

# Concurrent Duties of Care: Case et al. v Pattison et al., 2023 ONCA 529

August 21, 2023

The Ontario Court of Appeal released its decision on Aug. 8, 2023, setting aside the dismissal of the Town of Milton's (the Town) third-party claim against Milton Hydro. The Court reviewed the proper legal analysis in negligence claims and held that the motions judge erred in her consideration of whether the Town's alleged negligence constituted an intervening act that completely broke the chain of causation. The Court remitted the third-party claim for trial alongside the main action, holding that the fact-finding required to determine if Milton Hydro was negligent required a full evidentiary record.

## Background

The plaintiff was catastrophically injured when he was involved in a motor vehicle accident as a pedestrian on Jan. 20, 2015. He and his wife brought a claim against the driver of the vehicle, as well as the Town based on allegedly inadequate street lighting due to a missing streetlight. The Town commenced a third-party claim against Milton Hydro, alleging Milton Hydro had negligently removed the streetlight in question.

## Motions decision

Both Milton Hydro and the Town brought motions for summary judgment. The motions judge could not determine responsibility for the removal of the streetlight on the evidentiary record before her but was "prepared to assume" that Milton Hydro had removed the streetlight.

The motions judge held that the central issue was whether Milton Hydro owed a duty of care to the plaintiff or the Town. She held that Milton Hydro did not owe an ongoing duty of care to either party and that with the Town's intervening annual inspections, the Town could not demonstrate that the accident was reasonably foreseeable at the time the streetlight was removed. She further held that the Town's annual inspections, which failed to identify the missing streetlight, broke the chain of causation that may have established liability against Milton Hydro. The Town appealed.

## Appeal decision

The Court of Appeal determined that the motion judge's legal analysis was flawed and confused the duty of care and causation analyses. The Court held that the necessary fact finding to decide if Milton Hydro owed the plaintiff a duty of care should be determined at trial. Although the claim had to be remitted for trial, the Court nevertheless explored the negligence analysis the motion judge should have conducted in detail.

As a first step, the motion judge had to determine whether Milton Hydro owed a duty of care to the plaintiff. This required considering whether this was a novel duty of care or whether this duty had previously been established by case law. If a novel duty of care, the court had to consider whether there was a sufficiently close relationship between Milton Hydro and the plaintiff such that Milton Hydro could have foreseen that removing the streetlight could have caused harm to the plaintiff. The next step would then be to consider whether any policy considerations existed that could negate the imposition of the duty of care.

Furthermore, Milton Hydro's main argument was that the Town's inspections (or lack of inspections) were an "intervening act" that eliminated any liability on the part of Milton Hydro. The Court emphasized that the issue of an intervening act should be considered as part of the causation analysis. In considering consecutive negligent acts, the motions judge should have considered whether at the time Milton Hydro removed the streetlight it could have anticipated that the Town would fail to inspect this area. Furthermore, the motions judge should have considered whether the Town's failure to inspect contributed to Milton Hydro's alleged negligence in removing the streetlight, or whether the harm to the plaintiff would have occurred even if Milton Hydro had not removed the streetlight in the first place.

The Court further held that the time for determining foreseeability is at the time of the allegedly negligent act. In conducting the duty of care analysis, the motion judge should have considered whether someone in Milton Hydro's position could have foreseen, at the time the streetlight was allegedly removed, the type of harm it caused, i.e., the catastrophic injuries to the plaintiff.

The Court concluded that it was an error to assume the Town's alleged statutory duties necessarily meant that Milton Hydro could not also owe a common law duty of care. Ultimately, the Court determined that the fact-finding required to properly determine the duty of care and causation issues, including who removed the streetlight, would require a full trial of the action on a full evidentiary record. The Court set aside the dismissal of the Town's third-party claim and remitted the matter to trial alongside the main action.

## **Key takeaways**

*A subsequent failure to inspect does not automatically remove liability from the original negligent actor.*

In cases where there is a failure to conduct adequate inspections, the party responsible for creating a hazardous condition may be held responsible for doing so. This reaffirms the importance of doing a fulsome investigation and casting a wide net in identifying any relevant parties in a claim.

*The passage of time itself does not necessarily determine foreseeability or proximity under the duty of care analysis or the causation and intervening act analysis.*

This raises the potential for ongoing exposure to liability in cases where a party has created a hazardous condition that has not been addressed or remedied for a period of time. The Court left open the possibility that a defendant may be unable to rely on the fact that another party has taken over responsibility for maintaining a premises to avoid liability when the defendant itself is responsible for creating the hazard.

*There can be concurrent duties of care.*

We often see this in the municipal context, but this case is a good reminder that just because a party is has statutory obligations, does not mean that another party cannot also be found concurrently liable at common law.

For more information, please reach out to one of the key contacts listed below.

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