Thomson v. Hamilton-Wentworth (Municipality), [1980] O.J. No. 1366

Ontario Judgments

Ontario Supreme Court - High Court of Justice

Non-Jury Sittings - Judicial District of Hamilton-Wentworth

Hamilton, Ontario

Walsh J.

Heard: October 1, 2 and 3, 1980.

Judgment: October 3, 1980.

No. 6730A/78

[1980] O.J. No. 1366

Between John David Thomson and Keith Hall and Sons Transport Limited, plaintiffs, and The Regional Municipality of Hamilton-Wentworth, defendant

(12 pp.)

Counsel

Mr. J. Regan, for the plaintiffs. Mr. D. Dempster, for the defendant.

The judgment of the Court was delivered by

WALSH J.

1 This action is brought by the plaintiffs to recover damages as a result of an accident that occurred on the 26th day of July, 1976, in the Regional Municipality of Hamilton-Wentworth, on a road in that area known as the Southcote Road, at or near its intersection with John Frederick Road.

2 The Plaintiff, John David Thompson, was the driver of a tractor-trailer unit and was on the day in question transporting in this tractor-trailer, milk from Hagersville to Toronto. The tractor-trailer unit is owned by the plaintiff, Keith Hall and Sons Transport Limited.

3 The plaintiff's evidence was that he had gotten up at 5.30 am. after having gone to bed early the previous evening, and had driven from Waterford, where he lived, to Burford, where the tractor-trailer unit was located at the yard of his employers; that he had inspected his unit and it was loaded with milk; and he had then driven it to Toronto and had returned empty to Burford, (which is the transfer point where milk is collected from the various farmers in the region). He then picked up another load of bulk milk and was en route to Toronto to make his second delivery to Dominion Dairies. He stated he was proceeding in a northerly direction on Southcote Road, that it was a nice day, that the road was clear, that the traffic was light, and he was travelling at thirty-five miles per hour. He saw a car approaching him in its own lane, but as he approached this vehicle the vehicle appeared to move towards the

centre of the road. He could not recall the make and colour of this vehicle which was approaching, but as a result of the vehicle appearing to come towards the centre line of the highway, he moved over to his right to the far edge of the highway in order to give the approaching car lots of leeway, and in doing so, the wheels of his trailer unit went off the pavement. He then attempted to bring the wheels back on to the pavement, but he was unable to do so and the truck rolled over down the shoulder or ditch which was beside the highway. The tractor-trailer unit was loaded with milk, and thus had a weight of some fifty-five thousand pounds, and a complete write-off as a result of the accident.

4 Mike Kozak, who is a seventy-three-year-old resident of the area and residing at 318 Southcote Road, (which is at the intersection of Southcote and John Frederick Road), gave evidence that at the time in question he was in front of his house on a step-ladder, painting, and he happened to turn and saw a car going south, and as soon as the car passed, he saw a truck raising dust, and the truck finally ran off the road into a telephone pole and turned over.

5 The only other eye-witness to the occurrence was a witness called by the defendant, an Ian Goulden, who, on the day in question, together with his brother, had been playing golf in the neighbourhood, at Peters' Corners. They had followed the plaintiff and his milk tractor-trailer unit north-bound on Southcote Road. He also said that the traffic was light. He said that he was three to four carlengths behind the tractor-trailer and he was following quite closely as he wished to pass. He confirmed that the roadway was dry, that there were no problems with the roadway and that it was not raining. He recalls that the truck ahead began to move to the right very gradually and the wheels which he could see, which would be the wheels of the trailer unit, went off the road, the tractor-trailer then slid down the ditch and turned over. He jammed on his brakes, as the hydro lines were then down across the road, and came to a stop on the roadway. Mr. Goulden did not remember whether there were other vehicles on the road at this time or not.

6 An ambulance was summoned and the plaintiff Thompson was taken to the Chedoke Hospital. He was very fortunate, indeed, in that he did not suffer any serious injuries. After a short period of hospitalization he was released, and recuperated at home for a period of a month thereafter. When giving his story or history of the accident to the authorities in the hospital, and also to a police officer, Elizabeth Moore, the day following the accident, he made no mention of the car that was approaching from the southerly direction, but gave as an explanation that the road was narrow and he was too close to the edge of the roadway and was unable to get the truck back on to the roadway and rolled.

7 After seeing and hearing the plaintiff Thompson give his evidence, and hearing the evidence of Kozak, I am satisfied with the evidence that was given by the plaintiff Thompson and accept his evidence in that regard. I see no large inconsistencies with the statements which he had previously given. He may have attached at that time no significance to the on-coming car. I do not feel that it was a deliberate attempt on his part to fabricate or account for his actions.

8 The action against the defendant, The Regional Municipality of Hamilton-Wentworth, is based on the condition of the road at the particular area where the accident occurred. Many photographs of the scene of the accident were taken by the police shortly thereafter, and these were filed in evidence. Some two days afterwards an engineer was retained on behalf of the plaintiffs, and he also took photographs and took detailed notes of observations at the scene, and as a result, a plan or survey of this particular section of the road was prepared by him and entered as an exhibit (Exhibit 14).

9 The exhibit survey prepared by the engineer, Bender, disclosed that from the intersection of Gray Court Road and John Frederick Road, the drop from the edge of the pavement of Southcote Road to the gravelled surface varied from one inch at Gray Court Road to three inches at John Frederick Road, and at a portion of the road which was identified on the survey as Section "B", was six and three-quarter inches; and at Section "A" was some two and one-quarter inches. The evidence of the various witnesses would satisfy me that the tractor-trailer unit left Southcote Road in the vicinity known as Section "B" on the survey prepared.

10 Michael L. Anderson, regional manager of the Regional Municipality, or road superintendent for the roads outside the City of Hamilton, testified that this particular road had, prior to installation of sewers in the Town of Ancaster, been approximately twenty feet wide, or ten feet wide on each lane, with a two-foot gravel shoulder; that in 1973 and 1974, sanitary sewers were installed in all of Ancaster, and as a result this road was torn up in order that a sewer could be installed underneath it. This work was the responsibility of the Ministry of the Environment, who had retained a civil engineering firm to supervise and had hired contractors to do the actual road work, and after the sewers had been installed, the instructions to the contractor had been that it was to be put back in the same or better condition than it was prior to the sewer work being undertaken. As a result, this particular road is now twenty-four feet wide, each lane is now twelve feet wide, the two-foot shoulders having been paved over. Whether there was a shoulder beyond that, or whether it was the edge of a ditch, was difficult to determine from the evidence that was given. The position of the Regional Municipality as given by Mr. Anderson would appear to be that the shoulder had been paved over and the grassy ditch which fell off quite sharply was the top of the slope of the ditch, even though the photographs made it very evident that this portion was gravelled.

11 It is the plaintiffs' contention that this accident was caused by the non-repair of the highway, or the state of the highway, particularly the drop from the hard surface of the roadway to the gravel, which, as I have stated, I am satisfied was somewhere in the neighbourhood of six inches, or, alternatively, that the shoulder of the highway having been paved, this should have been delineated in some way, either by a white line painted upon the highway or signs or otherwise, to indicate to drivers using the highway that it was a paved shoulder and that there was no other shoulder to the highway.

12 Section 427(1) of The Municipal Act provides that, "Every highway and every bridge shall be kept in repair by the corporation and the council which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act, and in the case of default the corporation, subject to the Negligence Act, is liable for all damages sustained by any person by reason of such default."

13 The plaintiffs' position is that as a result of the decision in The Queen v. Jennings, et al., in the Supreme Court of Canada, reported in 1966 S.C.R. 522, where Cartwright J, (as he then was) stated: "It has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute, the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety."

14 The defendant refers me to Section 133(1) of The Highway Traffic Act, which provides that, "When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct from the owner or driver of the automobile is upon the owner or driver." It is the contention of the defendant that the plaintiff Thompson simply drove his tractor-trailer unit off the highway and that the accident was solely as a result of his negligence or want of care and not through any fault or neglect of the Regional Municipality in failing to have its highway in a state of proper repair.

15 Accepting, as I have, the evidence given by the plaintiff Thompson as to the manner in which he left the highway, I find that while through misjudgment he went too far to the extreme edge of the pavement and in doing so he himself was negligent, however, it might very well have been that had there not been the drop of some six inches from the edge of the pavement to the gravel, he might have been able to have brought his tractor-trailer unit under control and have avoided rolling it down the ditch and turning over, causing the extensive damage to it which did ensue.

16 It was urged upon me that if I find the Municipality negligent under these circumstances that it would be imposing almost strict liability on the Municipality. I do not take that view.

17 Mr. Anderson in his evidence detailed the inspections and precautions taken by his department, and I cannot help but feel that any inspections or precautions that may have been taken by the defendant could not have been adequately carried out if they were not aware that there was a six and three-quarter inch drop from the pavement to

the edge of the gravel. If they were not aware of this, which I was advised by him they were not, then they should have been aware of it.

18 I am assisted in my finding that a drop in level from the paved surface of a highway to a gravel portion adjoining constitutes non-repair, by a decision to which I have been referred (of the Ontario Court of Appeal), McCarroll v. Owell, reported in 1955, 4 D.L.R. at page 631, where a difference in height of three inches between the pavement of the highway and the immediately adjoining shoulder was held to have been properly found to constitute a state of non-repair.

19 I therefore find that the accident was caused both by the negligence of the plaintiff Thompson in the manner in which he operated his vehicle on the highway on that particular day, and also by the state of the non-repair of the highway by permitting, under these circumstances, without any warning of any kind, at least a six-inch drop from the edge of the pavement to the gravel. I apportion the degrees of negligence or blame between the plaintiff Thompson and the Municipality at eighty-five percent in favour of the plaintiff Thompson, and fifteen percent of negligence on the part of the Regional Municipality.

20 The special damages of the corporate plaintiff were agreed upon in the amount of $61,023.05 and are set out in Exhibit no. 8. The special damages of the plaintiff Thompson were partially agreed on in the sum of $3,757.65, a reservation being made by the defendant that some portion thereof ought not to be recoverable. If counsel are unable to agree upon this amount and it becomes significant, then I may be spoken to. Counsel could not agree on the general damages of the plaintiff Thompson, and having regard to his injuries, which largely consisted of bruises, aches and pains, and a laceration to his ear, an extremely short period of hospitalization and his one-month convalescence, I feel that the sum of $2,000.00 would adequately represent the general damages to which he is entitled. The total damages are, therefore, assessed at $66,780.70.

21 MR. REGAN: My Lord, I would ask for costs as well as pre-judgment interest on the sum of the --

22 HIS LORDSHIP: I have a discretion on pre-judgment interest.

23 MR. REGAN: Yes, My lord.

24 HIS LORDSHIP: Under the circumstances, I do not think I will exercise that. I do not think I will award any pre-judgment interest.

25 MR. REGAN: Well, My Lord, you know, with respect, I would like to make an argument. I think your discretion, you know, if it is exercised judicially, I think that this could have something to do with whether or not the plaintiffs were able to -- or the defendants were able to recognize some jeopardy in whether or not they have had the use of the money for four years, you know, there has been not a single dollar offered on this right from the word go, we have always been open to some kind of offer, they have had these figures right from day one, and I submit, My Lord, in all the circumstances, that is the purpose of pre-judgment interest. Maybe it isn't a significant amount, and I am sure of $10,000.00 the amount isn't all that much, but still and all, the plaintiff was successful for an apportionment, certainly more successful than what he was offered, so, you know, I think, My Lord, in fairness really I would ask you to re-consider your position.

26 HIS LORDSHIP: Have you any comments, Mr. Dempster?

27 MR. DEMPSTER: No, my Lord, liability in this case was hotly contested throughout, and as my friend says, a dollar was never offered; I am not sure that it was offered from either side. Maybe I am not the one to speak on that because I picked up this file right at the end, and I am not sure the plaintiff never said he would ever take anything less than one hundred percent. I leave it in Your Lordship's hands.

28 HIS LORDSHIP: There were no monies paid into court, you say, no offers made?

29 MR. REGAN: No offers made, My Lord, and we would have taken something considerably less than one hundred percent, and there were discussions along that line.

30 HIS LORDSHIP: All right then, together with interest. Is there any reason why costs should not follow the event?

31 MR. DEMPSTER: No, My Lord.

32 HIS LORDSHIP: Together with costs of the action.
