CITATION: Giuliani v. Halton (Municipality), 2011 ONCA 812
DATE: 20111221
DOCKET: C52734

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., LaForme J.A. and Cunningham A.C.J. (*ad hoc*)

BETWEEN

Patrizia Giuliani and Tina Giuliani

Plaintiffs (Respondents/Appellants by way of cross-appeal)

and

The Regional Municipality of Halton and the Town of Milton

Defendants (Appellants/Respondents by way of cross-appeal)

J. Murray Davison, Q.C. and Charles A. Painter, for the appellants/ respondents by way of cross-appeal

Allan Rouben, for the respondents/appellants by way of cross-appeal

Heard: November 10, 2011

On appeal from the judgment of Justice John C. Murray of the Superior Court of Justice dated August 31, 2010, with reasons reported at 2010 ONSC 4630, 75 M.P.L.R. (4th) 239.

O'Connor A.C.J.O.:

[1] The respondent lost control of her vehicle when the road on which she was travelling was covered with snow and ice. She struck an oncoming car and was seriously hurt. The respondent sued the appellants claiming they failed to keep the road in a condition that was reasonable in the circumstances.

[2] In a judgment dated August 31, 2010, the trial judge found the appellants liable. He found the respondent contributorily negligent. He apportioned liability on a 50/50 basis. The trial judge awarded the respondent $375,000 in damages.

[3] The sole issue on this appeal is whether the trial judge erred in concluding that *Minimum Maintenance Standards for Municipal Highways*, O. Reg. 239/02 does not afford the appellants with a defence. In my view, he did not. I would dismiss the appeal.

[4] The respondent cross-appeals the apportionment of damages. I would dismiss the cross-appeal.

FACTS

[5] The accident underlying the action occurred on April 1, 2003 at approximately 7:00 a.m. on Derry Road in Milton, Ontario. The road is a two-lane, two-way road with a speed limit of 80 kilometres an hour. At the time of the accident, approximately two centimeters of snow had fallen over the previous three hours. The respondent was

travelling on Derry Road when she lost control of her vehicle and collided with another vehicle in the oncoming lane. The respondent was seriously injured in the collision.

[6] The Regional Municipality of Halton entered into an agreement with the Town of Milton in 2001. Pursuant to this agreement, the Town undertook to provide road maintenance services on behalf of the Region on certain roads included in the regional road system but located within the Town's boundaries. Under the terms of this agreement, Derry Road was a Regional road to be maintained by the Town. The Town agreed to indemnify the Region from any claims and damages arising from any negligent act of the Town relating to the performance of maintenance service under the agreement.

[7] In careful reasons, the trial judge made the following findings of fact. They are not challenged on appeal:

a. The weather forecasts from the afternoon of March 31 through the morning of April 1 made it clear that snow would fall in the Halton/Peel area beginning in the early morning hours of April 1.
b. Snow likely began to fall in the Milton area at approximately 4:00 a.m. and roughly two centimeters of snow fell prior to the accident.
c. By the time of the accident, at approximately 7:00 a.m., the road surface on Derry Road was covered with snow and ice and presented a hazard to users of the road. The icy conditions were caused by traffic compacting the snow, not by ice pellets falling on the road.

d. Given the weather forecasts on March 31, the Town had ample time to schedule a person or crew to monitor the weather and road conditions, and to place a road maintenance crew on standby.

e. On the morning of April 1, the Town began salting operations at approximately 7:15 a.m., 15 minutes after the accident occurred.

f. If there had been monitoring of the weather, it is highly likely that operators would have been called in sometime between 3:30 a.m. and 4:00 a.m. on April 1. It would have been apparent to any reasonable person monitoring the roads that salting operations ought to have commenced significantly earlier than they did on the morning of April 1.

g. Proper monitoring of weather forecasts would have enabled an appropriate operational response. A road patrol would have taken steps to ensure that Derry Road was treated with the appropriate materials and equipment in order to make it safe. Salt applied down the center of Derry Road at the beginning of the storm at approximately 4:00 a.m. would have prevented ice build-up and the formation of icy conditions.

h. The time when icy conditions would have been identified is speculative. There was no evidence, however, that the Town would have waited until it identified the icy conditions before dispatching salting equipment.

i. The Region (through the Town) did not take reasonable steps to prevent the default of its obligations to keep Derry Road in a state of repair that was

reasonable in the circumstances. It failed to inspect the roads when it ought to have known that an inspection was necessary to trigger the remedial steps necessary to maintain Derry Road. The failure was not related to the budget.

[8] In summary, the trial judge concluded that the Region did not keep Derry Road in a state of repair that was reasonable in the circumstances and "but for" this failure, the accident and the injuries to the respondent would not have occurred.

[9] He also concluded that the defences provided to a municipality pursuant to the provincial *Minimum Maintenance Standards for Highway Maintenance* did not apply in the circumstances of this case. I will discuss the trial judge's findings in this regard in more detail below.

THE STATUTORY SCHEME

[10] Section 44 of the *Municipal Act,* S.O. 2001, c. 25, sets out the statutory scheme pursuant to which a municipality is required to maintain the highways under its jurisdiction and the consequences for default when damages ensue.

[11] Section 44(1) defines the duty. It reads as follows:

> 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.

While s. 44(1) is mandatory, it incorporates the concept of reasonableness. A municipality is only required to keep the road in a state of repair that is reasonable in the circumstances.

[12] Section 44(2) creates legal liability for default in complying with subsection (1):

> 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. [Emphasis added.]

The important point for the purposes of the present case is that liability attaches to a specific default. Thus, in determining whether a municipality is liable, it is necessary to identify the default or defaults that fell below the "reasonable in the circumstances" test set out in subsection (1).

[13] Section 44(3) sets out three defences to the liability of a municipality under ss. 44(1) and (2). It reads:

> 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 or 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. [Emphasis added.]

The three subparagraphs in subsection (3) are disjunctive. Thus, a municipality avoids liability if any one of the three is present. Paragraphs (b) and (c) focus on the default and relate back to the default referred to in subsection (2) which forms the basis of a finding of liability.

[14] Section 44(4) of the *Municipal Act* confers the authority on the Minister of Transportation to establish the minimum standards referred to in s. 44(3)(c). It reads as follows:

> The Minister of Transportation may, by regulation, establish minimum standards for a) highways and roads; b) classes of highways and roads; c) bridges and d) classes of bridges.[1]

THE MINIMUM STANDARDS

[15] Pursuant to the authority in s. 44(4), the Minister established a number of minimum standards. They are entitled *Minimum Maintenance Standards for Municipal Highways* ("MMS") and were first enacted as O. Reg. 239/02. The MMS were amended in 2010, O. Reg. 23/10. The 2002 Regulation is relevant for this case as the accident occurred in 2003.

[16] In his reasons, the trial judge incorrectly referred to the 2010 Regulation. However, the differences between the 2002 and the 2010 standards as they relate to the

[1] On this appeal, the parties have not put in issue the question whether the Minimum Standards relating to the maintenance of highways for winter road conditions come within the authority conferred by s. 44(4). I note this point because we were told during the course of oral argument that the issue of the *vires* of the Minimum Standards is in issue in another case currently before the courts.

circumstances of this case are not material, nor did they play a role in the trial judge's reasons. I will refer to the 2002 standards and will use the past tense in doing so.

[17] Section 4 of the MMS required a municipality to clear accumulated snow after it reached a specified depth. The depth at which the requirement was triggered and the time within which the accumulated snow must have been cleared depended on the classification of the highway in question. The relevant portions of s. 4 read as follows:

> (1) The minimum standard for clearing snow accumulation is,
>
> a) while the snow continues to accumulate, to deploy resources to clear the snow as soon as practicable after becoming aware of the fact that the snow accumulation on a roadway is greater than the depth set out in the Table to this section; and
>
> b) after the snow accumulation has ended and after becoming aware that the snow accumulation is greater than the depth set out in the Table to this section, to clear the snow accumulation in accordance with subsections (2) and (3) or subsections (2) and (4), as the case may be, within the time set out in the Table.
>
> (2) The snow accumulation must be cleared to a depth less than or equal to the depth set out in the Table.
>
> …
>
> (6) In this section, "snow accumulation" means the natural accumulation of new fallen snow or wind-blown snow that covers more than half a lane width of a roadway.

TABLE

SNOW ACCUMULATION

Class of Highway	Depth	Time
2	5 cm	6 hours

[18] Section 5 dealt with icy roadways and read as follows:

> (1) The minimum standard for treating icy roadways is,
>
> (a) to deploy resources to treat an icy roadway as soon as practicable after becoming aware that the roadway is icy; and
>
> (b) to treat the icy roadway within the time set out in the Table to this section after becoming aware that the roadway is icy.

As mentioned, Derry Road was a class 2 highway and the time provided in the Table for treating an icy roadway was four hours.

ISSUES

[19] The appellants do not challenge the trial judge's findings of liability except as they relate to paragraph (c) of subsection 44(3). The appellants argue that s. 5 of the MMS applied to Derry Road and to the defaults found by the trial judge. They argue that those standards were applicable and were satisfied. That being the case, the trial judge erred in not finding that the appellants had a defence pursuant to s. 44(3)(c).

[20] The respondents cross-appeal the trial judge's 50/50 apportionment of liability arguing that a proper apportionment is 90 percent for the appellant and 10 percent for the respondent.

ANALYSIS

(a) The Appeal

[21] This appeal turns on the interpretation of s. 5 of the MMS. A few preliminary comments about the MMS may be useful.

[22] It is worth repeating that the purpose of minimum standards is to provide a municipality with a defence even if it would be otherwise liable under the provisions of s. 44. Thus, if a municipality complies with the minimum standards, it is not liable even though it did not maintain a highway in a state of repair that is reasonable in the circumstances, knew or ought to reasonably have known of the faulty state of repair, and did not take steps to prevent the default. To use the common law language, a municipality is not liable for negligently failing to maintain a highway if it complied with the minimum standards that applied to its failure.

[23] The MMS do not purport to cover all circumstances that may arise in the course of maintaining roadways. In this regard, I agree with Justice Howden of the Superior Court who in the case of *Thornhill v. Shadid* (2008), 289 D.L.R. (4th) 396 (Ont. S.C.), at para. 95 said, "It has been recognized that the MMS are not, and do not purport to be, an all inclusive document."

[24] Justice Howden then quoted a passage from the *Law of Municipal Liability in Canada*, looseleaf (Markham: Lexus Nexus Butterworths, 1999) at para. 3.43, by D. Boghosian and J.M. Davison, which supported the above-quoted statement.

[25] Although the appellants no longer argue that s. 4 of the MMS applied to this case, I think a brief discussion of s. 4 is helpful. It will be recalled that s. 4 requires a municipality to clear snow after a certain depth within a specified time, depending on the class of the road.

[26] It is common ground that Derry Road was a class 2 road and that about two centimeters of snow had fallen on Derry Road prior to the accident on April 1, 2003.

[27] The trial judge held that s. 4 of the MMS did not apply to the circumstances of this case and, thus, did not afford the appellants with a defence. The trial judge reasoned that the obligation on the municipality to clear snow accumulation either while snow was continuing to accumulate or after accumulation had ended would only have been triggered when the snow on Derry Road exceeded five centimeters. Since only two centimeters had accumulated, s. 4 had no application.

[28] The appellants do not challenge this line of reasoning.

[29] Thus, the minimum standard for clearing snow accumulation did not apply to circumstances when there had been less than five centimeters accumulation. To be clear, s. 4 of the MMS did not say that a municipality need not clear snow if there was less than

five centimeters accumulation. The section did not address that circumstance. There was no minimum standard for clearing accumulated snow on a class 2 highway when the accumulated snow was less than five centimeters.[2]

[30] The trial judge also concluded that the minimum standard established by s. 5 did not apply. I agree with his conclusion. While I agree with the thrust of the trial judge's reasons, I would express those reasons in a somewhat different way. Section 5 was intended to create a minimum standard for treating a highway "after becoming aware that the roadway is icy". I do not think that it matters how the roadway became icy. It could be from natural causes such as freezing rain or ice pellets. It could have been, as in this case, from snow falling and covering the road and then being compacted by vehicles into hard packed snow and ice.

[31] Section 5 of the MMS was directed at the situation when the roadway had become icy, not before. The standard's requirement to deploy resources and treat was triggered by knowledge that the roadway *is* icy – present tense – not by knowledge that it *may* or *will become* icy. The standard did not address a municipality's response to conditions that had not yet become icy. The standard provided for a timeline for treatment of the icy condition depending on the class of highway.

[2] The trial judge also found that s. 4 did not apply because those responsible for road maintenance did not deploy resources to clear snow from Derry Road.

[32] In the present case, the allegations of fault directed at the appellants do not include a failure to treat the icy roadway within four hours of becoming aware of the icy conditions, as required by s. 5. The trial judge's findings of default on the part of the municipality are directed at failures to take reasonable steps to avoid ice forming on Derry Road. The failures, as I mention above, included failures to monitor the weather and to have deployed resources much earlier than was done so as to avoid the formation of ice.

[33] Thus, in my view, the trial judge was correct in finding that s. 5 of the MMS did apply to the failures or defaults that underlay his finding of liability. I agree with the trial judge that s. 5 did not provide a defence to the appellants. This conclusion is supported by the language of the section and by common sense. As the trial judge said, at para. 165:

> If it were otherwise, municipalities could avoid any of their obligations to clear the roads of snow by waiting until the snow becomes compacted and turns into ice and then claiming that a new time limit is triggered from the time when the municipality becomes aware that the roadway is icy.

[34] The appellants argue that this interpretation left an unacceptable gap in the regulation and that a court should interpret the regulation to fill the gap. I disagree for several reasons. First, the language of the two standards is clear. Clarity, it was argued by appellants, was one of the purposes of creating the standards. The drafters achieved clarity as to what s. 5 of the MMS applied.

[35] The interpretation I reach is also consistent with the language of s. 44(3)(c). I repeat that language for convenience:

> Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if
>
> (…)
>
> (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. [Emphasis added.]

[36] The key words for present purposes are "to the alleged default". The defaults here, as found by the trial judge, were the failure to monitor the weather and the failure to deploy resources so as to prevent Derry Road from becoming icy. The trial judge did not find the appellants liable for failure to treat a roadway after becoming aware that it was icy.

[37] It is important to note that the conclusion that a minimum standard did not apply to the circumstances of this case does not leave those circumstances unregulated. A municipality must take steps to keep the highway in a reasonable state of repair having regard to all the circumstances pursuant to s. 44(1). While assessing compliance with that standard will be a fact-specific exercise, the standard is grounded in reasonableness. A municipality is required to take reasonable steps and will only be found liable if its conduct is found to fall below the reasonableness standard.

[38] Finally, it is worth pointing out that the Region of Halton has established its own performance standards to address the problem of accumulating snow on roadways. Those standards contemplate monitoring the weather conditions and applying salt to the roadway prior to the accumulation of snow in order to form a "brine sandwich" and prevent the formation of ice. I point this out simply to indicate that the Minister could have created a similar standard to address the situation in this case, had he or she chosen to do so.

[39] In summary, I am of the view that the MMS did not establish a minimum standard to address the accumulation of less than five centimeters of snow on a class 2 highway, nor did it establish a minimum standard for the treatment of a highway before ice is formed and becomes an icy roadway.

[40] The appellants brought an application to admit fresh evidence to assist with the interpretation of the MMS. The respondent requested the admission of fresh evidence to respond to the appellants should the appellants' fresh evidence be admitted.

[41] I have reviewed the proposed fresh evidence tendered by both parties. I agree with the appellants that the fresh evidence tends to show that the drafters of the MMS intended to provide clear, bright line, results-orientated standards. That said, I do not think the fresh evidence adds anything to the interpretative exercise that I have discussed above. As a result, I would not admit the fresh evidence tendered by either the appellants or the respondent.

THE CROSS-APPEAL

[42] The respondent cross-appeals the trial judge's apportionment of negligence on the basis of 50 percent to each party.

[43] The trial judge found that the respondent was driving between 55 and 60 kilometres an hour on a roadway with a posted speed of 80 kilometres an hour. When the appellant got in her car on the day of the accident, she was aware of the snowy conditions on the roadways. The danger became even more apparent to her when her car slid while she was driving 55 to 60 kilometers per hour before the accident occurred. Given the condition of the road, she should have been aware that she was driving too fast.

[44] The trial judge concluded that the slippery road condition at the scene of the accident was foreseeable and that a reasonably prudent motorist, aware of the facts known to the respondent, would have realized that.

[45] The trial judge found that the respondent's negligence was a contributing cause of the accident. That finding is not challenged. Instead, the respondent argues that the 50/50 apportionment constitutes an error reviewable by this court when the primary cause of the accident was the appellants' failure to prevent Derry Road from becoming icy and dangerous. The respondent argues that she should be fastened only with 10 percent of the responsibility.

[46] An appellate court ought not to vary an apportionment of negligence at trial except in very strong and exceptional circumstances, unless an error in law was made or there

has been a misapprehension of some material fact: see *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 57; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at paras. 78 to 80.

[47] The question of degree of fault is difficult. While it may be said that the accident would not have occurred but for the appellants' failure, it can also be said that it would not have occurred but for the respondent's failure to exercise due care. Importantly, the respondent had warning as to the condition of the road and the circumstances that led her to lose control.

[48] I am not persuaded that the trial judge made an error in law, nor did he misapprehend evidence in reaching his conclusion as to the 50/50 apportionment.

DISPOSITION

[49] I would dismiss the appeal and cross-appeal. I would order the appellants to pay the respondent's cost of the appeal fixed in the amount of $50,000, inclusive of disbursements and all applicable taxes.

RELEASED: "DEC 21 2011" "D. O'Connor A.C.J.O."
"DOC" "I agree H.S. LaForme J.A."
"I agree J.D. Cunnhingham A.C.J. S.C.J. (*ad hoc*)