

Distracted Winter Driving

Brian Sunohara
December 2017

In *House v. Baird*, 2017 ONCA 885, the plaintiff was operating his friend's car in rural Ontario. Three people, including the owner of the vehicle, were passengers. The plaintiff lost control of the car and collided with another vehicle in the opposite lane.

The plaintiff sued the owner of the vehicle he was operating, as well as the driver of the vehicle that he collided with and the municipality.

There was evidence of the plaintiff and his passengers smoking marijuana on the evening of the accident. In fact, the plaintiff was smoking marijuana while he was driving.

The plaintiff was also distracted because he had learned earlier in the day that his 16 year old girlfriend was pregnant. He was upset about this.

The rear tires on the plaintiff's vehicle were worn beyond acceptable limits. The front and rear tires were mismatched and over-inflated. According to an expert, the vehicle was not safe to be driven on anything but a clear, dry road. There was some evidence of the road being slippery.

Trial Decision

The plaintiff and the owner of the vehicle were both found to be 50% liable. No liability was found on the other driver or on the municipality.

The trial judge indicated that unanticipated ice formed on the highway less than one hour before the accident occurred and that the ice had melted or was melting to slush at the time of the accident. He said that the highway was slippery in at least some spots.

According to the reasons of the trial judge, the municipality had an adequate system for call-out of winter maintenance of its roads. Further, the evidence did not support a finding that the section of the highway where the accident occurred was an area of concern.

It was found that the plaintiff was probably distracted as a result of learning of his girlfriend's pregnancy and smoking marijuana during the drive. The trial judge also concluded that there was some evidence of the plaintiff driving over the speed limit and not adjusting his speed for the conditions.

The trial judge stated that the condition of the tires on the vehicle created a risk of loss of control, especially on a snowy, slushy or icy roadway, and particularly if a driver was driving too fast for the conditions.

The trial judge held that it was not possible to determine to what degree the defective tires, the distracted driving, and the speeding contributed causally to the accident. Therefore, he applied section 4 of the *Negligence Act*, which provides that where it is not practicable to determine the respective degrees of fault or negligence between parties, then the parties are deemed to be equally at fault or negligent.

Appeal Decision

On appeal, the plaintiff argued that liability should have been found on the municipality. The Court of Appeal disagreed.

The Court held that the trial judge instructed himself of the proper test. In particular, a municipality's duty of repair is limited to maintaining its roads to enable ordinary drivers exercising reasonable care to use the roads safely.

Further, the Court referred to prior decisions which indicate that a municipality is not to be treated as an insurer of the safety of the users of its roads by imposing overly onerous maintenance obligations. A municipality's failure to salt or sand its roads does not automatically expose it to civil liability. The driving public cannot expect municipalities to keep roads free and clear of snow and ice at all times during the winter.

Moreover, the Court found it was reasonable for the trial judge to conclude that the municipality met the statutory defences under section 44(3) of the *Municipal Act*.

First, the municipality could not reasonably have known about the state of non-repair of the highway because the formation of ice was unanticipated and the section of the highway was not an area of concern. Secondly, the municipality's system for winter road maintenance was a reasonable one for a lower-tier municipality, and the steps taken by the municipality were in accordance with its system for winter road maintenance. Thirdly, the municipality met the requirements under the Minimum Maintenance Standards.

The plaintiff also argued that the finding of 50% contributory negligence was too high. The Court of Appeal disagreed, noting that an appellate court should not vary an apportionment of negligence at trial except in very strong and exceptional circumstances, unless an error in law was made or there was a misapprehension of some material fact.

The Court stated that there was clearly evidence from which the trial judge could infer that the plaintiff was negligent in failing to adjust his speed for the conditions and that he was upset about his girlfriend's pregnancy. Further, there was direct evidence of the plaintiff smoking marijuana while driving.

The Court further indicated that the trial judge's decision to apply section 4 of the *Negligence Act* and apportion liability on a 50/50 basis did not disclose an error.

The appeal was dismissed.

Conclusion

Drivers who operate vehicles in a distracted or impaired manner, including under the influence of marijuana, will be held accountable for their own actions.

Owners of vehicles must make sure that their vehicles are in proper condition, particularly for winter driving.

Drivers cannot expect roads to be free and clear of snow and ice at all times during the winter. A municipality is required to maintain its roads to enable ordinary drivers exercising reasonable care to use the roads safely.