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Apportioning Liability in Single-Vehicle Accidents: The Clash between Contributory Negligence, the Driver's Liability, and a Municipality's Duty of Care

By: David Elmaleh, Student-at-Law, McCague Borlack LLP

When single-vehicle accidents lead to a fatality, apportioning liability is often a daunting task for courts to undertake. In *Morsi v. Fermar Paving Ltd.* the Ontario Court of Appeal overturned a trial judge's decision which apportioned liability for a single-car accident as follows: The Driver – 50% liable, The Municipality – 25% liable, The Contractor in charge of resurfacing the road – 25% liable.

THE FACTS

On a clear and sunny day a driver turned off Highway 27 onto Major Mackenzie Drive, where he disastrously lost control of his car, flew over a ditch, and hit a telephone pole. He was tragically killed in the collision. The road had been resurfaced shortly before, pursuant to a contract between York Region (the "Municipality") and Fermar Paving Limited ("the Contractor"). There were several road signs on the side of the road containing construction updates and speed limit signs. The evidence from the police and accident reconstruction experts indicated that the driver's speed was almost double the speed limit when he lost control of his vehicle.

THE TRIAL JUDGMENT

The trial judge ruled that York Region owed a statutory duty, pursuant to s.44(1) of the *Municipal Act 2001,* S.O. 2001, c.25, "to keep Major Mackenzie Drive in a reasonable state of repair in all the circumstances." He also ruled that the Contractor had a common law duty of care to the driver "to carry out its responsibilities under the contract in a manner that did not create an increased risk of harm to the public." The trial judge held that both defendants breached their duties of care to the driver by reason of a lack of inspection in the transition area on the date of the accident and a lack of adequate signage on Major Mackenzie Drive to warn of the change in the road surface. The trial judge also found that the excessive speed of the vehicle contributed to the accident. As stated above, the trial judge apportioned liability among the three parties at 50% for the driver and 25% each for the Municipality and Contractor.

THE APPEAL

The only issue on appeal was whether the trial judge erred by finding that the Municipality and Contractor were partially liable for the accident resulting in the death of the driver.

The Court of Appeal ruled that while the trial judge correctly stated the statutory duty and test for resolving the issue of liability, it failed to apply the test to the facts of the case.

Section 44(1) of the *Municipal Act, 2001* imposes a statutory duty of care on municipalities with respect to the maintenance of highways and bridges:

> 44(1) 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.

The Supreme Court in *Housen v. Nikolaisen, supra,* reaffirmed the appropriate standard of care placed on municipalities pursuant to their respective applicable statutory obligations as set out in *Partridge v. Rural Municipality of Lanenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.):

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been vicariously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that *those requiring to use it, may, exercising ordinary care, travel upon it with safety*. [Emphasis added.]

The Court of Appeal noted that the driver did not meet the 'ordinary care' test. Had the driver driven at the speed limit, or even modestly above it, there would not have been an accident. Consequently, the driver's apparent reckless driving absolved York Region under the test enunciated in the leading decisions of the Supreme Court.

Regarding the liability of the Contractor, the Court of Appeal ruled that the trial judge erred by concluding that the Contractor should have known as a matter of common sense that motorists would travel in excess of the posted speed limit. The Court held that the Contractor should not be deemed to know that a driver would be so reckless on a curvy road with ongoing construction.

Accordingly, the Court of Appeal allowed the defendants' appeal and correspondingly dismissed the plaintiff's action.

This case is heart-wrenching, for obvious reasons. But it is also significant for the insurance industry, as it reaffirms the duties owed by municipalities to all those present on the road, and outlines the test that courts take when apportioning liability in a single-vehicle accidents. It also acts as a grave reminder that if one excessively speeds, they will be held liable for the damages that result.