CITATION: Hardcastle v. Corporation of the City of Windsor, et al., 2025 ONSC 5610
COURT FILE NO.: CV-21-29965
DATE: 20251002

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Gordon Hardcastle	)	Joanna Sweet, for the Plaintiff
Plaintiff	)	
– and –	)	
The Corporation of the City of Windsor and Your Quick Gateway (Windsor) Inc.	)	Tim Crljenica, for the Defendant: The Corporation of the City of Windsor
Defendants	)	
	)	**HEARD:** September 8, 2025

RULING ON MOTION

DUBÉ J.

A. INTRODUCTION

[1] The moving defendant, The Corporation of the City of Windsor ("the City" or "defendant"), seeks an order by way of notice of motion dated March 17, 2025, granting the City leave to amend paragraph 16 of its statement of defence and crossclaim ("statement of defence") to add its defence under s. 44(10) of the *Municipal Act, 2001*, S.O. 2001, c. 25, ("the *Municipal Act*").

[2] The plaintiff, Gordon Hardcastle, opposes the City being granted leave to amend the statement of defence on the basis that to do so:

a. Would cause prejudice to the plaintiff which is not compensable in costs; and

b. The proposed amendment is not an issue worthy of trial and *prima facie* meritorious.

[3] As a preliminary matter, on consent, paras. 20 and 21 and Exhibit "H" of the affidavit of the plaintiff's counsel, Jaclyn Habas ("Habas") sworn May 24, 2025, was struck as it contained privileged and confidential information.

[4] I am advised that the defendant Your Quick Gateway (Windsor) Inc. ("YQG") consents to the proposed amendment.

B. BACKGROUND

[5] My review of the background evidence is limited to those facts that are significant to the central issues, or that provide context necessary to appreciate and determine the relevant issues.

[6] This action arises from a single vehicle accident in Windsor that allegedly occurred on May 5, 2019, at the intersection of 9th Concession Road and County Road 42. The plaintiff alleges that his vehicle drove through the intersection and onto the property of the Windsor Airport and struck a concrete barrier, causing him bodily injury.

[7] In the statement of claim, the plaintiff alleges that the City, and the occupier of the Windsor Airport, the defendant YQG, were both negligent and are liable to him.

[8] Section 44(10) of the *Municipal Act* requires a person who intends on suing a municipality for bodily injury arising from the alleged non-repair of a public road to provide such notice to the municipality within 10 days. More specifically, s. 44(10) states:

> (10) No action shall be brought for the recovery of damages under subsection (2) unless, within 10 days after the occurrence of the injury, written notice of the claim and of the injury complained of, including the date, time and location of the occurrence, has been served upon or sent by registered mail to,
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> (a) the clerk of the municipality; or
>
> (b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities.

[9] The deadline for the plaintiff's s. 44(10) notice to have been given to the City was May 15, 2019.

[10] The plaintiff first provided notice to the City of his intention to claim damages against it for breach of the *Municipal Act* on August 11 or 12, 2020 (the cover letter from the plaintiff's counsel is dated August 11, 2020; the letter is stamped received August 12, 2020). In any event, the plaintiff's first notice to the City was more than 460 days after the accident.

[11] The plaintiff commenced this action by way of statement of claim on April 27, 2021.

[12] The City served its statement of defence on May 21, 2021.

[13] While the City's statement of defence pled and relied upon the *Municipal Act*, the statement of defence did not specifically plead reliance on s. 44(10) of the *Municipal Act*.

[14] Counsel for the City wrote to counsel for the plaintiff on January 14, 2025, to seek the plaintiff's consent to amend the City's statement of defence to specifically plead reliance on s. 44(10).

[15] At no time prior to January 14, 2025, did the City mention its intention to rely upon the statutory notice period defence at s. 44(10).

[16] On January 15, 2025, plaintiff's counsel advised that they would be opposing any amendments to pleadings given the proximity to the upcoming trial, necessitating this opposed motion.

[17] On March 17, 2025, the City brought the within motion requesting leave to amend their pleadings to include the s. 44(10) defence outlined in the *Municipal Act*.

[18] At this point, the parties had agreed to bifurcate the trial into two parts, liability and damages. On June 20, 2024, the parties attended assignment court and scheduled a three-and-a-half-week liability-only trial to commence on March 30, 2026.

C. POSITION OF THE PARTIES

Position of the Defendant

[19] The defendant argues that r. 26.01 requires the court to grant leave to amend a pleading at any time in a proceeding, unless the responding party demonstrates that they will suffer non-compensable prejudice.

[20] It is the defendant's position that the plaintiff has not shown any non-compensable prejudice that will result if leave is granted to the City to amend its statement of defence to particularize reliance on the s. 44(10) statutory notice defence and that sufficient time exists before trial for the plaintiff to consider and respond to the particularization of the s. 44(10) defence.

[21] Therefore, given the lack of demonstrated non-compensable prejudice to the plaintiff, r. 26.01 requires the court to grant the City leave to amend.

Position of the Plaintiff

[22] The plaintiff submits that the motion should be dismissed on the basis that allowing the City to amend its statement of defence at this late stage – on the eve of trial – would result in prejudice that cannot be compensated by costs. Further, the proposed amendments do not raise a triable issue which is required before leave is granted to amend pleadings.

[23] Finally, even if actual prejudice is not established, the plaintiff argues that prejudice should be presumed due to the defendant's inordinate delay in seeking to amend the statement of defence – a delay for which no valid explanation has been provided.

D. LEGAL PRINCIPLES

[24] Rule 1.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides as follows:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[25] Rule 26.01 of the *Rules of Civil Procedure* states:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[26] In *Marks v. Ottawa (City)*, 2011 ONCA 248 ("*Marks"*), the Court of Appeal affirms that there is no absolute right to amend pleadings and that the factors to be considered in relation to a motion under r. 26 are as follows:

(a) An amendment should be allowed unless it would cause an injustice not compensable in costs;

(b) The proposed amendment must be shown to be an issue worthy of trial and *prima facie* meritorious;

(c) No amendment should be allowed which if originally pleaded would have been struck; and

(d) The proposed amendment must contain sufficient particulars.

[27] The plaintiff concedes that only the first two are relevant factors in this matter.

[28] In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42 ("*State Farm*"), Hourigan J. summarizes the "well developed" law and general principles for motions for leave to amend as follows at para. 25:

> - The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action; *Iroquois Falls Power Corp. v. Jacob Canada Inc.*, [2009] O.J. No. 2642, 2009 ONCA 517, 75 C.C.L.I (4th) 1, at paras. 15-16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 367, 2010 CarswellOnt 425; and *Andersen Consulting Ltd. v. Canada (Attorney General)*, 2001 CanLII 8587 (ON CA), [2001] O.J. No. 3576, 150 O.A.C. 177 (C.A.), at para. 37.
>
> - The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.* (1996), 1996 CanLII 8109 (ON SC), 27 O.R. (3d) 479, [1996] O.J. No. 227 (Gen. Div.) vard (1999), 1999 CanLII 3051 (ON CA), 42 O.R.

> (3d) 641, [1999] O.J. No. 237 (C.A.), revd [2002] 1 S.C.R. 595, [2002] S.C.J No. 19, 2002 SCC 18.
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> - There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21; and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.), at para. 65.
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> - The non-compensable prejudice may be actual prejudice, *i.e.*, evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994),

[29] Even though the action at hand had been set down for trial, no leave is required to pursue a motion to amend pursuant to r. 48.04(1). Instead, the test for leave is simply whether allowing the amendments would result in non-compensable prejudice: *Horani (Litigation guardian of) v. Manulife Financial Corp*, 2023 ONCA 31 ("*Horani*"), at para. 22.

E. ANALYSIS

Actual Prejudice

[30] The onus to prove actual prejudice lies with the plaintiff or responding party: *Horani*, at para. 25.

[31] While the primary thrust of the plaintiff's argument is that the delay in bringing the motion to amend has resulted in presumed prejudice that has not been rebutted, they also assert that the delay caused real and tangible non-compensable prejudice prior to the motion being heard.

[32] Habas states in her May 24, 2025 affidavit, that it was only on January 14, 2025 – after the close of pleadings, examination for discovery, mandatory mediation, pre-trial, and assignment court – that plaintiff's counsel was, for the first time, placed on notice that the defendant intended to amend the statement of defence to include the statutory defence available under s. 44(10) of the *Municipal Act*.

[33] During her cross-examination on August 8, 2025, Habas testified that non-compensable prejudice would arise from the plaintiff not being made aware – until the "eve" of trial – that the City intended to rely on the s. 44(10) defence. More specifically, she said that time would be spent "perhaps" filing a reply pleading, or "perhaps" researching 44(10) and participating in further discovery of city witnesses. Habas went on to say that she anticipated that the defendant would use those [amended pleadings] as defences or bring a motion "or something" in advance of a trial, which may also require further affidavits, factums, case conferences, telephone calls, meetings, emails, court time – all of which, she

asserts, is time that could have been dedicated to the trial instead – although she acknowledged that without a "crystal ball" it would be difficult for her to know for sure.

[34] Habas testified that the plaintiff had already incurred significant time and disbursements – totalling $86,387.03 as of April 26, 2024 – in preparing for trial, during which the defendant had not indicated any intention to rely on the s. 44(10) defence. However, upon questioning, Habas conceded that a portion of those costs was also attributable to the case against the co-defendant.

[35] In any event, the plaintiff submits that parties are deemed to be ready for trial when an action is placed on the trial list and to require a party to change its "entire litigation strategy" so late in litigation amounts to non-compensable prejudice: see *Burton v. Docker*, 2023 ONSC 1974 ("*Burton*"), at paras. 29 and 24.

[36] In this respect, the plaintiff asserts in its factum – without evidentiary support – that granting the motion would likely force an adjournment of the trial to allow time to respond to the amended pleadings.

[37] I am not persuaded that the plaintiff was taken by surprise by the proposed amendments, nor that they materially altered its litigation strategy at this late stage. Rather, the evidence suggests that the plaintiff was, at some point, aware of the unpleaded but obvious defence available under s. 44(10) of the *Municipal Act*.

[38] At the examination for discovery held on January 26, 2022 – nearly three years prior to the notice of amendment – the plaintiff specifically questioned when the City first became aware of the accident, through witness Shawna Boakes, then Senior Manager of Traffic Operations and Parking Services.

[39] The plaintiff asserts in its factum that the City was allegedly notified within 10 days of the accident. An email dated May 13, 2019 – apparently disclosed to the plaintiff following discovery – indicates that a "discussion" was scheduled for May 24, 2019, at YQG regarding a "Fence Breach." Handwritten notes on the email reference Steve Tuffin ("Tuffin"), Carolyn Brown ("Brown"), and Mark Winterton ("Winterton"), suggesting that Tuffin and Brown were to meet or did ultimately "meet with" Winterton concerning the incident. However, during cross-examination on August 8, 2025, City solicitor Samuel Atkin ("Atkin") confirmed that Winterton was a City engineer at the time of the accident, but testified that he had no direct knowledge of any such meeting.

[40] Despite Mr. Atkin's response, plaintiff's counsel continued – albeit unsuccessfully – to pursue questions, as they had during discovery, regarding what the City may have known about the accident and when. This consistent line of inquiry since January 2022 suggests that the s. 44(10) defence had long formed, at least peripherally, part of the plaintiff's litigation strategy.

[41] In my view, the plaintiff was at least aware of the possibility that the statement of defence could be amended, but appeared to rely on the hope that the City would not raise this obvious defence at any point during the proceedings: *Trudeau v. Cavanagh*, 2017 ONSC

4314 ("*Trudeau*"), at para. 38. In any event, unlike the circumstances in *State Farm*, at para. 13, the City never indicated an intention to waive any defences, including one under s. 44(10).

[42] The defendant correctly submits that the evidence supporting the plaintiff's claim that the amendment would cause non-compensable prejudice is skeletal at best. During cross-examination, Habas could only speculate as to whether the amended pleadings would prejudice the plaintiff's case in a manner not addressable by costs. Her evidence is vague, conclusory, and fails to establish the necessary causal link between the proposed amendments and non-compensable prejudice. In this respect, the plaintiff's evidence "lacks the required degree of specificity to qualify as evidence of actual prejudice": *State Farm*, at para. 31.

[43] In her affidavit, Habas asserts that a change in litigation strategy at this stage would require additional time and expense for the plaintiff in responding to the amended pleadings. However, this assertion – though again lacking specificity – does not reflect the type of prejudice contemplated by r. 26.01, but rather prejudice that is fully compensable through a costs award, including throwaway costs for time and disbursements already incurred.

[44] The defendant is correct that, on the available evidence – or lack thereof – it is speculative whether the plaintiff would suffer prejudice if the motion were granted, would have acted much differently had s. 44(10) been pled originally, or has been unable to respond meaningfully to the new defence. As to these concerns, I agree with the following principle: "a mere statement as to what might or could be the case [in terms of non-compensable prejudice] will not suffice to defeat the motion; the evidence must go further": *Davenport v. Suboch*, 2013 ONSC 5212 at para. 10; *Knight v. Toronto (City)*, [2002] O.J. No. 4539 (O.S.C.J.) ("*Knight*"), at para. 21.

[45] Further on this point, Haberman A.J., in *Toronto Standard Condo. Corp No 20151 v. Clairlea Inc.*, 2016 ONSC 2948, had this to say about the evidence required by a party claiming prejudice on a motion to amend at para. 56:

> In the context of prejudice as an impediment to granting leave to amend, it must involve more than a vague suggestion about what a party may have done differently had the action been pleaded as the moving party now proposes from the outset (see *Tate v. Bishop*, 2015 ONSC 742). The onus is on the party asserting prejudice to specifically set out what it consists of (see *Transamerica, supra).* Added costs flowing from an amendment that results in further documentary and oral discoveries and increased trial preparation is not the kind of prejudice the rule speaks of and will not defeat a motion to amend (see *Transamerica, supra)* so is not a bar to a motion of this kind

[46] The plaintiff also asserts that the proposed amendment is prejudicial because of the following:

a. Should amending the pleadings cause the delay of the commencement of the liability trial, it will prejudice the plaintiff because the monetary threshold on non-pecuniary general damages increases annually.

b. Finally, any delay of the liability trial will result in real prejudice to the plaintiff because the 70 percent restriction on past income losses continues until the trial begins.

[47] At the hearing, plaintiff's counsel acknowledged that no prejudice had been identified in these areas that could not be addressed by a costs award.

[48] In all the circumstances, I am satisfied that the plaintiff has not met the onus of establishing that leave to amend would result in non-compensable prejudice. While the amendments may cause compensable prejudice, such prejudice can be addressed through a costs award – including throwaway costs – and reasonable terms, such as strict timelines for examinations or other procedural steps.

Proposed Amendments not *Prima Facie* Meritorious

[49] Proposed amendments must raise a triable issue and be *prima facie* meritorious: *Burton*, at para. 18. Put differently, the amended pleadings must not be "scandalous, frivolous, vexatious, or an abuse of process": *State Farm,* at para. 25.

[50] Although I have found no actual prejudice, the plaintiff argues that the proposed amendment lacks *prima facie* merit. This position is based on the assertion that the City was aware of the details regarding the accident within eight days of its occurrence and therefore had sufficient notice within the meaning of s. 44(10) of the *Municipal Act*.

[51] The plaintiff further submits that s. 44(12) may apply, providing an exception to the notice requirement under s. 44(10). Section 44(12) states:

> Failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence.

[52] The plaintiff contends that s. 44(10) of the *Municipal Act* was satisfied when, according to the May 13, 2019 email, a meeting was scheduled and occurred on May 24, 2019, between City engineer Winterton and representatives of YQG, Tuffin and Brown, to discuss the fence breach caused by the incident involving the plaintiff.

[53] The mere fact that a meeting may have been scheduled and possibly occurred between the City engineer and others does not, on its own and without more, establish that the plaintiff provided adequate notice within the 10-day period. In any event, the evidence does not

clarify who authored the handwritten note on the email, when it was written, the identities of Tuffin and Brown, whether the meeting even took place, or whether the fence breach referenced was in fact the same incident as the plaintiff's May 13, 2019 accident. Further, there is no evidence before me of a reasonable excuse by the plaintiff for the want or insufficiency of notice, nor that the City was not prejudiced in its defence, as required by s. 44(12) of the *Municipal Act*.

[54] In conclusion, I find that the plaintiff has not demonstrated that the proposed amendment is scandalous, frivolous, vexatious, or an abuse of process. On the contrary, the amendment not only raises a triable issue, but based on the limited evidentiary record at this stage, the merits of the City's s. 44(10) defence appear strong.

Presumed Prejudice

[55] At a certain point, delay becomes so prolonged that prejudice to the responding party is presumed and the onus to rebut this presumed prejudice lies with the moving party: *Horani*, at paras. 32. In other words, after inordinate delay is found, the presumption in favour of granting leave to amend shifts to a presumption that non-compensable prejudice will result if leave is granted: *State Farm*, at para. 36.

[56] All the moving party needs to provide to defeat the presumption of prejudice is some explanation of the delay in seeking the amendments and the presence or absence of prejudice to the opposite party:" *State Farm*, para. 39.

[57] In his affidavit sworn March 17, 2025, Atkin states that, within one month of assuming responsibility for the City's defence in November 2024, he reviewed the action and pleadings and discovered that the statement of defence did not specifically plead reliance on s. 44(10) of the *Municipal Act*.

[58] It appears that prior counsel for the City failed to consider the s. 44(10) defence both at the time of drafting the statement of defence and for approximately three-and-a-half years thereafter, even after formal notice from the plaintiff was received on August 11 or 12, 2020.

[59] Counsel's inattention, on its own, does not constitute a valid justification for excessive delay in bringing a motion to amend: *Horani*, at para. 34.

[60] I agree with the plaintiff that the City has not provided an adequate explanation for the delay in bringing this motion, and therefore has not rebutted the presumption of prejudice, if found to apply: *State Farm*, at para. 37. However, I depart from the plaintiff's position in concluding that, while there is "no hard and fast rule" defining inordinate delay, the delay in this case – though unexplained – was not so prolonged as to trigger presumptive prejudice: *State Farm*, at para. 44.

[61] In this case, notice to amend was served approximately 5 years and 9 months after the accident, nearly 3 years and 9 months after the action was commenced and roughly 15

months after the matter was set down for trial. The motion itself was served roughly 14 months before the scheduled trial and heard approximately 6 months prior to that date.

[62] I find that the case at hand is distinguishable from those in which motions to amend were dismissed due to the longer – often significantly longer – delays and other factors resulting in unrebutted non-compensable presumed prejudice, as summarized below:

a. *Broome* – The notice to amend came 11 ½ years after the incident, and almost 9 years after the action was commenced.

b. *State Farm* – the notice to amend came 9 years after the cause of action, and 8 years after the commencement of litigation.

c. *Horani*– The notice of motion was 7 ½ years after the incident and approximately 6 ½ years after the statement of claim was served. The notice was also brought 4 years after the action was set down for a 32-day trial, but only weeks before the trial was scheduled to commence. Additional factors include that:

- The amendment sought in *Hardcastle* does not involve pleading additional fact, unlike in *Horani*: see also *Marks*, at para. 14.

- Unlike in *Horani*, where the amended pleadings would add a new claim for punitive damages – the proposed amendment in this case does not raise a new defence. Instead, it simply calls the attention of the court to a part of the *Municipal Act* which had already been pled in the statement of defence. While I would not go so far as the defendant to say that the defence, already pled, has now been particularized, I find that the new pleadings merely identify an obvious statutory defence based on the facts already pleaded: *Simpson v. Vanderheiden*, [1985] O.J. No. 2426, at para. 13; *Knight*, at paras. 26 and 60 to 61.

- Other than a bald assertion, I have no evidence from the plaintiff that the March 2025 trial date was at risk of being adjourned – let alone for the second time – as was the case in *Horani*.

d. *Burton* – The request to amend was made approximately 6 years after the incident, nearly 4 years after action was started and roughly 21 or 22 months since the trial date was set. Importantly, the motion was heard only 10 weeks prior to the scheduled trial date.

[63] To further emphasize this point, unlike in *Horani* and *Burton*, the plaintiff in this case was not confronted with amended pleadings on the eve – or near the eve – of trial. Moreover, unlike in *Horani*, the timing of the amendments was not such that the plaintiff could not have been placed in the same position had the changes been made earlier: *Horani*, at para. 36.

[64] As previously indicated, I am not satisfied on the evidence that granting the motion would necessitate an adjournment of the trial – particularly with the imposition of appropriate terms – to allow the plaintiff to properly respond to the amended pleadings.

[65] Finally, there is no suggestion that the City at any time intended to waive the s. 44(10) statutory defence which was available to it under the *Municipal Act*, based on the proposed amendments: *Simpson* at para. 13.

F. CONCLUSION

[66] As a concluding thought, I agree with Kurke J. in *Trudeau* who said the following at para 23:

> The purpose of Rule 26.01 is to permit amendments to pleadings to ensure that there can be a just determination of the real matters in dispute, and that a party is not crippled in the litigation through a mistake or oversight.

[67] That is what occurred in this case. The defendant corrected what appears to have been an oversight in failing to plead the s. 44(10) defence – albeit late and without justification – in circumstances where any resulting prejudice can be properly addressed through appropriate cost consequences.

[68] Accordingly, leave is granted for the defendant to amend paragraph 16 of its statement of defence in accordance with the attached draft order, amended pleading and mutually agreed upon terms.

[69] The trial judge will be in the best position to determine what, if any, costs and throw-away costs should be awarded as a result of the amended pleadings.

G. COSTS

[70] I find the defendant to be the more successful party but urge counsel to attempt to resolve the issue of costs in respect to this motion.

[71] If the parties are unable to do so, they may file brief written submissions with the court, of no more than five (5) double-spaced pages (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the formatting standards of r. 4.01 and the following schedule:

a. The defendant shall deliver its submissions within thirty (30) days following the release of these reasons.

b. The plaintiff shall deliver their submissions within twenty (20) days following service of the responding party's submissions.

c. The defendant shall deliver its reply submissions, if any, which shall be limited to no more than three (3) double-spaced pages, within five (5) days following service of the submissions.

[72] If any party(s) fails to deliver their submissions in accordance with this schedule, they shall be deemed to have waived their rights with respect to the issue of costs, and the court may proceed to make its determination in the absence of their input or give such directions as the court considers necessary or advisable.

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Justice Brian D. Dubé

Released: October 2, 2025

Court File No.: CV-21-29965

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 1ST
	)	
	)	
JUSTICE DUBÉ	)	DAY OF OCTOBER, 2025

B E T W E E N :

GORDON HARDCASTLE

Plaintiff

and

THE CORPORATION OF THE CITY OF WINDSOR and
YOUR QUICK GATEWAY (WINDSOR) INC.

Defendants

ORDER

THIS MOTION, made by the Defendant the Corporation of the City of Windsor for leave to amend its Statement of Defence and Crossclaim, was heard on September 8, 2025, at 245 Windsor Ave, Windsor, ON N9A 1J2 by video conference.

ON READING the motion record the Defendant the Corporation of the City of Windsor, including the affidavit of Samuel Atkin and the exhibits thereto, and the motion record of the Plaintiff including the affidavits of Jaclyn Habas and the exhibits thereto,

AND ON HEARING the submissions of the lawyers for the Defendant the Corporation of the City of Windsor and the Plaintiff,

AND ON BEING ADVISED that the Defendant Your Quick Gateway (Windsor) Inc. is unopposed to the relief sought,

1. THIS COURT ORDERS that the Defendant the Corporation of the City of Windsor is granted leave to amend its Statement of Defence and Crossclaim in the form attached to this Order as Schedule “A”.

2. THIS COURT ORDERS that the Defendant the Corporation of the City of Windsor produce a witness for examination for discovery in relation to the amendments in the Statement of Defence and Crossclaim, with such discovery to take place prior to October 31, 2025.

3. THIS COURT ORDERS that the Defendant the Corporation of the City of Windsor provide prior to November 30, 2025 all answers to the undertakings arising from the further examination for discovery.

4. THIS COURT ORDERS that any motions arising from refusals or matters taken under advisement at the further examination for discovery be brought prior to December 31, 2025.

Date of issuance ……

(to be completed by registrar) (Signature of judge, officer or registrar)

SCHEDULE "A"

Court File No.: CV-21-29965

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GORDON HARDCASTLE

Plaintiff

and

THE CORPORATION OF THE CITY OF WINDSOR AND
YOUR QUICK GATEWAY (WINDSOR) INC.

Defendants

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM
OF THE DEFENDANT, THE CORPORATION OF THE CITY OF WINDSOR

1) Except as hereinafter expressly admitted, the Defendant pleading denies each and every allegation contained in the Statement of Claim and puts the Plaintiff to the strict proof thereof.

Absence of Negligence

2) The Defendant pleading denies that this accident occurred as a result of any negligence or breach of duty or want of care on its part or on the part of its employees, as alleged in the Statement of Claim or at all, and puts the Plaintiff to the strict proof thereof.

3) The Defendant pleading denies that the subject traffic sign and roadway at the intersection of Concession 9 and County Road 42 was in a state of disrepair causing or contributing to the motor vehicle accident.

4) The Defendant pleading states that, at all material times, the traffic signage and roadway at the intersection of Concession 9 and County Road 42 was in a state of repair that was reasonable in the circumstances and clearly visible.

5) In the alternative, the Defendant pleading did not know and could not reasonably have known about any state of repair of the traffic signage and roadway at the intersection of Concession 9 and County Road 42 that caused or contributed to the collision referred to in the Statement of Claim.

6) In the further alternative, the Defendant pleading states that it took reasonable steps to prevent any default in the state of repair of the traffic signage and roadway at the intersection of Concession 9 and County Road 42 from arising.

7) The Defendant pleading employed a system of inspection and maintenance of its roadways and traffic signage that was reasonable given the budgetary constraints and availability of personnel and equipment and pleads that any failure to maintain its roadways and traffic signage was as a result of a policy decision, made in good faith, for which the Defendant pleading cannot be held liable in law. The Defendant pleading pleads and relies upon s. 450 of the *Municipal Act*.

Negligence of the Plaintiff

8) The Defendant pleading pleads that the Plaintiff's injuries and damages, if any, were caused by the negligence of the Plaintiff, some particulars of which are as follows:
   a) He failed to observe the checker board arrow sign signaling the termination of the road and requirement to turn left or right;
   b) He failed to observe the stop sign for Concession 9 traffic at its intersection with County Road 42;
   c) He failed to observe the rules of the road as required by the *Highway Traffic Act*;
   d) He failed to apply his brakes properly or at all, or in the alternative, he drove with defective brakes;

e) He failed to observe that Concession 9 was coming to an end;
f) He failed to perform any evasive manoeuvres in an effort to avoid a collision;
g) He failed to take any or sufficient steps to avoid the accident by the exercise of reasonable care, even after the danger of an accident became or should have become apparent to him;
h) He had the last clear chance of avoiding the accident and failed to do so;
i) He failed to keep a proper lookout;
j) He failed to keep his motor vehicle under proper control;
k) He was traveling at an excessive rate of speed under the circumstances;
l) He was operating his motor vehicle when his ability to do so was impaired by alcohol and/or drugs;
m) He was operating his motor vehicle when his ability to do so was greatly reduced by physical exhaustion;
n) He was an incompetent driver lacking in reasonable self-command and control and should not have been driving on the occasion in question; and
o) He failed to maintain his motor vehicle in proper working order.

9) The Defendant pleading pleads and relies upon the provisions of the *Municipal Act*, S.O. 2001 c.25, Minimum Maintenance Standards for Municipal Highways, O. Reg 239/02 and the *Negligence Act*, R.S.O. 1990, c.N.1 (hereinafter "the *Negligence Act*") and the *Highway Traffic Act*, R.S.O. 1990, c.H.8.

Negligence of the Defendant, Your Quick Gateway (Windsor) Inc.

10) In the alternative, if the Plaintiff suffered any losses or damages, which is not admitted but denied, it was caused or contributed by the negligence of the co-Defendant, Your Quick Gateway (Windsor) Inc. The particulars of the negligence of the co-defendant are outlined at paragraph 8 of the Statement of Claim.

Damages

11) The Defendant pleading denies that the Plaintiff sustained the injuries alleged and the damages claimed in the Statement of Claim. The damages claimed are excessive and too remote to be recoverable in law. The damages claimed are referable to a medical condition or conditions unrelated to the accident of May 5, 2019. The Plaintiff has failed to mitigate his damages.

12) The Defendant pleading states and the fact is that if the Plaintiff has suffered injuries, which is not admitted but specifically denied, then such injuries, do not constitute an impairment that is either permanent or serious and do not constitute an impairment of any physical, mental or psychological function within the meaning of s. 267.5 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. Therefore, the Plaintiff's claim for non-pecuniary damages and healthcare expenses are barred by law.

13) The Defendant pleading denies that the Plaintiff has suffered a loss of ability to carry on his normal tasks of living, a loss of enjoyment of life, a loss of ability to perform his housekeeping and home maintenance tasks, compromised in his ability to perform in the labour market as alleged in the Statement of Claim, and puts the Plaintiff to the strict proof thereof.

14) The Defendant pleading pleads that the Plaintiff is entitled to statutory accident benefits as provided in the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, and to the extent of such payments made to the Plaintiff and to the extent of collateral benefits received by the Plaintiff, this constitutes a release by the Plaintiff from any claim against the Defendant pleading. The Defendant pleading pleads and relies upon section 267.8 of the *Insurance Act*.

15) The Defendant pleading pleads that any benefits received by the Plaintiff from private insurance, the Government or any other source as a result of the motor vehicle accident must be offset against the Plaintiff's damages.

16) The Defendant pleading states that the Plaintiff has failed to comply with the notice provisions contained in s. 258.3 of the *Insurance Act*, as amended, and in s. 44(10) of the *Municipal Act, 2001*. The Defendant pleading therefore states that this claim is barred by law.

17) If the Plaintiff has suffered injuries, which is not admitted but specifically denied, the Defendant pleading states that any awarded damages against the Defendant pleading herein shall be reduced by the appropriate amount set out in s. 267.5 of the *Insurance Act*, as amended, and s. 5.1 of O. Reg. 461/96 of the *Insurance Act*, including but not limited to those provisions.

18) The Defendant pleading pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c.N.1, the *Municipal Act*, S.O. 2001, c.25, the *Insurance Act*, R.S.O. 1990, c.I.8 and the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended.

19) The Defendant pleading submits that this action be dismissed with costs on a substantial indemnity basis.

CROSSCLAIM

20) The Defendant pleading crossclaims as against the co-Defendant, Your Quick Gateway (Windsor) Inc., as follows:
   a) contribution or complete indemnity with respect to any judgment obtained by the Plaintiff against this Defendant;
   b) interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.43;
   c) costs to defend the main action on a substantial indemnity scale;
   d) costs of the crossclaim on a substantial indemnity scale; and
   e) such further and other relief as this Honourable Court may deem just.

21) The Defendant pleading states that if the Plaintiff suffered any injuries and/or damages as alleged in the Statement of Claim, which is not admitted but denied, then such injuries and/or damages are solely as a result of the Defendant, Your Quick Gateway (Windsor) Inc.

22) The Defendant pleading adopts and relies upon the allegations set out in its Statement of Defence including any and all allegations of negligence against the Defendant, Your Quick Gateway (Windsor) Inc.

23) The Defendant pleading pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c.N.1 as amended.

24) The Defendant pleading requests that this crossclaim be tried at the same time and place as the main action.

DATE: ~~May 21, 2021~~

October __, 2025

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GORDON HARDCASTLE Plaintiff	and	THE CORPORATION OF THE CITY OF WINDSOR *et al.* Defendants	Court File No.: CV-21-29965

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

ORDER

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CITATION: Hardcastle v. Corporation of the City of Windsor, et al., 2025 ONSC 5610
COURT FILE NO.: CV-21-29965
DATE: 20251002

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Gordon Hardcastle

Plaintiff

– and –

The Corporation of the City of Windsor and Your Quick Gateway (Windsor) Inc.

Defendants

RULING ON MOTION

Dubé J.

Released: October 2, 2025