COURT FILE NO.: 38112A

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TAMMY FELTZ, and JUSTINE FELTZ and DYLAN FELTZ, by their Litigation Guardian, Tammy Feltz	Vicki J. Edgar, for the Plaintiffs
Plaintiffs	
- and -	
THE ESTATE OF CHRISTOPHER COWELL, deceased	Sheldon A. Gilbert, for the Defendant
Defendant	
- and –	
TOWNSHIP OF MIDDLESEX CENTRE	Brian McCall, for the Third Party
Third Party	
	HEARD: At London, February 1, 2, 3, 4, 2005

W. A. JENKINS J.

[1] The plaintiff Tammy Feltz sues the estate of Christopher Cowell for damages resulting from injuries she suffered in a motor vehicle accident that occurred on Adelaide Street North in the Township of Middlesex Centre on July 4, 2001. The estate of Christopher Cowell commenced a third party action against the Township of Middlesex Centre alleging that the

accident was caused or contributed to by the Township's failure to repair Adelaide Street in the area where the accident occurred and for allowing a condition of non-repair to exist contrary to s. 284(1 and 1.1) of the *Municipal Act* R.S.O. 1990 c. M.45.

Facts

[2] At approximately 4:25 p.m. on July 4, 2001, Christopher Cowell was operating his Toyota MR2 sports car in a northerly direction on Adelaide Street near the intersection with the Medway Road when he collided with a vehicle operated in a southerly direction by Shirley Veenendaal. As a result of the collision, Christopher Cowell was killed and Shirley Veenendaal was seriously injured. Tammy Feltz a passenger in Christopher Cowell's vehicle was also injured.

[3] Tammy Feltz and Shirley Veenendaal commenced separate actions against the estate of Christopher Cowell and he brought third party proceedings in each action against the Township of Middlesex Centre.

[4] Both actions were settled for a total of $602,383.44 inclusive of costs, plus some disbursements to be ascertained. The issue of liability for the accident as between the deceased Christopher Cowell and the Township of Middlesex Centre is to be decided in this third party action and the plaintiffs in the main actions have agreed to be bound by my decision.

The Accident

[5] At the time of the accident Christopher Cowell was coming from London on his way to Exeter where he lived. He regularly travelled this route and he was familiar with the area where the accident occurred.

[6] Adelaide Street north of the Medway Road is two lanes wide and paved. The speed limit is 80 kilometers per hour and there is an S-curve where the accident occurred. The point of impact was immediately north of the most northerly curve in the S which is a curve to the left.

[7] As Christopher Cowell approached the scene of the accident he stopped behind another vehicle at the intersection of Adelaide Street and the Medway Road. It had been raining heavily and the roads were wet.

[8] By the time Christopher Cowell stopped at the Medway Road, the rain had stopped and the sun was out. After he crossed the Medway Road, Christopher Cowell pulled out and passed the vehicle in front of him. He then continued in a northerly direction towards the S-curve.

[9] The evidence is that Christopher Cowell negotiated the first curve to the right but as he was coming out of the second curve, he lost control of his vehicle entered the southbound lane and collided head-on with the vehicle operated by Shirley Veenendaal. Christopher Cowell's vehicle came to rest mostly in the southbound lane of Adelaide Street and the Veenendaal vehicle which was pushed in a northerly direction came to rest in the ditch on the west side of the road. Both vehicles were severely damaged.

[10] Timothy Probaszka testified that he lives in Ilderton and that he witnessed the accident. He said he was driving north on Adelaide Street when Christopher Cowell came up behind him. He said it had been raining heavily but by the time they stopped at the Medway Road the rain had stopped.

[11] As they continued north on Adelaide Street, Mr. Probaszka said he was going 40 to 60 kilometers per hour. He said he was not paying much attention but he was aware that the Cowell vehicle passed him and continued in a northerly direction. He was unable to estimate the speed of the Cowell vehicle.

[12] After the Cowell vehicle passed him and as he approached the curve he said he saw a lot of spray from water on the road and he slowed down and turned his wipers on high. He then saw the Cowell vehicle collide with the Veenendaal vehicle.

[13] Mr. Probaszka said that Adelaide Street was wet but he is not sure how much water was on the road in the curve. He believes the Cowell vehicle threw up more spray in the curve than it did when it passed him.

[14] Joy Gallant testified that she was southbound on Adelaide Street at the time of the accident. As she approached the S-curve, she said it had almost stopped raining. She said the road was wet and as she entered the curve she was going 80 to 90 kilometers per hour.

[15] Mrs. Gallant said she saw the Cowell vehicle coming towards her. As it came into the most northerly curve, it was in the northbound lane. She said it hit a “slight puddle” and started to slide sideways towards her lane. She said she slowed down and Christopher Cowell appeared to get control of his vehicle. After she passed the Cowell vehicle, it crossed the road and hit the Veenendaal vehicle which was behind her in the southbound lane.

[16] Mrs. Gallant thought Christopher Cowell lost control of his vehicle as he came into the curve and hit the puddle. She told the police officer that the Cowell vehicle was travelling quickly. Later that evening she wrote out her recollections of the accident and estimated the speed of the Cowell vehicle at 130 kilometers per hour.

The Investigation

[17] The investigating officer, OPP Constable Terry Hamilton, testified that he was dispatched to the scene of the accident at 4:30 p.m.on July 4, 2001 and he arrived at the scene at 4:38 p.m. He said as he travelled to the scene of the accident, the rain stopped and the sun came out. He said the roads were wet.

[18] Officer Hamilton said he thought it was raining at the time of the accident because it was still raining as he drove to the scene. He said that Adelaide Street is 7.5 meters wide and there is one northbound and one southbound lane. He does not have any specific recollection of puddles on the road in the north curve, but he believes the accident occurred because the Cowell vehicle hydroplaned across the road into the southbound lane where it collided with the Veenendaal vehicle.

[19] Officer Hamilton reported that the Cowell vehicle was driving too fast for conditions and in his view, that is why Christopher Cowell lost control of his vehicle. He said he did not

observe any defects in the design or construction of the road during the course of his investigation.

[20] OPP Officer Susan Blacklock testified that she is a technical traffic collision investigator and she works out of the Sebringville detachment. She was dispatched to the scene of the accident at 5:59 p.m. on July 4, 2001 and she arrived about 6:14 p.m. She said it had been raining heavily that day but the rain had stopped earlier in the afternoon and the roads were bare and dry.

[21] Officer Blacklock found right rear, left rear and right front tire marks in the northbound lane of Adelaide Street in the most northerly curve to the left. She thought the marks were yaw marks but since she could not determine the point of separation between the front and rear tires, she referred to them as tire marks.

[22] About 65 feet north of the point where the tire marks started and in the southbound lane there were two gouge marks and an area of debris that she said was the point of impact. The Cowell vehicle came to rest straddling the north and southbound lanes and facing east. It was mostly in the southbound lane and about 25 feet north of the point of impact. The Veenendal vehicle was in the west ditch and it came to rest north of the Cowell vehicle indicating that it had been pushed in a northerly direction by the force of the collision.

[23] Officer Blacklock said that she did not notice any defects in the design or construction of the road. She said it was a flat open road and it appeared to be in good condition. In her view the accident was caused by driver error.

Maintenance of the Road

[24] Douglas Frances lives in Bryanston, Ontario and he used to work for the Township of London which is now part of the Township of Middlesex Centre. When the Township of Middlesex Centre was created by the amalgamation of three Townships, he continued to work for the new Township as a road supervisor. It was his job to patrol the roads and look for

potholes, damaged signs and other problems on the road. He also supervised equipment operators and labourers employed by the Township.

[25] In 2001 he patrolled a number of roads, including that section of Adelaide Street where the accident occurred. He said he drove along Adelaide Street every day and he never noticed any unusual puddles or pooling of water in the S-curve. He said if ponding had occurred in that area, he would have reported it to the road superintendent.

[26] Mr. Frances testified that Adelaide Street is paved with a chip and tar mixture that was put down over the existing gravel road. He said there were no engineers involved in designing the road when it was resurfaced.

[27] Mr. Frances said that the area where the accident occurred was resurfaced with tar and chips in 1999. In the spring of 2001 there was some additional work done on Adelaide Street to fill potholes and ruts. He does not recall any work being done on the S-curve where the accident occurred. That area was, however, resurfaced in 2002.

[28] Mr. Frances said there was an S-curve sign and an 80-kilometer per hour sign before the S-curve. He said the Township had not received any complaints about the S-curve and he was not aware of any accidents at that location.

[29] Mr. Frances testified that he had never been told nor had he noticed that the curve where the accident occurred lacked elevation and no analysis of the elevation of the curve had been done by the Township. He did not believe that the lack of elevation was visible. He said he had never had a problem negotiating the curve during his patrols.

[30] On the afternoon of the accident, Mr. Frances said it rained heavily at about 4 p.m. as he was on his way back to the Township offices. He said it was a torrential downpour that lasted until about 4:15 p.m. When he got to the Township offices, the yard was flooded. Shortly thereafter, he received a call from the fire department asking him to come to the scene of the accident to close off the road.

[31] On cross-examination Mr. Frances said he knew there was supposed to be a fall in elevation on a curve of one or two percent to permit water to run off and to make it easier to negotiate the curve. He said the Township did not have any design plans on file for the curve where the accident occurred and although he had patrolled that road for 18 years, he never checked the grade on the curve. He said that if the curve was flat, he thought it would be noticeable.

[32] Jeff Little testified that he also works for the Township and he patrolled the area where the accident occurred. He said he never saw any excessive pooling of water in the curve and he never noticed that the curve was flat. He thought that some patching had been done on Adelaide Street north of the Medway Road in 2001 but he did not believe any work was done on the S-curve. He said there had not been any complaints or accidents at that location.

[33] Mr. Little said that in July 2001 there was a traffic count done on Adelaide Street north of the Medway Road and it showed that during a 48-hour period, 4,450 vehicles used that stretch of the road. He said that shortly after 4 p.m.on the day of the accident he was with Mr. Frances when they passed through a heavy rainstorm on the way to the Township offices. He said the storm lasted about five minutes. It was sufficiently severe that they were worried about trees being knocked down and flooding. He said some cars pulled off the road to wait until the rain stopped.

The Engineering Evidence

[34] The defendant contends that the accident was caused in part by the failure of the Township to repair and maintain the S-curve on Adelaide Street. In support of that position, the defendant called two engineers who examined the scene of the accident in order to give evidence at the trial.

[35] Rene Caskanette is an engineer with Caskanette & Associates. He was retained by the defendant on July 6, 2001 to investigate the accident. He said he talked with the investigating officers and then attended at the scene of the accident on July 10, 2001. He said that the police paint marks indicating the tire marks and the gouge marks were still on the road. He said the

distance between the start of the tire marks and the gouge marks was 65 feet. In addition, he said the defendant Cowell's vehicle came to rest 25 feet north of the gouge marks.

[36] Mr. Caskanette testified that he could see without taking any measurements that the northbound lane in the northerly curve was flat. As a result, a surveyor was hired to survey the curve. The survey indicated that there is a slight rise in the road to the north of the point where the yaw marks were left by the Cowell vehicle. It also indicated a lack of elevation or cross-fall in the curve. As a result, rain water would flow down the northbound lanes towards approaching vehicles due to lack of cross-fall in the north curve. He said water would also accumulate in the flat spot and create a risk of hydroplaning. The absence of elevation in the curve would reduce the speed at which a vehicle could safely negotiate the curve.

[37] Mr. Caskanette testified that there was a seven meter flat spot in the northbound lane of the most northerly curve from +138 to +145 as shown on the Callon Deitz survey of July 30, 2001. As a result, northbound vehicles would travel up a slight grade with water flowing into their path and then encountered the flat spot and some accumulated water. He said there was inadequate cross-fall in the curve for a distance of about 30 meters.

[38] Mr. Caskanette said the curve did not meet the Ministry of Transportation specifications for a cross-fall of approximately 2% and according to his calculations, the maximum speed at which the curve could be safely negotiated was 74 kilometers per hour. As a result, even negotiating the curve at the speed limit of 80 kilometers per hour could be unsafe.

[39] Mr. Caskanette said because of the hazard created by the lack cross-fall and proper drainage the road would be hazardous when wet. In his opinion there should have been a "Slippery When Wet" sign with a reduced speed tab erected prior to the curve. He said the curve should have been repaired in due course but in the meantime, the sign would warn approaching drivers of the hazard.

[40] Mr. Caskanette was asked to calculate the speed of the Cowell vehicle prior to the accident. He calculated its speed at 72 to 89 kilometers per hour as it entered the curve. Mr.

Caskanette was assisted in his speed calculations by John McGlone the second engineer called by the defendant.

[41] Mr. McGlone is a civil engineer and an expert in accident reconstruction. He attended at the scene of the accident on July 24, 2001 and assisted Callon Deitz with the survey.

[42] Mr. McGlone testified that it was apparent to the naked eye that the curve in the northbound lane had minimal cross-fall. He said there were flat spots in the curve and traffic in the northbound lane would encounter a slight upgrade.

[43] In Mr. McGlone's opinion, the flat spots represented a hazard to motorists and a "Slippery When Wet" sign should have been posted until repairs could be made. He said a car could not have gone around this curve at more than 74 kilometers per hour in the conditions that existed at the time of the accident without a risk that it would hydroplane and the driver would lose control.

[44] Mr. McGlone testified that there was no cross-fall at all in the northbound lane between +138 and +145 as shown on the survey and this condition could have been rectified easily and inexpensively. In his opinion, there was an extraordinary situation at the scene of the accident that was a hazard to motorists when the road was wet.

[45] Mr. McGlone said that the lack of elevation in the curve could be repaired with binding agent and a thin layer of asphalt. He said because the road did not drain properly a pool of water would collect in the seven meter flat spot in the curve.

[46] In Mr. McGlone's opinion, a reasonably competent patrolman should have observed the lack of cross-fall in the curve as the road slopes the wrong way.

[47] Mr. McGlone said that Christopher Cowell lost control of his vehicle when it encountered accumulated water on the road in the seven meter flat spot and his vehicle began to hydroplane. He does not believe the accident was caused by excessive speed.

[48] The Township takes the position that this accident was caused by excessive speed on the part of the deceased, Christopher Cowell. It also denies that the lack of cross-fall in the curve could have been identified by a competent patrolman. The Township contends that the curve could be safely negotiated at a speed in excess of 80 kilometers per hour. In support of its position, the Township called two engineers.

[49] Jack DeChiara is a civil engineer, who has done roadwork for many years. He testified that many rural roads are not designed by engineers but simply evolve from gravel roads. That is the case with respect to Adelaide Street North in the area where this accident occurred.

[50] Mr. DeChiara testified that he attended at the scene of the accident in August 2004. He was not aware that the road had been resurfaced since the accident and consequently he does not know what the curve looked like at the time of the accident.

[51] Mr. DeChiara said that it is not unusual to find flat spots in curves on rural roads across the province. Flat spots vary with the length and radius of the curve but they occur in virtually every curve. He said that a competent patrolman would probably not recognize the flat spot in the curve involved in this accident.

[52] Mr. DeChiara said that in spite of the lack of cross-fall in parts of this curve, the curve could still be negotiated at the speed limit without difficulty. He said that at 80 kilometers per hour, in the absence of a heavy rainfall, the water on the road should not have affected the Cowell vehicle.

[53] Mr. DeChiara said that he did not believe a “Slippery When Wet” sign was required in this case. He said such a sign should only be used where investigations determine that the pavement has a reduced skid resistance when wet. There had been no previous investigations that he was aware of relating to this curve or accidents at this curve. He does not believe that this curve was hazardous.

[54] The Township also called Mark Galvin, a civil engineer, who does accident reconstruction work. He testified that he attended at the scene of the accident on February 9,

2004, which was after the road had been resurfaced. Based on the information contained in other reports and on his observations, he attempted to calculate the speed of the Cowell vehicle prior to the impact.

[55] He came up with a speed of 104 to 109 kilometers per hour prior to the vehicle beginning to yaw and 90 kilometers per hour at the time of impact. He agreed that accumulated water on the road is a common cause of hydroplaning and it is possible that Mr. Cowell lost control of his vehicle due to such conditions. Mr. Galvin admitted that he has no reason to doubt that there was a flat spot in the curve and that Mr. Cowell lost control of his vehicle in that area.

[56] On cross-examination Mr. Galvin conceded that water could accumulate where there is a flat spot in a curve and that hydroplaning could occur in that area. He agreed that since there was a deficiency in the road that needed repairs, the Township should have erected a “Slippery When Wet” sign with a reduction in speed tab.

[57] Mr. Gilbert, counsel for the defendant, contends that the combination of water and the lack of cross fall amounted to a state of non-repair which caused or contributed to the accident. He alleges that the Township was negligent in failing to repair the curve or erect a “Slippery When Wet Sign” with a speed tab. He argues that such a sign would have alerted Mr. Cowell to the dangerous condition of the curve and caused him to slow down.

Speed of the Cowell Vehicle

[58] Mr. Gilbert conceded during argument that this accident was caused, in part, by the negligence of Christopher Cowell in travelling at an excessive rate of speed having regard to the conditions at the time of the accident and in failing to negotiate the curve. He contends, however, that if there had been proper cross fall in the north curve, Christopher Cowell would have negotiated the curve without losing control of his vehicle.

[59] The speed at which Christopher Cowell was travelling was estimated by the engineers, Rene Caskanette and John McGlone, at 72 to 89 kilometers per hour before he lost control of his

vehicle and it began to yaw. Mark Galvin, the engineer retained by the Township, estimated the speed of the Cowell vehicle at 104 to 109 kilometers per hour before the accident.

[60] The independent witness Joy Gallant who passed the Cowell vehicle as it entered the curve, told the investigating officer that it was travelling quickly and when she made notes about the accident that evening, she estimated its speed at 130 kilometers per hour. Timothy Probaszka testified that he was travelling 40 to 60 kilometers per hour when the Cowell vehicle passed him shortly before the S-curve and he saw a lot of spray and had to put his windshield wipers on high.

[61] The problem with the speed estimate given by Messrs. Caskanette and McGlone is that they assumed it was raining at the time of the accident, and that there was more water on the surface of the road than the evidence of Mrs. Gallant indicated. She testified that there was a slight puddle on the road near the curve.

[62] Similarly, Mr. Galvin's calculations are suspect as they are based on the assumption that the Cowell vehicle was skidding on a gritty road surface when he lost control. In fact, the vehicle appears to have gone into a yaw when he lost control so that the wheels were still turning as opposed to being locked up in a skid. As well, the road surface was worn smooth which might affect the coefficient of friction used by Mr. Galvin.

[63] Regardless of the problems with the evidence of the engineers, it is clear from Mrs. Gallant's testimony that the Cowell vehicle was travelling in excess of the speed limit as it entered the curve. Mrs. Gallant said that at the time Mr. Cowell lost control of his vehicle, he appeared to hit "a slight puddle".

[64] Her evidence that the Cowell vehicle was travelling at an excessive speed is corroborated by the evidence of Mr. Probaszka who said that he was going between 40 and 60 kilometers per hour when the Cowell vehicle passed him and pulled away before it reached the curve. He also referred to excessive spray thrown up by the Cowell vehicle, which is consistent with a vehicle travelling at a significant rate of speed.

[65] Messrs. Caskanette and McGlone have the Cowell vehicle entering the curve at as fast as 89 kilometers per hour. Mr. Galvin has the Cowell vehicle entering the curve at as fast as 109 kilometers per hour and Mrs. Gallant estimates the speed of the Cowell vehicle at 130 kilometers per hour.

[66] In view of the questionable reliability of the engineer's evidence as to the speed of the Cowell vehicle, I prefer to rely on the evidence of the eye witness Mrs. Gallant. She observed the Cowell vehicle coming towards her at what she told the investigating officer was a fast rate of speed. Although her estimate of 130 kilometers per hour may be high, her evidence that the vehicle was travelling in excess of the speed limit is consistent with Mr. Cowell losing control of his vehicle in the curve and with the damage caused by the accident. It is also consistent with Mr. Probaszka's evidence that Mr. Cowell passed him, pulled away and threw up a lot of spray as it entered the curve.

[67] Based on the foregoing, I find that Christopher Cowell was travelling at or in excess of 100 kilometers per hour at the time he entered the S-curve on Adelaide Street and that he encountered some standing water on the surface of the road as he rounded the curve. As a result of his excessive speed which was at least 20 kilometers over the speed limit and the wet surface of the road, he lost control of his vehicle and collided with the vehicle operated by Shirley Veenendaal.

Liability of the Township

[68] While I am satisfied that the primary cause of this accident was the excessive speed of the Cowell vehicle, there is an issue as to whether the Township is partly responsible for the accident for failing to keep Adelaide Street in a reasonable state of repair.

[69] The evidence is that Adelaide Street north of the Medway Road is a rural two lane Township road with a tar and chip surface. The speed limit is 80 kilometers per hour and a traffic count taken in July 2001 indicated that 4,450 vehicles used the stretch of road where the accident occurred in a 48 hour period.

[70] It is therefore apparent that Adelaide Street north of the Medway Road is a moderately busy Township road that passes through an agricultural area. That stretch of road was last resurfaced in 1999 and any potholes or ruts that developed in the winter of 2001 were repaired that spring.

[71] The Township was not aware of any prior accidents at the S-curve and that stretch of road was regularly patrolled by Township employees. None of the patrolmen had reported any problems with elevation or cross-fall in the S-curve.

[72] At the time of this accident s. 284 of the *Municipal Act*, R.S.O. 1990 c. M-45 provided as follows:

> **Maintenance of roads and bridges**
>
> 284(1) The council of the corporation that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in light of all of the circumstances including the character and location of the highway or bridge.
>
> **Liability**
>
> (1.1) In case of default, the corporation, subject to the *Negligence Act*, is liable for all damages any person sustains because of the default.
>
> **Defence**
>
> (1.2) The corporation is not liable under subsection (1) or (1.1) for failing to keep a highway or bridge in a reasonable state of repair if it did not know and could not reasonably have been expected to know about the state of repair of the highway or bridge.
>
> **Same**
>
> (1.3) The corporation is not liable under subsection (1) or (1.1) for failing to keep a highway or bridge in a reasonable state of repair if it took reasonable steps to prevent the default from arising.

[73] In *McMaster (Litigation Guardian of) v. York (Regional Municipality)* (1997), O.J. No. 3928 E.M. McDonald J. heard a case involving alleged deficiencies in a speed advisory sign and the alignment of curves in the road that were alleged to have formed the basis for liability on the

part of the York Region for an accident that occurred on July 12, 1991. In that case the plaintiff's vehicle exited a curve in a gravel road and left the travelled portion of the road coming to rest at the bottom of a ravine. The speed limit in the area was 80 kilometers per hour and there was a speed advisory sign located prior to the curve recommending a speed of 30 kilometers per hour and Chevron signs warning of a sharp turn.

[74] At page 31 of the *McMaster* decision, McDonald J. said as follows:

> [96] The road on which Hugh John was travelling was not untypical of many rural roads in this province. It remains to succeed in their claim, plaintiffs must establish that York Region breached its mandated obligation to keep the road in repair and this breach caused Hugh John's injuries. In this connection I have paid particular attention to Houser et al v. Corporation of the Township of West Lincoln (1985), 29 M.P.L.R. 55 (Ont. C.A.) ("Houser"). In Houser, there were no signs to mark the curve in question or to warn the plaintiff to reduce his speed on entering the curve. It was on this basis that Brooke J.A. concluded that the defendant was 50 per cent responsible for the plaintiff's damages. I reproduce a portion of the judgment:
>
> … There was no warning given that the driver was now entering an area where there would be no warning and so he proceeded unaware of this important change and on the assumption that the highway was properly maintained and properly marked. I think it is probable in the circumstances that even if the plaintiff had noticed the lights of the oncoming car while it was in the curve he might well have failed to recognize the curve because there was no proper sign and, in any event, he would have assumed there was no feature of the highway ahead that would cause him to slow down and take the extra caution required to proceed through a flat, sharp curve with a surface that was designed for much slower speeds and was likely to cause him to drive off the roadway.
>
> [97] The plaintiff in Houser was also a stranger to the roadway in question. Hugh John was not a stranger to the roadway in the instant case.
>
> [98] Mr. Brown referred me to certain passages which appear in Thomson Rogers on Municipal Liability, Canada Law Book Inc. at p. 42.
>
> V. NON REPAIR
>
> The classic statement regarding the standard of repair to which municipalities are bound to maintain their roadways was made by Armour C.J., who said they must be 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". That test has since been adopted in many decisions. Variations of the test include references to the character of the road and the locality through which it passes, the requirements of the traffic on it, the season of the year and the climatic conditions, the type of roadway and the extent of improvement on it. Another statement of general principle was that made by Sir Charles Fitzpatrick C.J.: "A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety."
>
> A statutory duty to keep roads in repair creates a positive, or affirmative, duty which is the source of the duty to inspect (subject to a bona fide policy decision not to inspect), for the purpose of seeking out and remedying conditions of non-repair. The municipality must actively take steps to prevent disrepair from arising.
>
> Whether or not there is a condition of non-repair is a question of fact in each case depending upon all the surrounding circumstances, but the courts have been increasingly liberal in the interpretation of what constitutes non-repair. A municipality is not, however, to be treated as an insurer of the safety of those using its streets and highways. Its obligation is not absolute but rather involves a duty to take reasonable action. It cannot be expected to make all of its roads passable at all times and in all weather conditions. Any liability will be based on negligence principles, and the evidence must be examined in its entirety to determine whether the duty to reasonably maintain the highway was discharged.

[99] The theme of the cases cited in support of the general principle reproduced above is that a municipality has a duty to take reasonable action to maintain its roadways. The evidence must be examined in detail to determine whether the duty was discharged in this case. I have also proceeded on the basis that the analysis should be premised on the fact that a municipality must provide for ordinary drivers who exercise ordinary care, but who may make mistakes. In other words, not all drivers are model drivers. Having made this observation, I proceed in light of the caution set forth in Thomson Rogers on Municipal Liability to the effect that this principle should not be taken too far "on pain of negating the principle that a municipality is not an insurer of the safety of the users of its roads". This is a theme that also appears in cases cited to me by Mr. Davison. See, for example, Belling v. City (1902), 3 O.L.R.'s 318 (Ont. Div. Ct.). See also Rogers, The Law of Canadian Municipal Corporations, (1996) pp. 1242-1243 and 1244 as follows:

> 235.3 Extent of Duty

235.31 General

Both legislatures and the courts have defined the scope and extent of the obligation of municipal corporations to repair highways and have placed limitations thereon. The measure of the duty is to be found in the statute creating it (a). In some provinces the duty imposed is to keep the highways in a "reasonable state of repair" (b). The obligation imposed by the Municipal Act requires a municipality to keep its roads, or to use all reasonable efforts to keep them, in a state reasonably sufficient for the requirements of the traffic using them, that is, in such condition that a traveller using them in the ordinary way and with ordinary care may do so with safety (c). The duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair; and if the continued existence of such conditions is not prevented, to take precautions in the nature of an extra inspection commensurate with the likelihood of a dangerous state arising (d). However, local authorities are not required to maintain their streets according to an ideal standard of perfection (e); the duty is not an absolute one so as to call for the perfect repair (f). Hence they are not insurers of persons using their streets (g).

235.32 Factors Affecting Duty

(1) General

The courts have frequently stated that "repair" is a question of fact. It is local and relative because what may be good repair in one locality may amount to non-repair in another (h). The extent of the duty therefore depends on conditions and surrounding circumstances. They have taken into consideration many factors such as the requirements of the local traffic, the means at the command of the council, the ordinary purposes for which the road is used and varying conditions likely to arise (i). A municipality is entitled to decide to what degree it will maintain the gravel roads within its jurisdiction (j).

(2) Nature of Locality

The extent of the statutory duty to repair is to be gauged by the requirements of the particular locality (k). What would constitute a neglect of duty in one place might not be so at another place. (l) The character and population of the area are to be considered as well as the amount of the traffic using the road (m). A distinction has been made between highways and by-ways (n); a lower standard of care or degree of care is exacted for a road that is little travelled than for one which is much frequented (o). It follows that there is a difference between the obligations

> of urban authorities and those of rural municipalities (p); the standard of repair rises with wealth and population (q). The nature of the terrain may be a factor to be considered, that is, the physical difficulties to be met in the construction of highways which may be such that a high standard of repair cannot be expected (r).**

[75] I take from the foregoing that there was a statutory obligation on the Township under s. 284 of the *Municipal Act* to maintain Adelaide Street in a reasonable state of repair in light of all of the surrounding circumstances, and, if it fell below that requirement, it would be liable for failing to keep the highway in a state of repair if it knew, or could reasonably have been expected to know, about the non-repair of the highway.

[76] In this case, both Douglas Frances and Jeff Little patrolled Adelaide Street in the area where the accident occurred in 2001. Neither of them noticed a problem with the elevation and cross-fall in the S-curve north of the Medway Road. While they are not experts in the design of roads, they impressed me as reasonably diligent and intelligent employees of the Township who were involved in road maintenance.

[77] Mr. Frances said that he was not aware of any design plans for the S-curve and although he had patrolled Adelaide Street for 18 years, he had never checked the grade on the curves. Mr. Little testified that he had never observed any excessive pooling of water in the curve and he had never heard any complaints about the curve or accidents at that location.

[78] The accident was investigated by both Constable Terry Hamilton, the investigating officer and Susan Blacklock a technical traffic collision investigator and neither of them noticed any defects in the design or construction of the road. Officer Hamilton concluded that Mr. Cowell was driving too fast for conditions and Officer Blacklock concluded that the accident was caused by driver error.

[79] It is not surprising that no-one noticed the flat spot in the north curve as it was only seven meters long and the radius of the curve was over 300 meters. As Mr. DeChiara testified, it is not unusual to find flat spots in curves on rural roads as they occur on virtually every curve and vary with the length and radius of the curve.

[80] The engineers Mr. Caskanette and Mr. McGlone testified that they could see the seven meter flat spot in the curve when they attended at the scene of the accident. In spite of that they checked the cross fall in the northbound lane with levels and then had the area surveyed in order to confirm the flat spot.

[81] Since there were no reported accidents at this location and no reports of excessive accumulation of water on the road, I am satisfied that there was nothing that would have brought the lack of cross fall to the attention of the Township. Mr. Caskanette and Mr. McGlone discovered the flat spot because their attention was specifically drawn to the north curve by the occurrence of the accident.

[82] The defendant complains that the lack of cross fall resulted in excessive pooling of water at the scene of the accident but there is no evidence to support that contention. Neither Mr. Francis nor Mr. Little observed excessive pooling at that location and the defendant's experts did not carry out any tests to verify that excessive pooling could occur.

[83] Mrs. Gallant said there was a "slight puddle" in the north curve on the day of the accident. It is clear that there was also a heavy rainstorm that ended a few minutes before the accident. That storm was unusually severe and resulted in puddles at many locations throughout the Township.

[84] Mr. Probaszka said there was a lot of spray caused by the Cowell vehicle but he was unable to say how much water was on the road. Based on Mrs. Gallant's evidence, I conclude that there was a puddle in the north curve caused by the heavy rainfall that afternoon but that it did not amount to an unusual or hazardous condition.

[85] Since neither the Township employees who patrolled the area where the accident occurred or the police officers who investigated the accident noticed any lack of cross fall in the curve, I am satisfied that the Township was not aware of the flat spot in this curve prior to the accident. Since there were no reported accidents at this location or any reports of excessive accumulation of water on the road, there was nothing that would have brought the lack of cross fall to the Township's attention.

[86] Even if the Township ought to have been aware of the lack of cross fall in the curve, I am satisfied that it took all reasonable steps to maintain Adelaide Street in a state of repair in light of the character and location of the highway. This is a two-lane rural road that is adequately signed with an indication of the speed limit and a warning as to the S-curve. The surface of the road was in good condition, even though there was some crumbling along the edges of the tar and chip surface. Although the road did not meet the standards for a curve on a provincial highway, I am satisfied that it met the standards for a rural Township road and that it was in a state of repair.

"Slippery When Wet" Sign

[87] The Ministry of Transportation regulations provide that "Slippery When Wet" signs should be erected where investigations determine that a pavement has a significantly reduced wet weather skid resistance. The regulation specifies that application of the sign should be kept to an absolute minimum with its use restricted to "extraordinary situations". There were no investigations that indicated that the tar and chip surface at this location was unusually slippery, and I am not satisfied that the curve where the accident occurred was an "extraordinary situation".

[88] In any event, Tammy Feltz' evidence is that Christopher Cowell was familiar with this stretch of the road as he usually took Adelaide Street on his way to and from his home in Exeter. As a result, I am satisfied that Mr. Cowell was familiar with the area where the accident occurred and that he had negotiated the S-curve on many occasions in all sorts of weather.

[89] The curve where the accident occurred is a short distance north of the Medway Road. Within that short distance, Mr. Cowell pulled out and passed Mr. Probaszka, who was accelerating away from the stop sign at the Medway Road. Mr. Probaszka achieved a speed of 40 –60 kilometers per hour by the time Christopher Cowell passed him and as the vehicles continued in a northerly direction, Christopher Cowell was pulling away.

[90] Mr. Cowell knew that the road was wet as he had just come through a heavy rainstorm and he knew that the S-curve was immediately ahead of him when he pulled out to pass Mr. Probaszka. As he approached the S-curve, he was travelling at or in excess of 100 kilometers per

hour and I find that he would not have reduced the speed of his vehicle even if the Township had erected a "Slippery When Wet" sign at the curve. I find that the accident occurred when Mr. Cowell failed to negotiate the most northerly curve because he was travelling at an excessive rate of speed on a wet road.

Conclusion

[91] As a result of the foregoing I find that even though there was a seven meter flat spot in the curve just south of the place where the accident occurred, the road was in good repair. Further, I find that the Township was not aware of the flat spot prior to the accident and that the curve did not represent an extraordinary situation requiring a "Slippery When Wet" sign.

[92] I find that Christopher Cowell was travelling at or in excess of 100 kilometers per hour when he entered the curve and that he lost control of his vehicle on the wet surface of the road due to the speed at which he was travelling. I find that Christopher Cowell started to hydroplane or skid as he passed Mrs. Gallant and that he over-corrected causing his vehicle to cross into the southbound lane and collide with the Veenendaal vehicle. I find that the sole cause of the accident was the negligence of Christopher Cowell in approaching the curve at an excessive rate of speed, having regard to the condition of the road.

Judgment

[93] The third party action is therefore dismissed against the Township of Middlesex Centre. If necessary the parties may arrange an appointment with the trial coordinator to speak to the matter of costs.

"Justice W.A. Jenkins"
Justice W. A. Jenkins

Released: April 22, 2005

COURT FILE NO: 38112A

ONTARIO

SUPERIOR COURT OF JUSTICE

TAMMY FELTZ, and JUSTINE FELTZ and DYLAN, by their Litigation Guardian, Tammy Feltz

Plaintiffs

- and-

THE ESTATE OF CHRISTOPHER COWELL, deceased

Defendant

- and –

TOWNSHIP OF MIDDLESEX CENTRE

Third Party

REASONS FOR JUDGMENT

W. A. JENKINS J.

Released: April 22, 2005