

CITATION: Docherty et al. v. Lauzon et al., 2010 ONSC 1006
COURT FILE NO.: 04-CV-2896-CM
DATE: 20100721

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
LISA ROSE DOCHERTY, by her)
Litigation Guardian, DAWN LENORE) Alan L. Rachlin,
DOCHERTY,) for the Plaintiffs
DAWN LENORE DOCHERTY,)
JAMES ALAN DOCHERTY,)
CHRISTINA LENORE DOCHERTY, and)
SHAWN MICHAEL DOCHERTY)
)
Plaintiffs)
)
- and -)
)
CARISSA LAUZON, the CORPORATION) Lawrence R. McRae,
OF THE TOWN OF ESSEX, the) for the Defendant, Carissa Lauzon
CORPORATION OF THE TOWN OF)
KINGSVILLE and LOMBARD GENERAL) T. R. Shillington,
INSURANCE COMPANY OF CANADA) for the Defendant, Town of Kingsville
)
Defendants) Stephen R. Moore,
) for the Defendant, Lombard General
) Insurance Company of Canada
)
)
) **HEARD:** November 23, 2009

REASONS FOR JUDGMENT

SCOTT K. CAMPBELL J.

Introduction

[1] This action arises out of a motor vehicle collision that occurred on or about the 23rd day of February, 2004 at approximately 4:20 p.m. At that time, Lisa Rose Docherty was a passenger in the right front seat of a 1992 Chevrolet Cavalier automobile, bearing Ontario license plate number ASCC 424, owned and operated by her friend, the Defendant Carissa Lauzon. The motor vehicle was travelling westerly on the South Talbot Road, west of the intersection with the Cameron Sideroad, when it went out of control, left the

roadway, and collided with a tree on the south side of South Talbot Road. As a result of that collision, the Plaintiff Lisa Rose Docherty ("Docherty") suffered significant injuries.

- [2] At the opening of trial, I was advised that the Plaintiffs and Defendants had resolved the issue of damages and that the insurers of Ms. Lauzon had agreed to pay to the Plaintiffs an amount equal to the limit of her policy. I was further advised by Mr. Moore for the Defendant Lombard and by Mr. Shillington for the Defendant the Corporation of the Town of Kingsville ("Kingsville") that the sole issue for me to determine is what proportion of liability, if any, is to be borne by Kingsville.
- [3] For the purpose of the trial it was determined that Lombard would call evidence first, effectively assuming the position of the Plaintiffs. The Defendants, Lauzon and Lombard, allege that Kingsville was at least partly liable for the Plaintiffs' damages.
- [4] Though one of the named Defendants is the Corporation of the Town of Essex, the action was discontinued against Essex on June 14, 2005.
- [5] In its third party claim, Lombard alleges that Kingsville was negligent in failing to keep the roadway where the accident occurred in a state of good repair. Kingsville denies the claim and asserts that it complied with its legal duty in law as codified in the *Municipal Act, 2001*, S.O. 2001 c.25 and regulations made thereunder. For the reasons set out herein, I agree with the position of Kingsville and find that it is not liable in any way for the Plaintiffs' damages.

The Accident

- [6] At the time of the collision, Ms. Docherty and Ms. Lauzon were coming from the Lauzon home on South Talbot Road. Ms. Lauzon had gone to her friend's home from the home of another friend and had travelled eastbound over the South Talbot Road. She intended to get Docherty and to go back to Essex District High School where they planned to participate in a volleyball game.
- [7] Ms. Lauzon was born on May 4, 1987, and was 17 at the time of the accident. All of her evidence was introduced by way of the reading in of transcripts from her Examination for Discovery.
- [8] According to that evidence, Ms. Lauzon received her G-1 license approximately two weeks after her 16th birthday and obtained her G-2 license sometime in December of 2003 or January of 2004.
- [9] According to Ms. Lauzon, she was not in a hurry on the date of the accident. She stated that in this area the road is straight and level although there is a small drainage "hump" east of where the collision occurred. The road was gravel-covered with no pavement markings, but there was an evident lane for eastbound and westbound traffic. She described the gravel shoulder as extremely narrow. There was a drainage ditch on both sides of the road and a grassy area to her left, the south side.

- [10] Ms. Lauzon stated that she remained in the westbound lane from the time she left the Docherty home until the time of the accident. She stopped at the Cameron Sideroad, the road immediately east of the scene of the accident, and then accelerated to 80 kilometres per hour. She said that this was the speed she was travelling when she lost control. The only other vehicle she saw after leaving the Docherty home until the time of the accident was the vehicle operated by her friend's father, James Docherty.
- [11] Ms. Lauzon was asked to describe the weather conditions at the time of the accident. She said that it had rained either the night before or early that morning and described the day as cloudy, a "groggy" day but stated it was not raining at the time. She described the visibility on the road as fair, but stated that she had no difficulty seeing the road in front of her.
- [12] As for the condition of the road between the Malden and Cameron Sideroad, Ms. Lauzon stated that it was the same as it had been every other time she had travelled it. That is, it did not have very many bumps and it was in relatively good condition. Asked if the road was wet or dry, she answered that it was "really wet on the one side," and that "you could tell it had rained but there were no large puddles or anything of that nature." She said there were some pot holes and some bumps but nothing excessive.
- [13] Ms. Lauzon was also asked how she lost control of the vehicle. Her reply was that she came up to the little drainage hump in the road and that on the way down her wheel caught something and water splashed up on the windshield. She then felt the car pulling toward the righthand side of the road. She turned on the wipers because the water was covering her windshield. When the wipers went on, she could see herself going towards the ditch-side, so she corrected to the left. When she saw herself going too far to the left, she corrected back to the right and then back towards the lefthand side. At that point her car left the roadway, travelled through a small wire fence, and hit a tree. She stated that she had both hands on the wheel but could not recall if she took her foot off the accelerator or not. Nor did she recall applying the brakes.
- [14] Ms. Lauzon acknowledged that the speed she was travelling was the maximum speed under optimum driving conditions, and that drivers needed to operate a car at a speed that was safe having regard to road and weather conditions. She agreed that the more experience one has at driving the better he or she is able to assess driving conditions.
- [15] Ms. Lauzon said that on driving the road previously she had gone over the hump at 80 kilometres per hour and had no difficulty with it. On this occasion, when she met Mr. Docherty's vehicle she did not have any trouble passing it. She was asked if her driving would have been affected if she had seen puddles earlier that day. Her answer was, "Possibly." Asked what she would have done if she had seen the puddle ahead, she answered, "I would have moved towards the other side or middle."
- [16] I have reviewed the evidence of Ms. Lauzon in some considerable detail, because it is important on a number of levels. For example, all the witnesses except John Vespa gave evidence and formed opinions based in part on information taken from Ms. Lauzon. Mr. Vespa was the only other eyewitness to the accident to give evidence at trial. Both

experts who gave evidence listed in their sources the statements of Ms. Lauzon and Mr. Vespa.

- [17] Mr. Vespa is a mechanical engineer who works in Windsor. He lives in Ruthven, approximately 15 minutes from the scene of the accident, and was returning from Windsor to Ruthven on Highway No. 3, which runs parallel to the South Talbot Road. He was travelling eastbound at approximately 80 kilometres per hour.
- [18] According to Mr. Vespa, the day was cloudy and overcast. He saw a vehicle travelling westbound on the South Talbot Road. He saw a splash of water, then observed the vehicle lose control, spin at least one time, hit a tree, and skid into the ditch. He saw this in his peripheral vision. He estimated the vehicle to be going 60 to 80 kilometres per hour and to have travelled approximately 150 metres from the time of the splash to the time it struck the tree.
- [19] James Docherty is the father of Lisa Rose Docherty and has lived on the South Talbot Road for approximately 30 years. He gave evidence on behalf of the Plaintiff. He, his wife Dawn, and their three children, including Lisa, resided on the South Talbot Road at the time of the accident.
- [20] Immediately prior to the accident, Mr. Docherty was on the South Talbot Road, coming from the Arner Townline. His evidence was that it was a mild day with no precipitation. He met his daughter and Ms. Lauzon at the intersection of the Cameron Sideroad and the South Talbot Road. There is a stop sign at its intersection with the Cameron Sideroad, with the Cameron Sideroad being a through street. There is no posted speed limit and he has always assumed it to be 80.
- [21] His evidence was that the road west of the accident is fairly straight. From the Cameron Sideroad to what he described as a bridge is approximately 0.9 kilometres. From the bridge to the scene of the accident is approximately 0.5 kilometres. The road rises slightly over the bridge. The road rises slightly over the bridge and there's a culvert under the bridge. What he described as a bridge is in fact the hump referred to by Ms. Lauzon, and, according, to Mr. Docherty, it raises the level of the road two to three feet. When asked if it caused difficulty to drivers he said, "That would depend on their experience."
- [22] His evidence was that, on the day of the accident, there was standing water on the road in the westbound lane. Further, he said, the standing water between Malden Road and Cameron Sideroad was mostly on the north side and the road was saturated. The standing water was one hundred feet west of the bridge on the north side. It may have been one hundred feet long. It encroached into the road five feet or possibly as much as eight feet. In the eastbound lane there were puddles only that went four to five feet into the road. He also said the north side, after the bridge or hump, was one continuous puddle. He did not give any evidence about the depth of the puddle. He drove in the centre of the road when he travelled over it and did touch some water. His evidence was that he travelled the road at 75 kilometres per hour.

- [23] Mr. Docherty gave evidence that the road was lower at its edge and that the road holds water. When questioned about how much lower the edge of the road was from the shoulder he stated that it varied as much as five to six inches. However, that evidence related to the road in the vicinity of the accident. Specifically he stated that he walked to within about 50 feet of the accident scene. That is 50 feet from the vehicle's resting place and not from the rise in the road where Ms. Lauzon said she began to experience difficulty.
- [24] He was asked about whether he had spoken to the Municipality about the road between the time of amalgamation (1994) and the date of the accident. He stated that he had and said that he had complained frequently about the condition of the road. He had spoken to counsellor McLeod at least once a week and told him how bad the road was. He stated that he mostly complained about the mud.
- [25] Mr. Docherty also testified that he would call or attend the Township office and that he had been directed to various Town officials. Apparently he had spoken to the road supervisor on more than one occasion. He also said that he had been directed to staff to whom he complained about the dust in the summer and the bad conditions in the winter. His evidence was that staff generally told them they would look into it or get back to him.
- [26] Although he stated that he complained about the road frequently, he did know the names of any of the municipal officials, particularly the road superintendent. The evidence of both Mr. Black and Mr. Fuller, who worked for and testified on behalf of Kingsville, was that they did not know Mr. Docherty prior to the accident. It also bears emphasis that Mr. Docherty's complaints were about the dust and mud.
- [27] In cross-examination, Mr. Docherty agreed that he had just driven over the road and that he was aware Ms. Lauzon was a recently licensed driver. He acknowledged that he did not have sufficient concern to warn Ms. Lauzon about the road. Indeed, his evidence was that he did not give the road a thought.
- [28] He also acknowledged that the road condition could change through the course of the day as a result of freezing and thawing. He agreed that at this relevant time of year, February, the road would be experiencing freeze/thaw conditions and he acknowledged that this was a bad time of the year for the road.
- [29] He also acknowledged that the South Talbot Road has been called a service road and that there is access from the Cameron Sideroad and Malden Road directly to Highway No. 3. He did not think it was strange that the girls were travelling that route. In fact, he said that he did not allow his own children to take Highway No. 3. I found that a peculiar statement, given his insistence that he complained almost constantly about the poor road conditions.
- [30] In cross-examination, he spoke of his complaints about the road being dusty and muddy and on one occasion about the crown being left a foot high and the staff going home. I interpreted that to mean that they had graded the road and left a hump in the middle. He also commented that in some years Kingsville did no maintenance work.

- [31] He acknowledged that the drivers using that road would generally need to adjust speed to road conditions. On the day in question he had to adjust his speed to accommodate the road.
- [32] As part of the Kingsville case, counsel read in portions of the Examinations for Discovery of Mr. Docherty. One of the questions he was asked was whether or not in the two to three weeks before the accident he had travelled that section of the road more frequently. He agreed that he had. He was asked if he had to avoid standing water on previous trips close to just the day of the accident. His response was that in the week or so before the accident the road was frozen and covered in snow or ice. When asked if there was standing water on the day of the accident, his answer was that as far as he could recall. That answer of course was not as specific as his evidence at trial.
- [33] Mr. Docherty struck me as a sincere witness who nevertheless tended to embellish his evidence. As I noted earlier, while he testified that he called the Township frequently about the condition of the road, he did not know the name of any of the municipal employees with whom he spoke. I find that Mr. Docherty overstated the frequency of his communication with the municipality.
- [34] His evidence that the road was lower than the edge by 5 or 6 inches was not supported by other witnesses. While it was noted by others that there was a lip on the side of the road, the height was not noted to be that significant.
- [35] What I conclude from Mr. Docherty's evidence is that the South Talbot Road was a gravel road without a great deal of traffic. The condition of the road could change during the course of the day depending on the season. He had driven the road for 24 years, and despite stated complaints he continued to drive the road and told his children not to use Highway No. 3 as an alternative route. He also gave evidence that people are required to adjust their driving habits to the condition of the road.

Investigation

- [36] The first officer to arrive at the scene was Constable Troy Roberts of the Ontario Provincial Police. On the date of the accident he began his shift around 6:00 a.m. He noted the weather as clear and -1 degree Celsius. He made no further notes about the weather on that date.
- [37] On February 23, 2004, he was doing what he described as general patrol. He came upon the scene of the accident, prior to being dispatched to it, shortly after it occurred. His note is that he arrived at the scene at 4:26 p.m. He found the Lauzon vehicle in the ditch on the south side approximately 20 metres off the road.
- [38] Constable Roberts reviewed the videotape (Exhibit Three) and confirmed that it accurately reflected the conditions of the South Talbot Road on that day. He noted the road was sloppy, muddy, and wet with some snow on the shoulder but none on the roadway.

- [39] It was his decision to close Highway No. 3, and to divert the traffic on to the South Talbot Road, because he believed that Ms. Lauzon's vehicle had been travelling on that roadway at the time of the accident. When he viewed the videotape, time-stamped 4:47, he indicated that the diversion off Highway No. 3 had already occurred. Subsequently he determined that he had closed the wrong road. Unfortunately this decision resulted in evidence which might have been of assistance to the investigation being destroyed.
- [40] Constable Roberts requested the attendance of the traffic collision investigators but did not assist them. He left the scene at approximately 5:32 p.m.
- [41] The following day he attended the hospital to follow up on the condition of Ms. Docherty and he learned her injuries were quite serious. While at the hospital, Ms. Docherty's parents commented to him about the roadway. This peaked his curiosity and he returned to the scene of the accident.
- [42] When he re-attended the area of the accident he operated his vehicle in the same direction and at the same speed. He traversed the culvert/bridge at 80 kilometres per hour and tried to simulate what Ms. Lauzon's vehicle had done. He did not lose control of his vehicle or go off the road. He stated his cruiser slid slightly in the mud. He agreed with counsel for Kingsville that the road conditions were similar to those the day before.
- [43] He did not contact Kingsville nor did he believe he had any reason to do so. This leads me to conclude that he did not have concerns about the condition of the road on the day of the accident or the day following. In fact he agreed that he would have notified the municipality if the road conditions warranted such contact and he had the necessary phone numbers.
- [44] Constable Japp also gave evidence, and his report can be found at Tab 2 of Exhibit One. His qualifications and experience are set out as a schedule to his report. He has completed his Level III Technical Collision Investigative Training but he is not a reconstructionist.
- [45] His observations with respect to the road are contained in page two of his report. He acknowledges the road was probably in a different condition than it was immediately preceding the accident. At the time of his investigation the surface was wet and muddy and was softer than normal. He concluded this condition was as a result of frost coming out of the ground. He observed deep ruts at the edge of the roadway, both on the north and south edge, where heavy vehicles had travelled the road. He noted water filled pot holes on the roadway.
- [46] He noted that the drainage ditch next to Highway No. 3 had significant amount of water in it. He walked some distance east of the scene of the accident, approximately 200 to 300 metres, and recalled a slight rise in the road at approximately 300 to 400 metres from the scene of the collision.
- [47] He found that there were three marks on the roadway created by the Lauzon vehicle as it began to rotate counter-clockwise. The first mark was situated closer to the north edge of the South Talbot Road and continued into three visible tire marks that established the

vehicle was rotating. This movement is known as "yaw," which he described as a vehicle having forward momentum but spinning in a curve, not a circle. All the marks he found are documented in the sketch which is attached to the report.

- [48] Constable Japp and Constable Armstrong were the only professional witnesses who gave evidence that actually attended the scene. The information and measurements provided by Constable Japp and Constable Armstrong were utilized by Mr. Hrycay and Mr. McGinnis.
- [49] In addition to examining the scene of the accident and taking measurements, Constable Japp inspected the vehicle involved. He concluded that the vehicle was in a good condition, particularly regarding its age. The details of his inspection can be found at page four, five and nine of his report.
- [50] In his observations about the road, he made no differentiation with respect to the condition of the road between where Ms. Lauzon's vehicle came to rest and the area to the east, that is, in the vicinity of the ridge or box culvert.
- [51] He concluded that the vehicle unexpectedly swerved sharply to the west in a yaw movement and then travelled through the fence post before striking a tree. He concluded that driver inexperience contributed to the collision. In his report, he wrote:
- Had the driver been a more experienced driver she may have been able to deal with the road conditions and adjusted her driving accordingly.
- [52] In cross-examination, he was asked to look at photographs 4 and 5 of Constable Armstrong's report. He agreed that the centre of the road looked relatively free of water, that it appeared to have a crown, and that it was hard-packed. The pot holes he observed were shallow and nothing that he had measured. They were roughly the size of a softball or grapefruit and there was a small amount of water in them.
- [53] Included in Exhibit One, at Tab 3, is the report of O.P.P. Constable K.G. Armstrong which was filed on consent. Subsequent to the trial I sought clarification from counsel and was advised by them that both Exhibits One and Exhibit Four (Weather Analyst Report) were filed as evidence as to the truth of the facts contained in the reports.
- [54] Constable Armstrong's report is titled "Reconstructionist's Report". At page two, he stated:
- The centre portion, or crown, of the road was wet and relatively hard-packed and free of loose gravel providing a good travel surface for drivers going east or west on the South Talbot Road. There were some areas with minor washboarding and sporadic pot holes, however this was a rural gravel road and the conditions were not out of keeping for that noted on other well-travelled rural roads.
- [55] At page three of his report he concluded that heavy rains had caused puddles and pooling of water on the outside edge of the roadway, with the majority of the pooling occurring at

the north edge where the road meets the grass. In this area the grass was higher than the road surface resulting in a lip that prevents run off and allows water to pool or stand. This area of the road is also softer with more loose gravel than the middle portion of the road used by vehicles travelling east and west. However, there was sufficient room for two vehicles to meet and safely pass without the need to drive into or near the soft area along the north edge of the road. He concluded that Ms. Lauzon's vehicle had been in the soft gravel and water, and that it went into yaw and began to rotate in a counter-clockwise direction. The vehicle slid sideways across the road and went into the grass along the south side of the roadway.

[56] Constable Armstrong provided a summary of his findings beginning at page seven of the report. Most significant among his findings are the following:

- a) The Lauzon vehicle was travelling at a speed at or in excess of the speed limit at the time of the collision;
- b) At the time of the collision, Lauzon would have had approximately nine months' driving experience and would thus be regarded as a novice driver;
- c) Her limited driving experience would have translated to increased reaction times and also limited exposure to a variety of driving conditions;
- d) At the time of the collision, Lauzon would have had the benefit of some daylight and should have been able to observe the puddle on the road that she drove into;
- e) Upon entering the puddle, the vehicle most likely started to hydroplane, resulting in momentary loss of steering and control;
- f) Lauzon reacted to the hydroplaning by correcting the perceived path of travel which resulted in an over-reaction. This continued until the vehicle began to rotate and slide sideways;
- g) South Talbot Road is a gravel road and was in good condition at the time of the collision. It was also a well-travelled rural gravel road, and as such had little loose gravel along the travelled portion of the road leaving a hard-packed surface;
- h) The rain throughout the day caused the road to be wet and slightly muddy with some puddles forming on and along the road edges;
- i) An experienced and prudent driver would have adjusted both the speed and path of travel to compensate for the wet road conditions;
- j) While driving to and from the scene, he encountered no other difficulty with either the road condition or surface condition.

[57] His ultimate conclusion was:

In this particular collision it would appear that the inexperience of the driver and her perceived necessity to travel at the maximum allowable speed were contributory factors. This was a rural gravel road and she should have expected to find rough areas and puddles especially following a rainy day when temperatures had climbed above freezing.

[58] I found the evidence of the police officers to be particularly helpful. They attended the scene on the date of the accident and offered their evidence either orally or by report fairly and dispassionately. I found that they were in a position to take action with respect to the road and obviously concluded that no such action was necessary. Nor was their evidence to this effect seriously challenged in cross-examination.

Evidence of the Experts

[59] The Plaintiff called two witnesses to give expert evidence. The first was James R. Hrycay, M.A.Sc., P.Eng. Mr. Hrycay's curriculum vitae was filed as Exhibit Number 11. He was qualified as an expert in accident reconstruction, vehicle kinetics and dynamics, and roadway design.

[60] Mr. Hrycay prepared two reports. The first was dated June 5, 2009, and the second dated October 16, 2009. The latter was a response to the expert reports obtained by the Defendant Kingsville from Hokestra Weather Services, McCarthy Engineering Inc. and Landmark Engineers. Only Hokestra Weather Services Report was in evidence and was filed as part of Exhibit Number Two.

[61] Mr. Hrycay gathered information about the weather initially from Windsor Airport but then subsequently from the Hokestra Report provided by the Defendant Kingsville. He concluded from the Hokestra Report that it was a warmer winter than normal, and that in particular February temperatures were higher than average. In the weeks prior to the accident these milder than normal temperatures caused an early thaw. Additionally, it was a dryer than average February.

[62] With respect to moisture that fell around the time of the accident, he relied on the Hokestra Report. He concluded that: on February 20, 2004, there was measurable rain; on February 21, 2004, there was a light snowstorm; and on February 22, 2004, there was trace precipitation. On the day of the accident the only precipitation that occurred was after the collision.

[63] No physical evidence was found by the representatives from Mr. Hrycay's firm when they attended March 25, 2004, except the marks left by the Lauzon vehicle in the grass. Mr. Hrycay felt that the most significant evidence of the road condition was contained in the videotape taken by the fireman filed as Exhibit Number 3, especially the video images taken at 4:43 and 4:47 p.m. He believed that this was the earliest evidence as to the condition of the road. Police measurements and photographs were taken later after the road conditions had been changed by the traffic on the road.

- [64] He stated that he could see standing water on the road in the videotape shot at 4:43 p.m. This section is closer to the final resting place of the vehicle and was shown on Figure One of Exhibit Number 12. Using photometric techniques, he concluded that the standing water was 20 metres in length at the 100 metre point. He acknowledged that it is hard to see and hard to measure because of the distance and depth of field. Further, he testified that he could not determine anything beyond the 100 metre point.
- [65] Ultimately, one of the conclusions Mr. Hrycay reached was that the road lacked drainage. He determined this from the fact that standing water was visible on the road before the traffic had been diverted on to it.
- [66] Mr. Hrycay stated that in his opinion water was a sign of poor road design. His evidence was that one of the goals of design is to remove water from a roadway as quickly as possible. Water is the road's enemy, he said, because it changes the drag coefficient between the vehicle tires and the road surface, and it affects vehicle stability and dynamic control. As well, water can create hydroplaning which also impairs the driver's ability to control a vehicle. Finally, according to Mr. Hrycay, water on a road compromises structural stability or the integrity of the road. Excess water migrates into the base and may lead to deterioration.
- [67] Mr. Hrycay testified in detail about the length of the area of standing water shown in the fire department video. He concluded that it was 50 feet in length. He acknowledged that the "pot hole" that led to water being on the Lauzon vehicle's windshield was substantially further east and could not be seen from that photograph/video.
- [68] In Mr. Hrycay's opinion, the condition of standing water as shown in the photograph was not slight but moderate to severe. In reaching this opinion, he utilized the M.T.O. rating manual which was not in evidence. As well his rating was from a road design and maintenance perspective, not from a vehicle dynamics perspective. He could not rate the road from the latter perspective because the depth of the water could not be determined from the photograph.
- [69] He was asked if there were any significant observations other than the ponding. He stated that there were other stress manifestations that were typical of gravel roads beginning to show. Specifically, he noticed washboarding which is not a simple depression but a series of imperfections which gives rise to vibration in vehicles.
- [70] He also stated that he noticed an accumulation of loose gravel and material on the side of the road, (sometimes referred to as wind rows). He found that the centre of the road was hard-packed but that there was an excessive amount of loose material and gravel along its edge. This created a berm or lip which acted as a dam and caused water to remain on the road. He could not give any evidence about the length of the berm or its height, but concluded that because the water was standing it was the berm that was causing it to stand.
- [71] Having regard to all this testimony, I find that Mr. Hrycay's perspective on the issue of standing water and the condition of the road generally to be inconsistent with the

evidence of others, particularly that of Ms. Lauzon and the three police officers. Moreover, while I have not had access to the M.T.O. Rating Manual, I find that the standing water, as illustrated in Exhibit Number 6, was not severe.

- [72] Mr. Hrycay calculated the speed of the vehicle at the point it impacted the tree to be between 65 and 85 kilometres per hour. He did this by using the information he obtained from the scene by his firm, the police, and eyewitness statements.
- [73] He concluded that the vehicle began to lose control at Point 'A' in Figure Four of Exhibit Number 12 (i.e. Analysis and Vehicle Position). This point was some 240 metres from the culvert where this event began. He related and relied upon Ms. Lauzon's description that she had crossed the culvert, had water splash on her windshield, and ultimately lost control. He concluded that it would take several seconds for her to perceive, react, and change her steering direction.
- [74] Further, Mr. Hrycay concluded that what she described was a "skin" of water. According to Mr. Hrycay a "skin" of water is a puddle sufficiently large that when the wheel goes into it, it sprays up on the windshield and blocks the driver's view entirely. He stated that going through that depth of water would lead to dynamic changes, in part hydroplaning and in part differential drag. He emphasized that confronting water in such a circumstance may be an unexpected development for the motorist, depending on how far ahead the driver is looking.
- [75] Using different scenarios, Mr. Hrycay concluded that it would take between 10 to 12 seconds to travel from the culvert to the point where the vehicle impacted the tree. During that time, Ms. Lauzon would go through what he described as the perception/reaction process, that is, responding to the water and executing steering manoeuvres.
- [76] His evidence was that the road surface was not being maintained to M.T.O. and industry standards and that this lack of maintenance resulted in a sub-standard road surface. That is, it led to standing water, pot holes, and distortions such as washboarding. It also created the wind rows or berms that were seen. He concluded that all these factors led to a hazardous condition for the motoring public and contributed to the cause of the accident.
- [77] However, the standard Mr. Hrycay was referring to was not the Minimum Maintenance Standards Regulation made under the *Highway Traffic Act*, R.S.O. 1990 c.H-8 but the Design, Engineer and Maintenance Standard that had been applied prior to the advent of the M.M.S. There was filed in evidence Exhibit 13 Maintenance Quality Standard (M.Q.S.-104) and Maintenance Quality Standard M-100-4. The former appears to have been published in January of 2003, and superseded the latter.
- [78] In his evidence Mr. Hrycay referred to Figure 5 of Exhibit 12 which showed a cross section of the road from the final resting place of the vehicle to a point 105 metres east. Mr. Hrycay used that to illustrate his view that there was insufficient crossfalls. It should

be noted that Ms. Lauzon's evidence was that she encountered the water much further east than the points in Figure 5.

- [79] His evidence was that you needed to maintain a crossfall across the entire surface of the road. The steeper the crossfall, the faster water would leave the road and not be affected by berms and wind rows.
- [80] He stated that roads with hard top surfaces require a two per cent cross fall and that gravel roads require a four per cent cross fall. The additional cross fall for gravel roads assists in preventing water from being impeded by the material that makes up the road which tends to migrate to the road's edge. Mr. Hrycay said that the percentages to which he referred come from the American Public Works Association and the Canadian Public Works Association. Ultimately, his opinion was that there was not sufficient cross fall on the South Talbot Road.
- [81] Mr. Hrycay also stated that, as a part of maintenance, roads need to be built up and the edges cut down, the latter to prevent a barrier from being created along the edge of the road which in turn prevents water from leaving the road. He described how road authorities can restore the crown by grading, dragging, or scarifying the road up to a depth of three to four inches. The road is then graded to create the proper slope or crown. If this process is not done properly, the clumping of the material at the edge of the road becomes a problem.
- [82] Mr. Hrycay said that he believed the Municipality had done major grading approximately four days after the accident. When his firm did the inspection of the road they had not been successful in restoring the crossfall or they had lost the crossfall from the time of the work until the time he did his inspection. However, the evidence of Mr. Black and Mr. Fuller on behalf of the Municipality established that in fact a major grading was not done in the days immediately after the accident.
- [83] Of the eight profiles Mr. Hrycay prepared as part of Figure 5 in Exhibit 12. None of them met the four per cent grade. He found that one section was virtually flat in the westbound lane. He acknowledged, however, that this was not necessarily the crossfall at the date of the accident.
- [84] He testified that he believed the thaw experienced around the time of the accident was the first major thaw of the year and that the thaw does vary from year to year. This particular year did not have a long winter; therefore, the road was starting to thaw earlier than in other years.
- [85] In his June 4, 2004 report, he made four conclusions:
- (a) The speed of the vehicle at the time Ms. Lauzon lost control was between 65 and 85 kilometres;
 - (b) The surface of the South Talbot Road was not being maintained according to M.T.O. and industry standards, resulting in the surface being sub-standard which

gave rise to standing water and pot holes, distortions, wind rows, and corrugations (washboarding), presenting a hazard to the motoring public;

- (c) The sub-standard and defective road condition created a roadway hazard to drivers and was a contributing cause to this accident; and
 - (d) Ms. Lauzon's driving experience and her selected driving speed under the circumstances and her position on the road in the face of standing water were also contributing factors to the accident.
- [86] In cross-examination, Mr. Hrycay confirmed that he had not attended personally at the scene of the accident and that he was relying on information prepared by others.
- [87] He was cross-examined extensively about the position of the puddle, or standing water. Ultimately, he concluded that the puddle shown in the photograph attached to Exhibit Number Six began 75 metres east of the final resting point of the vehicle and ended at a point 125 metres beyond that point. He stated that, in coming to that conclusion, he considered the evidence of others including a report prepared by McCarthy Engineering which, of course, I did not see.
- [88] He also agreed that it was not the puddle that the Lauzon vehicle initially encountered. He agreed that there was no physical evidence beyond Point 'A' which is a tire mark in his Figure Four. He stated that the culvert is approximately 240 metres from Point 'A'.
- [89] He acknowledged that there was a crown in the area of the puddle shown in the photograph but that the water did not drain off the road because it got caught on the lip. He agreed that after reviewing Constable Armstrong's report he had no reason to disagree with it, that is, that the vehicle went to the south, north, and then south again before leaving the road and striking the tree.
- [90] Based on these facts, he said that in his opinion the entire sequence began at some point east of the tire marks. To the suggestion that he was not really sure what happened to start the sequence, his response was, "except what was said by Ms. Lauzon." He acknowledged, that without additional physical evidence, it was difficult to piece the scenario together and agreed that the scenario he offered was the best he could in the circumstances. The fact is that there is no evidence as to the exact distance past the culvert that Ms. Lauzon's vehicle struck the standing water.
- [91] When asked if it would be reasonable to reduce your speed in these circumstances, he indicated that would be an experience factor depending on the knowledge of the road and to some extent the knowledge of the road conditions. When Mr. Shillington put to him that Ms. Lauzon had just travelled the road, his response was that she had been travelling the other way and that it would be an experience factor in determining whether she would have taken note of the condition of the road.
- [92] Mr. Shillington directed Mr. Hrycay to photograph number five in Exhibit Number One, and suggested to him that this showed there was a crown. Mr. Hrycay did not agree. He stated that it showed a hard-packed area where the wheel path was and loose material

outside the wheel path. Further, there was water on the north edge. It was put to him that the water was there because of the crown. He stated that he agreed or that, in the alternative, there was a depression because of a deficient crossfall.

- [93] He acknowledged that, had the road not begun to thaw, water would not have been on the road. Further, he acknowledged that this time of year was a difficult time for roads. Water does not travel to the surface when a road is frozen. He agreed that the spring thaw was one of the most challenging times of the year to a road authority to provide safe passage, especially along gravel roads. He pointed out that water is always in the road. If the water did not fall, and the vehicles did not bring it, it is inherent in the material or make-up of the road.
- [94] On the issue of the standards which were marked as Exhibit Number 13 and 14, Mr. Hrycay acknowledged that these were M.T.O. standards for maintenance and design for the province and not for the municipalities. However, Mr. Hrycay stated that if the municipal authority did not have its own standards they used the next available standards, which would be the M.T.O. standards. However, he did subsequently acknowledge that if there was no standard Municipal Maintenance standards, they would have to rely on their own best practices. He conceded that the standards did not specifically state the crossfall on a gravel road should be four per cent, but agreed that newer standards require a range of two to four per cent. He acknowledged that two per cent was a minimum and four per cent was the ideal.
- [95] Mr. Hrycay also agreed that hard top roads tend to shed moisture and gravel surfaces tend to retain moisture. The problem is inherent in the nature of a gravel road, which can be made more serious by a lack of runoff.
- [96] Mr. Hrycay agreed that there was an initial thaw prior to the accident but that deeper layers of the road would still be frozen. In other words, just the top part would be thawed. He agreed that if most of the road was still frozen, it was not a good time to do a full depth grading.
- [97] He was questioned as to whether or not the condition of the road was consistent with it having rained that day. He responded that it was not what he understood or knew about the weather. However, he agreed that someone who did know about the weather might conclude it had rained because you would not expect water to be on the road for no reason. He also agreed that ground temperature is an important factor and not the air temperature. That is, even if air temperature is below freezing, on a bright and sunny day you would still get a thawing.
- [98] He also agreed that the traffic creates water and wheel load is a more important factor than air temperature. Simply stated, traffic itself creates heat.
- [99] Mr. Hrycay stated that traffic does two things. It pushes water out and generates heat. Mr. Shillington asked him if conditions may have been different at 8:00 p.m. Mr. Hrycay said that between 8:00 a.m. and 4:30 p.m. the temperature would have the greatest effect on the road, whereas between 4:30 p.m. and 5:00 p.m. the wheel loading would have had

a more serious effect. He therefore would expect the greater change visually from 4:30 p.m. to 5:00 p.m. than from 8:00 a.m. to 4:30 p.m.

- [100] In re-examination, Mr. Hrycay reiterated that there were puddles west of the bridge but that he could not determine the distance from the point of impact from the photographs. However, the evidence of Mr. Vespa was that he saw the vehicle beyond the trees. The trees end 125 metres from the final place of rest. From that, he concluded the vehicle was further east than the water in the videotape.
- [101] In my questioning, he confirmed that he could not tell where the water was that Ms. Lauzon encountered. Nor could he measure the pot holes or puddles from the photograph. Despite these obvious limitations and deficiencies, Mr. Hrycay steadfastly held to the opinion that the condition of the roadway was substandard and was a contributing cause of the accident.
- [102] It is the role of the trier of fact to weigh the relevant evidence and to make findings of fact. Experts can often be of assistance to a court in the discharge of this function. However, to be helpful, experts must be scrupulously fair and impartial and base their opinions to the extent possible on objectively reliable data. The recent amendments to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 reinforce that notion. Experts come to court to assist the trier in the pursuit of the truth. They are not advocates.
- [103] And therein for me lies the problem with Mr. Hrycay's testimony. He clearly felt that the Municipality ought to be held to the highest possible standard, and he downplayed the relevance or significance of any other factors that may have led to the accident. Specifically, he minimized Ms. Lauzon's lack of experience and the fact that she had travelled this roadway a short time before the accident. Further, he acknowledged the road would have changed visually most significantly after 4:30 p.m., after the time the traffic was diverted. Nonetheless, he clung to the view that the municipality somehow should have observed these conditions earlier in the day. For these reasons, I regard Mr. Hrycay's evidence as slanted and, to that extent, untrustworthy.
- [104] The Plaintiff also called, as an expert witness, Dwayne McGinnis. His curriculum vitae was filed as Exhibit Number 15. After a brief cross-examination, he was qualified as an expert witness in accident reconstruction including vehicle dynamics, road surface defects, and in particular asymmetric drag and the effect of washboarding on vehicle handling.
- [105] Mr. McGinnis prepared a report dated November 24, 2009. Prior to preparing the report, he reviewed extensive materials, including the motor vehicle accident report, Constable Japp's report, and the notes of Constables Japp, Armstrong and Roberts. As well, he reviewed witness statements from Ms. Lauzon, Mr. Vespa and James Docherty. He reviewed the videotape prepared by the Kingsville North Fire Department, and the transcripts of the examinations for discovery of Dennis Black, Carissa Lauzon, and James Docherty.

- [106] He was asked, after reviewing these materials, how he understood this incident to have unfolded. He answered that the Docherty vehicle was near the right side of the road, encountered a flooded region of the roadway which induced control difficulties. Specifically the water sprayed up on to the windshield obscuring vision. It also caused asymmetrical drag that introduced control instability. This ultimately led to Ms. Lauzon losing control of the vehicle.
- [107] The initial instability resulted in corrections each larger than the original instability until there was loss of control of the vehicle. From the tire marks he could see that the vehicle leaving the road was not the first event of loss of control, but was the second or even the third.
- [108] From the information he reviewed, he concluded there was asymmetrical drag on the right side of the vehicle which caused the vehicle path to change. He commented that asymmetrical drag occurs particularly if it is unanticipated by a driver.
- [109] He was asked how this event could have occurred and what conditions would be necessary. His evidence was that the puddle would have to be deep enough so that water is not handled by the tread on the tire.
- [110] Initially, he said the water would have to be a couple of centimetres deep and then he said an inch or inch and a half. When asked how long the puddle would have to be, he indicated that even a small puddle would put up a small splash but to sustain the splash long enough to obscure the windshield he estimated the puddle would have to be 10 to 20 metres.
- [111] The difficulty with this evidence is that it is purely speculative, because we do not have any measurement of the depth or the length of the puddle. As well, his initial evidence that the depth would have to be a couple of centimetres is, in my view, significantly less than an inch to an inch and a half. Two centimetres would be approximately three quarters of an inch. Of course all of this is theoretical given the lack of actual evidence.
- [112] He explained that asymmetrical drag is simply a pull on one side of the vehicle and not the other. If you hit a puddle with only one pair of tires, for example, on the right side which is most common, this would cause drag which would pull the vehicle to the right. The vehicle would not be off the road but it would change its path.
- [113] His evidence was that where water is on each side the driver would feel deceleration, but the forces on the front wheels would be balanced left and right. An equal amount of drag creates "symmetric" drag. If this is so, then if there was water on the entire westbound lane, as described by Mr. Docherty, there ought not to have been asymmetrical drag. There may well have been splashing, but no drag.
- [114] Mr. McGinnis was asked about the effect of encountering both conditions at the same time, that is, flooding of the windshield and asymmetrical drag. He responded that the driver would feel the vehicle pulling but could not tell what it was doing because she could not see through the windshield. He referred to it as "flying blind."

- [115] He was asked if water sprayed on the windshield what impact would that have on Ms. Lauzon's reaction time. He said that it would delay her response because she could not see what the proper response should be until she got the windshield wipers going.
- [116] He was asked what road conditions were likely to have been. His very fair response was that he said that he did not know but that he could see water "flooded" on the right side of the road and that the police photographs appear to show some irregularity on the road's surface.
- [117] Mr. McGinnis indicated that he understood the road to be straight and level, gravelled and quite wet. He concluded that the road had a slight crown or cross slope from the way the water was distributed on the right side of the road.
- [118] In summary, Mr. McGinnis's opinion was based on several specific findings that can be summarized as follows:
- The road was soft and muddy. There appeared to be little snow in the vicinity.
 - There appeared to be small wind rows of material at the outboard edges of the road surface reportedly caused by winter ploughing (that was from the evidence of Mr. Black.) The presence of the wind rows prevents the water from draining off to the side of the road and causes it to pool or puddle.
 - The incident as demonstrated by the yaw marks and described by Lauzon and Vespa is a classic reverse steer control loss.
 - Because the water splashed up on to the windshield, the water on the road was likely a few centimetres deep. Standing water at the side of the road would cause asymmetric drag and tend to pull the vehicle to the right off the road without the operator turning the steering as if it had been steered to the right. Muddy water on the windshield would make it difficult or impossible for the operator to detect the path change until the wipers cleared her view.
 - The presence of standing water over many metres is more hazardous than a single, shorter puddle.
 - The unrecoverable yaw (the marks on the road measured by the police) which caused the excursion across the roadway was likely introduced by aggressive steering input to the left on the part of the operator in response to her vehicle being redirected to the right.
 - Since there are reports of pot holes on the road by the police, there may have been pot holes in the flooded region at the time of the incident and not visible in the photographs. He did not know if there were or were not.
 - Because of the dynamic oscillations created by a sequence of small pot holes, a sequence of pot holes is more hazardous than a single large one.

- The presence of sequential pot holes setting up the dynamic environment similar to washboarding would complicate the attempts to steer and recover control.
- [119] On cross-examination, Mr. McGinnis noted that he was not retained until long at the event, February of 2009, did not attend at the scene, and did not have the report of Constable Armstrong.
- [120] Asked to say where the accident occurred, Mr. McGinnis conceded that there was probably not an answer to the question. Later, he indicated that he believed the initial loss of control occurred some place between number 177 and the blue marked area in Exhibit Number Six. That was characterized as a puddle on the Exhibit.
- [121] Initial loss of control as used by this witness does not mean where the splashing occurred. There is a significant distance from the area of the culvert to the blue marked area in Exhibit Number Six.
- [122] He reviewed the videotape (Exhibit Number Three) and agreed that the water was more apparent at 5:00 p.m. This is consistent with the evidence of Mr. Hrycay that the significant change to the road visually occurred after traffic was diverted on to the South Talbot Road.
- [123] He agreed that pooling or ponding of water at the side would indicate there was a crown. He agreed that the centre and eastbound lane were essentially clear of water. He acknowledged there was a wind row that could have been created through ploughing or some other activity.
- [124] In cross-examination, he gave evidence that it may not matter that the area of water was short in duration. He felt that five metres would be sufficient to flood a windshield. He acknowledged he could not tell the length of the puddle particularly if we did not know where the water was that Ms. Lauzon went through. He agreed with Mr. Shillington that without knowing where it was that Ms. Lauzon went through the water it was difficult to determine the length of the puddle.
- [125] The evidence of Mr. McGinnis underscored that other than through the account given by Ms. Lauzon we do not know what condition Ms. Lauzon encountered when she crossed the culvert. Mr. McGinnis' evidence was helpful in explaining asymmetrical drag and Ms. Lauzon's reaction.

Municipal Employees

- [126] The final evidence introduced by the Defendant Lombard was by way of the read-ins from the examination for discovery of the Road Superintendent Denis Black. Additionally Mr. Black gave oral evidence during the Defendant Kingsville's case. I find that the most salient evidence from his Examination for Discovery is as follows:
- The road was used mainly by local residents as an access road to get on to Highway No. 3. It is a Class 4 road.