretation of the word “consecutive” as read in 2015.

To determine whether non-functioning luminaires are consecutive, it is important to determine the “highway” in question and the direction it runs.

Hire experts to perform investigations and collision reconstruction.

A duty of care is owed by the municipality to an ordinary driver, not to a negligent driver.

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