Put your best foot forward: Summary judgment granted in favour of Milton in motorcycle accident case

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On July 29, 2024, the Superior Court of Justice released its decision in *Fadler v Milton (Town)*, dismissing the plaintiffs' claims against the Corporation of the Town of Milton (Milton), on a motion for summary judgment brought by Milton.

In May 2020, George Fadler lost control of his motorcycle while exiting a Milton shopping plaza. He travelled across four lanes of traffic and a median, landing on the opposite side of the road. There was no dispute that his injuries were catastrophic. Mr. Fadler and his family alleged that his accident was caused by a pothole on the road outside the plaza and they brought a claim against Milton, the plaza owner, and an unknown repair company that they alleged repaired the road. Milton brought a motion for summary judgment, arguing that (a) the road was in a state of repair; and/or (b) Mr. Fadler's driving caused the accident.

Milton later assumed liability for any negligence of the repair company and the claim against the plaza owner was eventually discontinued.

The pothole

There was a catch basin on the class 2 municipal roadway near the exit to the shopping plaza, with a pothole on the right side of the grate. The parties agreed that the pothole had a surface area of about 1400cm^2 and was 4cm deep.

Preliminary issues at the motion

At the outset of the motion, the court addressed two preliminary issues: whether the motion was premature and whether the affidavit evidence on behalf of the plaintiffs was admissible.

At the time of the motion, the parties had not yet completed documentary or oral discoveries. Nevertheless, the court held that the motion was not premature. The court

confirmed that in the post-*Hryniak* era, motions for summary judgment are no longer an exceptional step for a party to take.

All parties at a motion for summary judgment must put their best foot forward and cannot take the position that other evidence is needed to advance their case if they have not taken appropriate steps to investigate and collect this evidence ahead of the summary judgment motion.

Further, the court confirmed that affidavits for use on a summary judgment motion can be made on information and belief, however, where this hearsay evidence goes to a "fundamental contested aspect" of the summary judgment motion, the motion judge must first determine whether the evidence would be admissible under the rules governing admissibility at trial. In this case, the plaintiffs sought to admit an affidavit sworn by a lawyer at their counsel's firm that addressed a preliminary oral opinion provided to them by an expert. No formal written report had been furnished by the expert and the expert was not identified in the affidavit. The court held that this evidence was inadmissible hearsay.

Liability of Milton

The court next addressed whether the plaintiffs had proven Milton was liable for Mr. Fadler's accident, which involved considering the following issues (i) non-repair; (ii) causation; and (iii) Milton's available statutory defences under section 44 of the *Municipal Act*. The plaintiffs bore the burden of proving the first two elements, and then, if proven, the burden would shift to Milton to establish whether any of the statutory defences were available to it.

First, for non-repair, the court held that the plaintiffs had to establish that the road presented a hazard that posed an unreasonable risk of harm to an ordinary reasonable user of the road. The plaintiffs argued that the area of the pothole was problematic, and that the location of the pothole was also hazardous. The court ultimately determined that the plaintiffs had not led any admissible evidence to establish a condition of non-repair.

Turning to causation, the court held that the only admissible evidence regarding the cause of the accident was Milton's expert report which concluded that Mr. Fadler was speeding as he left the parking lot and that this alongside his lean angle and handlebar control contributed to his loss of control. The plaintiffs had decided not to cross-examine Milton's expert on his affidavit and did not take an opportunity to challenge this evidence. The court therefore held that the plaintiffs had failed to establish causation.

Finally, while it was not necessary to do so as the court held the plaintiffs had not proven Milton was liable for the accident, the court considered the applicability of the statutory defences under the *Municipal Act*. Specifically, the court held that the *Minimum Maintenance Standards* deemed a pothole on a class 2 road to be in a state of repair if it was less than 8cm deep *or* if it had a surface area of less than 800cm2. In this case, although the pothole was around 1400cm^2 in surface area, exceeding the regulatory standard, it was only 4cm deep and so the court determined that Milton met the minimum standards applicable to the road and pothole.

Key takeaways

- Motions for summary judgment can be brought in advance of discoveries. The court is entitled to assume that the evidentiary record is complete and can make a determination on that basis.
- Parties wishing to bring a motion for summary judgment need to put their best foot forward, and those responding must do so as well. What this means will vary depending on the case, but parties may wish to consider advancing expert evidence, and taking advantage of the provisions under the *Rules of Civil Procedure* that allow for examination of a non-party.
- Under the *Municipal Act* statutory defences, the regulatory standard for potholes remains a two-part inquiry, with both a depth and surface area requirement. Potholes that only exceed the depth *or* surface area requirement, but not both, will be considered to be in a state of repair.

By

Christine Kucey, Jonathan Thoburn

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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