

CITATION: Belanger et. al. v. The Regional Municipality of Sudbury et. al., 2015 ONSC 7071
COURT FILE NO.: C-5874/01
DATE: 20151117

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LISA MARIE BELANGER, CRAIG)
BELANGER, CHRISTINE BELANGER,) Jerome Morse and Claude Lacroix, for the
LORI BELANGER, AIME BELANGER,) Plaintiffs.
GAIL KENNEDY and JOHN LAUGHLIN)

Plaintiffs)

– and –)

THE REGIONAL MUNICIPALITY OF) David G. Boghosian and Avril Allen, for the
SUDBURY and THE CITY OF GREATER) Defendants.
SUDBURY)

Defendants)

)
)
)
) HEARD: November 18-21 and 24-28, 2014,
) December 1-5 and 8-12, 2014, April 14-17
) and 20-22, 2015.

R. D. GORDON, R.S.J.

Overview

- [1] On November 22, 2000, Lisa Marie Belanger, then 20 years of age, was driving southbound on Regional Road 35 (“RR35”) in The Regional Municipality of Sudbury (“the Region”) when she lost control of her car, crossed over the centre lane and collided head-on with a northbound school bus.
- [2] Ms. Belanger was badly injured. In the blink of an eye, her life and the lives of those closest to her, were changed forever. This trial was held to determine if the Region is liable for any or all of the losses arising from the accident. Those losses are substantial and were agreed upon by the parties in advance of trial at \$12 million.

Background Facts

- [3] The accident took place on RR35 about 400 metres south of Godfrey Road on a bridge that spanned a set of railway tracks. In the vicinity of the accident, RR35 was two lanes with a speed limit of 80 kilometres per hour. It was a busy road, indeed a major arterial road in the Region, estimated to accommodate some 16,000 vehicles per day.
- [4] November 22, 2000 was a bitterly cold day. The low temperature was -16 Celsius and the high reached just -11.3. The accident took place at about 11:15 in the morning at which time the temperature was about -11.6 with wind blowing from the north at approximately 25 kilometres per hour. Although little precipitation had initially been forecast for the day, at 8:17 a.m. the forecast changed to anticipate heavier snow.
- [5] In the end, total snowfall for the day was 5.7 centimetres. Of this amount, .5 cms fell before 7:00 a.m., 5 cms fell between 7:00 a.m. and 11:00 a.m., and .2 cms fell after 11:00 a.m.
- [6] Several people either witnessed the accident or came across the accident shortly after it had occurred. Most of them described RR35 as snow covered and slippery.
- [7] The Region had a written quality standard in place for winter road maintenance. Among the stated objectives for winter plowing, sanding and salting was the reduction of hazards of snow and ice conditions to users of the roads. For Class 1 and 2 roads (RR35 was a Class 1 road), the quality standard stated the following:
- Surfaces shall be maintained As Bare As Possible through Continued Use of all assigned men, equipment and materials suited to the conditions.
 - The maximum allowable snow accumulation is 1 INCH
 - Coverage (either plowing or spreading) intervals shall not be greater than every 2 hours throughout the storm.
 - These classes have First Priority
- [8] The Region also had in place a “Method and Procedure” for salting roads, streets and lanes. The recommended procedures included the following:
- Spread salt before snow accumulates so that a “brine sandwich” develops. This will prevent snow from sticking to the pavement, removal will be easier and bare pavement will result.
 - Cover route as often as possible, but not before the first application has a chance to work (usually 1 hour).

At End of Shift

- Fill gas tanks to prevent condensation.
- Clean equipment after use to prevent corrosion.
- Check equipment. Report service or repair requirements.
- Submit completed crew card to Area Superintendent.

[9] The Region also followed a Summary of Recommended Treatments prescribed by the Ministry of Transportation for Ontario (“MTO”). For temperatures between -18 and -12, with dry snow falling and a road condition described as “packing”, the following treatments are recommended:

Beginning of Storm

Plowing: If temperature rising, after salting. If temperature falling, after 2 cms accumulation.

Salting: If temperature rising before 0.5 cm accumulation.

During Storm

Plowing: Continuously.

Salting: If temperature rising, as necessary after plowing.

[10] The recommended treatment table included the following relevant notes:

1. During storm conditions plowing should be undertaken to ensure that the accumulation of snow on the road surface does not exceed 2.5 cm for Class 1...
2. After the storm, plowing should continue to achieve bare pavement within 24 hours for Class 1...
3. Winging back shoulders should usually be done only once after the storm.

[11] Ms. Belanger was driving a red 1990 Mazda on the day of the accident. In the vehicle about three car lengths behind her was Mary Brohart, who testified that as she approached the bridge, the red car started to fishtail but then straightened out. She described the front of the car then going into the oncoming lane before re-entering the southbound lane, hitting the side of the road, straightening out once again and then

shooting across the road to hit the bus head-on. She testified that it all happened within a matter of seconds.

- [12] For reasons that are not entirely clear to me, it took almost 14 years to get this matter to trial. Predictably, not every witness had a vivid memory of the events of the day. Many had to rely upon their statements, given shortly after the accident, for details of what conditions were like and what happened that day. Others relied heavily upon the Region's work records from that day to recall just what transpired. It was not the ideal atmosphere from which to make important findings of fact.

The Applicable Law

- [13] As summarized by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, a successful negligence action typically requires that plaintiff to prove four essential elements, each on a balance of probabilities:
- (1) That the Defendant owed a duty of care;
 - (2) That the Defendant's behaviour breached the standard of care;
 - (3) That the Plaintiff sustained damage; and
 - (4) That the damage was caused, in fact and in law, by the Defendant's breach.
- [14] A Plaintiff who has proved the Defendant to have been negligent may be contributorily negligent. If the Plaintiff's negligence is proved by the Defendant on a balance of probabilities, the court may apportion fault and reduce the Plaintiff's damages by the degree of fault attributed to him or her.
- [15] In this case, the duty of care and the standard of care are prescribed by statute. In particular, section 284(1) of the *Municipal Act*, R.S.O. 1990 c.M.45 provided that 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 the circumstances, including the character and location of the highway or bridge. Subsection (1.1) provided that in the case of default, the corporation, subject to the *Negligence Act*, is liable for all damages any person sustains because of the default. Subsection (1.2) provided that the corporation is not liable under subsection (1) or (1.1) if it did not know and could not reasonably have been expected to know about the state of repair of the highway or bridge. Subsection (1.3) provided that 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.
- [16] Accordingly, to succeed, the Plaintiffs must establish on a balance of probabilities that RR35 where the accident occurred: (1) Was in a state of non-repair; and (2) The non-repair was the cause of the injuries. If these two requirements are met, the onus shifts to the Defendant to prove on a balance of probabilities that it did not know or could not reasonably have been expected to know about the state of non-repair, and/or that the condition of non-repair existed despite its reasonable efforts to keep the road in repair.

The standard of repair is one of objective reasonableness. The Defendant must keep the road in such a reasonable state of repair that those needing to use the road may, using ordinary care, pass to and fro upon it in safety [see *Montani v. Matthews* (1986) 29 O.R. (3d) 257 at paras 50 and 51].

- [17] As stated in *Frank v. Central Elgin (Municipality)* 2010 ONCA 574:

Judicial interpretation of s. 284 and similar statutory provisions has held that the act does not impose on a municipality a duty to repair every adverse road condition. In the winter, for example, a municipality's failure to salt or sand its roads does not automatically expose it to civil liability. The driving public cannot expect municipalities to keep the roads free and clear of snow and ice at all times during the winter. Courts have recognized that although motorists ought to be kept reasonably safe during winter driving conditions, municipalities ought not to be turned into insurers of the safety of the driving public by imposing overly onerous maintenance obligations. See *Brown v. British Columbia*, [1994] 1 S.C.R. 420 at 439.

- [18] A consideration of these legal principles raises the following issues for determination in this proceeding:

- A. What was the condition of the road in the vicinity of the accident?
- B. Did the condition of the road amount to a state of non-repair?
- C. If so, did the state of non-repair cause the injury?
- D. What efforts did the Defendant make to address the non-repair?
- E. Were those efforts reasonable?
- F. Was the Plaintiff contributorily negligent?

- [19] I will address each issue in turn.

Analysis

A. What Was the Condition of the Road in the Vicinity of the Accident?

- [20] The condition of the road at the time of the accident was a hotly contested issue at trial. The analysis of this issue involves more than a simple evaluation of the witnesses present at the scene of the accident that day. It also involves an assessment of what winter maintenance work was done on the road that day, and what road conditions would have been expected given that maintenance.

The Position of the Plaintiffs

- [21] The Plaintiffs contend that the road was snow covered and slippery when the accident happened and base their position primarily on the testimony of the various witnesses who

were at the scene within moments of the accident. They say the condition of the road resulted from the Defendant's failure to perform winter maintenance in accordance with its quality standards.

The Position of the Defendant

- [22] The Defendant contends that RR35 was in no different condition than any other road in the municipality that day, with well under one inch of snow on it. It says any icy or slippery patches were isolated and that, overall, the road was in a reasonable state of repair having regard to the winter storm affecting the city that day. The Defendant is of the view that the road was both salted and plowed extensively within the hour immediately preceding the accident and would have been mostly bare and wet when the collision took place. It points to photographs of the scene taken by police as corroborative of that position and conclude that the various witnesses are honestly mistaken in their memory of the day.

The Plaintiffs' Lay Witnesses

- [23] Frank Schieman was a passenger in the vehicle travelling northbound behind the school bus. His recollection of RR35 was that it was snow covered and slippery and that it had not been plowed or salted. According to him, "the roads were very slippery and not safe at all" and "the roads were snow-covered and you couldn't see where the white line was or, even the shoulder." He estimated the depth of the snow to be two centimetres. When the driver of his vehicle applied the brakes to stop when the accident occurred, Mr. Shieman says their vehicle slid to a stop. Shortly after the accident he began directing traffic just north of the accident site and recalled letting a snow plow through, travelling southbound, 10 or 15 minutes later. Although he did not see it drop salt, he agreed that it was likely that it did.
- [24] Gilles Pepin was travelling northbound and was the second vehicle behind the school bus. He said that RR35 was snow covered, slippery and that no bare pavement could be seen. He estimated the depth of the snow to be at least two inches and says he saw no salt on the bridge. He was of the view that the road had not recently been plowed. He recalls seeing a snow plow travelling northbound in the southbound lane about five minutes after the accident and believes it was both a plow and salt spreader, but was unsure if the salt spreader was being used. On cross-examination he admitted that he did not note the depth of the snow in his statement to the police and did not mention the plow. Similarly, when interviewed about the accident in 2003, he said nothing about the depth of the snow and did not mention the direction of travel of the plow.
- [25] Mary Brohart was driving southbound in the vehicle directly behind Ms. Belanger. She described RR35 as slippery and snow covered with no markings visible. She did not recall seeing any plows either northbound or southbound and was of the view the road had not been plowed. Although she was adamant that the road was snow covered, her description of the snow cover was inconsistent. At one point in her testimony she estimated the depth of the snow on the road at 5 centimetres and at another point she

described it as hard and white. She said it had not been plowed recently and there was no salt on it. Her evidence is that her vehicle slipped and slid when she was trying to stop. On cross-examination she acknowledged that there was nothing in her police statement about the depth of the snow, the road conditions and not having seen salt on the road. These observations are the result of her memory today of events that took place some 14 years ago.

- [26] Richard Lavigne was travelling northbound and was the first vehicle in front of the bus. He described RR35 as snow covered and slippery. He said the road had not been plowed recently and he could not differentiate between the road and the shoulder. He says he saw no plows either northbound or southbound and that he saw no salt on the road. He said he was “slipping and sliding, that’s why I was driving very slow” although, he attributed that to a combination of the road conditions and having a “heavy foot”. On cross-examination he acknowledged that his statement to police said nothing about there being no salt on the road and did not mention anything about plows.
- [27] Randy Buchowski is a constable with the Greater Sudbury Police Service and was called to the scene of the accident, arriving at about 11:22 a.m. He was responsible for completing the Motor Vehicle Accident Report. He admitted to little independent recollection of the details surrounding the accident, however his notes and the report indicate the road surface was snow covered with slippery and icy sections. He testified that there was no bare pavement on arrival and no road markings visible. He said that a salt truck had been by either prior to or just after the accident as snow had quickly melted and salt could be seen on top of the snow.
- [28] Todd Bignucolo is a constable with the Greater Sudbury Police Service and arrived on the scene at about 11:20 a.m. He described road conditions in the vicinity of the accident as snow covered with slippery and icy sections. He had an independent memory of the accident scene, as he was a friend of Ms. Belanger’s family.
- [29] A fair summary of the evidence of these witnesses is that RR35 was snow covered and slippery, with an accumulation of snow, and that there had been no evidence of winter maintenance until a plow and/or salter passed through the scene of the accident after the accident had occurred.

The Defendant’s Witnesses

- [30] Gerald Lavoie and his wife Bernadette were in the third or fourth vehicle behind the Plaintiff. Mrs. Lavoie had little recollection of the road conditions that day but described the snow on the side of the road where they stopped as damp or wet and akin to slush. In his examination in Chief Mr. Lavoie described road conditions as “... a little bit slushy, but nothing too bad that I recall”. He said he had no trouble bringing his vehicle to a stop. On cross-examination he acknowledged that the road was snow-covered and that in the area of the accident the snow could have been as much as two inches deep and that his memory on that point was uncertain.

- [31] The remaining witnesses called by the Defendant were its employees responsible for winter road maintenance.
- [32] The roads in the Region were divided into several routes for the purpose of winter road maintenance. For salting, the scene of the accident was in spreader route S4. For plowing, it was in plow route P3. Although given different designations to differentiate between spreading and plowing, the routes were identical.
- [33] Route S4 was normally assigned to an independent contractor named Tate, however, it is apparent that Tate had mechanical difficulty with his truck on the morning of November 22, 2000 and Peter Kennedy was assigned the spare spreader known as R141 and was to cover route S4 in his place. Route P3 was normally assigned to Gilles Bonhomme and indeed he was on the route that day.
- [34] Mr. Kennedy testified that he recalls November 22, 2000 and being called in to replace a spreader contractor at 5:00 a.m. According to him, he plowed and salted over the bridge in the northbound lane at around 6:30 a.m. and then passed over the bridge in the southbound lane, again plowing and salting, at about 7:15 a.m. He recalls having an equipment breakdown between 8:00 a.m. and 10:45 a.m. that required him to return to the Frobisher depot for a windshield wiper repair. He says that at 10:45 he was ready to start route S4 once again on Lasalle Boulevard at MacDonald-Cartier High School ("MacJac") and travelled westerly on Lasalle to RR35, and then north on RR35 to the city limits and back. He testified that he was plowing and applying salt. He says that when he went over the bridge northbound he could see that the bridge had been recently plowed and the accident had yet to happen. When he returned southbound the accident had happened and he was waved through the accident scene. He thinks he continued to salt while passing through the accident scene but lifted his plow.
- [35] Mr. Bonhomme testified that on the day of the accident he had started his shift at the regular time of 8:00 a.m. He said that he has no independent recollection of November 22, 2000 and was not interviewed about his activities of that day until November of 2014, however he was confident that his completed crew card is an accurate reflection of what he did. Reviewing that crew card, it was his evidence that between 10:15 a.m. and 11:15 a.m. he plowed RR35 between Lasalle and the City Limits. He said that beginning at 10:15 he proceeded northbound on RR35 from Lasalle to the city limits then turned around and travelled southbound on RR35 back to Lasalle, then turned around and plowed once again on RR35 to the City Limits, and then turned and went southbound once again to Lasalle. Given that the bridge where the accident took place was a two lane road, he would have plowed each lane twice within the hour before the accident, and would have last plowed the southbound lane only minutes before the accident. He does not recall coming across the accident at any time.

The Police Photographs

- [36] Constable Jacques Seguin, a crime investigator with the Greater Sudbury Police Service, was called to the accident scene and arrived at 12:45. He was asked to take photographs

and took several, all of which appear in Exhibit 1. He testified that he cannot recall when specifically the photos were taken, but it would have been within 45 minutes of his arrival. Accordingly, the photographs were taken at least 1.5 hours after the accident and perhaps as much as 2.25 hours after the accident.

[37] The photographs generally show the following insofar as road conditions are concerned:

- The west shoulder of the road is slushy.
- The westerly half of the southbound lane is mostly bare and wet.
- The easterly half of the southbound lane adjacent to the bus is partly bare and wet and partly slushy. To the south of the bus, it is snow covered, although the cover is light.
- The northbound lane behind the bus is snow covered although the cover is light.
- The area beneath the bus has some bare areas and some areas with a thin covering of snow and/or slush.
- The east shoulder of the road is snow covered with evidence of considerable foot traffic.

[38] It can fairly be said that the road conditions in the photographs do not match the description of the road at the time of the accident as provided by the Plaintiffs' lay witnesses and the attending police.

The Expert Witnesses

[39] The Plaintiffs called an expert witness, Mr. Doner, to provide opinion evidence on the condition of the road. His expertise was gained through a 26 year career in winter road maintenance with the Ontario Ministry of Transportation in which he held several different positions ranging from snow plow helper, to plow operator, to patrol supervisor, to winter road maintenance superintendent. He was a member of various committees dealing with winter road maintenance issues and quality standards.

[40] Mr. Doner was of the view that if, as recorded in the crew cards of Mr. Kennedy and Mr. Bonhomme, the road had been treated with salt once in each direction between 6:15 and 7:15 a.m. and then again northbound at 10:45 a.m., and had been plowed twice in each direction between 10:15 and 11:15 a. m., he would have expected the road surface to have been bare and wet at the time of the accident. Because the evidence of the witnesses and the photographs of the scene do not support a bare and wet roadway, it was his opinion that the work reported to have been done, must not have been done.

[41] Mr. Brownlee was another expert witness called by the Plaintiffs to give evidence on the condition of the road. Mr. Brownlee's expertise arises out of his credentials as a civil

engineer with a Masters in Applied Science in Civil Engineering. Since 2009 he has taken a special interest in winter road maintenance. He has participated in conferences and training modules on winter road maintenance and has undertaken over 60 winter road maintenance reviews examining the winter road maintenance practices of many different and diverse road authorities.

- [42] Mr. Brownlee testified that salt is put down on the road to react with the falling snow to create a brine, essentially a salt water solution that remains on the road to prevent subsequent snowfall from sticking to or bonding with the roadway and thereby making it easier to plow away. The effect of salt is not instantaneous but rather requires a period of time to have its intended effect. The colder the temperature, the longer it takes to work. Its efficiency is also affected by the amount of traffic on the roadway and the amount of snow that falls after it is applied. He explained that if there is ongoing snowfall, a plow truck should follow half an hour to an hour behind the salt spreader to clear the snow that has fallen on the salt. Salt is then reapplied as necessary to maintain the brine. If sufficient time passes after the application of salt during which snowfall continues with no plowing and no further salt applied, the brine can become diluted and its efficiency lessened. If it is cold enough, and the brine becomes diluted enough, it can freeze with the result that falling snow bonds to the asphalt more readily and is more difficult for the plow to remove.
- [43] Mr. Brownlee was of the opinion that this is what happened on the day of the accident and explains why, notwithstanding the work reported to have been done by Mr. Kennedy and Mr. Bonhomme, the road was reported by almost all witnesses to have been snow covered and slippery.

Analysis

- [44] As I have noted, this accident took place some 14 years before trial. Although many of the witnesses had given a statement to the police a short time after the accident, they were not asked many of the pointed questions posed to them at trial and had to rely on their recollection of events that took place many years ago. I have no doubt that the civilian witnesses who said they recall the day in question in fact have a recollection of the day. It would not be every day that they witnessed an accident of this severity, and it would be reasonable to expect the event to stand out in their minds. As to details such as the amount of snow on the ground, whether or not there was salt on the road and who did what and at what times, I would expect there to be some frailties in what they may now accurately recall.
- [45] With respect to the police witnesses, I note that Constable Buchowski was frank in admitting that he recalled little of the accident. However, he is an officer trained to make observations that may be of importance and to make accurate notes of those observations. Constable Bignucolo also made notes that one would expect to accurately reflect his observation and in addition had an independent recollection of the day because he knew Ms. Belanger's family. This was not just another accident scene to him.

- [46] Both of the officers testified that the road was snow covered and slippery. Constable Buchowski indicated that there was salt present on top of the snow.
- [47] With the exception of Mr. Lavoie, whose testimony was equivocal, all of the civilian witnesses indicated that the road was snow covered and slippery.
- [48] Although I acknowledge that the crew cards completed by the Defendant's employees were not always a model of detail and accuracy, I accept that they are a fairly accurate reflection of the work done on the road that day and accordingly, I accept the evidence of Mr. Kennedy that he salted the area of the accident at about 7:15 a.m., and I accept that Mr. Bonhomme plowed in the area of the accident twice between 10:15 and 11:15 a.m. I also find it most likely that Mr. Kennedy dropped salt in the northbound lane within the 15 minutes prior to the accident, and then in the southbound lane not long after the accident had happened.
- [49] The Defendant correctly pointed out that if I accept Mr. Doner's expert evidence, one cannot reconcile the condition of the road as reported by the Plaintiffs' witnesses with a finding that the Defendant's employees did the work reported in their crew cards. However, I find myself unable to accept the evidence of Mr. Doner for the following reasons: (1) He seems to have done no independent analysis of the employee crew cards and instead relied upon an interpretation of them provided by another person, Mr. Bender, who did not give evidence in this case. That reliance led to at least one significant misinterpretation of when Mr. Kennedy last spread salt in the area of the accident; (2) His evidence as to what amount of spreader treatment would have resulted in centre bare pavement was uncertain at best. He began by saying that the salt as applied (accordingly to an erroneous interpretation of the crew cards) would have had that result. As was pointed out to him, his reports stated that even a single application of road salt would have resulted in centre bare pavement. Eventually his evidence was that the application of rock salt on a two hour turnaround would have resulted in centre bare pavement; (3) Overall, my impression was that he had not done an in depth analysis of the factual background and circumstances surrounding the accident in formulating his opinions.
- [50] It is my view that Mr. Brownlee's explanation best reflects what is likely to have happened on November 22, 2000. His explanation of a "refreeze" explains why almost all of the witnesses recall a snow covered and slippery road. It makes logical sense that the salt applied at or about 7:15 a.m. lost its effectiveness due to dilution by the falling snow, and began to freeze with the result that by the time the area was plowed some three hours later snow had bonded to the asphalt, making it difficult for the plow to remove. This explains why, notwithstanding the plowing that took place in the hour before the accident, the road remained snow covered and slippery.
- [51] I am not satisfied that the police photographs offer much assistance in determining the state of the road when the accident happened. I have determined that salt was applied shortly before the accident and again shortly afterwards. That salt would not have had sufficient time to work when the accident took place, but clearly would have had time to

work in the one and a half to two hours before the pictures were taken. During this time there would have been considerable vehicle and foot traffic in the area. I would also expect there would have been not insignificant heat generated from vehicles left running in the area. These factors would almost certainly have changed the condition of the road from what is shown in the photographs. To try and work backwards from the photographs to determine the extent of that change strikes me as speculative.

[52] The Defendant argued that the theories advanced by Mr. Doner and Mr. Brownlee were contradictory and that the evidence of Mr. Doner effectively “debunked” the opinion advanced by Mr. Brownlee. I do not agree. For the reasons I indicated above, I do not accept Mr. Doner’s evidence that the maintenance work reported to have been done by Mr. Kennedy and Mr. Bonhomme would have necessarily produced centre bare pavement at the time of the accident. Furthermore, I do not accept Mr. Doner’s evidence as an unequivocal statement that brine cannot refreeze in the conditions existing on November 22, 2000. Although he did testify that in his experience one would not expect a refreeze unless the temperatures were below -12 and falling, I do not accept this as necessarily correct. Whether or not a refreeze occurs will be dependent upon a number of factors. One of those factors is the temperature of the air. Another might be the temperature of the road. Others would include the amount of salt initially put down, the amount of snow that falls upon it, and the length of time the road is left without further treatment. These factors were not put to Mr. Doner in any detail. The expert opinion for which he was tendered did not include anything on refreeze or what steps if any he had taken to determine whether or not a refreeze could have taken place on November 22, 2000.

[53] Mr. Brownlee, on the other hand, seems to have specifically considered at least some of these other factors in arriving at his opinion and his calculations went largely unchallenged. Specifically, the following exchange took place between counsel for the Defendant and Mr. Brownlee during cross-examination:

Q. Let's be very careful, sir. You did not do a calculation that would tell us at what point in time if ever there would be a refreeze following the application of salt on this road in the conditions that existed that day, have you?

A. The exact...

Q. Be very careful.

A. ...period of time – No, I haven’t put bounds on that. They will --. In my analysis I established that it would take very little, as your expert has identified, as well, through the FDI report, very little snow accumulation to overwhelm the reported salt that was put on Regional Road 35 on – And the other bound being the start of the plow operations reported by Mr. Bonhomme, that at that point his plow operations were not being effective at clearing off the roadway. That tells me that upper bound, at that point

we have a refrozen road. Otherwise his plowing operations would have bared some, at least some of the pavement on this roadway. He's done it...

Q. All right.

A. ...four times.

Q. Sir, do I –

A. So I have limits.

Q. I'm asking – Let's go through this.

A. Yes.

Q. You have not – I want an answer to my question. You have not done any calculations to show at what point there would be a refreeze of this road any assumptions, correct?

A. The exact time? No.

Q. You've done no calculations, period, for any...

A. Yes, I have.

Q. ...time –

A. I have produced –

Q. For refreeze.

A. For refreeze?

Q. Refreeze, how long it would take, if ever, for a refreeze to occur given any assumptions of conditions. You have not done those calculations, have you?

A. I have – Yes, I have produced calculations. There's a spread sheet I had put together. It identified snow accumulation, what the water equivalent of that snow accumulation would be, how much salt would be placed on the roadway, any percentage concentration that that salt and water would be in various stages. That's the calculation I did to come to that conclusion.

...

- Q. You didn't do that calculation.
- A. Yes, I did.
- Q. You didn't produce that calculation.
- A. I did not put that in my report.
- Q. So we don't have –
- A. I put the findings from my analysis in the report.
- Q. No, sir –
- A. That a refreeze was probable during that period of time.
- ...
- Q. Do you have an electronic record of, of the document, the spreadsheet that you said you did?
- A. Yes.
- Q. Can it, can it be forwarded to me?
- A. From the office, yes.
- ...
- Q. How long will it take to get the electronic record forwarded in an email?
- A. Half an hour.

- [54] This was perhaps the most acrimonious trial over which I have ever presided. The objections were legion. That there was no further questioning of Mr. Brownlee on his calculations reveals to me that they were provided to defence counsel as promised and that they supported the opinion rendered by Mr. Brownlee.
- [55] The Defendant also argued that the maintenance standards adopted by the Ontario Ministry of Transportation suggest that a refreeze could not have happened. The argument went like this: For Class III roads falling under MTO maintenance, the recommended treatment during a winter storm is to have salt spread before there is any significant accumulation of snow and to complete follow up salting as required. The return period for a salt spreader is established at 4.9 hours. If the spreader cannot return for 4.9 hours it is reasonable to assume that a refreeze of the brine would not be expected to take place during that period of time.

- [56] This argument fails to recognize three things: First, that the MTO maintenance standards anticipate a plow following at least half an hour after the spreader to plow away snow accumulation, thus reducing the dilution of the brine and lengthening the time it takes to freeze. Second, that the maintenance standards provide that conditions of the storm will dictate the appropriate work required, and that follow-up salting will be determined by precipitation, road conditions and weather. Third, that sanding is also prescribed by MTO maintenance standards if slippery road conditions arise. These three factors indicate to me that MTO maintenance standards do not necessarily anticipate a single application of salt to be followed by 4.9 hours of inaction. I am not able to conclude from the MTO maintenance standards that a refreeze of brine on November 22, 2000 was contraindicated.

Conclusion

- [57] From the above analysis, I conclude that RR35 where the accident took place was snow covered and slippery at the time of the accident. The opinion of a refreeze offered by Mr. Brownlee accords with the evidence of the witnesses at the scene and the employees of the Defendant, and offers a logical explanation for the condition of the road that day.

B. Did the Condition of the Road Amount to a State of Non-Repair?

- [58] RR35 was in a state of non-repair if those needing to use it could not, using ordinary care, pass to and from upon it in safety.
- [59] I accept, from the witnesses noted above, that the road was snow covered and slippery. Mr. Pepin testified that although he was able to control his vehicle that day, it swerved a bit on acceleration and he had to travel below the posted speed limit. Mary Brohart testified that it was difficult to keep her car on the road and that she slid when coming to a stop at the accident. Mr. Lavigne testified that traction was not very good that day and that he was driving slowly because his truck was sliding all over.
- [60] I have little difficulty finding that the condition of the road amounted to a state of non-repair. Roads are not meant to be slippery. Although a snow-covered and slippery road may be safely travelled by many, it poses a significant risk to all users because it renders them less able to make the many adjustments required for safe driving. Braking takes longer, steering corrections are less effective, and driving becomes more difficult.

C. Did the State of Non-Repair Cause the Injury?

- [61] Causation is determined by application of the “but for” test [*Resurface Corp. v. Hanke* [2007] 1 S.C.R. 333]. I have little difficulty concluding that but for the slipperiness of the road this accident would not have happened and the injuries would not have been sustained. This conclusion is entirely consistent with the sudden and otherwise unexplained loss of control of the vehicle by Ms. Belanger, and her inability to regain complete control of her car once it began to fishtail.

D. What Efforts Did the Defendant Take to Address the State of Non-Repair?

- [62] The Defendant generally took a proactive approach to ensuring a state of non-repair did not arise on the morning of November 22. Salt spreaders were called out early in the morning to deal with the light amount of snow that had been forecast, and when the forecast changed to indicate greater accumulations of snow, the plow operators were called out to assist in its removal.
- [63] The Defendant had a system of spreading and plowing in place that had been designed to meet its objectives of reducing the hazards of snow and ice conditions to users by maintaining road surfaces as bare as possible with a maximum snow accumulation of one inch. The plowing and salting routes were designed so that they could be covered in a period of about two hours, with the actual use of equipment being based upon the circumstance of the day. Whereas a light snow may properly be handled by spreaders alone on a two hour cycle, heavier snowfall may require the mobilization of plows to assist the spreaders. Given that an application of salt takes some time to be effective and can become diluted, it is optimal to have the spreaders and plows deployed in a staggered manner so that salt is applied to the road, the salt is given an opportunity to work (up to one hour when the temperature is quite low), the road is then plowed to remove excess snow and prevent dilution of the brine, and an hour later the road is salted again, marking the start of another cycle of maintenance.
- [64] The Region owned several of the spreaders and plows used for winter road maintenance and had sufficient staff to man their equipment. It contracted out to cover certain spreader and plow routes. It had two spare spreader/plow units for use in the event of equipment breakdown.
- [65] On the morning in question, the spreaders were deployed in a timely way. When it became apparent that snow accumulations would be significant, the plows were also deployed in a timely fashion.
- [66] Although it is impossible to say with certainty what maintenance was undertaken on the day in question, on a balance of probabilities I am satisfied, based upon the testimony of Mr. Kennedy and Mr. Bonhomme, and my examination of the Region's crew cards, of the following:
1. Mr. Kennedy (in replacement of contractor Tate), operating a spare spreader equipped with a plow, travelled northbound and southbound over the bridge in question between 6:15 and 7:30 in the morning. Given his speed of travel and the distance to be covered, it is most likely that he passed over the bridge southbound shortly after 7:15. Given the minor amount of snow that had fallen by that time it is most likely that he was only spreading salt while travelling in both directions. Plowing would not have been required.
 2. Mr. Bonhomme, operating a plow, travelled northbound and southbound over the bridge twice between 10:15 and 11:15 a.m.

3. Mr. Kennedy, operating a spreader equipped with a plow, travelled northbound over the bridge shortly after 11:00 a.m. and travelled southbound over the bridge not long after the accident had happened. He was plowing and spreading salt while northbound and spreading salt only while travelling through the scene of the accident.
4. The rate at which salt was being spread was generous – meeting or exceeding the recommendations of the Ministry of Transportation for Ontario.

E. Were the Defendant's Efforts Reasonable?

The Position of the Plaintiffs

[67] The Plaintiffs argue that the policies and procedures set for the Defendant were appropriate and if followed would have reflected reasonable efforts on the part of the Defendant to prevent non-repair. However, they say the Defendant's maintenance standards were not met because: (1) Snow accumulations were allowed to exceed one inch; (2) Operators failed to meet the 2-hour return period; (3) There was a failure to communicate among the Defendants' employees to ensure appropriate intervals between the spreader and plow and to ensure the 2-hour return period was met; and (4) There was inadequate patrol to identify the state of non-repair.

The Position of the Defendant

[68] The Defendant is of the view that its maintenance of RR35 was reasonable and that any delay in maintenance was unavoidable given the late change in weather forecast, the lack of actual snow accumulation until after 8:00 a.m., and the unanticipated breakdown of the spreader operated by Mr. Kennedy with no available replacement. In addition, it argues that the Defendant could not reasonably be expected to know about the risk of refreeze on the day in question or that the delay in maintenance would adversely affect the ability of its employees to plow snow from the road later that morning.

Did Snow Accumulation Exceed One Inch?

- [69] The Defendant's quality standard for winter plowing, sanding and salting required that the maximum allowable snow accumulation be one inch (2.54 cms).
- [70] The Plaintiffs point to the evidence of the lay witnesses, the photographs of the scene and the evidence of the weather expert, Mr. Smith, to establish that the snow accumulation at the scene of the accident was likely between 2 and 5 centimetres.
- [71] As I have already noted, the total snow accumulation between 8:00 a.m. and 11:00 a.m. was approximately 5 centimetres. I have accepted that between 10:15 and 11:15 a.m. a plow passed over the location of the accident twice in each direction. In the

circumstances, there is little likelihood that there was any significant accumulation of loose snow on the roadway at 11:15 a.m. I note that the evidence of the witnesses who were at the scene of the accident was not consistent on the amount or depth of the snow. What *was* consistent was their evidence that the road was snow-covered and slippery. Bearing in mind that most were relating events that happened some 14 years ago, that there would be such an inconsistency is entirely reasonable.

- [72] With respect to Mr. Smith, he was shown the photographs of the accident scene and identified an area off the travelled portion of the road that he estimated had 5 cm deep snow. The area he identified was not the travelled portion of the road and would more likely reflect snow plowed from the travelled area by Mr. Bonhomme in the hour preceding the accident.
- [73] I am not satisfied on a balance of probabilities that there was an accumulation of snow on the road in excess of one inch.

Did Operators Fail to Meet the 2-Hour Return Period?

- [74] The evidence was clear that the spreader route was designed for a two hour return period. That is, even allowing for refilling of salt, a spreader should have been able to cover all parts of route S4 within a two hour period of time. Given the snow forecast the morning of November 22, 2000, and the continuous salting of the road that was to be expected, the spreader ought to have returned to the scene of the eventual accident within two hours of its first pass at about 7:15 a.m. As we know, it did not return until shortly after 11:00 a.m. It follows that its two hour return period was not met. In fact, it was exceeded by at least one and a half hours.
- [75] Ideally, once there is sufficient snowfall to warrant the use of a plow in addition to the spreader, their use is staggered so that the plow follows the spreader after sufficient time has passed to allow the salt to work. At the cold temperature that existed on November 22, 2000 it would have been best for the plow to follow the spreader after about 1 hour, thereby resulting in a pattern of alternating salting and plowing each hour.
- [76] Much trial time was spent determining the appropriate return period for a plow on route P3, and whether it was two hours or four hours. In the particular circumstances of this case, that determination need not be made. This is because until 8:17 a.m. on that day, there was no perceived need for the use of plows. The forecast before that time had been for light flurries that would be adequately handled by the spreader units alone. It was only at 8:17 a.m. that the weather forecast changed to predict some heavy snowfall that would require the plows to be used.
- [77] The plows were called in for their usual time of 8:00 a.m. Allowing for the time required to prepare the plows for use and to get them to their starting point, the plow on route P3 would be expected and in fact did begin its route at about 9:00 a.m. It reached the location where the accident eventually took place (the southbound lane) not later than 10:45 a.m. Regardless of whether the proper return period for the plow was two hours or

four hours, it reached the area in question within a reasonable time after beginning its route, and certainly within two hours.

Were the Defendant's Efforts to Meet the Two Hour Return Period by the Spreader Reasonable?

[78] The Defendant argues that unusual circumstances arose that day which could not reasonably have been anticipated and which conspired to prevent the two hour return period for the spreader from being met. It points to the following in support of its argument:

1. Mr. Kennedy, the spreader operator, testified that he suffered an equipment breakdown between 8:00 a.m. and 10:45 a.m. that required him to return to the Depot for repair. The result is that his spreader unit was unable to pass the accident site again during this time.
2. The other spare spreader had already been called into action in another location and was not available to replace it during this period of time.
3. The spreader on the adjacent route S-11, operated by Mr. Marynuk, also suffered a breakdown that required him to be in for repairs between 6:30 and 10:30 a.m., with the result that his spreader was not available to offer assistance.
4. All other spreaders were working on their routes, which were of equal priority to RR35, and could not be redeployed in a timely fashion without creating potentially hazardous conditions on their home routes.
5. Based upon these factors, the Defendant takes the position that it took all reasonable steps available to it in the circumstances that existed that day. It says that it was not responsible for and could not reasonably foresee the number of breakdowns that would occur that morning and that the accident was the culmination of a number of unfortunate but unavoidable equipment problems. In the circumstances, it says it could not have done any more and that its actions were reasonable by any standard.

[79] The Plaintiffs are of the view that the evidence does not support the Defendant's allegation that both spare spreader units were in use the morning of November 22, that the road should have been plowed and salted again well before 10:15 a.m. and that in any event, proper patrol of RR35 would have identified the bridge as an area requiring immediate attention warranting the redeployment or use of a spreader from another route.

What Was the Status of the Spare Equipment?

[80] The Region typically had two spare spreaders available for use -- a number the Plaintiffs' experts agreed was appropriate in the circumstances. They were identified as Units R-141 and R-136.

- [81] Unit R-141 was being operated by Mr. Kennedy to replace contractor Tate on the S-4 route. Mr. Kennedy's crew card from November 22, 2000 reveals no time spent at the depot because of breakdown, but does have a significant block of time wherein little or no work was noted as being done, namely between 8:00 a.m. and 10:45 a.m. In addition, there is a "lost operating time" crew card for Mr. Kennedy which indicates that he had two lost operating hours related to the replacement of the wiper motor on Unit R-141. The date of the lost operating time crew card is unclear, but I am satisfied that it relates to November 22. I am satisfied of this because: (1) The M.M.M.S. stamp on the card is November 23, 2000 and would therefore relate to a date prior to that; (2) Mr. Kennedy was normally a plow operator and would not normally be operating a spreader; (3) Mr. Kennedy's crew card for November 22 indicates that he was at work for 16 hours. The first 8 hours would normally be attributed to regular work hours with anything above that being designated as overtime. The crew card shows only six regular hours out of the first eight hours at work, indicating that two hours were charged elsewhere. It makes sense that those two hours were charged to lost operating time as indicated in the lost operating time crew card.
- [82] I am also satisfied that R-141 was out of commission from approximately 8:00 a.m. to 10:45 a.m. because it is the only time slot on Mr. Kennedy's crew card, within the first 8 hours of work, that lacks specificity of what work was completed. Furthermore, Mr. Kennedy, who, as I have explained, would have good reason to remember the events of the day, had an independent recollection of the wiper motor failure and when it happened, and testified that it made sense given the contents of his crew work card and lost operating time crew work card.
- [83] Accordingly, there was a legitimate and unforeseen reason for Unit R-141 to be unavailable for part of the morning of November 22.
- [84] With respect to Unit R-136, the only crew work card referencing that unit on November 22, 2000 is a lost operating time crew work card indicating that the unit was not in operation between 12:30 and 4:30 p.m. It indicates that the spreader was brought from the Suez depot to the Frobisher depot and that, among other things, leftover salt was removed from the hopper. That there was salt in the hopper indicates it had been in use that day, as spreaders were never stored with salt in them, even overnight, due to corrosion concerns. However, there is no employee crew work card indicating what use was being made of the unit on the morning of November 22, when it was being used, or where.
- [85] The spare spreader units were normally kept at the Frobisher depot. That R-136 was brought to the Frobisher depot from the Suez Depot for repair, with salt in its hopper, suggests that it had been in use on one of the routes serviced by the Suez depot. Those routes were S9 and S10.
- [86] Route S9 was normally serviced by a spreader R-135 owned by the Region and operated by Mr. N. Hnatiuk. There was no lost operating time crew work card pertaining to

spreader route R-135 as one would expect if it had broken down and been replaced by R-136.

- [87] Route S10 was normally covered by a spreader unit R725, which is owned by a contractor named M. Labre. There has been no crew work card produced for Mr. Labre and no crew work card for anyone replacing him on his route using R-136.
- [88] Although it is likely that R-136 was used to replace R725 on route S10 for at least part of the day leading up to when it went out of service at 12:30 p.m., because there is no crew work card indicating precisely when and where it was in operation, I cannot find that it was unavailable for use between 7:15 and 10:15 a.m. that morning.

Would Mobilization of R-136 Have Made any Difference?

- [89] Mr. Kennedy's evidence, confirmed by his crew card, was that, beginning at about 8:00 a.m., he salted and plowed RR71 from RR35 to MacDonald-Cartier High School before leaving his route at around 8:25 a.m. to take his spreader in for repair of the windshield wipers. He had, by then, called the garage to let it be known that he was coming for repairs, and it would have taken him another 20 to 25 minutes to get to the Frobisher Depot where the garage was located. On these time estimates, it would have been approximately 8:45 a.m. when he arrived at Frobisher. By that time the new forecast had been issued and heavier snow was anticipated. Mr. Levac would have appreciated that ongoing salting of the roads would be required. Had he ordered that R-136 be mobilized, Mr. Kennedy's unchallenged testimony was that it would take 45 minutes to have it operational and ready to go, and a further 20 to 25 minutes to travel back to MacDonald-Cartier High School to start his route once again. By then, it would be 9:50 a.m. or so. Assuming another 20 to 25 minutes to complete westbound RR71, Mr. Kennedy, had he been operating R-136, would have passed over the scene of the accident depositing salt northbound at around 10:15 a.m. and southbound at around 10:30 a.m. That salt would have begun working prior to the accident and allowed for greater effectiveness of the plow operated by Mr. Bonhomme when it passed over the road nearer to the time of the accident.

Could a Spreader Have Been Redeployed from Another Route?

- [90] Practically all of the roads covered by the Region's spreader routes are of equivalent priority. Accordingly, one would not expect a spreader to redeploy from one route to another unless a particularly dangerous situation arose on one route to the exclusion of others, or it could be redeployed without significantly affecting the maintenance on its home route. Put another way, it makes little sense to redeploy a spreader from its home route when its absence from that route may result in the same situation of non-repair that it is being redeployed to address.
- [91] The snow event that took place on November 22, 2000 affected all of the roads in the Region. If a spreader from another route was redeployed to address the deteriorating road conditions on route S-4, those same conditions might reasonably be expected to arise on the abandoned route. Accordingly, it is only if a spreader could be redeployed

without significantly affecting maintenance on its home route, that redeployment would have been a reasonable course of action that day.

- [92] Of the other spreader routes, S-11 would be most likely to be considered for redeployment because of its proximity to the bridge. The southeasterly limit of S-11 meets the northwesterly limit of S-4, so the spreader on S-11 could quite easily be redeployed to cover some part of S-4 without significantly affecting the balance of its maintenance activities.
- [93] Route S-11 was covered by a contractor named Mr. Marynuk. His crew card for November 22, 2000 (Exhibit 47) left much to be desired because there had been changes made to it that cannot be attributed to Mr. Marynuk and because it lacks specificity in identifying what work was actually done that day. In addition, Mr. Marynuk was not asked for his recollection of the day of the accident until November of 2014 and, rather predictably, his recollection was limited. As a supplement to Mr. Marynuk's crew card, however, there is independent evidence confirming that his truck suffered a breakdown that day.
- [94] Mr. Marynuk's crew card indicates that notwithstanding that he had begun work at 5:30 a.m. and finished work at midnight (a total of 18.5 hours) his truck was noted to be in service for 14.5 hours. This infers that the truck was out of service for four hours. Coincidentally, the crew card records a four hour period between 6:30 a.m. and 10:30 a.m. when no work is specified as having been done. The logical inference is that Mr. Marynuk suffered a breakdown that put his spreader unit out of service for that period of time. It makes sense that he returned to the Frobisher Depot for repairs and then returned to his route to begin salting again at 10:30, which is the next time entry on his crew card.
- [95] Interestingly, the route from the Frobisher Depot to the place where he began his route would have taken him directly over the road where the accident later happened at about 10:15 a.m. He had salt in his hopper. Had he been advised to do so, there is no reason why he could not have dropped salt on RR35 on the way to his regular route. Had this been done and been communicated to Mr. Bonhomme, he could have delayed his plowing of the route for a time to allow the salt to begin its work. The result would have likely have been a much improved RR35.
- [96] Accordingly, I find that Mr. Marynuk did not need to be redeployed to have treated the road where the accident took place. However, to have expected him to spread salt on the road when he returned to his route would have required the roads foreman to have: (1) identified the road as requiring service; (2) advised Mr. Marynuk to spread salt; and (3) advised Mr. Bonhomme, the plow operator, to hold off on plowing the road until such time as the salt had had an opportunity to work.

Was There a Failure to Communicate Among the Defendant's Employees?

- [97] Communications among employees of the Defendant were not logged or recorded. It follows that although Mr. Bonhomme, Mr. Kennedy and Mr. Potvin all agree that they would have been in regular communication in the hours leading up to the accident, they

cannot recall with any specificity what was said between them. One might reasonably assume that Mr. Kennedy and Mr. Bonhomme would coordinate their maintenance activities so that the Defendant's two-hour return period would be met. One might reasonably assume that one would communicate with the other to advise of a break-down so that any necessary adjustments to the other's activities could be implemented. One might also reasonably assume that communication of Mr. Kennedy and Mr. Bonhomme with Mr. Potvin would be regular in order to advise him of the condition of the route and to determine if any additional steps need be taken as a consequence of breakdown.

- [98] I have little doubt that communications of this nature took place on the day in question. It follows that it must have been apparent to all of them that the Defendant's maintenance quality standard would not be met that morning with respect to the route in question.
- [99] If everyone was aware that Mr. Kennedy's spreader was down for repair and that the two hour return period was not going to be met, why then was no action taken? The Defendant argues that it lacked knowledge of the specific condition that caused the state of non-repair. Since section 284(1.2) of the Municipal Act provides that it is not to be liable if it did not know and could not have reasonably known about the state of non-repair, it says the action must be dismissed.
- [100] Specifically, the Defendant argued that none of the three winter roads maintenance foreman who testified had ever experienced a refreeze in winter conditions equivalent to those that existed on November 22, 2000. Since they had never experienced a refreeze in these conditions, they could not have known or be expected to have known of the potential for refreeze.
- [101] I have difficulty with the position of the Defendant on this point for three reasons: First, a close examination of the evidence of those three foremen indicates that although they had not experienced a refreeze in similar winter conditions they had not been posed the question in the context of their having been no further winter maintenance on the road for over three and half hours. Secondly, the employees of the Defendant knew the maintenance standards and knew the standards were designed to prevent a situation of non-repair. They should have easily been able to adduce that failure to meet those standards could result in non-repair even if they did not appreciate the precise reason. Thirdly, the evidence of Mr. Brownlee, the Plaintiffs' expert, was that the refreeze principle is well known in the winter road maintenance industry.

Did the Defendant Fail to Adequately Patrol Its Roads?

- [102] It was the evidence of the Defendant's employees that during a winter storm the roads would be patrolled continuously so that if any particular hazards arose they could be quickly addressed. Typically patrol would have been by the on duty foreman and the spreader and plow operators assigned to the various routes. They were to be in communication through two way radio.

- [103] On the morning of November 22, 2000 Mr. Potvin was the on duty foreman. His evidence was that his usual route of patrol would not have seen him traverse the area of the accident until after noon and that he would keep in contact with his operators to be advised of road conditions in the areas he had not yet patrolled. Accordingly, he would have been relying upon communications with Mr. Kennedy and Mr. Bonhomme to determine the condition of the road in the area of the accident and in normal circumstances would have expected one of them to be passing the vicinity of the accident every two hours. In my view, a two hour interval for patrol of a site that was not known to have been particularly hazardous or dangerous would be reasonable. However, due to Mr. Kennedy's breakdown more than three hours had passed after his initial salting of the road before Mr. Bonhomme passed the area where the accident later occurred.
- [104] I am not satisfied that a patrol of the area within the two hour return period for maintenance would have made any difference in the circumstances of this case. I reach this conclusion because the precise time of the refreeze is unknown. Although I have determined that it had to have occurred by 10:15 a.m. because Mr. Bonhomme's plowing efforts were largely ineffective, the evidence was not particular enough to allow me to determine when, before that time, it occurred. Accordingly, a patrol at 9:15 a.m. may or may not have revealed a problem.

Conclusion

- [105] The Defendant failed to meet its maintenance quality standards when the road, in a winter storm event, was left without maintenance activity for over three hours. That lack of maintenance activity resulted in snow-packed and slippery road conditions. That those conditions could result ought to have been known by the employees of the Defendant. The winter road maintenance of the Defendant fell short of reasonable because of the failure to assign a spare spreader to plow and salt the road, or to require that Mr. Marynuk drop salt when he passed through the area of the accident approximately one hour prior to the accident. Had either of these actions been taken the road would not have been in the treacherous condition it was when the accident occurred and it is likely that the accident would not have occurred at all.

F. Was the Plaintiff Contributorily Negligent?

- [106] The onus is on the Defendant to establish that Ms. Belanger was negligent in the operation of her vehicle and was therefore partly at fault for the accident. Indeed, the Defendant characterized Ms. Belanger's actions as grossly negligent.
- [107] I have some difficulty arriving at that conclusion. Ms. Belanger was a licenced, albeit somewhat inexperienced driver. Although not all the witnesses agreed on her speed of travel, it is clear that she was travelling under the posted speed limit of 80 kilometers per hour. The best evidence, and that accepted by the investigating officer, was Ms. Brohart's testimony that she was travelling about 65 kilometres per hour.

- [108] Ms. Belanger is not alleged to have made any deliberate maneuver that could be construed as unusual or dangerous. There is no evidence that she was distracted from her driving or that the condition of her vehicle contributed in any way to the accident.
- [109] Although the Defendant contends that no one else was having difficulty with the driving conditions that day, Mr. Schieman, Ms. Brohart and Mr. Lavigne all testified of the difficulty they had bringing their vehicles to a stop due to the slippery conditions, and Ms. Brohart gave evidence of the difficulty she experienced driving before the accident.
- [110] The Defendant's case for contributory negligence is, essentially, that since no one else lost control of their vehicle on RR35 that day, Ms. Belanger must necessarily have been negligent in the operation of hers.
- [111] The operation of a motor vehicle involves the continuous application of conscious and subconscious decisions, actions and adjustments. Not all drivers will traverse the same stretch of road in exactly the same manner even though they may all pass safely over it. To say, without more, that because no one else lost control of their vehicle Ms. Belanger must have been negligent ignores that the accident could just as easily have resulted from a decision, action or adjustment made by Ms. Belanger that was perfectly reasonable but which was not undertaken by anyone else. Given the slippery road conditions that existed on November 22, 2000, in the absence of some evidence of an overt decision, action or adjustment by Ms. Belanger that would result in the loss of control of her vehicle, that loss of control is as consistent with normal and safe operation of her vehicle as it is with some act of negligence on her part. In my view, the Defendant has not met the onus of establishing that her operation of the motor vehicle was negligent.

Conclusion

- [112] The Defendant is liable to the Plaintiffs for their damages which have been agreed upon at \$12 Million in the aggregate.
- [113] In the event the parties are unable to agree on costs they shall, within 45 days of the release of this decision, contact the trial coordinator to arrange a conference call with me to determine how the issue of costs will be addressed.
- [114] The remaining issues of allocation of the damages among the Plaintiffs and the specific terms of the final order I leave to be determined by way of motion by the Plaintiffs at a date convenient to them.



R. D. GORDON, R.S.J.

CITATION: Belanger et. al. v. The Regional Municipality of Sudbury et. al., 2015 ONSC 7071
COURT FILE NO.: C-5874/01
DATE: 20151117

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LISA MARIE BELANGER, CRAIG BELANGER,
CHRISTINE BELANGER, LORI BELANGER, AIME
BELANGER, GAIL KENNEDY and JOHN
LAUGHLIN

Plaintiffs

– and –

THE REGIONAL MUNICIPALITY OF SUDBURY
and THE CITY OF GREATER SUDBURY

Defendants

REASONS FOR JUDGMENT

R.D. GORDON, R.S.J.

Released: November 17, 2015