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PERSONAL INJURY LAW

Court sheds light on municipal, driver responsibilities

Case deals with safety issues due to optical illusion created by road configuration

BY JUDY VAN RHIJN
For Law Times

With all avenues of appeal now closed, the Superior Court's decision in *Deering v. Scugog (Township)* becomes the latest word on both the duty of municipalities to keep roads in a reasonable state of repair and the expected driving capability of the ordinary driver.

The case concerns a tragic motor vehicle accident in 2004 that left two teenage sisters quadriplegics. The trial decision of Justice Peter Howden, released on Nov. 5, 2010, found the defendant municipality to be two-thirds liable with the driver responsible for the remainder. The Ontario Court of Appeal dismissed an appeal on June 7, 2012, and the Supreme Court denied leave to appeal on Dec. 20, 2012.

The circumstances of the case are unusual in that the narrow, unlit, and unmarked country road in question had a particular configuration that the trial judge concluded turned it into a death trap. Since the case, Roger Oatley of Oatley Vigmond LLP, who represented the sister who was driving, has become more aware of the condition of horizontal deflection. "There is a sudden, brief jog in the road that creates an optical illusion that the oncoming vehicle is in your lane. The special nature of this case is that the horizontal deflection occurred right at the top of a hill so that people didn't have a chance to see the other vehicle approaching."

In addition, the road was on the boundary between the Township of Scugog and the City of Oshawa, Ont. "The evidence was absolutely clear that the road had literally fallen between the cracks," says Oatley.

"Neither municipality took responsibility for seeing if it was safe and despite opportunities over the years to do an assessment, that didn't happen when it should have happened."

Kirk Boggs of Lerners LLP, who represented the municipalities, doesn't think it was reasonable to expect his clients to have known a problem existed at that location. "There was no history of past complaints or accidents indicating any potential problem at this location. It was also clear on the evidence that at night this was a very sleepy road. The chance of two vehicles encountering each other on this road at that location at night was .09 per cent, an infinitesimally small risk of such an event occurring."

The trial judge noted the road is similar to many local country roads in Ontario that predate the road design manuals. There had never been a centre line. "The municipalities' evidence was that they saw no reason for urgent action and that a line would have been put down later that year as part of the normal line-painting program," says Boggs. "The court, however, found that a centre line should have been put down within the approximately three weeks between the completion of a slurry sealing and the accident. To me, this is really a could-the-road-have-been-made-safer or could-this-accident-have-been-prevented approach to liability which is a burden a municipality will seldom be able to meet."

'It seems to me there is significant disconnect between recent decisions on municipal road liability and what the public thinks is reasonable to expect of municipalities,' says Kirk Boggs.

Oatley disagrees. "The argument that this case sets a cost-prohibitive standard for municipalities just doesn't fly. It is clear from the case that it would have cost these two municipalities very little money to implement the necessary traffic controls, namely painting a white centre line down the road, lowering the speed limit, and putting up a few warning signs. Municipalities are not required to go to the impossible expense of redesigning and rebuilding their rural roads."

The case also looks at the proper treatment of liability when the driver is negligent. A major point of contention dealt with the meaning of an ordinary driver and whether it included negligent drivers. Plaintiffs' counsel conceded that there was some contributory negligence by the driver in that she was probably travelling at around 90 kilometres an hour and may have been over the centre of the road.

On that question, Howden wrote: "The ordinary motorist includes those of average range of driving ability — not simply the perfect, the prescient or the especially perceptive driver or one with exceptionally fast reflexes but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes."

Dale Orlando of McLeish Orlando LLP, who represented the younger sister, believes judges themselves often confuse the issue as to whether a negligent driver can still pursue a negligence claim. "This case points out very clearly that it is not an absolute bar. It is a question of apportionment after objective analysis of the state of non-repair of the road. Shannon Deering was admittedly negligent. She was over the speed limit on an unfamiliar, hilly road and, accordingly, contributed to the happening of the accident. But that is the second question. The first is: On an objective analysis of the test, did the road represent an unreasonable risk of harm to an ordinary, average user, not to a negligent driver? This includes drivers who are not super drivers."

Accordingly, Orlando believes that the *Deering* decision doesn't create any new tests but reinforces previous decisions. "Municipalities are not held to a standard to make the road safe for negligent drivers. That's not what the case means." In fact, Howden found there was a danger even to motorists exercising due care on the hill at night.

"I don't believe a municipality has any greater responsibility than it had before the *Deering* case," says Oatley.

"Even beforehand, the Supreme Court of Canada determined that you didn't have to be a perfect driver in order to cast blame on a municipality when the road is unsafe. Even though Shannon was negligent in being slightly over the speed limit, she could still be a reasonable driver within the meaning of the law. Municipalities would want to impose a standard of perfection on drivers before they can point the finger, but the courts say that flies in the face of common sense. The perfect driver, by definition, never has an accident."

Boggs disagrees. "The *Deering* decision is only one of a number of recent road-related decisions where liability has been found on municipalities that in the past they would not have expected to exist. It seems to me there is significant disconnect between recent decisions on municipal road liability and what the public thinks is reasonable to expect of municipalities." LT