Stop Here, Not There: Court Of Appeal Comes To Seemingly Different Conclusions In Two Strikingly Similar Roadway Repair Cases

October 05, 2018

Two recent decisions from separate panels of the Ontario Court of Appeal, released the same day, considered similar fact patterns involving allegations of roadway disrepair and intersections with faded or partially removed stop lines. The motor vehicle accidents in both *Smith v. Safranyos*, 2018 ONCA 760 (*Smith*) and *Chiocchio v. Hamilton (City)*, 2018 ONCA 762 (*Chiocchio*), occurred when a vehicle stopped at a stop sign, but then did not stop closer to the intersection with a clear view of oncoming traffic, only to collide with an oncoming vehicle. Both actions involved a driver's obligations under s. 136(1) of the *Highway Traffic Act* (HTA) to stop their vehicle "immediately before entering the intersection."

Both panels held that a road authority may be found liable for roadway non-repair for failing to paint or maintain a stop line even where a driver negligently failed to comply with s. 136(1) of the HTA. However, in one case the Court absolved the road authority and in the other the liability finding was upheld. The reasoning of the Court calls for further scrutiny and a deeper analysis of the reasonable driver and causation analysis in roadway disrepair cases involving negligent drivers.

A Municipality's Roadway Obligations and the Reasonable Driver

Under section 44 of the *Municipal Act, 2001*, S.O. 2001, c. 25,road authorities owe a duty of care to maintain their highways in a reasonable state of repair taking into account the character and location of the highway. In both *Chiocchio* and *Smith*, the Court of Appeal reaffirmed its four-step test set out in its 2014 decision in *Fordham v. Dutton Dunwich* 2014 ONCA 891, [2014] (*Fordham*) for determining liability under s. 44 of the *Municipal Act, 2001*:

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, which then has the onus of establishing that at least one of the three defences found in s. 44(3) of the *Municipal Act, 2001* applies; and
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 that the plaintiff's conduct caused or contributed to the plaintiff's injuries.

However, a road authority owes no duty to accommodate negligent drivers, and the duty under s. 44 of the *Municipal Act, 2011*, is to be viewed through the lens of the ordinary and reasonable driver who drives without negligence, or, in accordance with the law. The "ordinary reasonable driver" is not a perfect driver, but one that makes mistakes. As had been explained previously in *Deering v. Scugog (Township)*, 2010 ONSC 5502, the ordinary reasonable driver is "of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes."

Both *Smith* and *Chiocchio* involved drivers who, each panel found, were negligent after failing to stop closer to an intersection in order to have a clear view of traffic, after having stopped initially at a stop sign. Yet, in *Chiocco* the road authority was absolved of liability, but in *Smith* was not.

Smith v. Safranyos, 2018 ONCA 760

In *Smith*, the defendant driver stopped at a stop sign some ways back from intersection, before moving into the intersection without stopping again, and struck an oncoming vehicle (whose driver was speeding and had consumed alcohol). The plaintiffs were the children and their family members in the vehicle that pulled out into oncoming traffic. The intersection had a stop sign, but the roadway's stop line was faded and had been partially removed during an earlier "shave and pave" operation and not repainted. The location of a metal guardrail and elevation changes near the intersection meant that there was a partial blind spot where oncoming vehicles were unable to see the turning vehicles until they were 35 meters from the intersection and turning vehicles had a corresponding partially obscured sight line. The trial judge found that the road authority did not meet the reasonable state of repair because of the cumulative effect of the faded stop line, the change in elevation, and the obscured sightline for vehicles approaching the intersection. Although the driver clearly contravened s. 136 of the HTA, the trial judge found that the breaches were a contributing cause of the accident, and apportioned 25 per cent liability to the road authority, along with 50 per cent to the driver of the plaintiffs' vehicle, and 25 per cent to the other driver.

The Court of Appeal upheld the trial judge's decision regarding the road authority, emphasizing that a non-repair action can succeed even where a negligent driver was the immediate cause of the accident so long as road conditions that would imperil ordinary drivers constitute a "but for" cause of the accident and posed an unreasonable safety risk to drivers who exercised reasonable care. Like the panel in *Chiocchio*, it was found that a municipality cannot avoid liability by relying on s. 136 of the HTA if the condition of the stop signs and road markings in whole or in part rendered the intersection unsafe for reasonable drivers. The Court of Appeal also noted that the trial judge's decision was not a declaration that a painted stop line is always required, but rather was a fact-specific assessment of the evidence.

Chiocchio v. Hamilton (City), 2018 ONCA 762

Given the articulation and approach to the reasonable ordinary driver by the panel in *Smith*, one would have expected a similar upholding of the trial judge's finding in *Chiocchio* that the road authority was liable for their faded stop line. Facts are, of course, case specific, which may explain to some degree the different outcome in these cases.

In *Chiocchio*, the accident occurred at a rural intersection with two-lane roads in both directions. One of the intersections had a stop sign, while the posted speed on the other, without a stop sign, was 80 km/h. The defendant driver stopped at the stop sign that was at most 12.3 metres back from the entrance to the intersection, but did not stop again at the faded stop line that was at most 2.94 metres back from the intersection. It was conceded at trial that the defendant driver was negligent in entering the intersection when it was unsafe to do so. He was found 50 per cent liable. The plaintiff, a passenger in the oncoming vehicle, was rendered a quadriplegic.

The trial judge found the road authority 50 per cent liable for failing to repaint the faded stop line that was no longer effective in guiding drivers as to where to stop. Had the defendant driver stopped at the faded stop line, which was accepted to be his usual practice, he would have been able to see the oncoming vehicle, and the accident would not have occurred.

The Court of Appeal overturned the trial judge's findings, noting that a road authority's "duty does not extend to remedying conditions that pose a risk of harm only because of negligent driving." The trial judge erred in applying the ordinary reasonable driver standard in considering whether such a driver would know the "safe stopping distance" in relation to oncoming traffic. Rather, the question that was to be asked was whether, in the absence of a stop line, the intersection posed an unreasonable risk of harm for ordinary drivers exercising reasonable care who sometimes make mistakes.

According to the Court of Appeal, the ordinary reasonable driver, despite stopping at a stop sign, would recognize a need to come closer to an intersection and stop again to have a clear view of oncoming traffic. Put another way, the Court of Appeal concluded that a driver who stops in a position where their view of oncoming traffic is obscured and does not stop again before entering the intersection falls well below the standard of an ordinary driver. The obligation of the reasonable driver, even if they did not meet their obligation of s. 136 of the HTA to stop *immediately* before entering the intersection, was to stop at a point close enough to the intersection to at least have sightlines in both directions.

And so the faded stop line at the intersection did not pose an unreasonable risk of harm to ordinary reasonable drivers.

Reconciling *Chiocchio* and *Smith*

The decisions are hard to square.

While both panels agreed that the failure of a driver to abide by s. 136 of the HTA would not immunize a road authority from a finding of liability, it is not clear that a consistent approach to the reasonable driver and causation is being applied.

In *Smith*, the Court rejected the argument that it was "always negligent to fail to stop immediately before entering an intersection marked with a stop sign, [and therefore] only negligent drivers are put at risk by the absence of a painted stop line." According to the panel, this argument was "too simplistic" and would immunize road authorities from liability, regardless of the character or quality of its stop signs or markings. Thus, the panel seems to have made room for a finding of liability against a road authority in cases involving negligent drivers.

However, the reasoning of the panel in *Chiocchio* appears to be the opposite. The panel found that the trial judge erred in finding the test for non-repair to be whether an ordinary reasonable driver could be expected to know the exact length of the safe stopping distance, and concluded that a reasonable driver would bring their vehicles to a stop before entering an intersection within a zone in which they had sightlines in both directions. According to the panel, a reasonable (*i.e.* non-negligent driver) "would know to come closer to the intersection before stopping initially or before stopping again, in order to have a clear view of traffic from both directions." By failing to do so, the ***cause*** of the accident was not the lack of a painted stop line, but the conduct of the driver in failing to stop in a position affording clear sight lines before entering an intersection.

In addressing the decision in *Smith*, the panel in *Chiocchio* cautioned that the decisions are dependent on the unique facts of each case. However, even if one accepts that there were changes in the gradient and a partially obstructed sightline in the intersection at issue in *Smith*, the evidence still involved a negligent driver who failed to stop in a position affording clear sight lines before entering an intersection. The difference in *Smith* appears to be that the panel found this to be but one cause of the resulting accident, whereas in *Chiocchio* is was found to be the cause of the accident. However, the panel in *Smith* accepted the trial judge's finding (based on agreed expert evidence), that drivers approaching the intersection would have seen the approaching vehicle when they were five metres back from the intersection. Applying the same reasoning as in *Chiocchio*, in *Smith* the ***cause*** of the accident could be attributed to the driver's failure to stop, rather than the lack of a painting stop line.

Thus, there remains some tension between these decisions and the Court of Appeal's view of causation and the standard of maintenance for the reasonable driver in cases of road disrepair.

Despite this tension, both panels found that in a roadway repair claims with respect to stop lines, the question remains whether, in the absence of a clearly painted stop line, the intersection posed an unreasonable risk of harm for ordinary drivers exercising reasonable care who sometimes make mistakes. Furthermore, painted stop lines are not always required where an intersection has obscured sightlines, but an assessment of all of the potential issues, such as gradient changes, should be considered to determine whether the cumulative effect of these factors is that the intersection is in a state of "non-repair".

These cases serve as a reminder that all roadway repair cases must be examined in light of their specific facts, with specific consideration and caution given to what would be expected of a "reasonable" driver in those particular circumstances.

By

Sarah Sweet, George R. Wray

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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