The Man on the Claphman Omnibus, Revisited
A Commentary on *Fordham v. Dutton-Dunwich (Municipality)*

Much of the common law of negligence rests on Lord Greer's hypothetical reasonable man who rode the Clapham Omnibus. Would our common law be different if Lord Greer had chosen as his standard a Yorkshireman in a farm lorry?

This issue was canvassed by the Ontario Court of Appeal in [*Fordham v. Dutton-Dunwich (Municipality)*, 2014 ONCA 891] released Oct. 11, 2014.

This interesting conundrum arises from a night-time single vehicle accident. The plaintiff blew through a stop sign at a rural intersection at 80 kph. He thought this was safe because visibility was unrestricted and he could see that there was no cross traffic. He might have been right but for the fact that the road he was traveling on curved sharply immediately after the intersection and he was unable to negotiate the curve at the speed at which he was traveling.

He sued the municipality alleging that the road was unsafe as there should have been a large checkerboard sign warning of the sharp curve.

The plaintiff led evidence from James Hrycay, a road design and maintenance engineer, and Dr. Alison Smiley, a human factors expert, that anyone who ran the stop sign at 80 kph would not be able to see the curve in time to slow down enough to negotiate it. They both agreed that a person who stopped at the stop sign, or even came to a rolling stop would have no difficulty with the curve.

All parties agreed that the case law stood for the proposition that "a municipality has a duty to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care."

The trial judge found, based on the evidence before her that, "it is a local practice in this rural area for drivers to go through stop signs if they consider it safe", and, moreover, "Ordinary rural drivers do not always stop at stop signs and the defendant knew that."

On that basis, the trial judge found the municipality owed a duty to warn drivers who might run the stop sign of the curve in the road.

The Court of Appeal found that on the evidence, "the trial judge's finding of a local practice of running stop signs, which Dutton-Dunwich knew about, was an unreasonable finding."

However, and more importantly, the Court of Appeal held:

> [47] Second, and more important, the law. Even if the evidence did support the trial judge's finding of a local practice, this finding cannot be used to impose

> liability on Dutton-Dunwich for two reasons. First, the local practice the trial judge endorsed nonetheless amounts to negligent driving. As Iacobucci J. said in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, at p. 473: "[N]o amount of general community compliance will render negligent conduct 'reasonable'".
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> [48] Second, the trial judge in effect created two categories of drivers: ill-defined ordinary rural drivers who frequently run stop signs, and all other ordinary drivers who habitually obey stop signs. In the trial judge's opinion, a municipality's duty of repair extends to both categories of drivers. This is, as Dutton-Dunwich says in its factum, "an invitation to traffic chaos." It is also not the law in this country.

So, it seems that the hypothetical "Man in the Clapham Omibus" still reigns supreme as the standard of reasonableness and is not likely to be supplanted, in the near term at least, by one of his more laissez faire rural brethren.

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