Court File No. 34680

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

THE REGIONAL MUNICIPALITY OF HALTON, THE TOWN OF MILTON

Applicants
(Appellants)

-and-

PATRIZIA GIULIANI, TINA GIULIANI

Respondents
(Respondents)

RESPONSE TO APPLICATION FOR LEAVE

TO APPEAL OF THE APPLICANTS

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26,

and Rule 27 of the *Rules of the Supreme Court of Canada*)

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CERTIFICATE

(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

I, Allan Rouben, Lawyer for the Respondents, Patrizia Giuliani and Tina Giuliani, hereby certify that there is no sealing order or ban on the publication of evidence or on the names or identity of a party or witness and there is no confidential information on the file that should not be accessible to the public.

Dated at Toronto, Ontario, this 14th day of March, 2012.

ALLAN ROUBEN
Barrister & Solicitor

PART I – FACTS

Overview Statement

1. The Applicants, having lost at trial, then again at the C.A. below, now take a fully factual tack: they only had to deal with a forecasted winter storm after becoming aware of the icy conditions on the roadway, and had no obligation to monitor weather forecasts before the storm.

2. These assertions are not only freshly created, but are:

(a) contrary to the evidence of the Applicants' witnesses at trial;

(b) contrary to the evidence of their expert witness at trial;

(c) contrary to their own Performance Standards;

(d) contrary to the academic writings of their counsel; and

(e) contrary to the clear and concurrent findings of fact of the trial judge and upholdings of the C.A.

3. The Applicants now also want to withdraw an admission made by their own counsel during oral argument in the C.A. The above absurd positions, adopted for the first time in this Honourable Court, highlight both the frivolous and factual nature of this leave application.

4. There is no national issue or issue of legal importance raised in the proposed appeal. Only a factual fight – factual findings made by the trial judge the Applicants really want to change. The *Minimum Maintenance Standards* are unique to Ontario. No other province or territory has similar regulations. The reasons for judgment of the C.A. represent a routine exercise of statutory interpretation based on clear and unchallenged findings of fact of the trial judge.

The Evidence at Trial

5. On March 31, 2003, Environment Canada issued its final weather forecast for that day and the following day. The forecast was for occasional light snow, meaning an 80-100% probability of snow in the early morning of April 1, and an overnight low temperature of -9 degrees C. Nicholas Zervos, Senior Transportation Co-ordinator for Halton Region, stated that the Region expected the

Town of Milton would use "all available resources" to monitor the weather. Douglas Thompson, Operations Manager for the Town of Milton, stated that he and his three crew supervisors are "always looking at the weather forecasts…its part of our daily routine…I don't think there's a day goes by that I'm not checking the weather." He went on to state: "If we were aware that there was a forecast that something was coming, something significant, we would – like I explained earlier, if the patrol wasn't out there, we would put somebody out there to see if it was coming whether it was day or night." Mr. Thompson agreed that patrolling the roads is "the key to keeping roads in good repair" for purposes of winter maintenance, and that "the most important part of the job" of his crew supervisors "is to prevent poor road conditions from forming." The expert witness for the Applicants, Brian Malone, agreed "absolutely" that monitoring weather forecasts was "extremely important" in dealing with winter road maintenance. Jim Cartwright, Milton road supervisor on duty the evening of March 31 and April 1, stated that it was his practice to monitor the weather forecasts several times a day but that he could not recall having done so on March 31. He said that, if he had been aware of the weather forecast of an 80-100% chance of snow, he would have scheduled an evening patrol before arrival of the storm. He also said that when he awoke at 5:30-5:45 a.m. on April 1 and saw the condition of the roads, he immediately called in operators before their scheduled shift to salt the roads.

Ref.: Application for Leave to Appeal, Tab 4, pp. 40-44
Extracts of the Evidence, pp. 21-33 [Tabs 3A-D]

6. Performance Standards of the Regional Municipality of Halton emphasize the importance of maintaining the roadways in a manner that is safe for the travelling public. They state: "Snow and ice control are the toughest problems faced by the Public Works Department in the winter. Failure to adequately control conditions can endanger life and cause property damage." The Standards go on to provide that busy Class 1 and Class 2 roads, which includes Derry Road where the accident occurred, are to be maintained "as bare as possible through the continued use of all assigned staff, equipment and material suited to the conditions." As Mr. Thompson for the Town of Milton stated: "Basically, in a layman's terms we tell our operators and everybody that you get it black and black and wet as soon as possible." Mr. Zervos, for the Regional Municipality of Halton, confirmed that at the time of the accident, the Town was required to follow the Region's Performance Standards, not the *Minimum Maintenance Standards*.

Ref.: Application for Leave to Appeal, Tab 4, pp. 42, 55
Extracts of the Evidence of Nicholas Zervos, pp. 22-23 [Tab 3A]
Extracts of the Evidence of Douglas Thompson, p. 25 [Tab 3C]

The Trial Judge's Reasons for Judgment

7. Faced with this body of evidence from the Applicants themselves, the trial judge found, *inter alia*, that:

(a) by 7:00 a.m. on April 1, Derry Road was snow-covered and icy and presented a hazard to users of the roadway;

(b) the Town had ample time to monitor the weather, and had this been done operators would have been called in between 3:30 and 4:00 a.m., which was sufficient time to have salted Derry Road before the accident;

(c) failure to monitor the weather forecast meant that there was a failure to identify snow and ice conditions;

(d) "as a result of such failure, management of the maintenance operations did not schedule the application of salting operations in a prompt and reasonable manner";

(e) being attentive to weather forecasts is "of fundamental importance in order to maintain the roads in a safe condition";

(f) reasonable steps to prevent the accumulation of snow and ice were not taken when the Applicants knew or ought to have known that hazardous conditions would result from the forecasted winter storm.

Ref.: Application for Leave to Appeal, Tab 4, pp. 53-57.

The Statutory Provisions

8. The *Municipal Act*, section 44(1), sets out the standard of care for a road authority in Ontario. It provides: "The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge." In 1996, section 44(4) was added to the *Municipal Act* and empowered the Minister of Transportation to make regulations "establishing minimum standards of repair for highways and bridges or any class of them."

Ref.: *Municipal Act*, S.O. 2001, c. 25. 44(1)

9. Section 44(3) of the *Municipal Act* sets out the defences available to a municipality. It states:

> Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if, (a) it did not know and could not have reasonably have been expected to have known about the state of repair of the highway or bridge; (b) it took reasonable steps to prevent the default from arising; or (c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.
>
> Ref.: *Municipal Act*, S.O. 2001, c. 25. 44(3)

10. Having lost every other argument they have put up, the Applicants now take the ludicrous position that municipalities are obligated to act only "after becoming aware" of a state of disrepair, and not only that, they have no obligation to prevent a state of disrepair from arising. This is as legally ludicrous as airlines saying they're not going to de-ice any of their planes, they won't bother watching the weather forecast everyone else is watching (that would clearly tell them to start de-icing), but wait for the first plane crash, and only then start the de-icing on the other planes. We don't run our airlines like that; why should we do that with our roads? The Applicants interpretation of the *Minimum Maintenance Standards* is advanced for the first time here in this Honourable Court, and is flatly contradictory to the evidence of the Applicants' own witnesses. As the trial judge stated at para. 153 of his reasons: "There is no evidence from Mr. Cartwright or anyone else on behalf of the Town that their practice would have been to wait until there was a determination that icy conditions existed before salting equipment was dispatched." (Emphasis added)

Ref.: Application for Leave to Appeal, Tab 4, p. 54.

11. Furthermore, by ignoring the "ought to have known" standard in section 44(2)(a) and the obligation to "prevent a default from arising" in section 44(2)(b), the Applicants' position brings the *Minimum Maintenance Standards* into conflict with its parent statute. It is axiomatic that a regulation cannot be inconsistent with a parent statute, and section 64(2) of the *Legislation Act*, cited by the Applicants, states: "Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act."

Ref.: *Legislation Act*, S.O. 2006, Chapter 21, Schedule F, s. 64(2)

The *Minimum Maintenance Standards*

12. Pursuant to the authority granted under the *Municipal Act*, the *Minimum Maintenance Standards for Municipal Highways*, O. Reg. 239/02, came into force on November 1, 2002. The relevant parts of the Regulation are section 3, which sets out a routine patrolling standard; section 4, which sets out a standard for the clearing of snow; and section 5, which sets out a standard for the treatment of ice. Section 3 is headed "Routine Patrolling" and provides for patrolling frequency of a Class 1 Highway three times every seven days, and for a Class 2 Highway two times every seven days. The trial judge found that section 3 did not apply as the weather conditions were not routine and called for the scheduling of an evening patrol in light of the forecasted winter storm. As indicated above, the Applicants' witnesses admitted to this. In light of this finding of fact, the *Minimum Maintenance Standards* did not apply to the default of failing to monitor the weather or to arrange for an evening patrol. Consequently, the defence in section 44(3)(c) was not available to the Applicants since the minimum standards did not apply to these defaults. This finding of fact was decisive of the appeal, and indeed this view accords with writings of the Applicants' own counsel.

13. In *The Law of Municipal Liability in Canada*, cited in the decision *Thornhill v. Shadid*, discussed below, Applicants' counsel and co-author, Murray Davison, stated: "The 'minimum standards' contemplated by subsection 44(4), (5) and (6) (according to the 2001 *Municipal Act*) are codified in regulations which came into effect on November 1, 2002. These new minimum standards cover most road maintenance activities, with some significant omissions (such as winter night patrolling, unexpected early freezing conditions), which were apparently left out because the committee drafting the standards was unable to reach a consensus on those issues. Municipalities defending cases involving such issues will not therefore be able to take advantage of the statutory defences." Consistent with this view, the standards did not apply to the defaults found by the trial judge and therefore the Applicants were unable to "take advantage of the statutory defences."

Ref.: *Thornhill (Litigation Guardian of) v. Shadid* (2008), 289 D.L.R. (4th) 396 (Ont. S.C.J.) pp. 43-44. [Tab 4C]

14. Section 4 deals with snow-clearing and provides for the clearing of snow to a depth set out in a Table to section 4. For a Class 2 Highway, the depth is 5 cm., to be cleared within six hours of becoming aware the depth is greater than is set out in the Table. The trial judge found that section 4

did not apply as the Applicants did not clear the snow but rather applied salt to the middle of the roadway, which it was hoped would eventually have the effect of melting the snow. The trial judge also held that section 4 did not apply as the 5 cm. depth of snow had not been reached.

15. During oral argument in the C.A., counsel for the Applicants, Mr. Davison, acknowledged that the trial judge's interpretation of section 4 was not being challenged any further. This concession is recorded at paras. 27 and 28 of the reasons: "The trial judge reasoned that the obligation on the municipality to clear snow accumulation either while snow was continuing to accumulate or after accumulation had ended would only have been triggered when the snow on Derry Road exceeded five centimetres. Since only two centimetres had accumulated, s. 4 had no application. The appellants do not challenge this line of reasoning." The Court also recorded at para. 25: "Although the appellants no longer argue that s. 4 of the MMS applied to this case, I think a brief discussion of s. 4 is helpful."

Ref.: Application for Leave to Appeal, Tab 6, p. 78.

16. The Applicants now state the Factum filed took issue with the trial judge's interpretation of section 4. This is true, but the Applicants neglect to mention that the concession was made in oral argument, not in the Factum. The Applicants now seek to withdraw this concession. This is inappropriate and reflective of the fact the Applicants are prepared to grasp at any straw, no matter how frivolous, to avoid responsibility for the accident. The finding of the trial judge that section 4 did not apply, and the resulting concession of the Applicants, was also decisive of the appeal.

Ref.: Application for Leave to Appeal, Tab 12, para. 24, p. 184.

17. Section 5 deals with the treatment of ice and requires that resources be deployed to treat an icy roadway as soon as practicable after becoming aware that the roadway is icy. For a Class 2 road, the time to treat the roadway is four hours. The trial judge found that section 5 did not apply as the ice had formed as a result of the compaction of snow by vehicular traffic rather than by freezing rain as had been argued for by the Applicants' climatologist. The C.A. accepted the learned trial judge's conclusion but for different reasons.

The Reasons for Judgment of the C.A.

18. The C.A. held that section 5 applied to a situation where the ice had already formed since the section is worded in the present tense. It did not apply to a requirement to take action before ice had formed. Here, the trial judge made unchallenged findings of fact that the Applicants failed to monitor the weather forecast and failed to arrange an evening patrol. If either one of these had been done, the ice would not have formed. Since the *Minimum Maintenance Standards* do not deal with monitoring the weather or evening patrols, a defence was not available to the Applicants. This reasoning is unassailable, and is in accordance with the interpretation of Mr. Davison in the textbook cited above and the concession made by him in oral argument.

PART II – STATEMENT OF ISSUES

19. Does this case raise sufficiently important legal issues relating to:

(a) statutory interpretation: No, this Honourable Court has repeatedly set out the approach to statutory interpretation. The Applicants' complaint is solely with the application of this test;

(b) the ability of provincial governments to regulate the level of civil liability of municipalities in order to control public expenditures: This suggested issue is exaggerated. The provincial government has regulated the civil liability of municipalities by way of the *Municipal Act* and standard of care set out therein. The *Minimum Maintenance Standards* must be interpreted in accordance with the language used in the regulation, and consistent with the parent legislation;

(c) the proper relationship between legislatures and the Courts: This issue is also grossly exaggerated. The Courts must interpret the words of statutory instruments in accordance with the guidance provided by this Honourable Court. That is what the Court of Appeal did.

PART III – STATEMENT OF ARGUMENT

20. The Applicants acknowledge that the approach to statutory interpretation is as set out by this Honourable Court, namely that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act. The scheme

of the *Municipal Act* is to regulate the standard of care of a municipality for maintenance of the roadways in accordance with all the circumstances of the case.

21. Section 44(1) requires that the municipality keep a highway or bridge in a state of repair "that is reasonable in the circumstances, including the character and location of the highway or bridge." Section 44(2) provides that "A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default." Section 44(3) goes on to provide for the defences noted above: (a) if the municipality did not know or could not have been expected to know of the state of repair of the highway or bridge; (b) "it took reasonable steps to prevent the default from arising"; or (c) "at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met."

22. The C.A. interpreted the plain language of section 44(3)(c) and concluded that, in order for the defence to be available, the minimum standards would have to have applied to the alleged default. Since the minimum standards did not address issues of monitoring the weather or evening patrols, a defence was not available under that section.

23. This interpretation accords with the ordinary sense of the words in the *Municipal Act*, and is harmonious with the scheme and object of the Act. Section 44(3)(a) speaks of knowing or ought to know of a state of repair, while section 44(3)(b) speaks of preventing a default from arising. To the extent the C.A.'s interpretation of section 44(3)(c) focusses on preventative action, this is harmonious with section 44. By contrast, the Applicants' take the position that the *Minimum Maintenance Standards* only obligate a municipality to act after becoming aware of a state of disrepair and there is no obligation to prevent a default from arising. This interpretation is contrary to the scheme and object of the Act.

Ref.: *Municipal Act*, S.O. 2001, c. 25. 44(3)(a)(b)(c)

24. It is also contrary to decades' worth of decisions on the obligations of a road authority. Those decisions make clear that there is an obligation to take action to prevent a state of disrepair from arising. In *The Queen v. Cote*, which involved an accident caused by compaction of snow and

consequent icy roads, Dickson J. (as he then was) stated:

> The impugned act or omission lay in permitting to continue for some hours a 'treacherous, slippery and dangerous' icy condition upon a short stretch of much-travelled highway with a known tendency to ice up. It would seem to me that a reasonable person, familiar with Canadian winters, should have anticipated a vehicle collision or collisions as the natural, and indeed, probable, result of such a condition of manifest danger.
>
> Ref. *The Queen v. Cote*, [1976] 1 S.C.R. 595, p. 604 [Tab 4B]

25. The trial judge referred to the 1948 decision of the Court of Appeal in *Gardam v. The King*, which in turn referred to this Court's 1917 decision in *Jamieson v. The City of Edmonton*, in which Duff J. (as he then was) stated: "if due diligence had been used by the municipality and those entrusted by the municipality with the care of the streets, the state of non-repair of the sidewalk there in question would have been known by the persons responsible."

Ref. *Gardam v. The King*, [1948] 4 D.L.R. 175 (Ont. C.A.), pp. 185-186, [Tab 4A]

26. The C.A. went on to say: "The absence of due diligence on the part of those entrusted with the care of the highway in ascertaining that a dangerous condition existed so that those using the road would receive warning, and so that the danger might be averted by those responsible for the repair of the highway, was in my opinion a failure to discharge a duty which would be cast upon a municipality in relation to a road under its charge where similar conditions existed, and which therefore, in the present case, was cast upon the Department of Highways by virtue of subs. 9 of s. 75 of the statute."

Ref. *Gardam v. The King*, *supra*, pp. 185-186 [Tab 4A]

27. In *Montani v. Matthews*, involving an accident on black ice which had formed on a bridge known to ice over quickly, Moldaver J.A. (as he then was) stated: "In my opinion, as a matter of law, there is no need to insist on the actual formation of black ice as a condition precedent to a finding of non-repair." In *Bisoukis v. Brampton (City)*, also involving black ice on a road with a known tendency to ice up, Borins J.A. stated: "there was no need to insist on the actual formation of black ice as a condition precedent to a finding of non-repair. It was sufficient, as the evidence in this appeal established, that the thaw of March 16 and 17 followed by a deep freeze on March 17-18 made it extremely likely that one, or more, culverts would freeze and black ice would form." In

MacMillan v. Ontario, which involved black ice on a bridge known to experience preferential icing, Goudge J.A. stated: "Thus, given the circumstances affecting the bridge in the early morning of October 12, even if the Ministry did not know of or have constructive knowledge of the actual formation of the preferential icing on the bridge, it ought reasonably to have known of the real risk of this happening....Had such an inspection been conducted in the early morning of October 12, 1988, I am satisfied that the bridge over Highway 2 would have been salted and sanded prior to the accident and the appellant would not have skidded out of control." This Honourable Court denied leave to appeal in each one of these cases.

Ref. *Montani v. Matthews* (1996), 29 O.R. (3d) 257 (C.A.), pp. 272 (Book of Authorities of the Applicants, Tab 10).
Bisoukis v. Brampton (City) (2000), 180 D.L.R. (4th) 577 (Ont. C.A.), para. 84 (Book of Authorities of the Applicants, Tab 1).
MacMillan v. Ontario (Minister of Transportation & Communications) (2001), 24 M.V.R. (4th) 15 (Ont. C.A.), paras. 48, 52 (Book of Authorities of the Applicants, Tab 7).

28. These decisions did not set out any new principles as the Applicants suggest, but rather were applications of the standard in section 44(1) of the *Municipal Act* and predecessors, to keep the highway in a state of repair "that is reasonable in the circumstances, including the character and location of the highway or bridge." In *Waldick v. Malcolm*, this Honourable Court reached the same conclusion in the related area of occupier's liability. Section 3(1) of the *Occupiers Liability Act* is similar to section 44(1) of the *Municipal Act* and provides that an occupier owes a duty to "take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises." The Court stated the goal of the Act was to "promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe."

Ref. *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, p. 477 [Tab 4D]
Municipal Act, S.O. 2001, c. 25. 44(1)

29. A similar conclusion was reached in relation to the *Minimum Maintenance Standards*. In *Thornhill v. Shadid*, Howden J. undertook an extended analysis of the standards and made the following comments:

Use of the routine patrol standard for the various classes of highways during periods

> such as winter storms, when highly dangerous conditions can form and change within hours, coupled with the trigger of actual knowledge to activate the duty of the municipality to clear snow or treat ice on the highways, would form a major departure from the legislated requirements in section 284 of the *Municipal Act* and the purpose of that legislation. That purpose is to protect reasonable users of the highways, roads and bridges from unreasonable risk of harm of which the authority has knowledge or, through reasonable steps, could be expected to be aware of, in order to prevent or to remedy the risk of harm. A literal interpretation of sections 3, 4 and 5 of the MMS, if applied to storm conditions, would countenance snow or ice accumulation over small or even wide areas of a regional municipality for days when no patrolling would occur at all (because the municipality is only required to patrol three times out of every seven days in the case of Class 1 highways and one of every fourteen or thirty days in the case of Class 4 and 5 roads.)
>
> Ref. *Thornhill (Litigation Guardian of), supra,* para. 100 [Tab 4C]

30. The trial judge also commented on the dangers of adopting a literal interpretation of the *Minimum Maintenance Standards*:

> This is a case of snow falling and covering the road which was then compacted by vehicular traffic into hard packed snow and ice or icy conditions at various places. The remediation, salting of the roads, was intended to prevent the compacting of snow and the creation of ice and slippery conditions. It makes no common sense to interpret this section [5] of the MMS as being applicable in the circumstances of this case. If it were otherwise, municipalities could avoid any of their obligations to clear the roads of snow by waiting until the snow becomes compacted and turns into ice and then claiming that a new time limit is triggered from the time when the municipality becomes aware that the roadway is icy.
>
> Ref.: Application for Leave to Appeal, Tab 4, para. 165, p. 60.

31. Like the trial judge herein, Howden J. held that section 3 of the *Minimum Maintenance Standards* dealt only with routine patrolling and did not apply to evening patrols or winter storms. Indeed, Howden J. quoted from Applicants' counsel, Mr. Davison's textbook in this regard. The Applicants did not refer to section 3 of the regulation in the Court of Appeal. Now, faced with the decision of the Court that a defence under section 44(3)(c) did not apply to the default of failing to arrange an evening patrol, the Applicants say, for the first time in this Court, that section 3 sets out the circumstances under which the icy conditions would have become known. Respectfully, this Honourable Court should not entertain such a crystal ball submission.

32. To return to the point made at the outset, there is no national issue or issue of legal

importance raised in the proposed appeal. The trial judge and the C.A. interpreted the *Minimum Maintenance Standards* in accordance with the words of the Act and the regulation, in accordance with the object and scheme of the *Municipal Act* and the factual evidence led at trial, including admissions made by the Applicants' witnesses. The proposed appeal is no more than an attempt by the Applicants to re-litigate issues decided against them.

PART IV – COSTS

33. The accident herein caused devastating injuries to Patrizia Giuliani. She was put through a two-week trial in which the Applicants' defences were rejected and indeed findings of gross negligence were made. The Applicants' appeal to the C.A. was also decisively rejected and $50,000 in costs was awarded against them. The Applicants now put forward a factual, frivolous application for leave to appeal raising issues that were not argued in the Courts below, which bear no relation to the evidence of their own witnesses and which seek to withdraw concessions made by their own counsel in oral argument.

PART V – ORDER SOUGHT

34. That leave to appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, in the Province of Ontario, this 14th day of March, 2012.

ALLAN ROUBEN
Counsel for the Respondents
Patrizia Giuliani, Tina Giuliani

PART VI - TABLE OF AUTHORITIES

PART VII – STATUTES AND REGULATIONS

1. *Legislation Act*, S.O. 2006, Chapter 21, Schedule F, s. 64(2)
2. *Municipal Act,* S.O. 2001, c. 25. 44(3)
3. *Minimum Maintenance Standards for Municipal Highways*, O. Reg. 239/02.

***Legislation Act*, S.O. 2006, Chapter 21, Schedule F, s. 64(2)**

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).

***Loi de 2006 sur la législation*, L.O. 2006, CHAPITRE 21, Annexe F, s. 64(2)**

Solution de droit

64. (1) La loi est censée apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de ses objets. 2006, chap. 21, annexe F, par. 64 (1).

Idem

(2) Le paragraphe (1) s'applique également à un règlement, dans le contexte de la loi en application de laquelle il est pris et dans la mesure où il est compatible avec celle-ci. 2006, chap. 21, annexe F, par. 64 (2).

council or to an employee of the municipality, subject to any conditions which the municipality may impose, the power to close a highway temporarily for any purpose specified in the by-law.

Conveyance of closed highway

43. A municipality that permanently closes a highway shall not convey the land forming the highway if it is covered with water without the consent of the Ministry of Natural Resources.

Maintenance

44. (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.

Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

Regulations

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

General or specific

(5) The minimum standards may be general or specific in their application.

Adoption by reference

(6) A regulation made under subsection (4) may adopt by reference, in whole or in part, with such changes as the Minister of Transportation considers desirable, any code, standard or guideline, as it reads at the time the regulation is made or as it is amended from time to time, whether before or after the regulation is made.

Limitation on actions

(7) No action shall be brought against a municipality for damages for lack of repair, even if the municipality was at fault, after the expiration of three months from the time the damages were sustained.

ployés ou à un comité de son conseil, sous réserve de toute condition qu'elle impose, le pouvoir de fermer une voie publique temporairement à toute fin que précise le règlement municipal.

Transport d'une voie publique fermée

43. La municipalité qui ferme une voie publique de façon permanente ne doit pas, sans le consentement du ministère des Richesses naturelles, transporter le bien-fonds qui constitue la voie publique et qui est immergé.

Entretien

44. (1) La municipalité qui a compétence sur une voie publique ou un pont en assure l'entretien raisonnable dans les circonstances, y compris le caractère et l'emplacement.

Responsabilité

(2) Sous réserve de la *Loi sur le partage de la responsabilité*, la municipalité qui ne se conforme pas au paragraphe (1) est responsable des dommages subis par quiconque en conséquence.

Défense

(3) Malgré le paragraphe (2), une municipalité n'encourt aucune responsabilité pour ne pas avoir assuré l'entretien raisonnable d'une voie publique ou d'un pont si, selon le cas :

a) elle n'avait pas connaissance de l'état de la voie publique ou du pont et il n'est pas raisonnable de s'attendre à ce qu'elle en ait eu connaissance;

b) elle a pris des mesures raisonnables pour empêcher le manquement de se produire;

c) au moment où la cause d'action a pris naissance, les normes minimales établies en vertu du paragraphe (4) s'appliquaient à la voie publique ou au pont et au manquement qu'elle aurait commis et ces normes ont été respectées.

Règlements

(4) Le ministre des Transports peut, par règlement, établir des normes minimales pour l'entretien des voies publiques et des ponts ou pour toute catégorie de ceux-ci.

Portée

(5) Les normes minimales peuvent avoir une portée générale ou particulière.

Adoption par renvoi

(6) Les règlements pris en application du paragraphe (4) peuvent adopter par renvoi, avec les modifications que le ministre des Transports estime souhaitables, tout ou partie d'un code, d'une norme ou d'une ligne directrice, tel qu'il existe au moment où sont pris les règlements ou tel qu'il est modifié, soit avant ou après ce moment.

Prescription

(7) Est irrecevable l'action intentée contre une municipalité pour des dommages causés en raison du manque d'entretien, même si celle-ci est fautive, plus de trois mois à compter du moment où les dommages ont été subis.

"paved surface" means a surface with a wearing layer or layers of asphalt, concrete or asphalt emulsion;

"roadway" has the same meaning as in subsection 1 (1) of the *Highway Traffic Act*;

"shoulder" means the portion of a highway that provides lateral support to the roadway and that may accommodate stopped motor vehicles and emergency use;

"surface" means the top of a roadway or shoulder.

(2) For the purposes of this Regulation, every highway or part of a highway under the jurisdiction of a municipality in Ontario is classified in the Table to this section as a Class 1, Class 2, Class 3, Class 4, Class 5 or Class 6 highway, based on the speed limit applicable to it and the average annual daily traffic on it.

(3) For the purposes of subsection (2) and the Table to this section, the average annual daily traffic on a highway or part of a highway under municipal jurisdiction shall be determined,

(a) by counting and averaging the daily two-way traffic on the highway or part of the highway for the previous calendar year; or

(b) by estimating the average daily two-way traffic on the highway or part of the highway in accordance with accepted traffic engineering methods.

TABLE

CLASSIFICATION OF HIGHWAYS

Average Annual Daily Traffic (number of motor vehicles)	Posted or Statutory Speed Limit (kilometres per hour)						
	100	90	80	70	60	50	40
15,000 or more	1	1	1	2	2	2	2
12,000 - 14,999	1	1	1	2	2	3	3
10,000 - 11,999	1	1	2	2	3	3	3
8,000 - 9,999	1	1	2	3	3	3	3
6,000 - 7,999	1	2	2	3	3	3	3
5,000 - 5,999	1	2	2	3	3	3	3
4,000 - 4,999	1	2	3	3	3	3	4
3,000 - 3,999	1	2	3	3	3	4	4
2,000 - 2,999	1	2	3	3	4	4	4
1,000 - 1,999	1	3	3	3	4	4	5
500 - 999	1	3	4	4	4	4	5
200 - 499	1	3	4	4	5	5	5
50 - 199	1	3	4	5	5	5	5
0 - 49	1	3	6	6	6	6	6

Application

2. (1) This Regulation sets out the minimum standards of repair for highways under municipal jurisdiction for the purpose of subsection 284 (1.4) of the Act.

(2) The minimum standards of repair set out in this Regulation are applicable only in respect of motor vehicles using the highways.

(3) This Regulation does not apply to Class 6 highways.

MINIMUM STANDARDS

Routine patrolling

3. (1) The minimum standard for the frequency of routine patrolling of highways is set out in the Table to this section.

(2) Routine patrolling shall be carried out by driving on or by electronically monitoring the highway to check for conditions described in this Regulation.

(3) Routine patrolling is not required between sunset and sunrise.

TABLE

ROUTINE PATROLLING FREQUENCY

Class of Highway	Patrolling Frequency
1	3 times every 7 days
2	2 times every 7 days
3	once every 7 days
4	once every 14 days
5	once every 30 days

Snow accumulation

4. (1) The minimum standard for clearing snow accumulation is,

(a) while the snow continues to accumulate, to deploy resources to clear the snow as soon as practicable after becoming aware of the fact that the snow accumulation on a roadway is greater than the depth set out in the Table to this section; and

(b) after the snow accumulation has ended and after becoming aware that the snow accumulation is greater than the depth set out in the Table to this section, to clear the snow accumulation in accordance with subsections (2) and (3) or subsections (2) and (4), as the case may be, within the time set out in the Table.

(2) The snow accumulation must be cleared to a depth less than or equal to the depth set out in the Table.

(3) The snow accumulation must be cleared from the roadway to within a distance of 0.6 metres inside the outer edges of the roadway.

(4) Despite subsection (3), for a Class 4 highway with two lanes or a Class 5 highway with two lanes, the snow accumulation on the roadway must be cleared to a width of at least 5 metres.

(5) This section,

(a) does not apply to that portion of the roadway designated for parking; and

(b) only applies to a municipality during the season when the municipality performs winter highway maintenance.

(6) In this section,

"snow accumulation" means the natural accumulation of new fallen snow or wind-blown snow that covers more than half a lane width of a roadway.

TABLE

SNOW ACCUMULATION

Class of Highway	Depth	Time
1	2.5 cm	4 hours
2	5 cm	6 hours
3	8 cm	12 hours
4	8 cm	16 hours
5	10 cm	24 hours

Icy roadways

5. (1) The minimum standard for treating icy roadways is,

(a) to deploy resources to treat an icy roadway as soon as practicable after becoming aware that the roadway is icy; and

(b) to treat the icy roadway within the time set out in the Table to this section after becoming aware that the roadway is icy.

(2) This section only applies to a municipality during the season when the municipality performs winter highway maintenance.

TABLE

ICY ROADWAYS

Class of Highway	Time
1	3 hours
2	4 hours
3	8 hours
4	12 hours
5	16 hours

Potholes

6. (1) If a pothole exceeds both the surface area and depth set out in Table 1, 2 or 3 to this section, as the case may be, the minimum standard is to repair the pothole within the time set out in Table 1, 2 or 3, as appropriate, after becoming aware of the fact.

(2) A pothole shall be deemed to be repaired if its surface area or depth is less than or equal to that set out in Table 1, 2 or 3, as appropriate.

TABLE 1

POTHOLES ON PAVED SURFACE OF ROADWAY

Class of Highway	Surface Area	Depth	Time
1	600 cm²	8 cm	4 days
2	800 cm²	8 cm	4 days
3	1000 cm²	8 cm	7 days
4	1000 cm²	8 cm	14 days
5	1000 cm²	8 cm	30 days

TABLE 2

POTHOLES ON NON-PAVED SURFACE OF ROADWAY

Class of Highway	Surface Area	Depth	Time
3	1500 cm²	8 cm	7 days
4	1500 cm²	10 cm	14 days
5	1500 cm²	12 cm	30 days

TABLE 3

POTHOLES ON PAVED OR NON-PAVED SURFACE OF SHOULDER

Class of Highway	Surface Area	Depth	Time
1	1500 cm²	8 cm	7 days
2	1500 cm²	8 cm	7 days
3	1500 cm²	8 cm	14 days
4	1500 cm²	10 cm	30 days
5	1500 cm²	12 cm	60 days

Q. It would be the Region's expectation, I'm just talking a bit about monitoring weather, it would be the Region's expectation that the Town would use all available resources to monitor the weather. Correct?

A. Correct.

Q. And to follow its progression. Correct?

A. Correct.

Q. And that's important because you wanted to implement these standards that the Region has as soon as possible. Correct?

A. Correct.

Q. Now in 2002, we were talking about it earlier about this system in place. I always forget the initials to it.

A. Road Weather.....

THE COURT: RWIS.

A. Yeah, road weather information system or if you want to use the "A", advanced road weather information system.

Q. Okay. Did the Region contact the Town in November 2002, and advise them that you were having this system installed.

A. According to this report, yes, but I couldn't definitively answer that question.

Q. Were you working for the Region in '91 and '92?

A. Yes.

Q. And there was winter control manual dated 1991 and 1992?

A. Appears that way.

Q. Okay. And do you recall seeing in that document a trial use of this same system of the RWIS.

A. Correct. The objective would be to meet our performance standards.

Q. The MMS, as I call it, those weren't introduced as far as the Region's standards until after this accident, I understand.

A. I believe they were January, 2003.

Q. They were actually implemented January '03?

A. Let me just double check.

THE COURT: The MMS?

MR. KENNEY: The Minimum Maintenance Standards.

A. January 22nd, '03.

Q. And that's according to the recommendations in the staff report of December 16th, 2002?

A. '07, '03, yeah. I don't know which Exhibit or what - it was P-P-W 0-7-0-3.

Q. Okay. As far as the accident on April 1st, 2003, and the road maintenance standards at that time, it's the agreement that the Region was still using?

A. Yes.

THE COURT: I'm not sure I understood that sequence of questions and answers. Sorry. I understood the words, but I'm not sure I understand their meaning. When were the Minimum Maintenance Standards implemented? Was the answer to that in January of 2003?

MR. KENNEY: Yes, but with respect to the accident on April, 2003, the Region was still using its performance standards attached to its agreement of 2001. Correct?

A. Correct. Because the performance standards were not updated until December '03, but we just, we changed the routine patrol back in January.

Q. So for March 31st and April 1st, 2003, the Town knew they were still following a 2001 agreement and the performance standards attached to it?

A. Correct.

Q. Mr. Zervos, I'm almost finished. The statistics that you prepared, the pie chart and the various other documents, you'd advised His Honour I think with respect to surface type, that information came from the police reports, the motor vehicle accident reports?

A. Correct.

Q. I take it the weather conditions also came from that report?

A. Yes.

Q. So all the data in those statistics, it solely comes from those reports?

A. Yes.

Q. And the Region does not go back and check to see if that information is correct?

A. Um, no, we would have no way of verifying what the Police Officer; sometimes we don't get these reports till a month, two months afterwards.

Q. Do you share that information with the Town, and I'm talking back in 2003, 2002, winter?

A. Um, no, we, we just forward to the Town accidents that take place on their roadways.

Q. And I believe you indicated this to His Honour, that the information in the stats that you provided, were only regional roads. You have no idea, and I'm talking about the one that was dealing with April 1st, 2003, that was setting out the times of various accidents?

A. That was just for the one day on April 1st, 2003, in Milton. Yes.

Q. So it would be reasonable to expect the Region to talk to the Town about this off season that isn't clearly defined in the standards.

A. I think it would reasonable for the maintenance, the organization responsible for maintenance, the Region and Milton if they're the contractor, to have a recognition that there may be a necessity for winter control services to be provided beyond the very hard fixed date.

Q. And in your review you didn't see any document showing any sort of discussion between the Region and the Town on that issue?

A. No, I didn't see anything explicitly detailing that.

Q. When you were going through the table and talking about all the various municipalities who have different end dates, do you, you don't comment on whether or not there they have flexible end dates. Do you know?

A. Um, well some do have flexibility in the survey, some of the input indicated that they ramp up. They start with a smaller level of service, numbers of employees assigned to the task and then increase as the calendar changes. And others change the start and end date each year depending on the calendar. For example, the first Monday in December as opposed to December 1st.

Q. Given your experience dealing with traffic safety, you'd agree with me that especially dealing with road, winter road maintenance, monitoring the weather's very important.

A. Yes, absolutely.

Q. There isn't any standard that I could find indicating how to monitor the weather or the frequency of

I guess, the maximum allowable snow accumulation is five centimeters, two inches, before plowing. What does that mean to you in practice?

A. In reading this you mean or?

Q. No, what how, what does that, what does that clause mean to you in its application to the roads covered by the agreement?

A. Um....

Q. Let me put it this way. Do you sit and wait till there's five centimeters of snow before you do anything?

A. No. Basically in a layman's terms we tell our operators and everybody that you get it black and black and wet as soon as possible.

Q. All right. Do you start plowing and salting when the first snowflake hits the ground?

A. No, no. Basically once the, the road appears, I use the term 'white' is when we'd start.

Q. Okay. I'll come back and touch upon that with you in a minute. Would you also look at page 24 which is the winter road patrol performance standard, and you've heard us yapping about this and the end of March, etcetera. Will you tell His Honour how that standard is dealt with in practice by the Town?

A. The, I guess the, the biggest thing is the, the patrols are performed from December 1st to March 1st, more or less for scheduling staff from a shift perspective and that's, that's what we kind of follow as the guidelines.

Q. Okay. And you'll agree that the time that appears here which is December to the end of March only seems to apply to the patrol standard.

A. Yes. I agree.

MR. DAVISON: We'll be hearing from him. Q. And I'm sorry. I interrupted. So there's four of you that deal with weather?

A. Just that, and its part of our daily routine you kind of look at it because of, you're outdoor maintenance and whether its winter or summer you're looking for rain, high winds, um, we just constantly since I took this job in '99 as far as the roads I don't think there's a day goes by that I'm not checking the weather or and even when you go home you can see what could be happening.

Q. Okay. And what facilities are there for checking the weather at the Town's offices or yards, whatever.

A. Presently or in 2000....

Q. Oh, at, everything I'm asking you is about...

A. Okay.

Q. ...2003.

A. We had, we had access to the internet and we used um, as I think I said we were using, sorry, we had access to the internet and we used the weather network, we used the environmental Canada and we had various radar that we would, we would - sites that we would go on. One was Intellicast which is a U.S.-based one, but it gives you a good idea of the, kind of almost North American - what's coming in and coming out.

Q. All right. Let me ask you this. In the event that a snowfall begins, are you able to tell us whether it would make any difference if the full patrol - if it happened during the full patrol period in March or after.

A. And meaning that a snowfall begins.

Q. Yeah, let's say, let's stay it started snowing on a given day, if that day is March 25th or if that day is April 2nd, or 3rd, the one having the full winter patrol and the

other not, are you able to say what difference it would make if there was a full patrol.

A. If we were aware that there was a forecast that something was coming, something significant, we would - like I explained earlier, if the patrol wasn't out there we would put somebody out there to see if it was coming whether it was day or night.

Q. Okay. Is this after March 31st or before?

A. After.

Q. Okay. But if it happened before would there be any difference? I mean would the trucks get to a particular point any sooner. Are you able to tell us what are the factors involved?

A. No I, yeah, I can't say whether they would be able - there's a lot of other factors involved, I mean....

THE COURT: Although generally speaking, just so, let me lead you through this, because based on what you've said, if you knew there was weather coming you'd put a patrol out there. Why do you do that? So you can react more quickly. Right?

A. Right.

THE COURT: Generally speaking, that's why you have a patrol out there, so you know if something's coming. If it didn't make a difference you wouldn't a patrol out, but you do. He's already done that.

MR. DAVISON: Okay. I guess I'm asking how much of a difference.

THE COURT: Well how do you know? Depends on how many variables. If its coming 100 miles an hour, maybe not as much as if its coming at 20 miles an hour, if that's the sort of variable you mean.

A. ...forecasting, yeah, I guess the weather. Yeah.

Q. Okay. And back in 2003 to the date of April 1st, the most common tool that you used were those things that you just mentioned to your counsel, Mr. Davison, earlier - the weather forecasts by going on the internet, looking at the radar, etcetera. Correct?

A. Yes.

Q. And in terms of road maintenance, you'll agree that weather forecasting gives, essentially all its going to do is give you notice that something's coming your way. Right?

A. Yes.

Q. And that without that notice you can't make a reasonable plan of action can you?

A. Um, no.

Q. And without a reasonable plan of action, you're left to deal with the road conditions just as they happen.

A. Yes.

Q. And if that's the case, then any response by your team will be after the fact. Correct?

A. In a particular area, yes.

Q. Well everywhere it'll be after the fact.

A. No. If we knew about, if we knew snow - if it was starting snowing in Brookville a lot of time we assume that its coming this way.

Q. Okay. In terms of road maintenance, road patrolling is the key tool that you use to be able to see what is actually happening on the roads. Right?

A. Yes.

Q. And you'll agree that road patrolling, we've talked about it a lot today, it's the key to keeping the roads in good repair.

A. For winter maintenance?

Q. Yes.

A. Yes.

Q. And you've already told us too that April 1st the Town had the equipment and the manpower to do road patrol. Correct?

A. Correct.

Q. Mr. Thompson, you'd also agree that the public is relying on you to keep the roads safe for their use, aren't they?

A. Yes.

Q. And you know that our tax dollars support your operations?

A. Yes.

Q. You also know that a dangerous road condition can have serious or life-threatening consequences for the users of those roads if you don't get your job done right.

A. Yes.

Q. And I'm sure you're keenly aware that in a large organization like a municipality it's extremely critical that you've got clear instructions for your employees to follow?

A. Yes.

Q. And to get, to allow them to get their tasks done. Correct?

A. Yes.

Q. And in order to meet your goal of keeping the roads in a safe condition.

A. So that was...

Q. Well, if they don't...

A. ...to get their tasks....

procedures that the Town employed with respect to road maintenance on the Regional Roads?

A. Yes.

Q. And it's up to you to make sure that the supervisors have all their necessary skills and knowledge in order to complete their work and meet the levels of service?

A. Yes.

Q. And it's also up to you to ensure that they know what level of service is expected by the Region.

A. Yes.

Q. And it's also up to you to ensure that those crew supervisors understand the importance of the timing of their operations.

A. Yes.

Q. And that they understand that the most important part of their job is to prevent poor road conditions from forming. Correct?

A. Yes.

Q. And you'd probably agree I'm sure that if you properly prevent there will be less repair to be done.

A. Yes.

Q. And that's cost efficient.

A. Yes.

Q. Which is one of the reasons for the Region downloading the maintenance operations to the Town in the first place?

A. It's my understanding, yes.

Q. I take it that your job description also requires you to make sure that they're meeting the performance standards and executing their duties.

A. That's correct.

Q. Okay. We've heard a lot of evidence in this trial and if, take it from me that there was snow predicted. We were talking about the quantum certainly. It was flurries...

A. Flurries.

Q. ...and it was cloudy and it was updated at 3:30 to snow and the evidence is that it was 80 to 100 percent chance of snow. That's the evidence that we heard from Mr. Smith. So if that's the weather that you had, you chose to leave without making any arrangements for either a patrol or for somebody to come in and just keep their eyes on the road. Right?

A. If that's the interpretation I would have got from myself then I would have arranged it.

THE COURT: Sorry? Can you just say that again?

A. If I had of realized that there was - I mean hindsight, if I had of realized there was a pending storm I would have implemented a patrol, but obviously I didn't interpret it that way.

Q. Well your methodology of monitoring the conditions of the road sounds - well, the way you do it it's actually 100 percent accurate isn't it? You go home, you go to sleep, you get up you take a look at what the weather is and you'll always be right won't you? You look out and if you see snow it'll be snowing, you see rain its rain, if you see sun its sun. You're going to be 100 percent right, so that's better than looking at the weather forecast. Is that what you thought?

A. I, my thought process wasn't that way.

Q. You woke up in the morning and you knew that the snow you had seen on those weather forecasts the day before

that was coming for that day had happened and it predicted it was going to happen in the morning hours and it did didn't it?

A. If I had of known that there would be a snow accumulation that would affect the public I would err on the side of caution and there would have been a patrol.

Q. You would have erred if you had known, but the only way for you to know is to check the weather. And when there's any snow you know that there is no guarantee, it could have been zero, it could have been 10 feet. So when you err on the side of caution, when you see snow predicted you've got to if you're going to err on that side of caution take steps to make sure that you're watching for when it starts. Right?

MR. DAVISON: Sorry, Your Honour. I have to rise on that one.

MS. CHITTLEY-YOUNG: Too long.

MR. DAVISON: There is no evidence of 10 feet. My friend knows full well that the evidence is that it was under two centimeters in the weather forecast if that's what she's talking about. That's not fair to put a 10 foot number to the witness.

MS. CHITTLEY-YOUNG: I, what I said I believe...

THE COURT: I agree.

MS. CHITTLEY-YOUNG: ...and I'll rephrase that. I said when you got up and looked outside at your own road, you said you saw two to three centimeters.

A. Guesstimate.

Q. Your guesstimate. And you could have gotten up that day with the same forecast from the day before and you could have seen six centimeters. You could have seen nothing because maybe it didn't start yet or come in as quickly as they said. Right? When you go home and you just look out your

window you don't know necessarily what's coming because forecasts aren't 100 percent perfect are they?

A. Not all the time, no.

Q. No. So if you're going to err on the side of caution like you said you would and I think you would have, you would have called out a patrol or you would have had somebody stay on shift. Or maybe even you would have stayed on shift yourself. Correct?

THE COURT: If what? I'm sorry.

Q. If he, if he wanted to err on the side of caution.

THE COURT: But err in what circumstances. I'm sorry.

MS. CHITTLEY-YOUNG: When he saw the snow forecast for snow.

THE COURT: Well what he said is he recalled flurries and he didn't think he's, he didn't think on that basis there was any need to schedule a winter patrol. Isn't that what I understood?

A. Yes. Absolutely.

THE COURT: And if, maybe the question that I might have - if you'd seen snow and recognized that it could be up to two centimeters would you have scheduled a winter patrol on that basis?

A. Yes.

MS. CHITTLEY-YOUNG: Your Honour, maybe this is a good time for a break.

THE COURT: Maybe. I was a little bit late coming in. I mean I'm happy to have one. How close are you to being finished.

MS. CHITTLEY-YOUNG: I still have a little bit of time.

Can.

Ex. Ct.

MALBOUF v. THE KING.

O'Connor J.

the employ of his master at the time of committing the grievance."

In *Joel* v. *Morison* (1834), 6 Car. & P. 501 at p. 503, 172 E.R. 1338, Parke B. said: "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

In *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476 at pp. 479-80, Cockburn C.J. said: "I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment."

Nor can it be said that when the driver left the beer parlour with the intentions of taking the ambulance to the garage that he re-entered upon the work he was employed to perform. Because not having started out on the respondent's business, his frolic would not end until he returned the ambulance to the Aylmer Bldg. or to the garage.

The result is, much as the loss to the suppliant is to be regretted, that the suppliant, in my opinion, is not for the reasons I have given, entitled to the relief sought against this respondent. If it had been necessary to compute the damages of the suppliant I would have assessed them at $800. The suppliant's claim will, therefore, be dismissed, but under the circumstances, without costs.

Action dismissed.

GARDAM et al. AND TWA et al. v. THE KING.

Ont.

C.A.

Ontario Court of Appeal, Robertson C.J.O., Fisher and Hogg JJ.A. June 23, 1948.

Highways IV—Liability for non-repair—Negligence—Inadequacy of inspection during flood conditions—Insufficiency of culvert—Highway Improvement Act (Ont.)—

The Department of Highways is liable for negligence under s. 75 of the *Highway Improvement Act*, R.S.O. 1937, c. 56 where damage results to persons because of a large and deep hole in a provincial highway which has been washed out where it is shown

Ont.

C.A.

GARDAM AND TWA v. THE KING.

Fisher J.A.

that when the Department took over the road there was a culvert on it, that no sufficient inquiry was made as to the adequacy of the culvert and subsequently the road was extended and widened so that the culvert created a situation of danger requiring close inspection and watching in time of flood, that flood conditions developed and only an inadequate and cursory inspection was made of the condition which menaced the highway and which subsequently gave rise to the accident.

Cases Judicially Noted: *Jamieson* v. *Edmonton*, 36 D.L.R. 465, 54 S.C.R. 443, [1917] 1 W.W.R. 1510; *McCready* v. *Brant*, [1939] 3 D.L.R. 358, S.C.R. 278; *Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 S.C.R. 457, 2 W.W.R. 66, refd to.

Statutes Considered: *Highway Improvement Act*, R.S.O. 1937, c. 56, s. 75.

APPEAL by the Crown (Ont.) from a judgment of Urquhart J., [1948] 2 D.L.R. 173, awarding damages against it for non-repair of a provincial highway. Affirmed.

D. M. Fleming, K.C. and *Nicol Kingsmill*, for appellant.

Arthur G. Slaght, K.C. and *M. Robb*, for respondents.

ROBERTSON C.J.O.:—I have read the reasons for judgment of Fisher J.A. and of Hogg J.A. I concur in the result at which they have arrived.

FISHER J.A.:—This is an appeal by the defendants from a judgment of Urquhart J. [[1948], 2 D.L.R. 173, O.R. 61] in two actions tried together, for damages, for serious injuries alleged to have been caused by the negligence of the defendants.

The learned Judge has referred in great detail to the evidence upon which he based his conclusions and this Court was favoured with lengthy arguments with further reference to the evidence and also with the citation of many cases. I was convinced at the close of the argument that the learned trial Judge was right in deciding: (a) that there was no negligence on the part of the driver of the car. (He was driving at a moderate rate of speed —20 to 25 m.p.h.—was keeping a proper look-out; his car was in perfect condition with the lights properly adjusted, and he had no warning whatever that he was approaching a cave-in); (b) that the accident was not due to the act of God, and (c) that it was not an unavoidable accident.

The cave-in at the culvert was a very large one, sufficient to permit practically the whole of the car to fall into it. The culvert was an old one and for about 17 years there is no record of any trouble arising thereat. The Court was informed that the highway was a lengthy one of many miles, and was taken over by the defendants about 10 years ago from the county and had over 1,000 culverts crossing through and under it. For such a highway to be kept in ordinary repair—and that is the legal

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crossing the surface of the highway underneath which water d undermined and washed out the supporting earth.

The *Highway Improvement Act*, R.S.O. 1937, c. 56, s. 75, provides that every portion of the King's Highway shall be aintained and kept in repair by the Department, and that in se of default to keep such highways in repair the Department shall be liable for damages sustained by any person by reason of ch default. Subsection (9) of s. 75 sets out that the liability posed upon the Department of Highways "shall not extend to any case in which a municipal corporation owning or having jurisdiction over the highway would not have been liable for the jury sustained".

It was held by the Supreme Court of Canada in *Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 S.C.R. 457, that where accident has occurred from the imperfect repair of a road, a esumption arises without evidence of notice that the duty relative to repair has been neglected. This doctrine was approved by this Court in *Sandlos* v. *Brant Tp.* (1921), 58 D.L.R. 3, 49 O.L.R. 142, and later in *Greer* v. *Mulmur Tp.*, [1926] 4 D.L.R. 132, 59 O.L.R. 259, where it was said that when want of repair of a highway is shown a *prima facie* case is made out. is then for the municipality to show that the want of repair existed notwithstanding all reasonable efforts on the part of the municipality to comply with the law. In the older cases the rule as stated to be that in order to render a municipality liable or failing to keep a highway in repair, there must have been actual notice of the state of non-repair and reasonable time to medy it, or the condition must have continued for so long that tice and time to overcome the defect, or in a proper case to give suitable warning, is to be implied.

In *Jamieson* v. *Edmonton* (1916), 36 D.L.R. 465 at p. 472, S.C.R. 443, Duff J. (afterwards C.J.C.), in commenting upon a condition present in one of the city streets which had caused n accident, said: ". . . if due diligence had been used by the unicipality and those entrusted by the municipality with the care of the streets", the state of non-repair of the sidewalk there in question would have been known by the persons responsible.

I am of the opinion that the language of Duff J., which I ave just quoted, may, with necessary alterations to comply with the facts of the present case, be applied to the present appeal. It is obvious from the evidence of the sub-foreman Baker at he made a most cursory inspection of the conditions which menaced the highway and which existed where it crossed over nd above the culvert in question, when he passed over this por-

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tion of the road in his motor truck on several days before the accident happened. The fact that the water was at one point level with the surface of the roadway, only a few feet distant from where the culvert passed under the road, should have induced him to make a more careful survey of probable danger to the highway than he did, and have induced him to do what his superior Park said he would have done, namely, to have placed a man to watch the road in case of it becoming dangerous to traffic and also to have reported the existing conditions to his headquarters.

The absence of due diligence on the part of those entrusted with the care of the highway in ascertaining that a dangerous condition existed, so that those using the road would receive warning, and so that the danger might be averted by those responsible for the repair of the highway, was in my opinion a failure to discharge a duty which would be cast upon a municipality in relation to a road under its charge where similar conditions existed, and which therefore, in the present case, was cast upon the Department of Highways by virtue of s-s. (9) of s. 75 of the statute.

In the comparatively recent appeal to the Supreme Court of Canada of *McCready* v. *Brant*, [1939], 3 D.L.R. 358, S.C.R. 278, the obligation resting upon a municipality in Ontario with respect to keeping the highways in repair was discussed, and Kerwin J. at p. 363 D.L.R., p. 282 S.C.R., expressed the following opinion:

"The obligation of a municipality in Ontario has been considered in numerous cases in the Courts of that province but the problem has always been to apply the principle as exemplified in the words of Chief Justice Armour in *Foley* v. *Tp. of East Flamborough*, 29 O.R. 139 at p. 141:—

" 'I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied.' "

Kerwin J. also referred to the words used by Sir Lyman P. Duff C.J.C. in *Oakville* v. *Cranston* (1917), 39 D.L.R. 762, 55 S.C.R. 630, where the Chief Justice of Canada said [p. 364 D.L.R.]: " 'The duty of the municipality . . . is to maintain its roads in a reasonable state of repair, in other words in a reasonably safe condition in so far as that can be done by the exercise of due diligence—*Jamieson* v. *Edmonton* 36 D.L.R. 465, 54 S.C.R. 443, — safe, that is to say for people using them lawfully and reasonably, due regard always being had in deciding

Her Majesty The Queen, in right of the Province of Ontario, represented by the Minister of Highways for the Province of Ontario (*Third Party*) *Appellant*;

and

Gabriel Côté (*Defendant*) *Respondent and Cross-Appellant*;

and

Anne Marie Millette and Caroline Millette by their next friend Rodrigue Millette and the said Rodrigue Millette, Xavier North by his next friend Rodrigue Millette and Philippe North (*Plaintiffs*) *Respondents*;

and

Constantinos Kalogeropoulos and James Karalekas as administrators of the estate of Angelo Karalekas (*Defendants*) *Respondents*;

and

Eric Silk, the Commissioner of the Ontario Provincial Police Force and Constable R. G. Hicks (*Third Parties*) *Respondents*.

1974: February 4, 5, 6; 1974: November 27.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Highways—Particular hazard—Knowledge and constructive notice of hazard—Duty of Highway Department to remedy or warn—The Highway Improvement Act, R.S.O. 1960, s. 33(1).

Negligence—Police—Department of Highways—Causation—Contributory negligence—Apportionment of liability.

An accident occurred on a section of highway which was known to have a tendency to ice up with snow blowing across it and which had developed a coating of ice several hours previous to the accident. Despite knowledge of the hazardous condition of this short stretch of the highway by the police and an earlier

Sa Majesté la Reine, du chef de la province de l'Ontario, représentée par le ministère de la Voirie de l'Ontario (*Mise en cause*) *Appelante*;

et

Gabriel Côté (*Défendeur*) *Intimé et appelant par incidence*;

et

Anne Marie Millette et Caroline Millette, par son représentant *ad litem* Rodrigue Millette et ledit Rodrigue Millette, Xavier North par son représentant *ad litem* Rodrigue Millette et Philippe North (*Demandeurs*) *Intimés*;

et

Constantinos Kalogeropoulos et James Karalekas, en leur qualité d'administrateurs de la succession d'Angelo Karalekas (*Défendeurs*) *Intimés*;

et

Eric Silk, le Commissaire de la sûreté provinciale de l'Ontario et le constable R. G. Hicks (*Mis en cause*) *Intimés*.

1974: les 4, 5 et 6 février; 1974: le 27 novembre.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Routes—Danger précis—Connaissance du danger et signalisation de ce dernier—Le ministère de la Voirie a l'obligation de remédier au danger ou de signaler sa présence—The Highway Improvement Act, R.S.O. 1960, art. 33(1).

Négligence—Police—Ministère de la Voirie—Lien de causalité—Négligence contributive—Répartition de la responsabilité.

Un accident est survenu sur une section de route qui avait une tendance à geler lorsque le vent y poussait de la neige, et qui était effectivement recouverte d'une plaque de glace formée plusieurs heures avant l'accident. Malgré le fait que la police connaissait l'état hasardeux d'une courte section de la route et qu'un accident était

Highways. Côté driving at 60-65 m.p.h. was attempting to overtake four vehicles and when about to pass the fourth of them he noticed an approaching car, that of Mrs. Millette, coming out of a curve ahead. He realized, according to his account, that his car was on ice (however this was not accepted as a fact by the majority of the Court), managed to pull in behind the Kalogeropoulos car and reduced his speed, but not sufficiently to avoid striking the rear of the Kalogeropoulos vehicle which slewed across the road into the path of the Millette vehicle. At trial, Galligan J. found that Côté was negligent but that the slippery surface of the road was a serious contributing factor. Côté instituted third party proceedings against the Minister of Highways, Constable Hicks and the Commissioner of the Ontario Provincial Police and the trial judge found against the third parties for 75 per cent, apportioned two thirds against the Minister and one third against Hicks and the Commissioner. The Court of Appeal dismissed the appeal of the Minister but allowed that of Hicks and the Commissioner because in the opinion of the Court there was no causal connection between the acts of which the complaint was made and the happening of the accident.

Held: The appeal of the Minister of Highways for Ontario is allowed in part and the judgment of the Ontario Court of Appeal is varied to provide that as between the Minister and the respondent Côté the latter shall bear seventy-five per cent of the liability of Côté towards the successful plaintiffs and the Minister shall bear twenty-five per cent. The cross-appeal of Côté is dismissed with costs.

Martland, Judson, Ritchie and de Grandpré JJ., dissenting in part, would have held Côté solely to blame.

Pigeon and Beetz JJ., dissenting in part, would have affirmed the Ontario Court of Appeal and held Côté twenty-five per cent at fault and the Minister seventy-five per cent at fault.

Per Laskin C.J. and Spence and Dickson JJ.: That some of the events must have taken place before Côté entered the ice patch did not invalidate the concurrent findings against the Minister in the courts below. The trial judge had found that but for the ice the probability was that "Côté could have avoided striking Kalogeropoulos" and that if the impact had not occurred he, the trial judge, was certain that Kalogeropoulos would not have gone out of control to the extent that he did.

tère de la Voirie ne prit aucune mesure. Côté, qui circulait à une vitesse de 60 à 65 milles à l'heure, entreprit de dépasser quatre voitures. Il se préparait à dépasser la quatrième lorsqu'il a vu venir une voiture, celle conduite par Mme Millette, qui sortait d'une courbe en avant de lui. Selon sa version des faits, il s'est alors rendu compte que sa voiture était sur une surface glacée (cependant, la majorité de la Cour n'a pas considéré ceci comme un fait établi), mais il a réussi à se ranger derrière celle de Kalogeropoulos et il a réduit sa vitesse mais pas assez pour éviter de heurter la voiture de Kalogeropoulos qui a dévié de biais sur la chaussée dans la voie de la voiture de Millette qui venait en sens inverse. En première instance, le juge Galligan a conclu que Côté a été négligent, mais que l'état glissant de la chaussée a été un facteur contributif important. Dans la procédure de mise en cause instituée par Côté contre le ministère de la Voirie, le constable Hicks et le commissaire de la sûreté provinciale de l'Ontario, le juge a décidé que les mis en cause devaient supporter 75 pour cent des jugements et dépens et il a réparti la responsabilité pour les deux tiers contre le Ministre et pour le tiers contre Hicks et le Commissaire. La Cour d'appel a rejeté l'appel du Ministre mais a accueilli celui du constable Hicks et du commissaire parce qu'elle a considéré qu'il n'y avait pas de lien de causalité entre les actes reprochés et l'accident.

Arrêt: Le pourvoi du ministre de la Voirie de l'Ontario est accueilli en partie et l'arrêt de la Cour d'appel de l'Ontario est modifié de façon à prévoir qu'entre le Ministre et l'intimé Côté ce dernier doit supporter soixante-quinze pour cent de la responsabilité de Côté envers les demandeurs qui ont eu gain de cause et le Ministre doit supporter vingt-cinq pour cent. Le pourvoi incident de Côté est rejeté avec dépens.

Les juges Martland, Judson, Ritchie et de Grandpré, dissidents en partie, auraient tenu Côté seul responsable.

Les juges Pigeon et Beetz, dissidents en partie, confirmeraient l'arrêt de la Cour d'appel de l'Ontario et imputeraient à Côté vingt-cinq pour cent de la faute et au Ministre soixante-quinze pour cent.

Le juge en chef Laskin et *les* juges Spence et Dickson: Quelques-uns des événements ont dû se produire avant que Côté ne parvienne sur la surface glacée, mais cela n'a pas pour effet d'écarter les conclusions concordantes des cours d'instance inférieure à l'encontre du Ministre. Le juge de première instance a conclu que s'il n'y avait pas eu de glace, selon toute probabilité, «Côté aurait pu éviter Kalogeropoulos» et que s'il n'y avait pas eu d'impact, il est certain que Kalogeropoulos n'aurait pas perdu la maîtrise de sa voiture à ce point.

While the duty of care required of the Minister of Highways is confined to reasonably foreseeable dangers, a reasonable person should have anticipated vehicle collisions resulting from the treacherous condition of this short stretch of much-travelled highway which was known to have a tendency to ice up. However imposition of some measure of liability on the Minister does not import recognition of any general duty to salt or sand highways but rests upon the narrower ground of permitting a particularly dangerous icy condition to continue at a particular location in the highway, otherwise passable, which was known to have a tendency to ice up.

Due to the inescapable conclusion that the Côté vehicle was not on ice when it pulled behind and struck the rear of the Kalogeropoulos vehicle Côté should bear a greater portion of the liability which was assessed at 75 per cent Côté, 25 per cent Minister of Highways.

Per Martland, Judson, Ritchie and de Grandpré JJ., *dissenting in part*: The accident took place on a part of the highway which was completely covered with a thin layer of ice. This ice extended the entire width of the highway for a distance of 625 feet. The impact between the Millette and Kalogeropoulos cars occurred 215 feet from the western end of the patch of ice, at each end of which the highway was dry and presented no driving problems. The unusual situation at the scene of the accident was blowing snow impelled by a north wind. The presence of Kalogeropoulos on the wrong side of the highway was caused by the Côté car striking a light blow at the rear of the Kalogeropoulos car after which impact, because of the ice, Kalogeropoulos was unable to regain control of his car.

Côté driving at a cruising speed of 60 m.p.h. in order to overtake the group of four cars also travelling east at speeds of 50-55 m.p.h. probably increased his speed to over 60 m.p.h., overtook three of the other cars, saw the lights of the Millette car coming towards him and then made a slightly sharper than usual turn to regain the right lane. In doing so he struck the Kalogeropoulos car. While Côté suggested that he was already on ice when he felt the rear of his car swerve, the evidence clearly indicated that as he stopped 215 feet from the western limit of the patch of ice all the events preceding the impact with Kalogeropoulos must have occurred on dry pavement. The accident was thus caused solely by the fault of Côté who did not have his car completely under control and was unable to avoid contact with the rear of the Kalogeropoulos car at a time when the latter could

Bien que l'obligation de diligence imposée au ministre de la Voirie soit limitée aux dangers raisonnablement prévisibles, une personne raisonnable aurait dû prévoir des collisions entre des voitures vu l'état hasardeux d'une courte section de route où la circulation est dense et qui a tendance à se couvrir de glace. Cependant, l'attribution d'un certain degré de responsabilité au Ministre n'est pas synonyme de reconnaissance de l'obligation générale de répandre du sel ou du sable sur les routes. Elle repose plutôt sur le fondement plus étroit qui consiste à permettre le maintien d'une situation particulièrement dangereuse vu qu'un endroit précis de la route qui, par ailleurs, était parfaitement convenable, avait tendance à se couvrir de glace.

En raison de la conclusion inévitable que la voiture de Côté n'était pas sur la surface glacée lorsqu'il s'est rangé derrière la voiture de Kalogeropoulos et l'a heurtée, le blâme imputé à Côté doit être accru; c'est pourquoi 75 pour cent de la responsabilité est attribuée à Côté et 25 pour cent au Ministre.

Les juges Martland, Judson, Ritchie et de Grandpré, *dissidents en partie*: L'accident est arrivé à un endroit de la route complètement couvert d'une mince couche de glace. La glace s'étendait sur toute la largeur de la route, sur une longueur de 625 pieds. Le choc entre les voitures Millette et Kalogeropoulos s'est produit à 215 pieds de l'extrémité ouest de la plaque de glace, à chaque extrémité de laquelle la route était sèche et parfaitement carrossable. La cause de cette situation extraordinaire à l'endroit de l'accident était la poudrerie poussée par un vent du nord. La présence de Kalogeropoulos du mauvais côté de la route a été causée par un choc léger à l'arrière de sa voiture par le devant de celle conduite par Côté. Après le choc, Kalogeropoulos n'était plus en mesure de maîtriser sa voiture à cause de la glace.

La vitesse de croisière de Côté était de 60 milles à l'heure; pour dépasser un groupe de quatre automobiles circulant vers l'est à une vitesse d'environ 50-55 milles à l'heure, Côté a probablement augmenté sa vitesse à plus de 60 milles à l'heure; il a dépassé trois des automobiles puis il a vu les phares de la voiture de Millette qui venait vers lui; pour revenir à sa droite, il a fait une déviation un peu plus aiguë que d'ordinaire et il a frappé la voiture de Kalogeropoulos. Côté a prétendu qu'il était déjà sur la glace lorsqu'il a senti l'arrière de sa voiture dévier, bien que la preuve démontre clairement que, puisqu'il s'est arrêté à un point situé à 215 pieds de la limite ouest de la plaque de glace, tous les événements qui ont précédé le choc avec la voiture de Kalogeropoulos se sont nécessairement produits sur du pavé sec. L'accident a donc été causé par la seule faute de Côté qui n'avait

no longer do anything to avoid collision with the Millette car. The Department of Highways could not, applying the test of reasonableness, have foreseen the combination in time and space of the factors which, taken together, resulted in the collision.

Per Pigeon and Beetz JJ., *dissenting in part*: Since the slight impact of the Côté and Kalogeropoulos vehicles would not have caused the Kalogeropoulos-Millette collision but for the icy condition of the highway, Côté's negligence was not the sole proximate cause of the accident. Further, as multiple or chain collisions are such frequent occurrences they must be regarded as predictable results of a treacherous icy condition on a short stretch of otherwise dry and safe highway. Foreseeability does not require that the particular way in which an accident occurs be anticipated.

The view that the initial slight impact occurred on the dry pavement rests on the premise that Côté correctly indicated the place where he brought his car to a stop. It conflicts with other facts which the trial judge accepted as proven, such as the short distance covered by the Kalogeropoulos car after the first impact. No valid reason was shown to justify an interference with the concurrent findings in the courts below.

[*University Hospital Board v. Lepine*, [1966] S.C.R. 561; *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. et al. (Wagon Mound No. 2)*, [1967] 1 A.C. 617 applied; *School Division of Assiniboine South No. 3 v. Hoffer*, [1971] 4 W.W.R. 746, appeal dismissed [1973] S.C.R. vi referred to.]

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing the appeal of the Minister of Highways but allowing the appeal of the Ontario Provincial Police from a judgment of Galligan J.[2] awarding contribution against the Minister and the Police on a third party claim. Appeal allowed in part, apportionment varied; cross-appeal dismissed with costs.

[1] [1972] 3 O.R. 224.
[2] [1971] 2 O.R. 155.

pas le contrôle parfait de sa voiture et qui n'a empêcher un contact avec l'arrière de la voiture Kal ropoulos au moment où celui-ci ne pouvait plus faire pour éviter la collision avec la voiture Millette ministère de la Voirie, guidé par le critère de l'hom raisonnable, ne pouvait imaginer que se rencontrera dans le temps et dans l'espace tous ces facteurs qui, en gerbe, ont produit cet accident.

Les juges Pigeon et Beetz, *dissidents en partie*: P que le léger impact entre la voiture de Côté et celle Kalogeropoulos n'aurait pu provoquer la collision K geropoulos-Millette si la chaussée n'avait pas été gla la négligence de Côté n'a pas été la seule cause im diate de l'accident. De plus, les carambolages ou co sions successives sont si fréquentes qu'ils sont des co quences prévisibles de la présence de glace traîtresse une courte section d'une route par ailleurs sèche et s La prévisibilité n'implique ni ne requiert qu'on ait ef tivement prévu la façon précise dont l'accident produit.

L'opinion selon laquelle l'impact initial s'est pro sur la chaussée sèche repose sur la prémisse que Cô correctement indiqué l'endroit où il a immobilis voiture. Elle vient en contradiction avec d'autres que le juge de première instance a tenu pour prou telle la courte distance parcourue par la voiture Kal ropoulos après le premier impact. Aucun motif n' établi nous justifiant d'écarter les conclusions su faits des tribunaux d'instance inférieure.

[Arrêts appliqués: *University Hospital Board Lépine*, [1966] R.C.S. 561; *Overseas Tankship (U Ltd. v. Miller Steamship Co. Pty. et al (Wa Mound No. 2)*, [1967] 1 A.C. 617; arrêt mention *School Division of Assiniboine South No. 3 v. Hof* [1971] 4 W.W.R. 746, pourvoi rejeté [1973] R.C.S.

POURVOI et POURVOI INCIDENT inte tés à l'encontre d'un arrêt de la Cour d'appel l'Ontario[1] qui a rejeté un appel du ministre d Voirie mais qui a accueilli un appel de la sû provinciale de l'Ontario interjetés à l'encontre d jugement du juge Galligan[2] qui avait tenu parti lement responsable le Ministre et la Sûreté suite d'une procédure de mise en cause. Pour accueilli en partie, répartition modifiée; pour incident rejeté avec dépens.

[1] [1972] 3 O.R. 224.
[2] [1971] 2 O.R. 155.

proceedings occurred and, further, that the police were aware that day, through previous experience in patrolling the highway, that the weather conditions were such as most likely to bring about at this particular location the actual dangerous situation which indeed resulted, we conclude that the same knowledge was available to the Department itself from any reasonable system of patrol or supervision and that the Department is chargeable in law with a failure to maintain the highway—at the dangerous point—within the provisions of the Highway Improvement Act in that regard; . . .

The duty of care which rests upon the Minister of Highways admittedly is confined to reasonably foreseeable dangers, the broad general test being that enunciated by this Court in *University Hospital Board v. Lépine*[3], at p. 579, "whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission". If one applies that test to the present case, what happened here was a series of collisions between motor vehicles. The impugned act or omission lay in permitting to continue for some hours a "treacherous, slippery and dangerous" icy condition upon a short stretch of much-travelled highway with a known tendency to ice up. It would seem to me that a reasonable person, familiar with Canadian winters, should have anticipated a vehicle collision or collisions as the natural, and indeed probable, result of such a condition of manifest danger. It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred: *Overseas Tankship (U.K.) Ltd. v. Miller Steampship Co. Pty. (Wagon Mound No. 2)*[4]; *School Division of Assiniboine South No. 3 v. Hoffer*[5], appeal to this Court dismissed.

From all of the evidence one can only conclude that the impact between the cars of Côté and Kalogeropoulos was slight. The photographs and the amount of the repair bill attest to that. The collision occurred on the icy patch with the result

[3] [1966] S.C.R. 561.
[4] [1967] 1 A.C. 617.
[5] [1971] 4 W.W.R. 746, appeal dismissed, [1973] S.C.R. vi.

présentes et, de plus, étant donné que la police savait c jour-là, en raison de ce qu'elle avait constaté auparavar en patrouillant la route, que les conditions atmosphér ques étaient telles qu'elles étaient susceptibles de provc quer à cet endroit particulier une situation vraimen dangereuse qui de fait s'est produite, nous concluons qu les mêmes faits étaient à la portée du ministère de l Voirie lui-même en utilisant toute méthode raisonnabl de patrouille ou de surveillance. Le ministère est don légalement responsable du défaut d'entretien de l route—à cet endroit dangereux—conformément aux dis positions à ce sujet du Highway Improvement Act; . . .

Il est admis que l'obligation de diligence imposé au ministre de la Voirie est limitée aux danger raisonnablement prévisibles. Le critère général es celui que cette Cour a énoncé dans l'arrêt *Univer sity Hospital Board c. Lépine*[3] à la p. 579 [TRA DUCTION] «à savoir si une personne raisonnabl aurait dû prévoir que ce qui est arrivé pouva découler naturellement de cet acte ou de cett omission». Si on applique ce critère en l'espèce, c qui est arrivé ici est une série de collisions entr des voitures. L'acte ou l'omission en question con siste à laisser subsister durant quelques heures, su une courte section de route où la circulation es dense et qui a tendance à se couvrir de glace, un chaussée glacée «traître, glissante et dangereuse» Il me semble qu'une personne raisonnable, con naissant l'hiver canadien, aurait dû prévoir qu'u tel état de danger manifeste entraînerait naturelle ment et même probablement une ou plusieurs col lisions. Il n'est pas nécessaire de prévoir [TRADUC TION] «le concours exact de circonstances»; pou attribuer une responsabilité, il est suffisant d'avo pu prévoir de façon générale la catégorie ou l caractère des dommages qui se sont produits *Overseas Tankship (U.K.) Ltd. v. Miller Steam ship Co. Pty. (Wagon Mound No. 2)*[4], *Scho Division of Assiniboine South No. 3 v. Hoffer* pourvoi à cette Cour rejeté.

D'après l'ensemble de la preuve, on peut seul ment conclure que l'impact entre les voitures Côté et Kalogeropoulos a été léger. Les photogr phies et le montant de la facture des réparations témoignent. La collision s'est produite sur

[3] [1966] R.C.S. 561.
[4] [1967] 1 A.C. 617.
[5] [1971] 4 W.W.R. 746, pourvoi rejeté, [1973] R.C.S. vi

Thornhill et al. v. Shadid et al.

[Indexed as: Thornhill (Litigation Guardian of) v. Shadid]

Court File No. 66500/03

Ontario Superior Court of Justice
Howden J.

Heard: October 15-17, 22-26, 29-31 and November 1, 2, 6 and 7, 2007
Judgment rendered: January 31, 2008

Constitutional law — Distribution of legislative authority — Transportation — Court declining to determine legality of minimum road maintenance standards established under regulation pursuant to Municipal Act — Record inappropriate for determination — Minimum Maintenance Standards for Municipal Highways, O. Reg. 239/02 — Municipal Act, R.S.O. 1990, c. M.45.

Torts — Negligence — Highway repair — Municipality 50 percent liable for accident occurring during winter storm — Municipality failing to provide adequate standards and failing to comply with duty under Municipal Act to clear snow or treat icy roads — Minimum Maintenance Standards for Municipal Highways, O. Reg. 239/02, ss. 4, 5 — Municipal Act, R.S.O. 1990, c. M.45.

Damages — Personal injuries — Non-pecuniary loss — Quantum — Thirty-year old active female plaintiff suffering severe, permanent injury to knee — Plaintiff suffering chronic pain, progressive arthritis, and depression — Non-pecuniary damages of $225,000 awarded.

Damages — Personal injuries — General — Plaintiff unable to work for period of time and working part-time after suffering serious knee injury in motor vehicle accident — Plaintiff entitled to claim moving costs after being forced to move for financial reasons.

The 30-year-old female plaintiff was injured when her vehicle was struck by the individual defendant's vehicle. It had been snowing for most of the day and the roads were snow covered and slushy. The defendant's vehicle spun out of control and its rear end struck the front of the plaintiff's vehicle, driving the engine and dashboard into the plaintiff's right knee.

The plaintiff suffered fractured ribs, a fractured right arm, a laceration over her right knee and open fractures to two of the three principal components of her right knee. The injury was very severe. After six surgeries, she suffered serious permanent limitations and arthritic changes in the joint which restricted her to part-time sedentary work and few activities. She faced further surgery to replace the knee joint and then to revise or change periodically the components of the knee replacement.

The individual defendant argued there was no evidence of negligence on his pa and rather the cause of his loss of control and the plaintiff's damage was the failu of the municipality to maintain the roadway for reasonably safe use by motoris The municipality relied on the *Minimum Maintenance Standards for Municip Highways*, O. Reg. 239/02, established pursuant to the *Municipal Act*, R.S.O. 199 c. M.45, and the fact that there was no municipal liability for failure in the duty repair if those standards were met at the time the cause of action arose. The indiv dual defendant also attacked the legality of the minimum maintenance standar and the Ontario Regulation establishing them.

Held, the municipality and the individual defendant were each 50 per cent liat for the plaintiff's damages.

The legality of the minimum maintenance standards and the Ontario Regulati establishing them was not properly before the court. The submissions related to t purpose, interpretation, and application of the minimum maintenance standards the circumstances of the case. The record was not appropriate to address the iss of whether the Regulation exceeded its statutory authority.

The evidence revealed a significant omission in the form of a lack of a standa for non-routine patrolling in the minimum maintenance standards, *i.e.* patrolling inclement weather conditions. Use of the routine patrol standard during peric such as winter storms, coupled with the trigger of actual knowledge to activate t duty of the municipality to clear snow or treat ice on the highways, would form major departure from the legislated requirements in the *Municipal Act*. It could r be the legitimate role of the regulation to defeat the purpose of the enabling leg lation. Given the incomplete state of the minimum maintenance standar ss. 4(1)(a) and 5(1) of the Regulation, which provide for minimum standards rel ing to clearing snow and treating icy roadways, had to be read as providing for t continuous deployment of resources to clear snow or treat icy roads during a sto with clearance or treatment to occur as soon as practicable after becoming awa or after it should have become aware, of the need to provide such services.

The evidence established the existence of a state of non-repair and an unreas able risk of harm which caused, at least in part, the loss of control by the individ defendant and the subsequent impact with the plaintiff's vehicle. The municipal failed to show that it cleared the snow/slush accumulation on the road as soon practicable in accordance with the requirements under the *Municipal Act*. T municipality also failed to show that either the minimum maintenance standa were met or that it took any steps to prevent the accumulation of slush/snow that part, led to the collision.

The speed of the individual defendant's vehicle was excessive in the circu stances that day and was a contributing cause of the collision. It could not be s that the negligence of one defendant was more substantial than the other. Each the municipality and the individual defendant were responsible to the extent of per cent of the plaintiff's damages.

Prior to the accident the plaintiff was a career woman who loved her job a nurse and she and her husband's lives were active, social and generally happy. S

was suffering in physical and reactive depressive terms under the burden of limitations imposed by her injury. Her impairments would be lifelong and the arthritic changes progressive. General damages were assessed at $225,000.

The plaintiff's family was forced to move for financial reasons following the accident. The moving expense was properly claimable under the *Insurance Act*, R.S.O. 1990, c. I.8, and not the *Statutory Accident Benefits Schedule — Accidents On or After November 1, 1996*, O. Reg. 403/96. The family had to move due to the loss of the plaintiff's full salary for a period of time, followed by protracted loss of half of her salary.

Cases referred to

Bisoukis v. Brampton (City) (1999), 180 D.L.R. (4th) 577, 41 C.P.C. (4th) 33, 7 M.P.L.R. (3d) 1, 1 M.V.R. (4th) 42, 46 O.R. (3d) 417, 127 O.A.C. 107, 93 A.C.W.S. (3d) 389, [1999] O.J. No. 4598 (QL) [leave to appeal to S.C.C. refused 188 D.L.R. (4th) vi, 141 O.A.C. 200*n*, 261 N.R. 200*n*] — **refd to**

Brown v. British Columbia (Minister of Transportation and Highways) (1994), 112 D.L.R. (4th) 1, [1994] 1 S.C.R. 420, 20 Admin. L.R. (2d) 1, 19 C.C.L.T. (2d) 268, 2 M.V.R. (3d) 43, [1994] 4 W.W.R. 194, 67 W.A.C. 1, 89 B.C.L.R. (2d) 1, 164 N.R. 161, 46 A.C.W.S. (3d) 797 — **consd**

Dickson (Litigation Guardian of) v. Vezina (2004), 134 A.C.W.S. (3d) 528 — **consd**

Gould v. Perth (County) (1983), 149 D.L.R. (3d) 443, 24 M.V.R. 49, 42 O.R. (2d) 548, 20 A.C.W.S. (2d) 478; affd 12 D.L.R. (4th) 763, 29 M.V.R. 47, 48 O.R. (2d) 120, 5 O.A.C. 279, 27 A.C.W.S. (2d) 493 — **refd to**

Graham v. Rourke (1990), 74 D.L.R. (4th) 1, 75 O.R. (2d) 622, 40 O.A.C. 301, 23 A.C.W.S. (3d) 288 — **refd to**

Jameus v. Midland (Town) (2006), 27 M.P.L.R. (4th) 163, 152 A.C.W.S. (3d) 353, 2006 CarswellOnt 6878 — **consd**

Johnson v. Milton (Town) (2006), 25 M.P.L.R. (4th) 17, 150 A.C.W.S. (3d) 504, 2006 CanLII 27234 — **refd to**

Just v. British Columbia (1989), 64 D.L.R. (4th) 689, [1989] 2 S.C.R. 1228, 41 Admin. L.R. 161, 1 C.C.L.T. (2d) 1, [1989] I.L.R. ¶93-042, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 18 A.C.W.S. (3d) 527 — **refd to**

MacMillan v. Ontario (Minister of Transportation and Communications) (2001), 24 M.V.R. (4th) 15, 105 A.C.W.S. (3d) 558, [2001] O.J. No. 1891 (QL) [leave to appeal to S.C.C. refused [2002] 1 S.C.R. ix, 163 O.A.C. 399*n*, 292 N.R. 194*n*] — **refd to**

Mero v. Waterloo (Regional Municipality) (1992), 89 D.L.R. (4th) 533, 10 C.C.L.T. (2d) 197, 6 C.P.C. (3d) 250, 8 M.P.L.R. (2d) 1, 37 M.V.R. (2d) 56, 7 O.R. (3d) 102, 54 O.A.C. 334, 31 A.C.W.S. (3d) 1065 [leave to appeal to S.C.C. refused 92 D.L.R. (4th) vi, 58 O.A.C. 239*n*, 141 N.R. 399*n*] — **refd to**

Montani v. Matthews (1996), 39 Admin. L.R. (2d) 112, 20 M.V.R. (3d) 95, 29 O.R. (3d) 257, 91 O.A.C. 161, 63 A.C.W.S. (3d) 756, [1996] O.J. No. 1974 (QL) [leave to appeal to S.C.C. refused 99 O.A.C. 240*n*, 211 N.R. 152*n*] — **refd to**

Portland (Town) v. Griffiths (1885), 11 S.C.R. 333 — **refd to**

R. v. Compagnie Immobiliere B.C.N. Ltee. (1979), 97 D.L.R. (3d) 238, [1979] 1 S.C.R. 865, [1979] C.T.C. 71, 79 D.T.C. 5068, 25 N.R. 361 — **apld**

R. v. Côté (1972), 27 D.L.R. (3d) 676, [1972] 3 O.R. 224; revd 51 D.L.R. (3d) 244, [1976] 1 S.C.R. 595, 3 N.R. 341 — **consd**

conditions, as well as in regard to clearance of slush as distinct from snow, and that where relevant gaps occur, this court must resort to the remaining provisions of section 284 of the *Municipal Act* and their associated common law of principles. The submission is that the MMS simply do not cover the circumstances presented on December 25, 2002, which required continuous patrolling in storm conditions in accordance with York's policy manual, and which required a standard of performance for slush which, with snow, covered Green Lane that afternoon to a depth of 2 1/2 to 3 inches. Mr. Yeager's and Mr. Bigelow's evidence established the differing traction issues as between snow and slush, including the lowered coefficient of friction posed by slush and the downgrade eastbound on Green Lane. Again, it is submitted that this gap should cause the court to resort to the common law principles developed under section 284's other provisions, analyzing the accumulation of snow/slush on a grade that afternoon as the creation of an unreasonable risk of harm, or, in the language of Aylesworth J.A. from *The Queen v. Coté*, [1972] 3 O.R. 224 at 226, 27 D.L.R. (3d) 676, a "highly special dangerous situation" requiring timely remedial action. It was submitted that use of the patrol and snow standards in the MMS, coupled with the requirement of actual knowledge of a deemed snow or ice hazard, would render the duty to repair meaningless. For instance, a Class 1 road could be left unpatrolled for four days out of seven, and snow or ice formation in those four days could occur without any actual knowledge to trigger deployment of snow clearance forces.

[95] It has been recognized that the MMS are not, and do not purport to be, an all-inclusive document. The following excerpt, from an authoritative text on municipal liability law, addresses this aspect and recognizes the incompleteness of the MMS.

> The "minimum standards" contemplated by subsection 44(4), (5) and (6) (according to the 2001 *Municipal Act*) are codified in regulations which came into effect on November 1, 2002. These new minimum standards cover most road maintenance activities, with some significant omissions (such as winter night patrolling, unexpected early freezing conditions), which were apparently left out because the committee drafting the standards was unable to reach a consensus on those issues. Municipalities defending cases involving such issues will not therefore, be able to take advantage of the statutory defences ... the regulations require the Minister of Transportation to conduct a review of the minimum standards every five years. (D. Boghosian & J.M. Davison, *The*

Law of Municipal Liability in Canada, looseleaf (Markham: Lexis I Butterworths, 1999) at para. 3.43.)

[96] A useful summary of the principles relating to legisla gaps is contained in *Sullivan and Driedger on The Constructio Statutes*. These principles involve a heavy dose of judicial s restraint.

1. Courts have no jurisdiction to disregard the intentions of the legisla however ill-considered these intentions may be.
2. Courts have no jurisdiction to cure under-inclusive provisions or ga legislative schemes.
3. Courts may, however, supplement under-inclusive provisions by relyin the common law, including in particular their inherent jurisdiction.
4. If an activity has been subjected to regulation by the Legislature, courts obligated to make the scheme work. (Ruth Sullivan, *Sullivan and Drie on The Construction of Statutes*, 4th ed. (Markham: Butterworths Can Limited, 2002) at p. 136.)

[97] In considering the submissions before me in light of th principles, I do not accept the submission that failure to provid distinct standard for slush amounts to a gap in the regulati Though Mr. Yeager did testify as to the greater hazard posed slush as opposed to dry snow, his expertise is not in regard to t intent of a regulatory scheme or set of standards. He was testifyi as an expert on tires and tire designs used under differing road co ditions. He did not draw a distinction, for instance, between w snow and slush, nor did he address how one distinguishes, for pu poses of highway maintenance standards, between the gradati from powder snow to heavy or packing snow, to wet snow, slush, to water. There is no suggestion in his evidence that a di tinct maintenance standard is required for rain water, for instanc or for slush, or other gradations of water in freezing or near free ing conditions, though no doubt each carries with it differing risl of skidding or hydroplaning and differing coefficients of frictio As well, the words 'snow' and 'slush' are used in the MMS accor ing to their ordinary meanings; 'snow' is defined as "atmospher water vapour frozen into ice crystals and falling as light, whi flakes or lying on the ground as a white layer", and 'slush' defined in the same dictionary as "partially melted

necessary to ensure reasonable levels of service on sections of roadway syst which have not been inspected during the normal course of other duties.

3.1 Summer Road Patrols

1. Road patrols should be scheduled as follows:

Class of Highway	Patrolling Frequency
1	3 times every 7 days
2	2 times every 7 days
3	Once every 7 days
4	Once every 14 days
5	Once every 30 days

3.2 Winter Road Patrols

1. During clear weather conditions, road patrols will be conducted (per day.
2. During inclement weather, road patrols will be conducted on a (tinuous basis.

[100] I find that the lack of a standard for non-routine patroll in the MMS, i.e. patrolling in inclement weather conditions, i significant omission. It is also an omission made by a Ministe a regulation, not by the Legislature which was Ms. Sullivan's c cern. Use of the routine patrol standard for the various classes highways during periods such as winter storms, when highly d gerous conditions can form and change within hours, coupled w the trigger of actual knowledge to activate the duty of the mun pality to clear snow or treat ice on the highways, would forr major departure from the legislated requirements in section 28 the *Municipal Act* and the purpose of that legislation. That purp is to protect reasonable users of the highways, roads, and brid from unreasonable risk of harm of which the authority has kno edge or, through reasonable steps, could be expected to be aw of, in order to prevent or to remedy the risk of harm. A literal in pretation of sections 3, 4, and 5 of the MMS, if applied to stc conditions, would countenance snow or ice accumulation o small or even wide areas of a regional municipality for days wl no patrolling would occur at all (because the municipality is o required to patrol three times out of every seven days in the c

[101] Mr. Danson submitted that, in interpreting a regulation such as the MMS, the regulation must be read harmoniously and in a manner consistent with the enabling legislation. It is not the legitimate role of a regulation to defeat the purpose of the enabling legislation (See Ruth Sullivan, *Sullivan and Driedger on The Construction of Statutes*, 4th ed. (Markham: Butterworths Canada Limited, 2002) at p.282; *R. v. Compagnie Immobilière B.C.N. Ltee*, [1979] 1 S.C.R. 865, 97 D.L.R. (3d) 238). I agree with this submission and with its corollary in this case — that a municipality should not be held to have met the MMS by failing to patrol the busiest highway in the patrol district from the commencement of the storm at 6:10 a.m. for at least ten hours, and by failing to plow it for more than four to five hours after depositing salt while snow continued to fall and slush accumulated to three times the depth in the MMS Table, by merely claiming lack of knowledge. That is not the submission on behalf of York in any event.

[102] As I understood Mr. Davison's submissions, he did not seriously contest the point that there is no patrol standard in the MMS for winter storm conditions. His submission is that York proactively deployed all of its resources from the commencement of the storm, and did not wait for snow to accumulate. The issue raised by York regarding the MMS is whether it cleared the snow on Green Lane, pursuant to section 4(1)(a), as soon as practicable, and Mr. Davison's submission is that York complied with section 4(1)(a). Mr. Davison addressed the use of actual knowledge in the MMS as referring to knowledge of a condition different from a state of non-repair in section 284(1.2), and thus not a departure from the purpose of the enabling legislation. However, that argument does not counter the problem caused by the combined failure in the MMS to provide a patrol standard appropriate to storm conditions, and then dispensing with the duty to take reasonable steps to be aware of, and thus to remedy, a resulting state of non-repair.

[103] In my view, given the incomplete state of the MMS as they pertain to winter storm conditions, section 4(1)(a) must be read as providing for the continuous deployment of resources to clear the snow during a storm, clearance to occur as soon as practicable after becoming aware, or after it should reasonably have become aware, of snow accumulation exceeding the Table depth. A similar interpretation of section 5(1), regarding ice formation, is also required, in

my view, in order to harmonize with the purpose of the enabling legislation in section 284. "As soon as practicable" is a variable term to be interpreted according to the circumstances of each case and in light of the purpose and intent of the Act and regulation. In my view, "as soon as practicable" means as soon as the municipality is able to act using the resources open to it, considering the size of the road system and the respective intensities of use of the various roads and highways within that system. It recognizes that no municipal road force can be at all places at all times; it also imports a sense of priority and urgency once the municipality should reasonably have become aware of the fact that the depth of snow in the section 4 Table was exceeded, or would be exceeded, during the particular storm event.

(v) Findings Regarding Liability of York

[104] Green Lane is the most heavily traveled road in Sutton District. It is a major, multi-lane connector across the top of Newmarket between Highway 404 and Highway 400. Yet, during a moderate snowstorm which began at 6:10 a.m. on December 25, 2002, no patroller inspected its condition from the beginning of the storm at approximately 6 am until 4:30 p.m., almost one hour after the accident, and after the order by York Regional Police to close the road due to its slippery condition caused by a covering of slush and snow to a depth of 2 1/2 to 3 inches (or 6 to 7 cm). The evidence of P.C. Manzon, Ms. Thornhill, Mr. Adams, and Mr. Anaka, confirms the slippery and slush/snow-covered condition. The evidence of Mr. Yeager and Mr. Bigelow confirms the police officer's actions in closing Green Lane until the plow trucks arrived at the scene — the condition of Green Lane prior to and at the time of the accident at 3:35 p.m. was dangerous to the traveling public, carrying the risk of hydroplaning on the slush-covered surface on a downgrade and of loss of control; the driver would not be aware of the danger until he or she was on it. The condition of snow and slush on a roadway is a common feature of most Canadian winters. However, the requirement of "as soon as practicable" in section 4(1)(a) of the MMS and the municipal duty of reasonable care to ascertain and remedy a hazardous situation within a reasonable time are important to this case.

[105] On the evidence before me, I find that Green Lane was covered with slush and snow to a depth more than double the 2.5 cm

Marvin Malcolm, Roberta Malcolm, Betty Stainback and Harry Hill *Appellants*

v.

Norman Edward Waldick and Janet Marie Waldick *Respondents*

INDEXED AS: WALDICK *v.* MALCOLM

File No.: 21781.

1991: February 26; 1991: June 27.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Duty of care — Occupiers' liability — Rural residence — Icy and snow covered walk, driveway and parking area not salted or sanded — Condition known to visitor — Visitor slipping and seriously injured — Whether or not householders failed to fulfil statutory duty — Whether visitor had willingly assumed risk and was contributorily negligent — Occupiers' Liability Act, R.S.O. 1980, c. 322, ss. 2, 3, 4, 9.

Waldick was seriously injured when he fell on the icy parking area of the Malcolm's rented farmhouse. The parking area and laneway had not been salted or sanded; apparently few people in that rural region did so. Waldick was aware that the laneway was slippery and acknowledged that its condition could be seen without difficulty. At issue here was whether or not the Malcolms failed to meet the statutory duty of care imposed by the *Occupiers' Liability Act* on occupiers of premises to persons coming onto those premises and whether Waldick had willingly assumed the risks of the injury. Also involved was the issue of whether Waldick had been contributorily negligent.

The Malcolms were found liable for Waldick's personal injuries and the Court of Appeal dismissed the appeal from that judgment. The action and cross-claim against the other appellants, Betty Stainback and Harry Hill, were dismissed because they had rented the prop-

Marvin Malcolm, Roberta Malcolm, Betty Stainback et Harry Hill *Appelants*

c.

Norman Edward Waldick et Janet Marie Waldick *Intimés*

RÉPERTORIÉ: WALDICK *c.* MALCOLM

N° du greffe: 21781.

1991: 26 février; 1991: 27 juin.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Responsabilité délictuelle — Obligation de prendre soin — Responsabilité des occupants — Habitation rurale — Ni sable ni sel n'ont été épandus sur un sentier, sur une allée et sur une aire de stationnement recouverts de glace et de neige — Visiteur au courant de cet état de choses — Le visiteur glisse et se blesse gravement — Les occupants de la maison ont-ils manqué à une obligation légale? — Le visiteur a-t-il volontairement assumé le risque de sorte qu'il y a eu négligence contributive de sa part? — Loi sur la responsabilité des occupants, L.R.O. 1980, ch. 322, art. 2, 3, 4, 9.

Waldick a été grièvement blessé par suite d'une chute qu'il a faite sur la glace qui recouvrait l'aire de stationnement de la maison de ferme que les Malcolm prenaient en location. Ni sel ni sable n'avaient été épandus sur l'aire de stationnement et sur l'allée. Il semble d'ailleurs que peu de gens dans cette région rurale ne le faisaient. Waldick savait que l'allée était glissante et il a reconnu que cet état de choses pouvait se voir sans difficulté. La question en l'espèce est de savoir si les Malcolm ont manqué à l'obligation de prendre soin qu'ont, aux termes de la *Loi sur la responsabilité des occupants*, les occupants de lieux envers les personnes qui y entrent et si Waldick avait volontairement assumé les risques de blessure. Se pose en outre la question de savoir s'il y a eu négligence contributive de la part de Waldick.

Les Malcolm ont été jugés responsables des blessures subies par Waldick et la Cour d'appel a rejeté l'appel formé contre cette décision. L'action contre les autres appelants, Betty Stainback et Harry Hill, ainsi que la demande faite contre eux par leurs codéfendeurs ont été

erty to the Malcolms and were not the occupiers of the farmhouse.

Held: The appeal should be dismissed.

The Malcolms, notwithstanding the alleged local custom, breached s. 3(1) of the Act. The existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to the courts, does not oust the duty of care owed by occupiers under s. 3(1) of the Act. This statutory duty to take reasonable care in the circumstances to make the premises safe does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation. Local custom is one such circumstance. It can inform the court's assessment of what is reasonable in any given set of circumstances. Where an alleged custom is raised, however, the party who relies on his compliance with it or another person's departure from it must prove the custom is in effect. Only in the rarest and most patently obvious of cases will the courts take judicial notice of a custom.

The alleged local custom of not salting or sanding parking areas and driveways was unproved; only Mrs. Malcolm's unsupported testimony would tend to prove it. Even if there had been adequate evidence in the record of such a local custom, that custom would not necessarily be decisive against a determination of negligence. No amount of general community compliance will render negligent conduct reasonable in all the circumstances. If it is unreasonable to do absolutely nothing to one's driveway in the face of clearly treacherous conditions, it matters little that one's neighbours also act unreasonably. The Act was meant to discourage this type of generalized negligence. It was far from self-evident that the "practice" of not sanding or salting parking areas and driveways in the area should earn the acceptance of the courts.

The *Occupiers' Liability Act* did not warrant a departure from the widely accepted *volenti* doctrine. The Act was to replace, refine and harmonize the common law duty of care owed by occupiers of premises to visitors on those premises. It was not intended to effect a wholesale displacement of the common law defences to liability.

rejetées parce qu'ils louaient la propriété en cause aux Malcolm et n'occupaient pas la maison de ferme.

Arrêt: Le pourvoi est rejeté.

En dépit de l'usage local qu'ils ont invoqué, les Malcolm ont violé le par. 3(1) de la Loi. L'existence de pratiques habituelles déraisonnables en soi, ou par ailleurs inacceptables pour les tribunaux, n'écarte pas l'obligation de prendre soin qu'impose aux occupants le par. 3(1) de la Loi. Cette obligation légale de prendre le soin qui est raisonnable dans les circonstances pour assurer la sécurité sur les lieux en question ne change pas, mais les facteurs pertinents aux fins de déterminer en quoi consiste un soin raisonnable seront nécessairement bien particuliers aux faits de chaque espèce. L'une de ces circonstances est l'usage local. Les tribunaux peuvent retenir l'usage local pour décider de ce qui est raisonnable dans des circonstances données. Lorsque l'usage est invoqué, toutefois, la partie qui prétend avoir respecté cet usage ou qui soutient que son adversaire y a dérogé a le fardeau de prouver qu'il s'agit effectivement d'un usage répandu. Ce n'est que dans les cas les plus rares et les plus évidents que les tribunaux prendront connaissance d'office d'un usage.

Mis à part le témoignage, sans corroboration, de M^me^ Malcolm, il n'y a rien qui tende à établir le prétendu usage local consistant à n'épandre ni sel ni sable sur les aires de stationnement et sur les allées. Même s'il avait existé au dossier une preuve suffisante d'un tel usage local, cet usage n'aurait pas nécessairement milité décisivement contre une conclusion de négligence. Si généralisée soit-elle au sein de la collectivité, une conduite négligente ne sera pas pour autant raisonnable dans toutes les circonstances. Si on agit déraisonnablement en ne faisant rien du tout devant l'état manifestement dangereux de son allée, il importe peu alors que la conduite de ses voisins soit également déraisonnable. C'est ce genre de négligence généralisée que la Loi vise à décourager. Il est loin d'être évident que la «pratique», suivie dans la région en question, consistant à n'épandre ni sable ni sel sur les aires de stationnement et sur les allées devrait être admise par les tribunaux.

La *Loi sur la responsabilité des occupants* ne justifie pas qu'on se détourne du principe généralement admis de l'acceptation du risque. La Loi vise à remplacer, à mettre au point et à harmoniser l'obligation de prendre soin qu'avaient en common law les occupants de lieux envers les visiteurs qui entraient sur ces lieux. Elle n'est pas destinée à écarter en bloc les moyens de défense de common law en matière de responsabilité.

The Act promotes and requires, where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe. The occupier may, however, wish to put part of his or her property "off limits" rather than to make it safe, and that might be considered reasonable in certain circumstances. Where no such effort has been made, the exceptions to the statutory duty of care will be few and narrow.

The legislature, in enacting s. 4(1), intended to carve out a very narrow exception to the class of visitors to whom the occupier's statutory duty of care is owed. This exception shares the same logical basis as the premise that underlies *volenti*: the plaintiff assumes the risk and absolves the defendant of all responsibility for it. This interpretation accords best with general principles of statutory interpretation, is more fully consonant with the legislative aims of the Act, and is consistent with tort theory generally.

This Court was not presented with any new arguments on the issue of contributory negligence that could in any way lead to the conclusion that the trial judge made a "palpable and overriding" error in his appreciation of the evidence or in his finding on the contributory negligence issue.

Cases Cited

Considered: *Dube v. Labar*, [1986] 1 S.C.R. 649; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186; **disapproved**: *London Graving Dock Co. v. Horton*, [1951] A.C. 737; **referred to**: *Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645; *Donoghue v. Stevenson*, [1932] A.C. 562; *Samis v. City of Vancouver*, unreported, February 23, 1989, (B.C.C.A.); *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *James v. River East School Division No. 9* (1975), 64 D.L.R. (3d) 338; *Drewry v. Towns* (1951), 2 W.W.R. (N.S.) 217; *Beatty v. Brad-Lea Meadows Ltd.* (1986), 39 A.C.W.S. (2d) 334; *Bunker v. Charles Brand & Son, Ltd.*, [1969] 2 All E.R. 59; *White v. Blackmore*, [1972] 3 All E.R. 158; *Mitchell v. Canadian National Railway Co.*, [1975] 1 S.C.R. 592.

La Loi encourage les occupants — et leur en impose l'obligation lorsque les circonstances le commandent — à prendre des mesures concrètes pour assurer un degré raisonnable de sécurité sur les lieux qu'ils occupent. L'occupant pourra toutefois préférer interdire l'accès d'une partie des lieux plutôt que de les rendre sûrs, et cela pourra être considéré comme raisonnable dans certaines circonstances. Lorsque aucune mesure de ce genre n'a été prise, les exceptions à l'obligation de prendre soin prévue par la loi seront peu nombreuses et leur portée restreinte.

Le législateur a visé par l'adoption du par. 4(1) à créer une exclusion, de portée très limitée, de la catégorie des visiteurs envers lesquels l'occupant a une obligation légale de prendre soin. Le fondement logique de cette exclusion est identique à celui de la prémisse qui sous-tend l'acceptation du risque: le demandeur assume le risque et dégage le défendeur de toute responsabilité. C'est cette interprétation qui s'accorde le mieux avec les principes généraux d'interprétation des lois, qui est le plus en harmonie avec les objets de la Loi et qui concorde avec la théorie de la responsabilité délictuelle en général.

On n'a présenté à la Cour sur la question de la négligence contributive aucun argument nouveau qui permette de conclure que le juge de première instance a commis une erreur «manifeste et dominante» dans son appréciation de la preuve ou dans sa conclusion sur la question de la négligence contributive.

Jurisprudence

Arrêts examinés: *Dube c. Labar*, [1986] 1 R.C.S. 649; *Crocker c. Sundance Northwest Resorts Ltd.*, [1988] 1 R.C.S. 1186; **arrêt critiqué**: *London Graving Dock Co. v. Horton*, [1951] A.C. 737; **arrêts mentionnés**: *Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645; *Donoghue v. Stevenson*, [1932] A.C. 562; *Samis v. City of Vancouver*, inédit, 23 février 1989, (C.A.C.-B.); *Roberge c. Bolduc*, [1991] 1 R.C.S. 374; *James v. River East School Division No. 9* (1975), 64 D.L.R. (3d) 338; *Drewry v. Towns* (1951), 2 W.W.R. (N.S.) 217; *Beatty v. Brad-Lea Meadows Ltd.* (1986), 39 A.C.W.S. (2d) 334; *Bunker v. Charles Brand & Son, Ltd.*, [1969] 2 All E.R. 59; *White v. Blackmore*, [1972] 3 All E.R. 158; *Mitchell c. La compagnie des chemins de fer nationaux du Canada*, [1975] 1 R.C.S. 592.

victim was a defence. As Professor Fleming notes in *The Law of Torts*, *supra*, at p. 431:

> *Horton's* case encountered such devastating professional disapproval that it was promptly abrogated in England by statute. . . .

To my mind, it is significant that the English law to which Professor Fleming refers uses a similar phrase, namely, "risks willingly accepted" as s. 4(1) of the Act and adds parenthetically that the question whether a risk was so accepted is to be decided on the same principles as in other cases, in which one person owes a duty of care to another. The absence of the parenthetical explanation in s. 4(1) of the Act does not mean it should be interpreted differently: see *Occupiers' Liability Act, 1957* (U.K.), 1957, 5 & 6 Eliz. 2, c. 31, s. 2(5); *Occupiers' Liability Act, 1984* (U.K.), 1984, c. 3, s. 1(6). In that connection, the U.K. section has consistently been held to require more than a mere knowledge of the risk by the plaintiff: see, for example, *Bunker v. Charles Brand & Son, Ltd.*, [1969] 2 All E.R. 59, at p. 65, *per* O'Connor J. and *White v. Blackmore*, [1972] 3 All E.R. 158, at p. 164, *per* Denning M.R.

The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe. The occupier may, however, wish to put part of his property "off limits" rather than to make it safe, and in certain circumstances that might be considered reasonable. Where no such effort has been made, as in the case at bar, the exceptions to the statutory duty of care will be few and narrow. As Professor Di Castri states in his book *Occupiers' Liability*, at p. 229: "It may be assumed the words 'willingly accepted' will not be given a liberal interpretation. . . . It would seem that the defence will be difficult to sustain in view of the high standard of evidence [of voluntariness] required." In the course of these remarks, Professor Di Castri cites from the decision of Laskin J. (as he then was) in *Mitchell v.*

risque. À la suite de cet arrêt, la simple connaissance du péril par la victime constituait une défense. Ainsi que le fait remarquer le professeur Fleming dans *The Law of Torts*, précité, à la p. 431:

> [TRADUCTION] L'arrêt *Horton* a suscité chez les juristes une désapprobation tellement accablante qu'il a été promptement annulé en Angleterre par l'adoption d'une loi . . .

Il est révélateur, à mon sens, que la loi anglaise mentionnée par le professeur Fleming utilise l'expression «*risks willingly accepted*» («risques volontairement acceptés») semblable à celle du par. 4(1) de la Loi et poursuive, entre parenthèses, que la question de savoir si un risque a été accepté doit être tranchée selon les mêmes principes que dans les autres cas où une personne a une obligation de diligence envers une autre personne. L'absence d'explication entre parenthèses au par. 4(1) de la Loi ne signifie pas qu'elle doive être interprétée différemment: voir *Occupiers' Liability Act, 1957* (R.-U.), 1957, 5 & 6 Eliz. 2, ch. 31, par. 2(5); *Occupiers' Liability Act, 1984* (R.-U.), 1984, ch. 3, par. 1(6). À cet égard, les tribunaux britanniques ont statué uniformément que ce paragraphe exige davantage que la simple connaissance du risque par le demandeur: voir par exemple, *Bunker v. Charles Brand & Son, Ltd.*, [1969] 2 All E.R. 59, à la p. 65, par le juge O'Connor, et *White v. Blackmore*, [1972] 3 All E.R. 158, à la p. 164, par le maître des rôles Denning.

La Loi vise à encourager les occupants — et leur en impose même l'obligation lorsque les circonstances le commandent — à prendre des mesures concrètes pour assurer un degré raisonnable de sécurité sur les lieux qu'ils occupent. L'occupant pourra toutefois préférer interdire l'accès d'une partie des lieux plutôt que de les rendre sûrs, et cela pourra être considéré comme raisonnable dans certaines circonstances. Lorsque aucune mesure de ce genre n'a été prise, ce qui est le cas en l'espèce, les exceptions à l'obligation de prendre soin prévue par la loi seront peu nombreuses et leur portée restreinte. Ainsi que l'affirme le professeur Di Castri dans son livre intitulé *Occupiers' Liability*, à la p. 229: [TRADUCTION] «On peut supposer que les mots «volontairement acceptés» ne recevront pas une interprétation libérale [. . .] Il semble que ce moyen de défense sera diffici-