

COURT OF APPEAL FOR ONTARIO

CITATION: Bannister v. Toronto (City), 2014 ONCA 48

DATE: 20140122

DOCKET: C57192

Rouleau, van Rensburg and Benotto JJ.A.

BETWEEN

James Bannister and Elaine Gurney

Plaintiffs

and

The City of Toronto, The Nordic Insurance Company of Canada, Toronto Hydro Energy Services Inc., The City of Mississauga and Enersource Hydro Mississauga Services Inc.

Appellant/Respondent/Defendants

David G. Boghosian and Laura Day, for the appellant the City of Mississauga

Andrew A. Evangelista and Avi Cole for the respondent Enersource Hydro Mississauga Services Inc.

Reeva Finkel, for the respondent Toronto Hydro Energy Services Inc.

Heard: January 7, 2014

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated June 6, 2013, with reasons reported at 2013 ONSC 3326.

van Rensburg J.A.:

[1] The City of Mississauga appeals the dismissal of its crossclaim and the action against Enersource Hydro Mississauga.

[2] In these proceedings the main action involves a serious personal injury claim arising out of a collision between a bicycle and a car that occurred on February 28, 2007 on Renforth Drive on the bridge over Highway 401 (the “Renforth bridge”). The plaintiffs allege that at the time of the accident a number of streetlights were not illuminated along both sides of the bridge, and that the reduced visibility caused or contributed to the accident. The defendants to the action include the City of Toronto and its contractor Toronto Hydro Energy Services Inc. (“Toronto Hydro”) and the City of Mississauga and its contractor Enersource Hydro Mississauga Services Inc. (“Enersource”). There are crossclaims between the defendants.

[3] Subsections 29(1) and (2) of the *Municipal Act, 2001*, S.O. 2001, c. 25 provide that boundary roads and bridges are under the joint jurisdiction of the municipalities on either side of the boundary line. The parties to the appeal agree that the Renforth bridge is part of a boundary road located between Toronto and Mississauga, and that the west side of the bridge is geographically located within the City of Mississauga, while the east side is within the City of Toronto. At issue is responsibility for the streetlights on the west side of the bridge. According to the evidence, the street lights on the west side of the bridge had never been maintained by Enersource, and were energized by Toronto Hydro.

[4] The motion judge considered a summary judgment motion, seeking dismissal of the claim and crossclaim against Enersource. The motion was opposed by the City of Mississauga. Summary judgment was granted, after the motion judge concluded that there was no basis on which Enersource could be liable to any party. The plaintiff and the other parties to the litigation took no position in response to the issues on the motion and the appeal.¹

[5] For the reasons that follow, I conclude that the motion judge erred in granting summary judgment in this case, and would therefore allow the appeal.

[6] Central to the question of Enersource's liability is its agreement with the City of Mississauga. The Streetlighting Services Agreement, which is dated July 1, 2004, obliges Enersource to perform certain identified services, which include the maintenance and repair of the "Streetlighting System".

[7] "Streetlighting System" is defined as "all lighting installations under the jurisdiction of the Transportations and Works Department of the City...and along public roadways of both the City and the Region, and public walkways within the City." Under the same provision that defines "Streetlighting System" there is a requirement that Enersource provide to the City a map of the Streetlighting

¹ Counsel for Toronto Hydro appeared at the hearings of both the motion and the appeal to urge the court in each case not to make any determination that could affect the issues between the other parties to the litigation, which will need to be resolved by the trial judge.

System in electronic form promptly upon execution of the Agreement and updates every six months thereafter during the term and any renewal thereof.

[8] The City of Mississauga and Enersource were of the common understanding that, at the time of the accident, the streetlights on the Renforth bridge, even including the western side of the bridge that was physically located within the City of Mississauga, were not the responsibility of the City or its contractor. This was confirmed by the City's Streetlighting Supervisor, Eric Menezes, on his examination for discovery, where he stated that, from a streetlighting perspective, Mississauga's boundary stopped where Enersource stopped energizing the lights. Mr. Menezes also acknowledged that the City believed that the map of the Streetlighting System that had been provided by Enersource, which did not include the Renforth bridge, was correct.

[9] In his affidavit in response to the summary judgment motion, Mr. Menezes confirmed the City's position that the Renforth bridge, including all streetlights on the bridge, were not the responsibility of the City to maintain. However he went on to state:

...the jurisdictional boundary between the City of Mississauga and the City of Toronto is located along the western curb of the Bridge and the six streetlights on the western side of the Bridge are within the geographical boundary of the City of Mississauga. I verily believe that as the boundary between the Cities of Toronto and Mississauga are [sic] within the Renforth Drive road allowance, Renforth Drive is a boundary

road. I verily believe that as a boundary road, Mississauga has joint jurisdiction over Renforth Drive and therefore the Renforth Bridge is “under the jurisdiction of the Transportation and Works Department of the City of Mississauga” as set out in the Agreement.

[10] The streetlights in question, on the west side of the Renforth bridge, were physically located within the City of Mississauga, but energized by Toronto Hydro. There was conflicting evidence on the motion as to which party, the City or its contractor, would be responsible for identifying all of the streetlights that fall “under the jurisdiction of the Transportation and Works Department of the City” pursuant to the Agreement. There was also a dispute as to which party would reach agreement with neighbouring municipalities and utilities respecting lighting on boundary roads or bridges located within the physical limits of the City, but energized by another utility.

[11] Enersource’s Director of Business Development, Andrew Bloomfield, deposed that Enersource takes instruction from Mississauga as to what Mississauga considers to be its jurisdiction with respect to maintenance and repair of streetlights. He offered two examples: part of Dundas Street West where streetlights on the south side energized by Oakville Hydro were included within Mississauga’s jurisdiction and serviced by Enersource, and on Ninth Line where streetlights on the west side energized by Milton became part of Mississauga’s jurisdiction after Mississauga acquired the land on which the streetlights were located. Mr. Bloomfield said that on each occasion Enersource

had received instructions from the City to include lights that were energized by another facility, and that this is why such streetlights were included in the Streetlighting System map, and were maintained by Enersource.

[12] In response, Mr. Menezes stated that he had no knowledge and had found no documentation that the City had instructed Enersource to service the lights on Dundas Street that were energized by Oakville Hydro, and that such lights had been maintained by Enersource since before the first streetlight servicing agreement was signed in 2000, when Enersource had maintained all streetlights under the City's jurisdiction, without a written agreement. With respect to the Ninth Line example, any discussions about the obligations of Enersource to inspect and maintain streetlights on the west side that had been energized by Milton took place four years after the accident, and at a time when Ninth Line was no longer a boundary road.

[13] Mr. Menezes stated at para. 17 of his affidavit:

I verily believe that the examples Mr. Bloomfield has given not only fail to support the claim that Enersource only maintained lights on boundary roads when directed to by the City, but in fact refutes it. The City at all times expected Enersource to identify and map all streetlights "under the jurisdiction of the Transportation and Works Department of the City" as per the Agreement, and to work out an arrangement with the other municipality's electrical authority (in this case Toronto Hydro) regarding maintenance on boundary roads as I verily believe it did with Oakville Hydro in the [Dundas Street West] example....

[14] Under cross-examination Mr. Bloomfield confirmed that any instructions that Enersource maintain the streetlights on Dundas Street would likely have been provided in writing, however Enersource was unable to produce any document from Mississauga directing that it maintain those lights.

[15] Mr. Bloomfield also acknowledged that Enersource was maintaining streetlights for the City of Mississauga on Winston Churchill Drive, which is a boundary road between Mississauga and Oakville, and that at least some of the streetlights it maintains are energized by Oakville. He acknowledged that any instructions from the City of Mississauga would have been in writing, but again Enersource was unable to produce any document from the City advising of its responsibility to maintain the streetlights on that portion of the road.

[16] The Agreement is unclear as to which party had responsibility for identifying all of the streetlights “under the jurisdiction of the Transportation and Works Department of the City of Mississauga” that were to be mapped by Enersource. Further, it is unclear as to who was responsible to work out the arrangements on Mississauga’s boundary roads. The motion judge concluded that the City of Mississauga would have to advise its contractor of the lights it considered itself responsible for servicing (even where the streetlights were located on a boundary road within the geographical jurisdiction of the City).

[17] In our view this finding ought not to have been made at this stage of the proceedings where the evidence was contradictory. The motion judge did not address the conflicting evidence, and erred in his conclusion that the common understanding of the parties (that the streetlights in question were not within Mississauga's streetlight servicing jurisdiction) was determinative of the issues between the City of Mississauga and Enersource.

[18] For these reasons I would conclude that, whether Enersource is liable to the plaintiffs under the claim, and to the City of Mississauga under its crossclaim, are issues for trial, and I would set aside the judgment dismissing such claims against Enersource. The appeal is allowed.

[19] The appellant is entitled to its partial indemnity costs of the summary judgment motion from the respondent Enersource in an amount to be agreed; if the parties are unable to agree, they are to provide brief written submissions not exceeding three pages in length within ten days hereof. Costs of the appeal, as agreed between the parties, are fixed at \$10,000, inclusive of disbursements and taxes, and payable by the respondent Enersource to the appellant.

Released: January 22, 2014

(P.R.)

"K. van Rensburg J.A."

"I agree Paul Rouleau J.A."

"I agree M.L. Benotto J.A."