COURT OF APPEAL FOR ONTARIO

CITATION: Case v. Pattison, 2023 ONCA 529
DATE: 20230808
DOCKET: C70905

Roberts, Miller and Coroza JJ.A.

BETWEEN

Christopher Case, Karen Cabrera, and Warren Case

Plaintiffs

and

James Pattison, Cara Pattison, and The Corporation of the Town of Milton

Defendants
(Appellant)

and

Milton Hydro Distribution Inc.

Third Party
(Respondent)

Charles M.K. Loopstra, K.C. and Paul E.F. Martin, for the appellant

Alan Mark and Kirby Cohen, for the respondent

Heard: May 4, 2023

On appeal from the judgment of Justice Janet E. Mills of the Superior Court of Justice, dated June 28, 2022.

L.B. Roberts J.A.:

[1] The appeal arises out of a personal injury action in Milton, Ontario. It turns on the motion judge's treatment of the questions of whether the third party ("Milton Hydro") owed a duty of care arising out of the assumed removal of a luminaire and

whether the alleged failure of the appellant ("Town of Milton") to notice the missing luminaire constituted an intervening act that severed any potential liability from Milton Hydro's assumed removal of the luminaire.

[2] The Town of Milton argues that the motion judge erred in granting summary judgment and in her analysis of the issues of duty of care and causation. Milton Hydro responds that this appeal amounts to a veiled invitation for this court to redo the motion judge's findings that are owed appellate deference.

[3] For the reasons that follow, I agree that the motion judge's legal analysis was flawed. Specifically, the motion judge conflated her duty of care analysis with her causation analysis and erred in her consideration of whether the Town of Milton's alleged negligence constituted an intervening act that completely broke the chain of causation. As a result of her legal error, no deference is owed to her decision. I would therefore allow the appeal, set aside the dismissal of the third-party claim, and remit the third-party claim for trial with the main action.

Background

[4] The relevant facts set out here are taken from the motion judge's reasons and the pleadings. They remain to be determined. I make no findings of fact but refer to them only to give context to the issues on appeal.

[5] On January 20, 2015, at approximately 7:09 p.m. in the Town of Milton, the plaintiff, Christopher Case ("the plaintiff pedestrian"), was catastrophically injured

as he walked across the road and was struck by the car driven by James Pattison and owned by Cara Pattison. The plaintiffs and the Pattison defendants claim damages against the Town of Milton based on allegedly inadequate street lighting because of a missing luminaire. The Town commenced a third-party claim against Milton Hydro for contribution and indemnity, alleging that Milton Hydro negligently removed the luminaire. Milton Hydro defended and denied removing the luminaire.

[6] Milton Hydro and the Town of Milton brought competing motions for summary judgment. The motion judge stated that she was unable to determine responsibility for the removal of the luminaire based on the evidence before her. For the purpose of deciding the motions, however, the motion judge was prepared to assume that Milton Hydro removed the luminaire.

[7] The motion judge stated that "[t]he real issue is whether four years later Milton Hydro can be held liable for any damages that may be awarded to the plaintiff." She concluded that Milton Hydro did not owe an ongoing duty of care to either the plaintiffs or the Town of Milton respecting the adequacy or operation of street lighting and that the responsibility was "solely that of the Town pursuant to the *Municipal Act, 2001 [S.O. 2001, c. 25]* and the [*Minimum Maintenance Standards for Municipal Highways, O. Reg. 239/02, s. 10(1)*]." She reasoned that "with the passage of more than four years and with the intervening annual inspections, the Town cannot demonstrate the alleged pedestrian accident was reasonably foreseeable at the time the luminaire was removed." She also held that

"[t]here is no proximity to establish a duty of care by Milton Hydro to the plaintiff and therefore no basis upon which to find liability for contribution and indemnity" based on the "several opportunities" by the Town of Milton to "discover the missing luminaire and remediate the issue."

[8] As a result, the motion judge concluded that the Town of Milton's "failure to do so broke any proximity between Milton Hydro and the damages allegedly suffered by the plaintiff." She held that the "failure of the Town's annual inspections to note the luminaire was missing or that the roadway in that location was darker than usual is an intervening act that most certainly broke any chain of causation that may have existed to establish any liability on Milton Hydro."

[9] The motion judge therefore allowed Milton Hydro's motion for summary judgment and dismissed the third-party claim, awarding Milton Hydro its costs of the motions and the third-party claim on a substantial indemnity basis from its April 26, 2022 offer to settle onward.

Analysis

(i) The requisite analysis

[10] A successful claim for negligence requires proof of a duty of care, breach of the standard of care, compensable damage, and causation: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 30-39; *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; *Hill v Hamilton-*

Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 96. This case concerns the motion judge's treatment of the duty of care and causation elements of the negligence analysis.

[11] In considering the third-party claim, the motion judge was first required to determine whether Milton Hydro owed a duty of care to the plaintiff pedestrian. As part of this analysis, the motion judge should have considered whether the duty of care in issue was a novel duty of care as it would be unnecessary to conduct a full *duty of care* analysis if previous case law had established that the duty of care in issue or an analogous duty existed: *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 18. If it were necessary to determine whether a novel duty exists, the motion judge was required to consider whether there was a relationship of proximity in which Milton Hydro's failure to take reasonable care by removing the luminaire might foreseeably cause this type of loss or harm to the plaintiff: *Rankin*, at para. 18; *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, at para. 17. In assessing foreseeability, the emphasis should be on the "[f]oreseeability of harm to the victim, and not the specific interceding events surrounding that harm": Allan M. Linden et al., *Canadian Tort Law,* 12th ed. (Toronto: LexisNexis Canada Inc., 2022), at s. 7.10.

[12] As part of the duty of care analysis, the motion judge had to consider whether, if she determined that a *prima facie* duty of care existed, Milton Hydro had established that there were any residual policy considerations that should

negate the imposition of such a duty: *Rankin*, at para. 20. Consideration of these residual policy concerns is an essential step in recognizing a novel duty of care, though it will rarely be necessary when the claim falls within or is analogous to an established duty of care: *Nelson (City)*, at paras. 18-19; *Cooper*, at para. 39. Here, the motion judge did not reach this fact-driven step in the analysis because of her determination of the issues of foreseeability and proximity.

[13] If she were satisfied that Milton Hydro owed the plaintiff pedestrian a duty of care and breached the standard of care, the motion judge would also need to consider causation. In assessing causation, the motion judge had to consider whether Milton Hydro's assumed removal of the luminaire was a factual cause of the harm the plaintiff pedestrian suffered from the accident as alleged by the plaintiff pedestrian. She also had to consider whether Milton Hydro's assumed removal of the luminaire legally caused the damages suffered by the plaintiff pedestrian: see e.g., *Mustapha*, at para. 11; *Frazer v. Haukioja*, 2010 ONCA 249, 317 D.L.R. (4th) 688, at para. 39.

[14] In assessing whether Milton Hydro's assumed removal of the luminaire was a factual cause the accident, the motion judge had to apply the well-established "but for" test, namely: would the harm the plaintiff pedestrian suffered from the accident have occurred but for Milton Hydro's assumed removal of the luminaire: see e.g., *Clements v. Clements,* 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8

[15] The legal causation analysis is rooted in assessing remoteness: *Nelson*, at para. 96; *Mustapha*, at paras. 12-13. The motion judge needed to assess whether the harm the plaintiff pedestrian suffered from the traffic injury was a reasonably foreseeable consequence of Milton Hydro's assumed removal of the luminaire: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 20. If the harm the plaintiff suffered was not "the reasonably foreseeable result of the defendant's negligent conduct", then the harm would be too remote for the defendant's negligence to have legally caused it: *Nelson*, at para. 97. This remoteness inquiry can be distinguished from the foreseeability analysis within duty of care "because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury": *Nelson*, at para. 97.

[16] It is in the causation analysis that the question of intervening acts arises: *Phillip v. Bablitz,* 2011 ABCA 383, at para. 29. As this case concerned allegedly negligent acts in succession, this inquiry should have involved consideration of whether, first, the alleged later negligence of the Town of Milton's failure to inspect was reasonably foreseeable at the time of Milton Hydro's assumed negligent removal of the luminaire; and, second, whether the Town of Milton's alleged negligence compounded the effects of the earlier assumed negligence of Milton Hydro or whether it fully broke the chain of causation and put a complete halt to the consequences of Milton Hydro's first act: *Price v. Milawski* (1977), 18 O.R. (2d) 113 (C.A.), at p. 124; *Phillip,* at para. 29.

[17] Further, in determining whether the Town of Milton's alleged negligent inspection was the sole cause of harm and broke the chain of causation in this way such that Milton Hydro should not be found liable for the harm, the motion judge was required to consider whether the harm to the plaintiff pedestrian would have occurred despite Milton Hydro's alleged original negligent act of removing the luminaire: see e.g., *Athey v. Leonati,* [1996] 3 S.C.R. 458, at para. 41. Accordingly, to break the chain of causation in this way, the motion judge had to find that the Town of Milton's alleged negligence in failing to conduct proper inspections was the *only* cause of the harm, and that Milton Hydro's negligence *played no role*.

(ii) The motion judge's approach

[18] The motion judge did not carry out the requisite legal analysis.

[19] First, the motion judge conflated the duty of care analysis with the legal causation analysis. I come to this conclusion not because of the organization of her reasons in which her determination of the causation issue precedes, and is interwoven with, her consideration of the issues of foreseeability and proximity. Rather, a reading of her reasons as a whole indicates that she was focussed on causation and the "break" in the chain of responsibility for the removal of the luminaire and its effect on the street lighting. This was an appropriate consideration but should have been considered after she had properly assessed whether Milton Hydro owed a duty of care to the plaintiff pedestrian.

[20] In finding that no *prima facie* duty was owed by Milton Hydro to the plaintiff pedestrian, the motion judge did not ask whether the alleged duty was a novel duty nor did she properly consider the questions of reasonable foreseeability and proximity. Rather, she appeared to consider the questions of foreseeability and proximity in the duty of care analysis from the causation perspective of foreseeability and remoteness. The motion judge's duty of care analysis should have been focussed on whether someone in Milton Hydro's position ought reasonably to have foreseen at the time of the assumed removal of the luminaire the type of harm it caused, rather than on whether the assumed removal of the luminaire caused in fact and in law the harm in issue.

[21] Moreover, in her duty of care analysis, the motion judge did not consider or determine whether Milton Hydro's assumed action of removing the luminaire was negligent, independent of any duty of care owed by the Town of Milton to the plaintiff pedestrian. Rather, she assumed that the Town of Milton's actions were the *sole* cause of any harm alleged by the plaintiff pedestrian simply because it was responsible for inspections over the intervening four-year period. In doing so, she again conflated the causation analysis, which includes the assessment of intervening actions that may break the chain of causation, alleviating liability from one party, with the duty of care analysis, in which multiple independent parties may owe a duty of care to a plaintiff. Further, it was an error to assume the Town of

Milton's alleged statutory duties *necessarily* meant that Milton Hydro could not also owe a common law duty of care arising from its assumed action.

[22] In addition to conflating the duty of care and causation analyses, in assessing causation, the motion judge was required but failed to consider or explain why Milton Hydro's alleged removal of the luminaire would not be an ongoing contributing cause to the allegedly inadequate lighting that the plaintiff pedestrian argues contributed to the accident. Rather than considering, as the correct analysis required, whether the alleged negligence of Milton Hydro could co-exist with the allegedly negligent inspections by the Town of Milton such that both parties can be said to have caused the plaintiff's harm, the motion judge simply assumed that the Town of Milton's alleged negligence necessarily extinguished Milton Hydro's alleged original negligence. This was incorrect and insufficient reasoning.

[23] A subsequent failure to inspect does not automatically and necessarily remove liability from the original negligent actor. In Linden et al., at s. 7.10, the authors note that "[a]t one time, the possibility of intermediate inspection excused negligent actors; but more and more modern courts are refusing to grant salvation on the 'gospel of redemption' by inspection." For example, they point at s. 7.10 to *Ostash v. Sonnenberg (1968),* 67 D.L.R. (2d) 311 (Alta. C.A.), in which the Alberta Court of Appeal did not accept that a negligently conducted gas inspection, which could have discovered an earlier defect in the installation of gas appliances, should

release another defendant from liability because “there were separate acts of negligence on the part of two persons which directly contributed to cause injury and damage to the plaintiffs and…therefore they are entitled to recover from both of them”: at p. 328. Similarly, referencing *Ostash*, among other authorities, this court in *Dominion Chain Co. Ltd. v. Eastern Construction Co.* (1976), 12 O.R. (2d) 201 (C.A.), per the majority (borrowing language from *Ives v. Clare Bros. Ltd. et al*., [1971] 1 O.R. 417 (H.C.), at pp. 421-22), rejected “the redemptive effect of intermediate inspection” by engineers and architects as breaking the chain of causation to relieve contractors from their negligent actions.

[24] Accordingly, even if the Town of Milton were negligent in failing to inspect the street lighting, the Town of Milton’s alleged negligence would not automatically or necessarily negate the reasonable foreseeability of harm arising from Milton Hydro’s removal of the luminaire. The motion judge appears to have approached these issues through a binary lens – either the Town of Milton or Milton Hydro was responsible but not both. She should have considered whether both could be responsible for the harm caused to the plaintiff pedestrian.

[25] The main reason the motion judge provided for finding that the Town of Milton’s failure to inspect removed liability from Milton Hydro was that the injury occurred over four years after the removal of the luminaire. At para. 20 of her reasons, she stated: “It cannot be said there existed a real risk in the mind of a

reasonable person that due to the removal of the luminaire, a pedestrian jaywalking mid-block across the street would be injured more than four years later."

[26] However, the passage of time by itself does not necessarily determine foreseeability or proximity under the duty of care analysis or the causation and intervening act analysis. The time for determining foreseeability is at the time of the allegedly tortious act: see e.g., *Mustapha*, at para. 19; *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, at para. 16. Similarly, the Alberta Court of Appeal held in *Phillip*, at para. 13, that "the case law makes it clear that as long as the type or kind of injury is foreseeable, a plaintiff need not establish foreseeability of the extent of the injury or the precise manner of its occurrence".

[27] The correct question under the duty of care analysis and the intervening act analysis is whether the traffic injury to the plaintiff pedestrian, allegedly caused by poor lighting, was a reasonably foreseeable consequence of the removal of the luminaire at the time it was removed – regardless of when the traffic injury occurred in relation to the removal of the luminaire. The motion judge erred in failing to answer this question.

[28] For these reasons, I would set aside the motion judge's judgment and the requisite analysis must be undertaken anew. I agree with the appellants that the proper determination of the duty of care and causation issues here, including, importantly, the determination of which party removed the luminaire, requires the

kind of fact finding that can only be made by a trial judge in the context of the trial of the main action and third-party claim. I would therefore remit the matter for trial.

Disposition

[29] Accordingly, I would allow the appeal. I would set aside the dismissal of the third-party claim, including the costs award for the motions and third-party claim. I would remit the third-party claim for trial at the same time as the main action.

[30] I would grant the appellant its partial indemnity costs of the appeal in the all-inclusive agreed upon amount of $35,000.

[31] If the parties cannot agree on the disposition of the costs related to the summary judgment motions, I would allow them to make brief written submissions of no more than two pages, plus a costs outline, within ten days of the release of these reasons.

Released: August 8, 2023 “LBR”

“L.B. Roberts J.A.”
“I agree. B.W. Miller J.A.”
“I agree. Coroza J.A.”