CITATION: McLeod v. General Motors of Canada Limited et al., 2014 ONSC 134
COURT FILE NO.: 47039 (London)
DATE: 2014/01/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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KATHERINE MCLEOD AND LINDA MCLEOD	)	Vicki Edgar
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Plaintiffs	)	
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- and -	)	
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	)	
GENERAL MOTORS OF CANADA LIMITED, THE CORPORATION OF THE MUNICIPALITY OF DUTTON/DUNWICH, and DONALD MCLEOD	)	T.R. Shillington and Jonathan de Vries for the defendant Municipality of Dutton/Dunwich
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** September 20, 21 and 24, 2012, and January 7, 8 and 9, 2013

LEACH J.

[1] This action stems from a single-vehicle accident on September 18, 2004, in which the plaintiff Katherine McLeod, ("Katherine"), suffered very serious and life-threatening injuries.

[2] Those injuries and resulting losses are acknowledged, and the remaining parties to the litigation, (the plaintiffs and the defendant Municipality), commendably were able to reach agreement on an appropriate assessment of damages in the amount of $950,000, inclusive of interest to the date of trial.

[3] The trial before me accordingly was focused entirely on issues relating to liability.

[4] In broad terms, the plaintiffs, (Katherine and her mother Linda McLeod), allege that the accident was caused by the negligence and/or breach of statutory duty of the defendant Municipality, in failing to ensure that proper steps were taken to ensure that the road on which the accident occurred, and for which the Municipality

had maintenance responsibility, was kept in a state of repair. They say the Municipality failed to keep the road in a safe and proper condition, and free from present and known dangers that caused this very serious accident.

[5] In response, the defendant Municipality says that, while the accident obviously is very unfortunate, its conduct was entirely reasonable and appropriate in the circumstances, and did not cause the accident or associated injuries. It says the accident had nothing to do with the condition of the roadway, but was instead caused by the negligence of the injured plaintiff, an inexperienced young driver who was driving inappropriately and without a seatbelt. It also relies on numerous statutory defences created by the *Municipal Act, 2001*, S.O. 2001, c.25.

Background and Context

[6] I will have more to say about particular evidence and factual findings in the course of addressing various individual issues relating to liability; e.g., Katherine's speed at the time of the accident, the road's state of repair, causation, the possible application of statutory defences, and Katherine's alleged failure to wear her seatbelt. However, the following findings will provide a context for those more detailed considerations:

- At the time of the accident, on September 18, 2004, Katherine was 18 years old, and living at home with her parents in a house on Thompson Line Road, (the road on which the accident occurred).

- Thomson Line Road is but one of 30 to 50 dirt and gravel "country" roads maintained by the defendant Municipality in its primarily rural and sparsely populated community. Bonnie Vowel, who was mayor of the community from 2003 to 2010, testified that the Municipality has a limited budget, within which it tries to make decisions in the best interest of the community as a whole. The simple reality is that it does not have the resources to pave all of the roads under its jurisdiction, and most of its roads have a dirt and gravel surface.[1] A staff of eight employees, including a superintendent and an assistant superintendent, have primary responsibility for addressing all road maintenance issues on an ongoing basis.

- Some of Katherine's family and obviously supportive neighbours and friends suggested that Thomson Line Road was "quite busy" or "fairly busy", and regularly saw a "lot of traffic". (Katherine's father, Don McLeod, went so far as to call it a "major artery" because it led in one direction to a golf course and the township dump. Robert Bobier, a neighbor and friend of the McLeods, echoed that sentiment.) However, I am more inclined to accept the evidence of less partisan witnesses such as Bradley Luyks, who also lived and farmed on the road, and acknowledged that it really was "not that busy", as it was used primarily by "farmers and locals". Moreover, as confirmed by Michael Hull, objective traffic counts indicated that Thomson Line Road was, on average, used by 150 vehicles per day.[2] Combined with its speed limit of 80kph, that relatively modest average annual daily traffic, (albeit at the "higher end" of the scale compared with other roads in the Municipality), results in Thomson Line Road being

[1] Michel Hull, (who was the Municipality's road superintendent at the time of the accident and still holds that position), testified that there were approximately 220km of gravel road within its jurisdiction, in contrast with the 30km of roads covered with tar and chip, and the small number of paved roads found in villages.

[2] As noted below, traffic count information also indicates that such daily vehicular traffic along Thomson Line Road is more concentrated towards its west end, in the area of the aforesaid golf course and dump; a reality that prompted a decision to pave the western end of the road with tar and chip in or around 2009. However, the more eastern end of the road, (including the area where Katherine's accident took place), still used primarily by locals and farmers, and associated feed and fuel vehicles, remains less busy and unpaved.

formally classified, pursuant to provincial guidelines, as a "Class 4" highway. (At trial, the plaintiffs apparently took no issue with that characterization and classification of the road.)

- The area of Thomson Line Road where the accident occurred was, like most of the road, rural and unlit, with an unpaved dirt and gravel surface, and a speed limit of 80kph. It had a generally straight east-west alignment, with no significant bends, turns or curves. Across its standard width, (of approximately 6.5 to 7.5 meters, from one side of the road to the other), the road was not lined or otherwise formally divided, and its surface was made up of the same material until it met with grass or similar natural vegetation on either side, with no discernible or differentiated shoulders. However, at the time of the accident, regular transit of vehicles and the apparent travel preferences of drivers had led, in an apparently usual manner, to certain areas of dirt and gravel on the road becoming more "hard-packed" than others.[3] In particular, although lacking perfectly distinct edges or boundaries, three noticeable bands of parallel hard-packed area had developed: a band running down the centre of the road, (wider because it was regularly traversed by the driver's side wheels of vehicles travelling in each direction), and two narrower bands running closer to each side of the road, (formed by the corresponding transit of the passenger side wheels of such vehicles). While the road was clearly wide enough for two vehicles travelling in opposite directions to pass safely, such passage obviously would be more difficult and potentially hazardous if both vehicles insisted on keeping their driver's side wheels fully towards the middle of the central and otherwise shared band of hard-packed material. At the time of such passing, one or both vehicles therefore naturally and commonly would move closer to their respective sides of the roadway. In doing so, they inevitably would move outside the more regularly traversed and therefore comparatively hard-packed bands of dirt and gravel, and into areas of the road where the dirt and gravel remained more soft and loose.

- As indicated by various witnesses and numerous photographs tendered as exhibits at trial, Thomson Line Road is not entirely level from end to end. It instead ascends and descends, at various stages along its east-west route, a number of relatively modest hills. One such hill is located immediately to the west of where the relevant accident would occur. As cars drew near to that hill from each side, varying elevations of the road temporarily would prevent direct sight-lines between oncoming vehicles. However, owing to changing elevations in the road, cars approaching that particular hill from opposite directions also still were able to see each other intermittently from a distance.[4]

- Katherine admittedly was very familiar with Thomson Line Road. She had lived in the same house with her parents her entire life, and accordingly had travelled the road on which they lived many, many times.

- Using vehicles owned by her parents, (a GM truck and the Oldsmobile car later involved in the accident), Katherine also had driven Thomson Line Road on a regular and frequent basis since obtaining her driver's licence at the age of 16. At the time of the accident, she had completed a driver's education course as well as high school and, with her G2 licence, (which she had had for 18 months without any tickets or accidents, but which still subjected her to a number of limitations), was driving the road each day. This included driving herself to and from employment at a nearby egg farm, (where she usually worked each weekday morning and afternoon, and sometimes on week-ends); a path that regularly took her past the site where the accident would occur, approximately one mile west of her home.

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[3] I accept the view of Constable Walker, (the primary investigating police officer whose evidence is reviewed in more detail below), that these areas actually were "*very* hard packed", at the time of the accident, and largely "clear" of any loose gravel.

[4] These observations and those in the previous sub-paragraph were supported and confirmed not only by various photographs entered as exhibits, but by the testimony of Stacey and Don Luyks, to which I will return.

- Katherine was not only very familiar with Thomson Line Road generally, but also with the particular area where the accident occurred, and the particular hill described above. In addition to passing that part of the road on a regular basis, and almost every day, her grandmother lived in a house immediately nearby. Katherine also stated, (and indeed emphasized repeatedly), her awareness that multiple potholes regularly would form immediately to the east of that particular hill, (in the area of the road used by eastbound vehicles), and that she "knew where they were", even in the darkness. In her words, such potholes were "not unusual".

- Katherine acknowledged that she had always been able to travel safely along Thomson Line Road without any problems, although she also claimed to have made conscious efforts to avoid the aforesaid potholes on a regular basis.

- On Saturday, September 18, 2004, the weather was clear and dry. There similarly was no evidence before me at trial to suggest that Thomson Line Road was anything but completely dry, in all relevant locations, and in all material respects, at the time of the accident. Kevin Englehart, the Municipality's former assistant road superintendent, (who was actively involved in the regular inspection and maintenance of the Municipality's roads from approximately 1994 to 2010), testified that it actually had been a noticeably dry summer leading up to Katherine's accident.

- During the course of the day in question, Katherine travelled along Thomson Line Road and past the scene of the accident numerous times before it happened; e.g., driving herself to work early that morning, driving herself home from work for lunch, being driven by her father to and from Dutton in the afternoon, and driving herself to the home of family friends who were hosting a social gathering that evening.

- Katherine's parents, (Don and Linda McLeod), also attended the same evening social gathering, which took place 3-4 km, or "just a few minutes" drive, from the McLeod home. However, Katherine and her parents made arrangements to travel to and from their friends' home in separate vehicles. Katherine testified this was because she had to work again the next morning, and therefore did not want to stay at the gathering as long as her parents. In the result, her parents travelled to and from the social outing in the family truck, (the vehicle normally used by Katherine), while Katherine travelled to and from the social outing alone in the family Oldsmobile. (The "main driver" of that vehicle usually was Katherine's mother. Katherine drove it much less frequently than the truck, and accordingly was less familiar with its operation.)

- At the time of the accident, the Oldsmobile was in good repair, at least insofar as its brakes, steering and tires were concerned. (A subsequent mechanical inspection carried out by the police concluded the vehicle was in working order, and played no role in the cause of the accident.)

- Katherine left home for the social outing at approximately 8:30pm, after it was dark, and stayed there for approximately three hours, enjoying a campfire and conversation. There was no evidence, or indeed suggestion by any party or witness, that Katherine consumed any alcohol or drugs at any time on the day in question, or that alcohol or drugs played any role whatsoever in the accident that followed.

- Katherine left the social gathering in the Oldsmobile, for the intended non-stop drive home, at approximately 11:30pm. She admits she had the radio on, but says this was not a distraction. She says she was not rushing to get home. However, the plans made for her to depart from the social gathering much earlier than her parents, (thereby facilitating an earlier bedtime for her that evening, for work-

related reasons), appear to have gone somewhat awry, as later events confirm that Katherine eventually left the gathering only a very short time before her father and mother.

- Katherine says that, after she left the social gathering, she saw no other vehicles on the road that evening, or the lights of any other vehicles, until she was "shocked" to see the headlights of an oncoming westbound car, (later confirmed to have been occupied by Stacey and Bradley Luyks, two other residents of Thomson Line Road who also happened to be travelling home along the road late that evening, albeit in the opposite direction), crest the top of the hill immediately west of where the accident happened. In that regard, Katherine indicated that she was "not used to seeing other vehicles on the road late at night". Moreover, while Katherine also clearly seemed to be suggesting that she had no reasonable opportunity to see or notice the Luyks before they crested the hill, I prefer the evidence of Mrs and Mr Luyks[5], who both gave testimony effectively negating such a suggestion. In particular, each confirmed that, because of the successive hills along Thomson Road, they intermittently but otherwise clearly were able to see Katherine's vehicle approaching from a considerable distance, (from as much as a kilometer or a "two minute drive" away), and track its progress "off and on" as the two cars moved towards each other. This makes sense to me, as it was a dark night, and the headlights of an oncoming vehicle, on this generally straight road, could and would have been clearly visible and noticeable provided there were no intervening objects, (and hill elevations in particular), to block direct sight-lines from time to time. Moreover, in my view, the corollary to the Luyks being able to see Katherine and her approach from time to time is that Katherine similarly could and should have seen and been aware of their approach, had she been paying attention to her surroundings.

- Mrs Luyks was driving that evening and, temporarily losing sight of Katherine's vehicle while approaching the hill immediately to the west of where the accident occurred, was unsure of where the two cars would meet. However, knowing that would happen at some point, Mrs Luyks says, (and Mr Luyks independently confirmed), that she deliberately and quite sensibly slowed their vehicle from 70-80kph to 40-50kph. She did so because she was anticipating the need for each passing vehicle to make room for each other; i.e., to move closer to their respective sides of the road, and therefore necessarily outside the more hard-packed bands of dirt and gravel to areas where, in the words of Mrs Luyks, the surface of the road would be more "loose" and "not sturdy". (Mrs Luyks observed that, had both vehicles continued in the hard-packed bands, without moving away from the centre of the road, there likely would have been a collision.) Although somewhat surprised by the vehicles happening to meet precisely at the crest of the hill, Mrs Luyks therefore was able to safely move her vehicle more towards her side of the road as the two vehicles passed. The Luyks then proceeded without incident to their nearby home, completely unaware of what was happening behind them over the crest of the hill.

- Katherine was not so fortunate. She says the sudden appearance of the Luyks necessitated her movement closer to her side of the road, (as she deliberately had been travelling closer to the centre of the road in order to avoid the anticipated potholes), but that she was able to make that move safely and under control, thereby passing the Luyks without incident. (For their part, the Luyks confirmed that, although apparently "startled" by the two cars meeting, Katherine initially did appear to move closer to her side of the road in a controlled and uneventful way, before they passed and lost sight of her.) However, for reasons I will address in more detail below, Katherine then lost control of her vehicle shortly after cresting the hill, and within seconds of passing the Luyks. In a "yaw" or "slide-slipping"

[5] The Luyks had lived on Thomson Line Road for approximately 2½ years at the time of the accident, but admittedly did not know Katherine or her family very well, and did not recognize their vehicle. Mrs and Mr Luyks had no obvious loyalties, and no apparent interest in the outcome of the proceedings. They both gave testimony in a completely balanced, impartial and therefore impressive manner.

movement, her car continued to proceed east and north across the entire width of Thomson Line Road, (while rotating counterclockwise on a horizontal plane), before leaving the road at its northern edge, where it became airborne. Crossing a ditch and descending to a lower elevation north of the road, the Oldsmobile hit the ground in a forceful way and rolled over, before eventually coming to rest upside down in a nearby cornfield, with its front end closest to the roadway.

- As noted at the outset, Katherine sustained very serious and acknowledged injuries in the accident. These included serious trauma to her head and face, and she was bleeding profusely. In circumstances addressed in greater detail below, Katherine nevertheless was able to exit the overturned vehicle and make her way to her nearby grandmother's house, (approximately 500 feet away). There she remained, while calls were placed to emergency services, and until paramedics and an ambulance arrived to take her to hospital. During that time, calls also were placed to those still at the social gathering, in an effort to contact Katherine's parents. However, they already had departed for home, so those at the party in turn then made calls to reach Katherine's father and mother while they were still in transit.

- In fact, Katherine's parents were the first to come upon the scene of the accident after it happened, and before completion of the telephone calls described above – all of which indicates, to me, that they were travelling the same route as Katherine only a short time behind her. (Her father, Mr McLeod, estimated that he and his wife arrived at the scene of the accident no more than 10 minutes after it happened.) Their actions and observations at the accident scene, (prior to receiving a telephone call from those at the party, letting them know that Katherine was at the nearby home of her grandmother), are addressed in more detail below.

- The police arrived and, throughout the night and into the next morning, carried out extensive efforts to investigate the accident, document the accident scene, and determine what had happened. Those efforts were led by Constable George Walker, a senior OPP officer with decades of experience and formal training in matters of accident investigation, reconstruction and analysis[6], whose evidence is considered in more detail below. The work done by Constable Walker at the scene included preparation of a "total-station survey" of the site to document the roadway evidence and the trajectory of Katherine's vehicle, and "friction tests" to assist with determination of Katherine's speed prior to the accident.

- The resulting activity on the road attracted the attention of Mrs and Mr Luyks, who returned to the scene from their nearby home. Based on her recent experience and observations, Mrs Luyks estimated that the distance between Katherine's passing of her vehicle, and the point where Katherine's vehicle came to rest, was no more than 30 meters. Her immediate conclusion was that Katherine had been startled and unable to regain control just after moving to her side of the road when the vehicles passed each other. Similarly but independently, Mr Luyks indicated his immediate belief that Katherine must have been unable to regain control after she moved to the right from the path on which she had been travelling.

- After eventual departure of the police the day after the accident, the accident scene then was visited and examined by numerous members of Katherine's extended family and friends, all of them understandably concerned for Katherine's welfare and wanting to understand what had happened. They too went to considerable lengths to investigate and document the accident scene. A camera, level and tape measure were employed to record the state of Thomson Line Road, as it appeared looking in both directions at and near the scene of the accident. Particular care was taken to depict the location, diameter and depth

[6] The Collision Reconstruction Report prepared by Constable Walker includes a copy of his *curriculum vitae*, which was reviewed in detail during the course of his testimony, highlighting his considerable expertise in this area.

of potholes on Katherine's side of the roadway, near the area where she was thought to have lost control of her vehicle.

The Law – General framework of analysis required

[7] Before turning to a more extended review of certain other aspects of the evidence, and more detailed principles of law applicable to the particular issues raised at trial, I am mindful of the general statutory scheme and corresponding analytical framework applicable to a case of this nature.[7]

[8] In particular, section 44 of the *Municipal Act, 2001*, R.S.O. 1990, c.25, sets out the statutory scheme pursuant to which a municipality is required to maintain highways under its jurisdiction, and the consequences for default when damages ensue.[8]

[9] Subsection 44(1) defines the duty, and reads in part as follows: "The municipality that has jurisdiction over a highway … shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway".

[10] A correlative of the duty to keep such a highway in a "state of repair" means the duty is breached if the highway is in a state or condition of "disrepair" or "non-repair". However, while s.44(1) is mandatory, it incorporates the concept of reasonableness. A municipality is only required to keep the road in a state of repair that is "reasonable in the circumstances".

[11] Subsection 44(2) creates legal liability for default in complying with s.44(1), and reads as follows: "A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default."

[12] As liability attaches to a specific default, it accordingly is necessary, in determining whether a municipality is liable, to identify the default or defaults that are said to have fallen below the "reasonableness in the circumstances" test set out in s.44(1). In that regard, a specific condition of non-repair of the roadway can involve any aspect of the road[9].

[13] However, s.44(2) clearly incorporates a causation requirement, and the corresponding need for causation analysis. A municipality is liable only for damages sustained by a person "because of the default"; i.e., in relation to defaults which cause damages.

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[7] In *Guiliani v. Halton (Regional Municipality)*, [2011] O.J. No. 5845 (C.A.), at paragraphs 10-14, our Court of Appeal provided a helpful summary and overview of the relevant statutory scheme, and the overview that follows tracks those comments in large measure.

[8] As noted above, the plaintiffs have framed their claim in "negligence and/or breach of statutory duty"; see paragraph 8 of the statement of claim. In my opinion, however, a parallel claim in negligence, (independent of reference to the *Municipal Act, 2001, supra*), is both unnecessary and inappropriate. As emphasized by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, at paragraph 171, it is unnecessary for our courts to impose a common law duty of care where a statutory one clearly exists. I accordingly agree with the view that, in relation to highway repair, the relevant common law principles of tort and negligence law now have been subsumed in the provisions of s.44 of the *Municipal Act, 2001, supra*, and the authorities interpreting and applying them, thereby forming a sufficient and governing "code of legal requirements and principles" to resolve such disputes. See *Deering v. Scugog (Township)*, [2010] O.J. No. 4229 (S.C.J.), at paragraph 185, affirmed [2012] O.J. No. 2546 (C.A.).

[9] See *Johnston v. Milton (Town)*, [2006] O.J. No. 3232 (S.C.J.), at paragraph 76, varied but generally affirmed, [2008] O.J. No. 2157 (C.A.).

[14] Subsection 44(3) then goes on to set out three possible defences to liability of a municipality under ss.44(1) and 44(2) of the *Municipal Act,* and reads in part as follows:

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

[15] The three subparagraphs of s.44(3) are disjunctive, such that a municipality will not be liable if any one of the three defences applies.[10]

[16] Subsection 44(4) of the *Municipal Act* then confers authority on the Minister of Transportation to establish the minimum standards referred to in s.44(3)(c), and reads in part as follows: "The Minister of Transportation may make regulations establishing minimum standards of repair for highways … or any class of them".

[17] Subsection 44(5) makes it clear that those minimum standards "may be general or specific in their application".

[18] The onus is on a claimant to prove, on a balance of probabilities, that a road was in a state of disrepair at the time of an accident, and that the specified non-repair was the cause of the accident in question.[11]

[19] Once those two requirements have been met, (suggesting *prima facie* liability)[12], the onus then shifts to a municipality to establish, on a balance of probabilities, that liability for the state of disrepair and resulting accident is negated by application of one or more of the statutory defences outlined in s.44(3) of the *Municipal Act*.[13]

[20] As noted above, s.44(2) of the *Municipal Act* expressly preserves the ability of municipalities to temper any liability on their part through application of the *Negligence Act*. In that regard, the defendant bears the usual onus of proving, on a balance of probabilities, any alleged contributory negligence on the part of the plaintiff.

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[10] See *Thornhill v. Shalid*, [2008] O.J. No. 372, at paragraph 107.

[11] See *Johnston v. Milton (Town)*, *supra*, at first instance, at paragraph 76; and *Deering v. Scugog (Township*), supra, at first instance, at paragraph 185, (decision affirmed as noted above).

[12] A *prima facie* case is established against a municipality once it has been shown that a road is not in a reasonable state of repair and that the damages claimed were caused by want of repair. See Rogers, *The Law of Canadian Municipal Corporations*, (2d.ed.), quoted with approval in *Bishop v. Durham*, 2007 CarswellOnt 10163, at paragraph 35.

[13] Again, see *Johnston v. Milton (Town)*, *supra*, at first instance, at paragraph 76; and *Deering v. Scugog (Township), supra*, at first instance, at paragraph 185, (decision affirmed as noted above). See also *Docherty v. Lauzon*, [2010] O.J. No. 5017 (S.C.J.), at paragraph 200.

***Prima facie* liability analysis, (prior to consideration of statutory defences)**

SPEED

[21] Before turning to more detailed consideration of the authorities and facts relating to the "state of repair" of Thompson Road, and to causation, I think it appropriate to outline my determination as to Katherine's probable speed at the time of the accident.

[22] It was a topic that received considerable attention at trial, given the defendant Municipality's assertion that Katherine's speed played a critical role in the accident.

[23] The relevant speed evidence from lay witnesses was limited to that provided by the Luyks, Katherine's parents, and Katherine herself.

[24] In my view, none of it was very helpful or persuasive.

[25] Although Mrs and Mrs Luyks each gave a statement to the police indicating that Katherine did not appear to be speeding, and reiterated that view at trial, I share Constable Walker's view that the circumstances did not place the Luyks in a position to form an accurate and reliable observation of Katherine's speed immediately before the accident. In particular:

- From their vantage point in a vehicle moving in the opposite direction, the Luyks necessarily were obliged to assess *relative* speed; an exercise inherently more challenging than gauging speed of a passing object from a static position.

- Katherine's vehicle had passed from the Luyks' sight for a period of time immediately prior to the accident. It was a length of time sufficient to make Mrs Luyks unsure of Katherine's probable location, and surprised to find that Katherine's vehicle was reaching the crest of the hill at the same time as the Luyks.

- In the brief seconds between their first sighting of Katherine's vehicle after cresting the hill, and its passing them to move out of sight beyond the hill now behind them, the Luyks had only a very fleeting temporal opportunity to make observations about the manner in which Katherine was travelling.

- In cross-examination, Mr Luyks acknowledged that they really did not know how fast Katherine was going.

[26] Katherine's father testified that he had taught Katherine to adjust and reduce her speed considerably below the speed limit in response to road conditions such as darkness, potholes, hills and other vehicles, (as he himself was doing on the night in question), and that he would be very surprised if Katherine had been speeding before the accident.

[27] Katherine's mother similarly testified that Katherine knew to reduce her speed in response to such conditions, and therefore would have been going "a safe speed", and "well below 80kph", on the night of the accident. She was adamant that Katherine "*never* sped".

[28] However, Katherine's parents were understandably but unmistakably partisan in their evidence, and the reality is that Katherine frequently drove in their absence, (as she was doing the night of the accident). I

accordingly feel unable to place significant weight on their speculation and hopes as to the speed at which Katherine would have been driving immediately prior to the accident.

[29] At trial, Katherine herself was adamant that she was not speeding at the time of the accident.

[30] She testified that she generally drove slightly under the speed limit, (at approximately 70kph), to and from work, and to and from the social gathering on the evening of the accident, so that she could "go around potholes". She also said that she was going slightly under the 80kph speed limit immediately before the accident, as she had taken her foot off the accelerator, (without braking), for better control while moving to the right in order to avoid the Luyks.

[31] In my view, however, the credibility and reliability of this evidence were substantially undermined by a number of considerations, which included the following:

- To state the obvious, Katherine had significant incentive to deny all allegations of speeding prior to the accident.

- In my view, the repeated suggestions that Katherine constantly and consciously modified all of her driving habits to address concern for potholes, which coincidentally then became the central focus of this dispute, seemed unrealistic and - intentionally or unintentionally - litigation driven.

- During the course of cross-examination, Katherine eventually acknowledged that she in fact had not looked at her speedometer prior to the motor vehicle accident. In an effort to counter the effect of that admission, she then suggested that looking at her speedometer was unnecessary, to monitor how fast she was going, as she had "learned how to feel" whether her car was going at or around the speed limit. However, I did not find the suggestion convincing.

[32] In making determinations regarding Katherine's speed, I therefore am inclined to place far more reliance on the objective physical evidence, (interpreted with the assistance of those with expertise), than the subjective evidence of the lay witnesses.

[33] Turning first to the speed-related evidence of Constable Walker:

- At the outset, I note that the plaintiffs relied on certain acknowledged "slips" in the preparation of Constable Walker's Collision Reconstruction Report to suggest that his overall speed analysis also might be unreliable; e.g., because he was sleep-deprived, working through the night, and therefore understandably tired and possibly less attentive.[14] I nevertheless am not persuaded that these two isolated slips undermined the overall credibility or reliability of Constable Walker's observations and speed analysis in any meaningful way.

[14] In particular, Constable Walker's written comments suggested that Katherine "crawled out through the driver's side window" after the accident, (when that realistically was not a possibility because of crush damage, and all other evidence, including the blood evidence documented by the police, indicates that she exited through the vehicle's front passenger window) Similarly, immediately after clearly indicating in his written comments that his co-efficient of friction testing had been carried out in "the eastbound lane of Thomson Line, west of the area of impact", Constable Walker then indicated that he used the resulting data to calculate "the average co-efficient of friction for the westbound (sic) lane of County Road 20 (sic)", which was not the same road as Thomson Line Road. (Constable Walker attributed those particular errors to his probable use of an earlier electronic report, relating to a different road, as a template when preparing a formal written report for this accident.)

- Constable Walker's considerable expertise in accident reconstruction extends to knowledge of various methods used to determine pre-accident speed of vehicles. This includes a great deal of operational training, (as a student and instructor), relating to a device known as a "Vericom 3000", used to obtain the "co-efficient of friction" or "slipperiness", (to use the informal explanation offered by Constable Walker), of various road surfaces. It involves a police vehicle, equipped with the device, being driven along the relevant surface before then being put into a deliberate skid, (as well as a possible additional yaw or "side-slip"). The system then measures the road surface resistance encountered in such movements, (described variously by Constable Walker as "friction values" or "drag factors"), which in turn permits calculations used to determine probable pre-accident speeds, employing standard formulas.

- Constable Walker emphasized, and I accept, that friction values will vary from one particular road surface to another, and according to weather conditions. As he said, such variations may be "slight" or "great". All of this makes it advisable and "good practice", in carrying out speed analysis, to obtain the precise friction values applicable to the particular location of an accident, at the time of the accident, (i.e., as opposed to relying on data or averages compiled in relation to other roads, at other times, under possibly different conditions).[15]

- Using the Vericom 3000 device, Constable Walker conducted successive "friction value" tests the night of the accident and later the following morning, (once additional officers were available to assist in controlling traffic at the scene). He performed the tests on the hard-packed area of Thomson Line Road where the tire marks from Katherine's vehicle began, in order to obtain a more accurate idea of the surface forces acting on her vehicle's tires at that point.[16]

- The manner of testing involved Constable Walker starting from a point to the west of the test area, (i.e., the hard-packed surface on which Katherine's tire marks began). After calibrating the Vericom device to appropriate "zero" settings, Constable Walker then accelerated, heading eastbound along Thomson Line Road and towards the test area, to a desired speed of 50-60kph[17]. Once he reached the test area, at that desired speed, he would then fully apply his vehicle's brakes in order to "skid to a stop". During the skid, the Vericom device would gather data to determine the friction value of Thomson Line Road at the point of the test area, under the prevailing conditions.

- Because it has relevance to criticisms suggested later by the plaintiffs' expert, Mr Udall, I note that the police vehicle used by Constable Walker in performing the Vericom testing, (a Ford Crown Victoria, which Constable Walker described as a "large heavy American car" similar in size and weight to the Oldsmobile being driven by Katherine at the time of the accident), was equipped with an "anti-locking

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[15] As noted below, Constable Walker's views in that regard, which I accept, were supported in large measure by those of the Municipality's expert witness, Josephy McCarthy, and to some extent by concessions made by the plaintiffs' expert witness, Jeff Udall, who are both professional consulting engineers.

[16] In cross-examination, Constable Walker agreed that, if the tests had been performed on the area of soft-packed or looser gravel found towards the southern edge of the road, in that same area, that inevitably would have generated a lower friction value which, if used in speed calculations, in turn would have suggested a lower speed of the vehicle. However, it seems to me that the observation, on its own at least, does little to undermine the advisability of making calculations of Katherine's speed using, to the extent possible, friction tests performed on surfaces that her vehicle is known to have traversed at the time of the accident. It simply means that some further allowance and/or adjustments should be made for the fact that Katherine's vehicle also travelled, to some extent, during the course of the accident, over other surfaces that probably had a different friction value than the particular surfaces that were tested.

[17] Constable Walker explained that performing the tests at any faster speed risked damaging the tires of the police vehicle, while performing the tests below that speed would generate inaccurate data.

brake system", also described as "ABS brakes". Constable Walker testified that he left the ABS brakes "on" while performing the tests in this case. (Doing so arguably was consistent with attempts to replicate the forces encountered by the wheels of Katherine's vehicle since, as noted in the "Mechanical Inspection Guide and Evaluation" attached as an appendix to Constable Walker's report, the Oldsmobile vehicle being driven by Katherine at the time of the accident also was equipped with ABS brakes, with sensors attached to each of its four wheels.) However, Constable Walker also emphasized that, in the circumstances, and for various reasons, the presence or absence of ABS brakes was a factor unlikely to make any significant difference in any event.[18] He therefore made no allowance for the possible implications of ABS brakes in his initial calculations.

- Constable Walker performed six separate and successive tests on the same road surface of Thomson Line Road, in the area of Katherine's tire marks, in order to ensure that the data collected was reliable and therefore usable in his calculations. To be reliable, all six results had to be within "plus or minus five percent" of each other and they were, (varying in a range from 0.71 to 0.76). The results of the testing indicated an average friction value of 0.73 on Thomson Line Road, in the hard-packed area where the tire marks from Katherine's vehicle began.

- Constable Walker acknowledged in cross-examination that an average friction value of 0.73 was somewhat high for a road with a gravel surface, (e.g., according to studies carried out in the United States, suggesting that friction values for gravel roads ranged, on average, from 0.55 to 0.85), but strongly disagreed with the suggestion that it was too high for the particular road surface he was testing. As noted above, Constable Walker had observed that the area of Thomson Line Road with Katherine's tire marks was, at the time of the accident, a "very hard-packed surface" and largely "clear" of any loose gravel. In such circumstances, it was not surprising to him that it had a relatively high friction value which, he noted, still "fell within the range" of average friction values for such roads suggested by the American study. He was satisfied that the 0.73 average friction value was reliable and appropriate to use in his speed analysis calculations.

- Using the friction value of 0.73 in a "slide to stop" mathematical formula, Constable Walker then was able to "sit down later with measurements of the tire marks" to calculate the minimum loss of speed that occurred in the course of the accident, and therefore an estimate of the minimum speed at which Katherine's vehicle was likely to have been travelling when it traversed the area of her tire marks before coming to rest where it did. In particular, as indicated in his Collision Reconstruction Report, Constable Walker calculated that Katherine was likely travelling at a minimum speed of 112kph, and therefore well above the applicable 80kph speed limit. This led him to believe that excessive speed was a significant factor in causing the accident.

- Constable Walker readily acknowledged that "sliding to a stop" certainly did not reflect the type of accident and collision that actually occurred in this case. In particular, he noted that Katherine's vehicle obviously did not "slide to a stop" on Thomson Line Road, but instead went into a yaw or slide-slipping

[18] Constable Walker indicated that the application of ABS brakes is capable of producing higher friction values on asphalt surfaces where they work well, (by releasing otherwise "locked" brakes to apply pressure to the asphalt on a pulsating basis), but not on gravel surfaces where such brakes do not work well and actually may extend sliding distances. He also noted that ABS brakes inherently would not play a role if they were not being applied at a relevant time, which often is the case when a vehicle is in yaw. He indicated that, in the particular circumstances of this accident, the friction values therefore were likely to be approximately the same regardless of whether or not ABS brakes were used and considered in the calculations. In these assertions, Constable Walker was supported by the testimony of Mr McCarthy and, having regard to the circumstances, I find their rejection of ABS as a relevant factor to be reasonable.

maneouvre before leaving the road and rolling over. While Constable Walker acknowledged that there is a different formula and method for making a more precise calculation of speed in such circumstances[19], (to consider the somewhat different frictions created during such a yaw or side-slipping maneuver), it requires precise tire marks permitting measurements on two points of the "circle or cord" being formed by the path of the tire marks, (e.g., to calculate the radius of the circle with precision). At the time of his investigation, Constable Walker felt the marks at the accident scene might not be sufficient for that purpose, and he therefore did not attempt that speed calculation method.[20] However, he felt that the "slide to stop" formula would "give a good idea" of the speed required, in the circumstances, to make Katherine's vehicle travel as it had.

[34] Constable Walker's view that Katherine was speeding was shared by Joseph McCarthy, (the expert consulting engineer retained by the Municipality). He too is highly qualified and experienced, by virtue of his extensive training, supplemented by many decades of related employment and consulting experience, to opine on issues of accident reconstruction and biomechanics, (including speed, causation and seatbelt issues).

[35] However, Mr McCarthy did not simply accept and support the analysis carried out by Constable Walker. After reviewing all of the available data and information, he instead undertook his own three-dimensional total-station survey of the accident scene, (on which the police survey of the physical evidence was superimposed), and apart from his use of the measurements and speed friction test results documented by Constable Walker, carried out his own largely independent speed analysis, using two different methods.[21]

[36] In Mr McCarthy's view, analysis carried out using his two different methods suggested that Katherine was indeed speeding when she lost control, but at a rate significantly lower than the 112kph speed suggested by Constable Walker.[22]

[37] In particular:

- The first method employed by Mr McCarthy was described as "trajectory analysis". In essence, the method recognizes that the forces applied to decelerate Katherine's vehicle from the commencement of its tire marks to its final resting place were inherently different. (In particular, the vehicle initially was in an out-of-control "slide slip" over the road while making its tire marks, after which it continued its "side slip" over grass, after which it was airborne – during which there effectively would be no deceleration - before it finally, on hitting the ground, began a "tumbling" rollover movement that took it to the place where it came to rest.) The method therefore divides the vehicle's overall trajectory into different and discrete stages, in respect of which a different deceleration calculation method appropriate

[19] Mr McCarthy and Mr Udall later identified this alternate method as "critical speed analysis". It is a type of calculation based on the radius of the curve of a vehicle as it swerves. At the risk of over-simplification, the faster the speed of the vehicle making the resulting curved tire marks, the larger the radius of the curve.

[20] As noted below, Mr McCarthy determined later that it was possible to perform such an analysis, using the available data and evidence.

[21] Mr McCarthy indicated that, at the outset at least, there was nothing inherently preferable about using one method instead of the other, (as each had advantages and disadvantages), and that use of multiple methods to estimate the same desired speed determination, coming at the problem from different directions, actually provided a useful "cross-check" verification of each approach, (i.e., if both methods produce results in the same range). Mr Udall also confirmed that this was a sound methodology.

[22] This was but one aspect of Mr McCarthy's analysis and testimony which, in my view, suggested and reinforced a perception that he approached this matter in an entirely objective way.

to each stage is applied. Working backwards, through the cumulative effect of these successive decelerations, one then can determine or at least estimate the approximate speed of Katherine's vehicle at the commencement of the tire marks.

- Mr McCarthy then detailed the basis of his calculations for each of the above phases of his trajectory analysis. I will not replicate it here but, using the distances covered in each phase, Mr McCarthy generated and explained a table of possible "effective deceleration" ranges for each phase of the distance travelled by Katherine's vehicle during the accident, in turn reflecting ranges in the underlying assumptions for multiple factors such as:

    - a range of maximum tire/road friction of 0.55 to 0.73, (the lower number reflecting a friction value for gravel roads that are not loosely packed, for the reasons outlined below, and the higher number reflecting the average of the friction values generated by Constable Walker's testing);

    - a range of maximum tire/grass friction of 0.35 to 0.45, (a range of friction values taken from texts in the absence of any testing of the surface at the accident scene);

    - a range of "tumble" deceleration factors of 0.4 to 0.6, (a range which brackets the 0.5 tumble deceleration factor typically used in such calculations, according to Mr McCarthy[23], and which, given the 19 meters covered after its impact with the ground, suggested that Katherine's vehicle was still going 44-54kph when it hit the ground and began to roll[24]); and

    - alternative scenarios of no braking, 50% braking and 100% braking[25].

- Combining these component calculations, Mr McCarthy's "trajectory analysis" of Katherine's speed suggested that she was travelling between successive ranges of 68kph to 86kph, (if one assumed no braking), 81kph to 96kph, (if one assumed 50% braking), and 88kph to 103kph, (if one assumed 100% braking). The admittedly wide range of overall possibilities suggested by the analysis, (from 68kph to 103kph), was reflective of the extremely wide variations in the underlying ranges and underlying assumptions.

- Indeed, Mr McCarthy fairly conceded that the wide range of overall possibilities suggested by his first method of speed calculation made it difficult to determine Katherine's pre-accident speed with accuracy.

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[23] Mr McCarthy explained that numerous tests, documented in various studies he has read, have confirmed that a "0.5g" tumble factor appears to be something approaching a constant, regardless of the surface being traversed by the tumble; e.g., whether the surface is grass or asphalt.

[24] As a cross-check of this calculation, Mr McCarthy separately performed an additional calculation, suggesting that the "take off speed" of Katherine's vehicle, when it became airborne, must have been approximately 42-43kph; i.e., a figure that generally conforms with Mr McCarthy's separate "tumble factor" calculation.

[25] Mr McCarthy identified the relevant quantity of braking as one of the most difficult factors to determine with any degree of accuracy, as there was little physical evidence to assist in determining the timing or duration of any braking, or how forcefully Katherine may have applied her brakes, (if at all), during the course of the accident. Mr McCarthy thought an assumption of zero braking would probably be too low, given Katherine's evidence that she repeatedly had attempted to brake, in various ways, and at various unspecified points, throughout the course of the accident. However, Mr McCarthy also felt that an assumption of 100% braking would be too high, given that Katherine almost certainly did not fully apply her brakes the entire time, (as reflected in her own evidence). Generally, the estimate of Katherine's speed would increase correlative to assumptions that she applied her brakes sooner, more often and/or harder.

- The second method employed by Mr McCarthy was described as "critical speed analysis"; (i.e., the alternative method acknowledged by Constable Walker as a means of calculating speed based on the radius of the curve of tire marks, which he nevertheless did not perform). This method presumes that the tire marks were created while the vehicle's lateral acceleration was as high as the road friction would allow, and that the brakes were not applied; i.e., that all available road friction was "used up" in "cornering" the vehicle during transit of its curve. The method involves determination of the radius of the arc created by tire marks, which combined with the friction value of the relevant road surface, permits calculation of probable speed using a standard formula.

- In this case, Mr McCarthy used the tire marks and the vehicle's centre of gravity to determine a radius of 101 meters[26]. Using the lower, average and upper points of the range of the friction values generated by Constable Walker's testing, (0.71, 0.73 and 0.76 respectively), Mr McCarthy then employed the formula to generate corresponding estimates of Katherine's speed, at commencement of the tire marks, as being 95kph, 97kph or 99kph. To address the possibility that the tire marks commenced in an area of loose gravel, (although I find that not to be the case, although the tires then traversed such areas), Mr McCarthy also made a calculation using a much lower friction value of 0.55, (which he felt to be fairly representative of the friction value one might expect in relation to loose gravel rather than a hard-packed surface). However, even use of that much lower friction value in the critical speed analysis formula suggested a speed of 84kph. Combining these results, Mr McCarthy's critical speed analysis resulted in an estimate that Katherine's speed, when she lost control, was somewhere between 84kph and 99kph.

- As between the two methods of approach described above, Mr McCarthy indicated that he would put more emphasis on critical speed analysis, as it tended to provide a speed estimate that was more accurate, and was independent of any necessary assumptions as to the level of braking possibly going on during the course of the accident. According to Mr McCarthy, the possibility of such braking could not be ruled out entirely, especially having regard to Katherine's evidence, (also given during oral discovery examinations and thus relied upon by Mr McCarthy as part of his investigation and assessment), that she had indeed been attempting to apply her brakes at various times and in various ways during the overall course of the accident. However, in an independently made concession, (effectively operating in favour of the plaintiffs and thereby providing further confirmation of objectivity), Mr McCarthy performed additional calculations suggesting that, (at least from the time she began to slip sideways, and assuming she had not already commenced braking), Katherine may not have had much opportunity to notice/perceive that she was out of control, realize that a reaction was necessary, and physically apply her brakes, between commencement of her tire marks and the point at which her vehicle became airborne.[27]

- As noted above, Mr McCarthy's critical speed analysis suggested that, at the commencement of her documented tire marks, Katherine's speed was in excess of 84kph, (the rate suggested if one used the lower friction value for loose gravel), and less than 99kph, (the rate suggested if one used the highest friction value generated by Constable Walker's testing). As for Katherine's probable speed within that range, Mr McCarthy suggested that the mid-point of the range would be a reasonable approximation, having regard to the fact that the types of surfaces traversed by Katherine seemed, (based on his review of the various accident scene photographs), somewhat evenly divided between those with friction values at the higher end, (e.g., the hard-packed areas), and those with friction values at the lower end, (e.g., the

[26] This, in fact, was extremely close to the 100 meter radius determination made by Mr Udall.

[27] Mr McCarthy noted that this distance was approximately 50 feet or 15 meters. If Katherine traversed it at 80kph, it would have taken her no more than three-quarters of a second. If she did so at 90kph, it would have taken her no more than six-tenths of a second.

areas with loose gravel). In his opinion, a reasonable estimate of Katherine's probable speed at the commencement of her tire marks, and therefore at the time she lost control, was approximately 90-91kph.

[38] In terms of speed analysis, the plaintiffs relied upon the expert evidence of their own professional consulting engineer, Mr Udall.

[39] Compared to Mr McCarthy, Mr Udall's formal training, background and experience certainly were not as focused on automotive engineering and accident reconstruction, (e.g., insofar as Mr Udall's earlier focus had been predominantly on matters associated with structural engineering, which still formed approximately 75% of his practice). In my view, however, Mr Udall still had relevant and significant expertise by virtue of his training and professional practice, including years of work and study dealing with accident reconstruction matters, (as it formed the remaining 25% of his activities). He accordingly had special knowledge and experience beyond that of the trier of fact, justifying his proper qualification as an expert witness in matters of accident reconstruction, including speed analysis.

[40] Mr Udall did not perform his own independent accident reconstruction. Rather, he took the data compiled by Constable Walker and Mr McCarthy, and suggested numerous criticisms of their methodology and analysis. He also offered his own opinion as to Katherine's probable speed immediately prior to the accident.

[41] For various reasons, including the following, I did not find those criticisms, or the speed analysis suggested by Mr Udall, to be persuasive or convincing:

- Mr Udall suggested that the 0.73 friction value generated by Constable Walker's testing was inherently suspect, in that it was "unusually high" for a gravel road. In that regard, Mr Udall relied on certain published tables, (different than those cited and relied upon by Constable Walker), indicating that the average friction values normally found on such roads would fall within an average range of 0.4 to 0.77. Mr Udall suggested that a value of 0.6 generally would be expected for such a road. He also said that, even if one used the 0.73 friction value without any reduction, a proper calculation would generate an estimate that Katherine was travelling only 96kph, (and not 112kph), at the point where her tire marks began. However:

    - As noted above, Constable Walker explained why the particular surface he tested for friction values would have been at the higher end of such ranges, (given that it was very hard-packed and generally clear of gravel), and pointed out that the average 0.73 friction value he used still fell within the ranges suggested by standard tables indicating the range of friction values one might expect on such a road. Mr McCarthy's testimony supported that view.

    - In my opinion, it is not reasonable to abandon data generated by testing of actual road surfaces at an accident site, and resort to use of tables suggesting friction values in the abstract, (generated by data relating to other roads in unspecified conditions), merely because the friction value indicated by actual testing falls at the high end of tabulated averages. Such tables contain rates at the higher end of ranges for a reason; i.e., because some particular gravel road surfaces will, in fact, have higher friction values. As noted above, Mr Udall himself acknowledged to some extent, during cross-examination, that use of friction values generated by actual surface testing normally generates more accurate speed assessments than the use of tables. Mr McCarthy similarly emphasized that use of friction values generated by physical testing of an actual road surface generally is preferable to use of generic data obtained from tables in accident reconstruction texts, which usually are used only where accident scene data is not available.

- To state the obvious, a speed of 96kph would still mean that Katherine was travelling well above the speed limit at the point where her tire marks began.

- Mr Udall criticized Constable Walker for not travelling over the potholes when carrying out his speed friction tests, which in Mr Udall's opinion had an impact on the surface friction values encountered and recorded by the testing. I find the suggestion problematic, insofar as it is based on an assumption that may or may not be accurate. In particular, Constable Walker testified that he *did* travel over the potholes, without difficulty. Whether or not he did so during his speed friction tests is not clear, but it is a possibility, given that the potholes in question were located, (like the tire marks of Katherine's vehicle), in the bands of well-travelled and hard-packed areas of the road where Constable Walker was doing his testing. In that regard, Mr Udall himself said in cross-examination that he assumed Constable Walker did his friction testing "by staying on the hard-packed surface".

- More generally, while Mr Udall acknowledged that use of actual surface friction testing would generate more accurate speed assessments than the use of tables, he criticized Constable Walker for applying the same friction value to his entire analysis, notwithstanding the fact that Katherine's vehicle actually traversed multiple surfaces, of different types, as she travelled from the scene of the tire marks to where her vehicle came to rest. Some of the surfaces traversed, (including those with loose gravel or grass), would have had a lower friction value and, when factored into the speed calculation analysis, would have produced a lower speed estimate than the "artificially high" speed estimate of 112kph arrived at by Constable Walker. While I think this point has merit, it was also something Mr McCarthy took into account when making allowances, in the alternative ways described above, for the fact Katherine's vehicle travelled over different surface areas. Given the practical impossibility of carrying out surface friction tests on every particular point along the path travelled by Katherine's vehicle, I think Mr McCarthy's approach was a reasonable compromise.

- Mr Udall criticized Constable Walker for carrying out his speed friction tests using a vehicle with ABS brakes, while making no corresponding allowance or adjustment for that in his calculations. However, for the reasons outlined above, I do not think that is a fair criticism. As explained by Constable Walker and Mr McCarthy, there are reasons for their view that such an allowance or adjustment is unnecessary and inappropriate, in the circumstances of this case.

- Mr Udall also criticized Constable Walker for using a "slide to stop" formula in his calculations, when the tire marks left by Katherine's vehicle were obviously curved in an arc, reflecting the yaw movement that was happening at the time; a movement where the wheels of the vehicle were "still spinning". This meant that the friction created with the surface of the road would have been different than that encountered in a simple forward slide, where the wheels would have been locked, and the surface friction forces would, in Mr Udall's opinion, have been 10-20% greater. Use of the "slide to stop" formula therefore inherently would have generated an artificially high speed estimate. This point has merit, but was acknowledged by Constable Walker himself when he noted that a more accurate speed calculation method, in the circumstances, would have utilized the curvature (radius of path) of the tire marks created by Katherine's vehicle. However, it also seems to me that this is precisely the "critical speed analysis" undertaken by Mr McCarthy, as his second method of approach. Moreover, in cross-examination, Mr Udall agreed that, "based on the limited information available", Katherine definitely was speeding at the time when her vehicle was into a yaw movement and out of control. In particular, he acknowledged that, even if the results of the "slide to stop" calculation are adjusted in the manner he suggested, reducing the friction value by 10-20%, (i.e., to 0.61 or 0.66), to correct for a possible ABS factor and/or adjustments to the "slide to stop" formula, this still would indicate that, at the point where

Katherine's tire marks began, she still was exceeding the speed limit at a rate of 88kph to 91kph. Mr Udall also acknowledged that even those higher rates of speed would have decreased Katherine's ability to regain control if she was called upon to make an unexpected move to the right.

- Although Mr Udall was critical of the trajectory speed analysis effectively conducted by Constable Walker, (e.g., questioning its underlying assumptions of how Katherine's vehicle actually moved during the accident, Constable Walker's "vault" calculations in particular, and the cumulative effect of Constable Walker's alleged errors at each phase of the vehicle's transit), he offered, in my view, no substantial or meaningful criticism of the similar analysis independently carried out by Mr McCarthy, (apart from the same general criticisms, addressed elsewhere in these reasons, concerning the speed friction values employed by Constable Walker and Mr McCarthy).[28]

- Mr Udall and the plaintiffs were critical of Mr McCarthy's critical speed analysis, not only because it employed the friction values indicated by Constable Walker's testing, but also because it employed a friction value for loose gravel not at the lower or lowest end of the table information Mr Udall relied upon in relation to gravel surfaces, (described above). However, for the reasons outlined herein, I consider use of the friction values generated by Constable Walker's testing to be reasonable in the circumstances. Moreover, use of the lowest possible friction value for gravel surfaces does not seem appropriate to me, having regard to the fact that the road generally was thought to be very hard packed, and even the road areas not devoid of gravel were also not completely and uniformly covered with gravel. (The reality is that, moving outside the bands of hard-packed travel lanes, some areas of the road had more gravel than others.) Mr McCarthy's use of the 0.55 friction value therefore does not seem unreasonable to me.

- Mr Udall initially was also critical of the manner in which Mr McCarthy applied the critical speed analysis formula, and suggested that Mr McCarthy somehow had made an error, (e.g., by using the path of the vehicle's centre of gravity instead of the right front tire mark in his calculations). However, Mr McCarthy responded by carefully examining the authorities on which Mr Udall apparently had relied in advancing that criticism, which in Mr McCarthy's view did not justify any departure from the methodology Mr McCarthy had used, which in turn had been "standard practice" within the accident reconstruction industry for decades. During cross-examination, Mr Udall indicated his agreement with Mr McCarthy, and effectively withdrew that particular criticism.

- Mr Udall initially suggested that Mr McCarthy's suggested range of Katherine's probable pre-accident speed was "on the high end", and attributed that to Mr McCarthy's use of the 0.73 friction value suggested by Constable Walker's testing, (which Mr Udall considered inappropriate for the reasons outlined above). However, Mr Udall acknowledged in cross-examination that the actual range ultimately suggested by Mr McCarthy was "more than 84kph but less than 99kph", and that this was indeed "close" to the adjusted figures being suggested by Mr Udall. In particular, it encompassed the speeds of 88kph, 91kph and 96kph alternatively suggested by Mr Udall's proposed adjustments.

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[28] For example, Mr Udall made a somewhat vague suggestion that Mr McCarthy may not have made sufficient allowance for the effect of gravel, while performing his calculation of the frictions encountered during the vehicle's transit over the hard-packed surfaces of the road. However, as noted elsewhere, the need for a significant allowance in that regard seems doubtful, given the evidence, which I accept, that the hard-packed areas of the road were largely *free* of gravel. Although Mr Udall also suggested that Mr McCarthy arbitrarily "picked a value for each zone without suggesting why", Mr McCarthy in fact fairly identified ranges of possible effective deceleration within each phase of the vehicle's transit, and explained the manner in which he has established the boundaries of each range.

- Mr Udall acknowledged in cross-examination that the application of brakes definitely was "a factor to consider in the calculation of speed", but his speed analysis made no allowance whatsoever for the possibility of braking by Katherine during the accident; i.e., no allowance for the increased friction her brakes may have created. That in turn suggests that, if Katherine *did* apply her brakes at all during the accident, she actually was travelling at rates of speed higher than those suggested by Mr Udall. Mr Udall attempted to defend his assumption of "no braking" by suggesting that brake application would have been dangerous and conducive to further loss of control in the circumstances, and by relying on the arc of Katherine's tire marks, (which in turn suggests that Katherine's wheels were not locked in braking but still turning when the marks were made). In my view, this ignores the possibility that Katherine's reaction was not that of an experienced or ideal driver, the possibility that she applied her brakes before or after those particular rounded tire marks were made, and the possibility that she applied her brakes intermittently but briefly at points along the path of the tire marks, but not in a manner to disrupt the overall arc. Moreover, Mr Udall's assumption of no braking also runs counter to Katherine's own evidence that she applied her brakes intermittently and then forcefully at various points during the accident.[29] In contrast, for the reasons noted above, (which I find more persuasive), Mr McCarthy was willing to consider the possibility that little or no braking might be a more likely assumption. In the circumstances, Mr McCarthy's attempt to make some allowance for the possibility of braking in his speed calculations, (in a manner effectively favoring the plaintiff), compared to Mr Udall's reluctance to concede the possibility of any braking at all, reinforced my impression that Mr McCarthy generally was attempting to be more reasonable and objective in his approach.

- Mr Udall indicated that he was relying, in part, on the speed assessments offered by Mr and Mrs Luyks. He considered those statements reliable, based on his belief that we "all have the inherent ability to tell whether someone is speeding". For the reasons outlined herein, I disagree.

[42] In the result, having regard to all of the speed evidence, and taking into account the competing considerations and analysis outlined above, I find that Katherine probably was travelling at approximately 90-91kph at the time she lost control of her vehicle; i.e., at the point where the tire marks indicate that she went into a yaw.

[43] However, accepting her evidence that she took her foot off the accelerator when she encountered the Luyks as they crested the hill, in an effort to facilitate her passing movement to the right, (a measure which accords with my view of what would have been her natural reaction in the circumstances upon being "shocked" by the Luyks' appearance), this means that Katherine was travelling at an even faster rate of speed before she then continued up and over the hill, (after passing the Luyks), and proceeded on towards the point where her tire marks began.

[44] In other words, when heading towards the hill and approaching the point of her unexpected and necessary turn to the right, Katherine was travelling *faster* than 90-91kph, (albeit at a precise rate not capable of being determined by the evidence before me).

[45] In my view, there accordingly is no question that Katherine was simply going far too fast in the circumstances.

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[29] It was suggested to Mr McCarthy, during the course of cross-examination, that Katherine's descriptions of her unsuccessful attempts at braking were tantamount to there having been no braking at all. However, as Mr McCarthy explained, (reasonably in my opinion), Katherine's perception that she "got nothing" from the brakes, in terms of noticeable resumption of control, does not necessarily mean that her actions were not resulting in increased friction with the road surface. In a loss of control situation, drivers often will not have any perception of traction or sensation that their brakes are working.

[46] Katherine not only was exceeding the speed limit, but she also was travelling closer to the centre of an unlit gravel road, at night, approaching a hill that obstructed her view of oncoming traffic, oblivious to the fact that the Luyks were approaching from the other side, when she knew or ought to have been alert to the possibility of their presence had she been keeping a proper lookout.

[47] In the circumstances, Katherine knew or ought to have known that it might be necessary for her to make a sudden turn to the right, off the obvious well-travelled and hard-packed areas of the road, (which were largely clear of loose gravel), and into the areas of more loose and less sturdy gravel clearly visible nearer the side of the road. She should have reduced her speed in any event, but particularly as she was approaching that hill, in order to ensure that she could execute such a passing maneouvre, if it became necessary, in safety. (This was precisely what Mrs Luyks did, coming from the other direction.)

[48] Finally, before temporarily leaving the question of "speed" in the course of my reasons, I note, if only to discount and reject, the suggestion made by Mr Udall and argued by the plaintiffs that the reasonableness of Katherine's speed somehow should be assessed not by the applicable speed limit or the particular circumstances and conditions prevailing immediately prior to the accident, but by the "design speed" of Thomson Line Road. In that regard, Mr Udall testified that Ontario road design, by engineers employed with the Ministry of Transportation, always "builds in a safety factor of 15kph higher than the expected speed".

[49] In my view, even if roads generally are designed with a view to facilitating safe travel at speeds up to 10 to 15kph above the posted speed limit, this does not necessarily make travelling at those higher speeds a reasonable or safe thing to do. To the contrary, experience shows that, depending on applicable conditions, (e.g., depending on such factors as lighting, weather, surface conditions and other traffic), travelling even at the posted speed limit may very well be ill-advised, unreasonable and/or dangerous.

[50] In this case, having regard to the prevailing circumstances, I think Katherine should not even have been travelling at the road's 80kph speed limit as she approached the hill in question, let alone at a rate approaching the road's suggested "design speed" of 95kph.

STATE OF REPAIR

[51] Reference already has been made to the basic statutory provisions, in ss.44(1) and 44(2) of the *Municipal Act, 2001, supra*, confirming the municipality's duty to keep Thompson Road in a "state of repair" that is "reasonable in the circumstances".

[52] Not surprisingly, these concepts have been the subject of considerable judicial consideration and elaboration over the years. Additional principles and observations guiding interpretation and application of the legislative provisions include the following:

- In relation to road maintenance, municipalities are not insurers of the safety of the travelling public, and their obligation is not absolute.[30] The standard of care required of a municipality, to fulfill its duty under s.44(1) of the *Municipal Act*, is to keep a road only "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it in safety".[31]

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[30] See *McCready v. Brant (County)*, [1939] S.C.R. 278, at p.282; and *Deering v. Scugog*, *supra*, at first instance, at paragraph 101.

[31] See *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask.C.A.), quoted repeatedly with approval in numerous cases, including the following: *Housen v. Nikolaisan*, *supra*, at paragraph 38; *Johnston v. Milton (Town)*, *supra*, (C.A.), at paragraph 35; and *Morsi v. Fermar Paving Ltd.*, [2011] O.J. No. 3960 (C.A.), at paragraphs 18-19.

- Municipalities must provide for ordinary drivers who exercise ordinary care. This includes those of average driving ability, and not simply model drivers who are perfect or prescient, especially perceptive, or gifted with exceptionally fast reflexes. It includes, rather, the ordinary driver who is of average intelligence, pays attention, and uses caution when conditions warrant, but is human and sometimes makes mistakes.[32] Care nevertheless must be taken not to press the allowance for ordinary drivers making mistakes too far, so as to negate the principle that municipalities are not insurers.[33] The "ordinary driver", exercising ordinary care, does *not* include those who do not pay attention, drive at excessive speeds, or who are otherwise negligent.[34] The "ordinary driver" is expected to adjust his or her behavior according to the nature of the roadway and driving conditions, and such adjustments may include driving *below* the speed limit.[35] Moreover, the "ordinary driver" is one with the skill and care expected of a reasonable driver, "from the general driving pool", at the time and place in question, and not some more limited pool of drivers having limited experience or qualifications comparable to a specific plaintiff.[36]

- In relation to such matters, each case is significantly dependent on its own facts. In assessing what is "reasonable in the circumstances", it is important to keep in mind the particular characteristics of the road in question. There cannot be a universal standard of care for all roads within a municipality. To the contrary, the applicable standards of care will be relative, different and diverse; what is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances.[37] Regard must be had to such matters as the locality in which the road is situated, (e.g., whether in a city, town, village, or township), the situation and character/composition of the road therein, the road's history, whether its use is required by many or by few, the number of roads to be kept in repair by the municipality, the means at the municipality's disposal for that purpose, and the requirements of the public.[38]

- Because the standard of care is relative and depends on the surrounding conditions and nature of the roadway, including traffic volume, "a rural unpaved road with low volume traffic will not be assessed in the same fashion as a paved roadway in a densely populated area".[39] Rural roads, by their nature, are susceptible to the development of adverse conditions, to which drivers must adjust, and the condition of repair for a rural road accordingly does not normally impose a high standard on a municipality.[40] To the

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[32] See *Deering v. Scugog*, *supra*, at first instance, at paragraph 154.

[33] See *MacMaster v. York,* [1997] O.J. No. 3928 (Gen.Div.), at paragraph 99, affirmed, [2000] O.J. No. 1404 (C.A.); and *Docherty v. Lauzon, supra*, at paragraph 202.

[34] *Deering v. Scugog*, *supra*, at first instance, at paragraph 155.

[35] See *Ferguson v. Brant (County)*, [2013] O.J. No. 238 (S.C.J.), at paragraph 17; and *Deering v. Scugog*, *supra*, at first instance, at paragraph 262.

[36] *Adams v. Cargill*, [2000] O.J. No. 5595 (S.C.J.), at paragraph 24.

[37] See *Housen v. Nikolaisan*, *supra*, at paragraph 38; and *Tourand v. Meadow Lake (Rural Municipality No. 588)*, [2000] S.J. No. 100 (Q.B.), at paragraph 71.

[38] See *Foley v. East Flamborough (Township)*, [1898] O.J. No. 76 (Div.Ct.), at paragraphs 8-9, reversed on other grounds (1899), 26 O.A.R. 43 (C.A.); *Mighton v. Wellington*, [1953] O.R. 290 (H.C.J.), at paragraph 15; and *Docherty v. Lauzon*, *supra*, at paragraph 201.

[39] See *MacMaster v. York, supra*, at first instance, at paragraph 58; and *Ferguson v. Brant (County)*, *supra*, at paragraph 14.

[40] See *Docherty v. Lauzon, supra*, at paragraph 206, and *Ferguson v. Brant (County)*, *supra*, at paragraph 15.

contrary, rough and uneven roads are a reality of life in rural communities.[41] Rough conditions that might normally be expected and found elsewhere in a rural municipality with extensive roads, most of which are gravel, do not present an unreasonable risk of harm.[42]

- Past cases certainly have held that the duty requires a municipality to take remedial steps when it knows or ought to know of a "highly special" and "highly dangerous" situation at a certain location on the highway that "creates a risk of serious and imminent harm to motorists"; a situation without which the highway would be quite passable and usable for traffic to persons reasonably using it.[43] However, it should be remembered that the general negligence standard applies. A municipality's duty of repair arises not just in a "highly special dangerous situation at a certain location in the highway" but in any situation where road conditions create an unreasonable risk of harm to users of the highway. The former is simply a subset of the latter.[44]

[53] As for the actual "state of repair" of the relevant road in this case, I already have outlined, in the "Background and Context" section of my judgment, a number of my factual findings concerning such matters as the general nature, character and configuration of Thomson Line Road, as well as its relative use and the community and environment in which it is located.

[54] Before returning to my "state of repair" analysis and findings in more detail, I think it helpful to make reference to a substantial amount of evidence that I received and considered, but which I also did *not* find very relevant or helpful.

[55] For example, I heard a great deal of evidence in support of the claim that the condition of Thomson Line Road was in a poor state of repair in numerous ways and at various other times, before and after the time of the accident, and at locations sometimes including but often extending well beyond the precise area where Katherine lost control of her vehicle. For example:

- Katherine's father testified that the road had been full of potholes for "quite a while", and for at least six months before the accident. Indeed, he went further, saying that he had noticed there were "always" potholes in that area for approximately ten years prior to the accident, ("not just sometimes"), and that he had been complaining about them to various representatives of the Municipality, (e.g., Ken Loveland and Kevin Englehart), at least three to four times a year, for at least two years. He said the potholes "seemed to get worse" all the time.

- Katherine's mother similarly indicated that, in the six months prior to the accident, "the potholes never got better, just worse". However, she too went further, saying she had complained to municipal representatives about the number of potholes deterring people from taking a "2003 Christmas Tour" of the area, (to view decorated homes).

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[41] See *Tourand v. Meadow Lake (Rural Municipality No. 588), supra*, at paragraph 92.

[42] See *Martin v. St Andrews (Rural Municipality)*, [1997] M.J. No. 603 (Q.B.), at paragraphs 13 and 19.

[43] See *McAlpine v. Mahovolich* (1979), 9 C.C.L.T. 241 (Ont.C.A.), at p.247; *Montani v. Matthews* (1996), 29 O.R. (3d) 257 (C.A.), at p.270; *Bisoukis v. Brampton (City)* (1999), 46 O.R.(3d) 417 (C.A.), at paragraphs 77-78; and *MacMillan v. Ontario (Minister of Transportation & Communications)*, [2001] O.J. No. 1891 (C.A.), at paragraphs 31 and 4, leave to appeal dismissed [2001] S.C.C.A. No. 348.

[44] *Frank v. Central Elgin (Municipality)*, [2010] O.J. No. 3736 (C.A.), at paragraph 10.

- Barb Cowan, (Katherine's aunt), said she visited the McLeods approximately two to three times each month in the year before the accident, travelling over the accident scene, and always found that the "road was rough".

- Robert Bobier testified that he was aware of other accidents having taken place in the area, that he personally had experienced near accidents on at least three occasions owing to the road's poor condition, and that there had been "major wash outs" on the road in the two to three years before Katherine's accident, (including one alleged to have flooded a 60 foot section of the road with six inches of water). He claimed to have made more than 10 complaints about the condition of the road, "mainly" about potholes, to representatives of the Municipality, (including Ken Loveland and Bonnie Vowel). He felt that the "sand and clay" surface of Thomson Line Road and poor grading made it "very dangerous when wet". He had gone so far as to take "samples" of wet sand or dirt from the road, (taken from the sides of his vehicle according to Mr Bobier, and described as "a bag of mud" by Ms Vowel and Mr Hull), into the office of the Municipality. He says he also repeatedly had invited the then mayor, (Bonnie Vowel), to travel the road with him to see the road's condition.[45]

- Wayne McPhail, (who lives on Thomson Line Road in a house in almost immediate proximity to the scene of Katherine's accident), testified that there were "always" potholes "on the hill" and elsewhere on the road, and said that he too had made complaints about them to representatives of the Municipality without any significant or timely corrective action being taken in response. He described numerous earlier accidents and, (in a manner I found to be argumentative), attributed them all to the presence of potholes; e.g., rhetorically asking defence counsel "What else *would* it be?" However, Mr McPhail also confirmed that at least two of the other incidents had happened many years before Katherine's accident, that one had happened almost a kilometer down the road, and that most had occurred at other times of the year, (including a number in the fall and several in December, when weather conditions likely would have been different than in September). Moreover, Mr McPhail indicated that at least one of the previous accidents involved a driver not going the speed limit, and he acknowledged, in cross-examination, that speed and driver inattention may well have played a role in the other accidents as well.

- Steven Prentice, another resident of Thomson Line Road who regularly went past the area where the accident took place, and someone with heightened familiarity with road surface material, (as he has operated an excavating and gravel trucking business for approximately 27 years), testified that the condition of the road was "always bad" in that location, and on the day of Katherine's accident, because of "soft spots" and holes. He says he made telephone complaints to the Municipality's road superintendent each year, (on a regular basis throughout the year, in calls he described as "too frequent to number"), suggesting that the Municipality "tar and chip" the road, or employ a different type of sand and gravel mixture that would not wear away as quickly after the Municipality's repeated grading efforts.

- Bonnie Vowel acknowledged that, during her tenure as mayor from 2003 to 2010, generalized complaints from citizens about Thomson Line Road, suggesting that its condition was "not great" and commenting repeatedly about water ponding and potholes, were a common occurrence. In addition to casual and non-specific remarks made to her by various people in public places, she also recalled

[45] To the extent it matters, I accept Ms Vowel's later testimony and explanation that she refused such invitations because she was concerned about Mr Bobier's possibly reckless driving, and generally considered the suggestion of her driving alone with a man on a country road to be inappropriate. I do not accept Mr Bobier's allegation that Ms Vowel expressly professed a reluctance to travel with him on Thomson Line Road because the road itself was dangerous to the point of making her "fear for her life".

complaints from Mr Bobier and Mr McPhail, (as described above), and a delegation of citizens from Thomson Line Road who were permitted to speak to Council about the condition of the road during a Council meeting in 2008.

[56] In my view, such evidence is neither appropriate nor necessary in making the "state of repair" determination required in this case.[46]

[57] It is not appropriate because, as noted above, liability pursuant to s.44(2) of the *Municipal Act* attaches only to a *specific* identified default, and in my view, that inherently and necessarily must be a default that exists at the time and place of the accident underlying the claim. The Municipality should not effectively be held liable for a default or poor road condition at some earlier or later time, or at some other particular location, (albeit perhaps on the same road), that has no direct and demonstrated connection with the particular accident giving rise to a claim.[47]

[58] Such evidence is not necessary in this case because the situation before me is one involving ample direct evidence clearly indicating the precise state of repair of the relevant road, at the relevant location, at the time of the accident. Put another way, this is *not* a case where the parties and the court are obliged to rely on indirect evidence as to the road's state of repair at other times, before or after the accident, and/or in nearby locations, in an effort to extrapolate, perhaps inaccurately, the state of repair that may have confronted a particular claimant at the relevant particular time and particular place of his or her underlying accident.

[59] In that regard, I think such extrapolations are inherently problematic and unreliable in a situation like this, in any event, where the nature and condition of the relevant road is not largely static, (as in the case of a paved road), but constantly changing over time.

[60] The reality is that dirt and gravel roads such as Thomson Line Road are dynamic.

[61] They are built up, shaped, crowned, smoothed, levelled and/or sloped periodically by forces such as the application of gravel and grading, before they are then progressively reshaped, hard-packed, displaced, worn down and eroded by other forces such as the transit of vehicles and operation of the elements. The process then begins again.[48]

[62] In such circumstances, it is unwise and unfair to assume that a particular state of repair existing on a dirt and gravel road before or after a particular accident, and/or at a location possibly nearby but different to that of

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[46] As noted below, it may have some relevance to determinations pursuant to s.44(3)(a) of the *Municipal Act, 2001, supra*; e.g., insofar as past incidents and complaints arguably may have put the Municipality on a heightened state of alert, in terms of looking for similar problems or defaults thereafter. That, in turn, may have an impact on a determination as to whether the Municipality knew or reasonably could have known about a particular state of repair existing at the time of the relevant accident. However, that is a discrete and separate question, and one that arises only after a claimant has satisfied his or her onus of establishing a state or condition of disrepair or non-repair that is not reasonable in the circumstances.

[47] To take an obvious example, Mr Bobier's testimony that Thomson Line Road was "very dangerous when wet" hardly seems relevant when the weather and road at the time of Katherine's accident were entirely dry.

[48] The dynamic and changing nature of Thomson Line Road was confirmed directly and indirectly by many witnesses. These included not only Mr Hull and Mr Englehart, who described and explained the process of grading and subsequent road changes in significant detail, but other witnesses such as Katherine's parents, (who claimed the potholes grew progressively worse prior to the accident, despite grading efforts that made them disappear for short periods of time), Mrs Luyks, (who thought potholes may have been somewhat worse at the time of Katherine's accident than they were at the time of trial), and Mr McPhail, (who described the extent of potholes changing at various points in time in response to grading, the application of sand, rain, and the use of different types of gravel).

the particular accident, was the same or similar in all material respects. Where such extrapolations and inferences based on indirect evidence are unnecessary, (because direct evidence is available to put the state of repair at the time of the accident beyond doubt), they should be avoided.

[63] I therefore attach little or no weight to such indirect evidence, at least for the purpose of making my "state of repair" determination pursuant to ss.44(1) and 44(2) of the *Municipal Act, 2001, supra*.

[64] I also heard a considerable amount of evidence and argument relating to the alleged cause of potholes along Thomson Line Road, including potholes occurring in the area where Katherine lost control of her vehicle. For example:

- Katherine's father opined that Thomson Line Road is too flat, (with no crown in the middle), and the grass verge too high on the road's southern side, (compared to the one on the north), to permit drainage of water in wet weather. This, he says, rendered that side of the road "slushy and muddy" and/or liable to "ponding" and standing water up to half an inch deep during heavy rains, all of which "kept making potholes" on that side. He also thought there was inadequate gravel present in that section of the road to fill and eliminate the potholes whenever the Municipality graded it. According to him, such grading efforts would improve the situation only for a "couple of hours", after which potholes would "show up again".

- Robert Bobier voiced similar concerns about drainage on Thomson Line Road, saying that the road generally was too flat. According to him, water on the road accordingly "can't drain", leading to "more potholes all the time".

- Wayne McPhail said much the same thing, claiming that there was "always a problem with drainage" during the entire year. He said this was caused by having "shoulders higher than the road", which resulted in a "lot of the road being covered by water after rain".

- Bonnie Vowel indicated her belief, (at the time of the aforesaid Council meeting in 2008, attended by a delegation of residents from Thomson Line Road), that the road generally was one, at least at that time, in need of further "ditching and berming", in order to improve drainage, and thought her view at the time might have been formed after discussions with road department staff.

- Mr Hull acknowledged, in cross-examination, that standing water on a gravel road could be a reason for such a road's failure, which in turn underscored the needing for grading and having a crown in the middle of the road. He also confirmed that, at the time of the accident, Thomson Line Road lacked a ditch along its southern edge, and that such ditches help to increase road drainage.

- As noted above, Steven Prentice gave testimony suggesting that the potholes were caused, at least in part, by the particular sand and gravel mixture being used by the Municipality. In particular, he felt that mixture employed too much sand, and that the stone component included too many small and rounded stones, all of which rendered the mixture inherently less stable. He also suggested that the materials chosen by the Municipality were less expensive than those that should and could have been used, and intimated that such cost-conscious decisions resulted in the inappropriate use of a lower quality surface material that often would wear away quickly, (perhaps "within days"), after the Municipality's grading efforts.

[65] There may very well have been problems with water at various points along Thomson Line Road, at various points in time, before and after Katherine's accident. However:

- The suggestion that the particular potholes in question were caused by surface water drainage issues seems inherently problematic and suspect, in my view, having regard to the potholes' obvious location on the slope of a hill. This was confirmed not only by the photographs, but also by Mr Hull, (who said the potholes were located "on a knoll" that was "always in a high spot" compared to its surroundings), and even by Mr Bobier, (who said he actually didn't know of any issue with drainage "there on the hill"). Mr McCarthy's testimony confirmed the common-sense proposition that the crest of a hill is not a place where one would expect to find a pond of water.

- As emphasized by Mr Hull, drainage issues and the measures put in place to control them are not static either, which underscores the need to avoid sweeping generalizations about a road's drainage conditions without focusing on a specific location at a specific point in time. In particular, the reality is that, over time, gravel naturally will migrate to the edges of such a road, (e.g., given the passage of traffic, and because the road is graded to a higher crest in the middle with cross-slopes to its sides). This may lead to increased elevations at the side of the road, with corresponding potential implications for drainage of surface water. Mr Hull explained how grading effectively is one of the measures used to control such build-ups, as the process effectively pulls gravel back from the shoulders onto the rest of the roadway. Despite grading, noticeable elevations or "berms" nevertheless may still form where the gravel meets the growing grass at the sides of the road, and the Municipality periodically therefore "needs to go along to remove them, to help let water off at the edge of the road". Specifically, this needs to be done only "every few years". In that regard, Mr Hull, supported by a "Road Report" to Council dated September 25, 2002, confirmed that such measures were in fact taken along Thomson Line Road less than two years before Katherine's accident.[49] The fact that the road may have needed berming again in 2008 accordingly does not necessarily mean that it was in need of berming in September of 2004, at the time of Katherine's accident.

- Mr Hull emphasized that it generally "would take a *lot* of rain" for any ponding to result in potholes during the summer months, as the Municipality's gravel roads usually were "*very* hard in summer". However, as noted by Mr Englehart, the summer of 2004, leading up to Katherine's accident had been noticeably dry.

[66] In such circumstances, I think it very unlikely that significant accumulations of surface water would have descended from the skies and/or remained on the slope of the relevant hill to undermine and undo the benefits of the Municipality's monthly grading efforts in the months immediately prior to Katherine's accident.

[67] The views and beliefs expressed by Mr Prentice were also problematic and, in my view, substantially if not completely undermined by the testimony of Mr Hull and Mr Englehart, whose evidence of the precise surface material used by the Municipality in 2003 and 2004 was based on direct knowledge of specifics, rather than speculation, in my opinion was therefore more persuasive and preferable. In particular:

- Mr Hull and Mr Englehart were actively involved in the pricing and purchase of gravel used by the Municipality on Thomson Line Road in the period leading up to Katherine's accident. Mr Englehart confirmed that it was "Granular A" quality, with ¾ to 5/8 inch stones that generally had to be fractured

[49] The report reads, in part, as follows: "Road Report – September 25, 2002. In the past month the road dept has … Removed berm and lowered the banks along the right-of-way of Thomson Line to reduce water ponding at the edge of the road and lower the height of snow buildup in the winter. The material removed from these areas was used around the Fairview Cemetery."

on three sides, (and therefore not rounded), purchased from a gravel supplier known as "AAROC".[50] Mr Hull and contemporaneous invoices from AAROC, filed as exhibits by the Municipality, confirm that the Municipality purchased, throughout 2004, substantial quantities of such "A-Gravel". Mr Hull also testified that the product complied with applicable provincial standards, and never gave rise to any concerns about quality.

- Mr Prentice acknowledged in cross-examination that he was familiar with the supplier in question, and that its "Granular A" product would have been within accepted specifications and standards for a road like Thomson Line Road.

- Mr Hull and Mr Englehart both explained that, (contrary to the assertion of Mr Prentice), using gravel mixtures with smaller stones actually would have been not less but *more* expensive, as it costs more to cut stone to a smaller size. In any case, Mr Hull and Mr Englehart both emphasized that the Municipality did not simply base its road maintenance purchases on the "cheapest tender".

[68] The reason or reasons advanced by the plaintiffs for creation of these particular potholes are therefore not convincing.

[69] Even if true, however, it seems to me that such evidence and/or speculation as to why Thomson Line Road may or may not be prone to potholing actually has limited relevance, insofar as the "state of repair" inquiry is concerned.

[70] In particular, while it might have a bearing on whether a dangerous condition at the time of the accident was "reasonable in the circumstances", and/or on a determination pursuant to s.44(3)(b) of the *Municipal Act* as to the reasonable prevention steps the Municipality could or should have taken to prevent a default (if there was one) from arising, it seems to me that such evidence cannot transform a non-dangerous condition *at the time of the accident* into a dangerous one.

[71] Thus, if the potholes that *actually* existed at the precise time of Katherine's accident are clearly documented, (in terms of number, location and dimensions), and are of a character that presented no unusual situation of danger or risk in the circumstances to an ordinary motorist exercising ordinary care, the plaintiffs will have established no relevant state of disrepair or specific default even if drainage conditions on Thomson Line Road may have been conducive to the creation over time of more numerous, larger or deeper potholes, (in other words, potholes *different* than those actually present at the time of the accident).

[72] As a final example of "state of repair" evidence that I found to be unhelpful, I mention, if only to discount for a number of reasons, evidence and suggestions from Mr McPhail that the Municipality somehow was acknowledging or admitting by its grading activities, (and especially those allegedly done in the immediate wake of various accidents, including the one involving Katherine), that Thomson Line Road was in a state of disrepair.

[73] The evidence and allegations of Mr McPhail in that regard were vague in detail, and unsupported by anything other than his testimony and speculation, (which I found to be argumentative, as noted above). They also were at odds with the testimony of Mr Hull and Mr Englehart, (who denied that any extraordinary remedial action was thought necessary or taken by the Municipality in the wake of Katherine's accident, and who also

[50] Mr Hull conceded that some smaller rounded stones might make their way into the mixture used by the Municipality and therefore onto the Municipality's roads, but strongly disagreed with the suggestion of Mr Prentice that one would be hard-pressed to find anything *other than* rounded stone on the surface of Thomson Line Road.

indicated that the Municipality was not even aware of the other accidents alleged by Mr McPhail). Mr McPhail's suggestion that grading took place within 1-2 days after Katherine's accident is also at odds with the contemporaneous grading records of the Municipality[51], as well as the photographs taken by Mr Englehart on September 20, 2004[52]. In the result, I find no satisfactory evidence to substantiate Mr McPhail's allegations, and found his testimony alone to be unpersuasive.

[74] More generally, I agree with the sentiments expressed in *McMahon v. Harvey Township* (1991), 2 C.P.C. (3d) 154 at pp. 155-156, and *MacMaster v. York*, *supra*, (at first instance), at paragraphs 37-38, that courts should not be unduly influenced by measures taken by a municipality to change or improve a road, after an accident, as they are by no means necessarily indicative of any admission that there was something wrong with the road before such measures were undertaken. In fulfilling their obligation to maintain highways, municipalities are obliged to respond to continually changing conditions that are affected by many factors, and they should not be deterred from discharging their mandate owing to fear they might be "crucified in a lawsuit".

[75] Similar comments apply, in my view, to:

- evidence from Mr McPhail, Mr Prentice and others that the quality of Thomson Line Road has been improved in more recent years (and long after the accident) through the application of additional and/or different types of gravel; and

- evidence that the Municipality decided, in 2008, to devote a considerable portion of recently received federal infrastructure grant funding to "reconstruction" of Thompson Line Road, (as one of four of the Municipality's streets or roads selected for improvement that year)[53].

[76] Leaving aside the evidence outlined above, for the reasons indicated, I now return to the "state of repair" of Thomson Line Road, at the time of the accident and at the place where the accident occurred, in order to determine whether there was any relevant condition of disrepair that was unreasonable in the circumstances.

[77] Again, liability attaches only to a specific default, and in this case, the plaintiffs suggested only two problematic conditions, (as distinguished from the suggested explanations *for* those conditions), facing motorists such as Katherine at the time of the accident, at the place where it occurred.

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[51] Mr Hull and Mr Englehart expressly confirmed that grading of Thomson Line Road in 2004 was limited to that described in the record prepared by Mr Englehart, dated November 29, 2004. The report is considered in more detail below, but indicates routine grading approximately three weeks before Katherine's accident and nine days afterwards, with no grading in the interim. Mr Hull also testified that there was no additional or "custom" grading of the road area in question between the accident and September 29, 2004.

[52] At the time the photographs were taken, the road, at the scene of the accident, clearly still had its bands of dirt and gravel that had become hard-packed over time. For the reasons outlined below, (in the context of considering whether or not the Municipality took reasonable steps to prevent a default in the road's state of repair from arising), this would not have been the case if grading recently had taken place so as to return the entire surface of the road to a more loose condition. Despite his insistence that grading of the accident scene took place shortly after Katherine's accident, I think Mr McPhail is simply mistaken about the date on which subsequent grading took place.

[53] Ms Vowel indicated that, of the $164,000 in federal grant funding allocated to improvements of Thomson Line Road, a good deal of money went towards paving portions at the road's western end, (not near the site of the accident), where traffic volumes were relatively higher; e.g., owing to the presence of a golf course. However, Ms Vowel believed approximately $100,000 was then spent on ditching and berming along Thomson Line Road to improve its drainage.

[78] One was a suggestion by the plaintiffs, advanced during argument, that the surface areas of the road close to each side or edge of the road were in a poor state of repair, insofar as they had comparatively more loose gravel than one would find in the hard-packed areas, and were therefore "less sturdy".[54]

[79] In my view, however, such conditions are entirely typical of such roads, and something which ordinary drivers undoubtedly would expect and reasonably anticipate without requiring any enhanced notice or visual cues.

[80] To state the obvious, one should expect to find gravel on gravel roads.

[81] The presence of comparatively more loose gravel towards the sides of the road is also something clearly visible in the photographs taken immediately after the accident, and a road condition that would have been obvious to any driver of the road looking at the oncoming road, (whether in daylight or using headlights at night).

[82] Nor should it be surprising to find less "hard-packed" dirt and gravel in areas of the road that normally are less travelled, and correspondingly less compressed over time. In that regard, even without the sort of noticeable bands of hard-packed dirt and gravel that clearly were present and visible on Thomson Line Road, (and in my opinion not atypical of such roads), most would be readily familiar with the reality that prudent drivers normally are not inclined to drive unnecessarily close to the edge of roads.

[83] As noted below, (in the context of addressing whether or not the Municipality took reasonable maintenance steps to prevent any default from arising), Mr Hull also explained how and why gravel naturally and normally migrates over time to the sides of such crested gravel roads, and onto the areas already less sturdy than those that have become hard-packed.

[84] For these reasons, I accept Mr Hull's observation, confirmed by ordinary experience, that "gravel roads typically have loose stone at their edges", and that this does not represent some form of atypical or unexpected hazard.

[85] In particular, at the time of the accident, the presence of loose gravel and therefore less sturdy surfaces towards the side of Thomson Line Road accordingly is not something I would regard as unusual, dangerous, or unreasonable in the circumstances, or a situation that would pose an unreasonable risk of harm to a driver exercising ordinary care for his or her own safety[55]. It accordingly was not a "default" in the road's "state of repair", for purposes of s.44(1) and 44(2) of the *Municipal Act, 2001, supra*.

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[54] The plaintiffs' attempt to characterize this as a default, for the purposes of ss.44(1) and 44(2) of the *Municipal Act, 2001, supra*, seemed to be something of an afterthought, advanced at the end of trial as a "fall back" alternative if the plaintiffs were unsuccessful in their original and primary goal if having potholes in the area characterized as a "default" in the sense required. The alternative was not mentioned in the plaintiffs' opening, (which focused on potholes as the suggested default). Nor was it raised or addressed as a suggested relevant default, in the road's state of repair, in any of the multiple reports prepared by the plaintiffs' expert Mr Udall in advance of trial. It also was not consistent with the evidence of Katherine, (the first witness at trial), who testified, as described below, that she remained entirely in control of her vehicle as she made her way through the loose gravel in question, and subsequently lost control only when she hit the potholes, *because* of the potholes. Loose and less sturdy gravel at the sides of the road seemed to develop into an alternate plaintiff "default" theory only after it was mentioned in by Ms Luyks, in her testimony, as a reason why she thought it prudent to reduce her speed on approaching the hill, in anticipation of meeting and having to pass Katherine's vehicle at some point. Potholes were by far the primary default in repair suggested by the plaintiffs, and by far the primary focus of the trial as far as "state of repair" was concerned.

[55] I note that, in support of their argument that the loose gravel at the side of Thomson Line Road constituted a hazard, the plaintiffs also relied on Constable Walker's indication that, in order to avoid placing himself at risk, he did not want to use that particular

[86] The other problematic road condition suggested by the plaintiffs, (and the one on which they primarily relied to suggest that Thomson Line Road was in a state of disrepair at the time of the accident), focused on potholes.

[87] I heard varied and sometimes vague estimates as to the number of potholes present at the scene of the accident, in the area where Katherine lost control of her vehicle.

[88] For example, Katherine's father said the area was "*full* of potholes". Her mother emphasized there were "a *lot* of potholes", and suggested the road was "so full of potholes" that people were reluctant to drive on it. Barb Cowan said there were simply "*too many* to measure".

[89] Having carefully reviewed the many photographs filed in evidence, (depicting the surface of the relevant area of road, and taken immediately after the accident, from various angles and in various lights), I nevertheless am of the opinion that, at least at the time of the accident, such descriptions exaggerate the number of depressions or hollows in the surface of that area of the road that might reasonably be described as "potholes" of any significance.

[90] As one might reasonably expect with a road of this nature, the precise level of its surface did not have the uniformity of a billiard table, nor that of a newly paved road. Mr Hull and Mr Englehart both testified, and I accept, that the progressive formation of indentations and potholes is something that inevitably occurs on every road of this type, owing to forces of nature and driver activity.

[91] The photographs accordingly show numerous marks and/or very minor indentations in various places. These included an alignment of very slight rounded depressions, located approximately one third of the distance across the road from its southern edge, which might, in the future, with the passage of time and further wear or subsidence, have developed into what most would regard as true "potholes".

[92] However, in my view, at the time of the accident, in the area near to where Katherine lost control of her vehicle, the number of noticeable and roughly circular depressions, with areas of elevation appreciably below that of the average road surface level, to any extent that might reasonably have any significance to this matter, was limited to approximately eight potholes.[56] Having studied the photographs taken of the potholes in question immediately after the accident, I also agree with the assessment of Mr Hull that the potholes in

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section of the road during his tests to determine an appropriate friction co-efficient for use in his speed analysis. However, I consider reliance on that evidence to be inappropriate and unhelpful, in assessing whether the loose or less sturdy gravel at the side of the road posed an unreasonable state of disrepair, in the sense required. Constable Walker was indicating his reluctance to travel at substantial speed through loose gravel knowing that he deliberately and repeatedly would be applying his vehicle's brakes in a forceful manner, with a view to sliding to a stop during each successive friction value test. In my view, an ordinary driver, even of average abilities, exercising ordinary care for his or her safety, clearly would not be inclined to do that either. In my opinion, the proper and more relevant question is whether that area at the edge of the road created any unreasonable risk for such a driver, paying appropriate attention, and travelling at an appropriate speed having regard to prevailing conditions, who nevertheless may have found it necessary to move temporarily into that area while moving over to pass an oncoming vehicle. I do not think that it did.

[56] I base that count primarily on my independent review of the photographs. However, I note that it accords with the testimony of Katherine's neighbour Robert Bobier, who carefully examined that area of the road the day after the accident, and described seeing "a succession of eight potholes, maybe". Katherine's father also provided a similar estimate, when expressing his opinion that there were "8 to 10" potholes that Katherine would have travelled over prior to the accident. However, to the extent he was suggesting there also were additional significant potholes in the relevant area, beyond that numerical estimate, I find that simply was not the case.

question did not have “sharp” edges, and did not constitute sudden drops in elevation. They were, rather, fairly shallow “dish-type” depressions, with rounded edges and sloping sides leading down to their deepest point.

[93] The potholes in question were not scattered randomly. To the contrary, they were all contained within the band of hard-packed dirt and gravel closest to the south side of the road, and were positioned, at intervals with spaces in-between, in a row running parallel with the alignment of the road. The row began just to the east of the nearby hill crest, and ran in an easterly direction from there.

[94] The plaintiffs’ expert, Mr Udall, repeatedly indicated and explained that the location and alignment of the potholes was not a situation that occurred at random. It was, rather, something produced by the operation of average suspension systems as vehicles regularly came over the hill, traversing the same area, with their wheels landing, bouncing and landing, at regular intervals, in response to elevations and bumps that became progressively larger as the potholes began to form over time.

[95] Depth of the potholes also was exaggerated to some extent, at least initially, by a number of plaintiff witnesses.

[96] In particular, both Katherine’s father and her aunt Barb Cowan initially testified that the potholes had a depth of “two to three inches”. However, when confronted with photographs taken of the measurements made the day after the accident, with the assistance of levels and tape measures, (used to produce a record of pothole depth), each witness separately acknowledged that there were in fact no recorded pothole depths exceeding two inches.

[97] In their remarkable efforts to be as supportive as possible the day after the accident, while carefully examining the scene, I think Katherine’s family and friends almost certainly would have looked for and documented the deepest potholes they could find, insofar as that inherently and obviously would lend the most support to later arguments that the condition of the potholes, (rather than Katherine), was responsible for what had happened. Indeed, Katherine’s father eventually acknowledged in cross-examination that only the “deepest” potholes were measured, (with corresponding photographs taken), and Ms Cowan admitted they “would have tried for the deeper ones”.

[98] For similar reasons, and as suggested by a number of the photographs, I believe the depth of such potholes also probably would have been measured at their deepest point; i.e., the nadir of each dish-shaped depression.

[99] In the circumstances, I find that none of the eight potholes in question had a maximum depth exceeding 2 inches. Moreover, the remaining areas of each pothole, (e.g., on the slopes leading down from each pothole’s edge to that maximum depth), inherently would have been more shallow.

[100] The diameter of the eight potholes varied from approximately six inches to no more than 12 inches. (That was the evidence of Katherine’s father, and those estimates seem reasonably supported by the photographs, wherein the photographed tape measure and depth measurements provide context and perspective.)

[101] The potholes in question were described by a number of plaintiff witnesses in very negative terms; e.g., suggesting that the potholes rendered the road “a mess”, and were “pretty deep”.

[102] However, having reviewed the photographs, and the dimensions and locations of the potholes outlined above, I am more inclined to share the view of witnesses such as Stacey Luyks, Bradley Luyks and

Constable Walker, who all struck me as being more impartial, objective and/or independent witnesses, and who respectively described the condition of the potholes at the time of the accident as being "relatively minor", "pretty minor" and "slight".

[103] Constable Walker in particular noted that he not only saw and recalled the relevant "slight indentations" and "little potholes" in the "very hard packed" area of the road, but that he had "no trouble" controlling his vehicle as he went over them.[57]

[104] As discussed in more detail below, Mr McCarthy, relying on his additional automotive expertise, also explained how and why potholes of this modest depth are something easily accommodated by the design and operation of average vehicle suspension systems, which address such conditions without loss of steering control.

[105] Having regard to all the evidence, I am satisfied that an ordinary driver, using ordinary care, and adjusting to the conditions of a rural country road of this character, would have been quite capable of safely traversing this particular area of the road, and these potholes in particular.

[106] Having regard to such matters as the rural nature of the township, the number of similar roads within the municipality's jurisdiction, the municipality's limited resources, the road's low traffic volume, and the obvious nature of the road's surface, alignment and elevations, I find that the condition of the road was entirely reasonable in the circumstances.

[107] There was nothing unusual or unexpected about these particular potholes, which were quite modest in nature. They would have posed no unusual, special or dangerous challenges, uncharacteristic of the general character of such gravel roads in that area, on which the progressive formation of potholes would have been a reality of life.

[108] In my view, reasonable drivers, adjusting to the character of the road and prevailing conditions, easily could have travelled over the area and the potholes in question, without the loss of control.

[109] Indeed, the potholes in question were located in the well-travelled portion of the roadway, and clearly had been traversed by many vehicles without incident. As the plaintiff's expert emphasized many times, they actually were a product of that ordinary and regular passage. The particular area of the road in question was quite passable and usable for traffic to persons reasonably using it.

[110] At the time of the accident, the potholes in question accordingly did not constitute a state of disrepair or default, for the purpose of ss.44(1) or 44(2) of the *Municipal Act, 2001, supra*.

CAUSATION

[111] Even if my above analysis is mistaken, and there somehow was a "default" in the road's "state of repair" at the time of Katherine's accident, the plaintiffs then would still have to satisfy their onus of establishing causation, as required by s.44(2) of the *Municipal Act, 2001, supra.*

[57] Mr Udall suggested that this was no indication that the potholes in question did not pose a hazard for Katherine, as Constable Walker had full knowledge the potholes were there at the time, and had no oncoming traffic to distract his attention. However, Katherine, on her own evidence, was also fully aware that the potholes were there.

[112] If such a default exists but did not cause the accident or the resulting losses experienced by the plaintiffs, no liability can attach to the Municipality even if it otherwise is to blame for allowing and/or not taking adequate measures to remedy the default.[58]

[113] The test for causation has been restated fairly recently by the Supreme Court of Canada in *Clements v. Clements*, [2012] S.C.J. No. 32, at paragraph 8:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury - - in other words, that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
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> [Original emphasis.][59]

[114] With this in mind, I turn to the causation-related evidence in this case.

[115] In doing so, I focus primarily, as the parties did at trial, on the question of whether the alleged defect in repair relating to potholes caused the accident.

[116] Far less attention was paid to whether or not the loose or "less sturdy" gravel at the side of the road caused the accident, in the sense demanded by the Supreme Court of Canada. Again, this no doubt had much to do with the suggestion effectively running counter to Katherine's testimony and the plaintiffs' corresponding primary theory of the case; i.e., that Katherine remained in control of her vehicle until she hit the potholes, (coming back onto the hard-packed area from the right side of the road), and that the potholes really were the effective cause of the accident.

[117] To the extent necessary, however, I find that the loose or less sturdy gravel to the side of the road actually was a "cause" of the accident, in the legal sense required, for the following reasons:

- It obviously was present, (as confirmed by such evidence as the photographs, and the testimony of witnesses including Stacey Luyks and Constable Walker).

- Constable Walker said that it "played a role" in what happened. This is because the friction values over loose gravel would have been much different than those encountered on the hard-packed surface of the road. According to Constable Walker's assessment and theory of causation, that in turn made it far more difficult for Katherine to brake or steer her vehicle back towards the centre of the road, after being shocked by the Luyks and making a sudden and hard turn to the right off the hard-packed surface at excessive speed, which in turn leading to an over-correction by Katherine and her loss of control.

- Mr McCarthy similarly opined that, if Katherine entered the relevant thin layer of uncompacted surface gravel at excessive speed, after steering quickly to the right to allow the Luyks' westbound vehicle to pass, that likely would have contributed to her loss of control and/or made it more difficult for her to recover.

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[58] See *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, at paragraphs 16-18.

[59] In my view, the circumstances of this particular case do not create any need to consider possible modification of the general "but for" causation test by consideration of "material contribution" analysis, the nature and application of which was clarified by the Supreme Court of Canada in the *Clements* case.

- Mr Udall opined during the course of his testimony that travelling through such gravel "could absolutely have affected her ability to steer", as Katherine's wheels would have lost slide-slip friction value in that area. He went so far as to say that the loose gravel would have acted "like ball bearings", in terms of their impact on Katherine's ability to steer over them.

- Having regard to all this evidence, and the probable explanation for the accident confirmed in more detail below, it seems clear to me that, on a balance of probabilities, the accident likely would not have happened had the loose surface gravel not been present at that location; i.e., if the surface at the southern edge of the road had been similar to that of the hard-packed bands on which Katherine previously had been travelling, (before encountering the Luyks). In particular, the road surface at the southern edge of the road, if similarly hard-packed, then would have facilitated Katherine's ability to recover and head safely back towards the centre of the road, *despite* her probable sudden and hard steering move to the right and her excessive rate of speed. In that sense, the resulting accident and resulting injuries would not have happened "but for" that loose and less sturdy gravel being present towards the edge of Thomson Line Road, in the particular area where the accident occurred. Its presence accordingly was "necessary" to bring about the accident and injury, thereby making it a cause of the accident, according to the legal test confirmed in the *Clements* case.

[118] I emphasize that none of this is intended to suggest in any way, (contrary to my above analysis and conclusions), that the Municipality somehow was at fault because the gravel in question was there. In my view, the gravel in question did not constitute a state of disrepair, (for the reasons outlined above), and it also would have remained an entirely neutral causal consideration, but for Katherine's excessive speed and her making of inadequate allowance for the possibility of necessary passing maneuvres.

[119] In particular, for the reasons outlined below, had Katherine been paying proper attention to the approach of the Luyks, and reduced her speed appropriately, (in contemplation of any possibly advisable or required move towards the right of the road to allow for passing), as Constable Walker thought Katherine should have done, and Mrs Luyks actually did, the loose and less sturdy gravel towards the south side of the road likely would not have presented any difficulties for Katherine.

[120] Again, however, in the circumstances that prevailed at the time of the accident, I think the gravel was a "cause" of the accident, according to the causation test mandated by the Supreme Court of Canada.

[121] For the reasons that follow, I do not think the same is true about the relevant "potholes" that were alleged to have caused the accident.

[122] At trial, Katherine provided detailed testimony as to the manner in which the accident was said to have occurred. In particular:

- As noted above, she said that she was aware of the potholes on the road, but constantly drove in a manner so as to avoid them, and that she was doing just that when travelling along the "centre" of the road when approaching the hill where she encountered the Luyks.

- She said that she moved her vehicle further to the right of the road, to "get by" the passing Luyks, and made the move gradually and safely, with no steering difficulties.

- She denied travelling on to "the shoulder" or grass adjacent to the road when making her move to the right, and similarly denied that doing so caused her to lose control. She insisted that she remained "fully on the roadway" when moving to the right.

- She said that, seconds after passing the Luyks, she then tried to "move back to the centre of the road". According to Katherine, it was at that point that she "hit potholes", probably encountering the first one at the crest of the hill. However, she also said it was "hard to tell" whether that happened as she was moving back to the centre of the road, or once she had completed her move back to the centre.

- In any case, Katherine said she was sure that it was her contact with the potholes that caused her to lose control of the vehicle. In particular, she said that, when she began to encounter potholes, she could "feel the car dip", and that it "felt like a series" of such dips. She also said that, after encountering the potholes, she tried to brake and steer, but the car would not respond as it began to slide sideways while continuing to move forward, and then head towards the ditch running along the north side of the road. She said that she tried the brakes repeatedly, pressing harder the second time, and agreed that she "slammed on the brakes" at some point.

- Katherine acknowledged that she does not remember the vehicle going off the road or rolling but, (despite repeated suggestions to the contrary put to her during cross-examination), she insisted that she had a clear memory of the events leading to her loss of control.

- In cross-examination, Katherine did acknowledge that the potholes in question were 2 inches deep at most, that she in fact had driven over such potholes before without incident, and knew they could be driven over safely. However, she stressed that these particular potholes were *not* safe to drive over, because they were "a *series* of potholes, *like a washboard*". She also asserted that she was very familiar with the condition of these particular potholes, as there was "no difference" in that condition over time, and she had seen those potholes "many times".

[123] I found the above testimony from Katherine, in relation to causation, to be problematic and troubling for a number of reasons.

[124] First, in my view, there are very significant contradictions between her evidence at trial, over eight years after the events in question, and a detailed statement given by Katherine to the police in January of 2005, just four months after the accident and prior to commencement of this litigation. For example:

- Her statement to the police says that she lost control "as [she] was pulling over to the centre of the road, *so [she] didn't have to drive on the shoulder*". [Emphasis added.] This seems at odds with her express denial, at trial, of having travelled to "the shoulder" when moving to the right to go past the Luyks.

- Her statement to the police says "*I don't know what happened*, but I lost complete control of the car". [Emphasis added.] I find this very difficult to reconcile with her detailed description, at trial, of how and why the accident occurred.

- Her statement to the police says "I hit the pot holes, *before* I lost control, *but I usually hit them, when I drive on the road*". [Emphasis added.] To me, this clearly indicates Katherine's more contemporaneous view that loss of control did not occur when she hit the potholes, or because of the potholes. To the contrary, she was saying that her loss of control occurred at some point *after* contact with the potholes, and she herself was minimizing and/or rejecting the suggestion that the potholes had played any role in her loss of control. Moreover, her acknowledgement that she "usually hit" the potholes in question is clearly at odds with her assertion that she constantly drove so as to avoid them, and in my view seriously undermines her claim that, immediately prior to the accident, she deliberately was driving in a manner intended to avoid the potholes she admittedly knew were on the other side of that hill.

[125] When confronted at trial with her statement to the police, Katherine became noticeably defensive and argumentative.

[126] She adamantly refused to agree with the reasonable suggestion that her memory four months after the accident was likely to be better than her memory eight years later.

[127] She suggested that the police improperly took her statement when she was "under extreme stress, medicated and dealing with medication and doctors". However:

- The police clearly waited approximately four months for an appropriate time to take Katherine's statement, which to me provides a strong indication that they were being very sensitive to any such concerns.

- The written statement's express confirmation that Katherine received a formal "caution" at the time, (reflecting the ongoing possibility at the time of charges stemming from the accident), also verifies that taking of the statement was being treated by all concerned as a very serious matter.

- The form and content of the document similarly indicate that the taking of Katherine's statement was not a brief, perfunctory or casual exercise. It is four pages in length, and ends with a written confirmation that Katherine was expressly asked whether there was anything she wished to add, change or delete, before the statement was finalized. At the time, Katherine was content to independently sign each and every page of the statement.

[128] In my opinion, the plaintiffs provided no satisfactory explanation for the significant inconsistencies between Katherine's testimony and her much earlier statement.

[129] Second, I found Katherine's express and emphasized reference at trial to the accident having been caused by "a *series* of potholes, *like a washboard*", to be very revealing and troublesome. With the advent of mechanized cleaning, washboards, (a primitive tool designed for hand washing clothing), are now archaic and rare domestic appliances, at least in Canada. To me, it seems very unlikely that they would readily and independently inspire their use as a metaphor by a relatively young witness such as Katherine.

[130] However, "washboarding" *is* a term of art still frequently employed to describe the physics of a very particular type of road surface condition; i.e., one where gravel and dirt roads develop a series of ridges, (not holes), following one after the other in very close succession, much like the surface of an old-fashioned washboard. Driving over such a deeply ridged surface can give rise to dangerous driving conditions, due to resulting sustained reduction of contact between tires and a road surface, with corresponding loss of control.

[131] As noted above, that was *not*, on any view, the very particular type of road surface condition that existed on Thomson Line Road at the time and location of Katherine's accident. There was no situation of nearly constant and closely spaced successive ridges, but only a number of non-contiguous potholes with areas of more level surface area in-between. The concept of "washboarding" nevertheless *was* a topic expressly raised and referenced in a pre-trial report and later testimony of the plaintiffs' expert, Mr Udall, who sought to rely, by way of analogy, on a published authority dealing with the effect of such washboard road conditions on the ability of a driver to maintain steering control.[60]

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[60] In his report dated July 13, 2012, delivered some two months before trial, Mr Udall addressed the topic of "steering while traversing potholes and gravel" by making references to a text prepared by Rudolf Limpert; i.e., *Motor Vehicle Accident Reconstruction and Cause Analysis*, 5th ed., Lexis Publishing, 1999. Specifically, at p.16 of his report, Mr Udall said this:

[132] I was not persuaded by Mr Udall's analogy, (for the reasons outlined below), but still think it very telling that Katherine made use of a corresponding "washboard" reference in her testimony. To me, her use of that particular and now rare metaphor strongly suggests that, at some point prior to trial, Katherine directly or indirectly somehow became aware of Mr Udall's report and/or anticipated evidence, and consciously or subconsciously tailored her testimony to support the plaintiffs' theory of the case.

[133] Third, there are aspects of Katherine's causation testimony at trial which, to me, seem inherently implausible. In particular:

- It seems doubtful that she deliberately was travelling along "the centre of the road" as she approached the hill where she encountered the Luyks. Doing so would have required her to leave the well-travelled, established and obvious hard-packed bands of dirt and gravel, and instead travel along the road's remaining areas of comparatively loose dirt and surface gravel. It also would have made it much more difficult for her to move sufficiently to the right to avoid a collision with the Luyks, in the very limited time between her "shock" at seeing them and the time at which the cars passed in apparent safety. It seems far more likely that Katherine was travelling along the bands of hard-packed dirt and gravel as she approached the hill.

- For similar reasons, I think it improbable that Katherine was intent on returning to "the centre of the road" after passing the Luyks. It seems far more likely that, after necessarily moving into the areas of loose dirt and gravel closer to the right side of the road, she was trying to return to and regain the well-established hard-parked bands on which she had been travelling. However, these were the very areas in which, for the reasons outlined by the plaintiffs' own expert, (relating to operation of vehicle suspension systems), the relevant series of potholes were located.

- The potholes in question were in a row, in the hard-packed band, and in an alignment running parallel with the direction of the road. It seems to me that Katherine therefore would not have encountered them in succession, in the sustained, rapid and repeated manner described in her testimony, unless her vehicle generally had returned to and been travelling along the hard-packed band of dirt and gravel in the usual general direction of the road. Yet this was precisely the "normal" path of vehicular traffic that had created the potholes, (according to Mr Udall), and which motorists, (including Katherine according to

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> Ms McLeod reported having to move to the right of the roadway to avoid an oncoming car. When she did so, her car passed over a series of potholes and loose gravel on the right side of the road. She reported loosing (sic) the ability to steer and subsequently lost control.
>
> According to Limpert,
>
> > High frequency road bumps (*wash boards*) cause an increased understeering response of the vehicle during a turning maneuver on a rough road. The front wheels will loose (sic) side force traction before the rear wheels, resulting in a partial or complete loss of steering. The driver is forced to turn the steering wheel more than normally required for the turn. When the front tires regain traction, the vehicle generally may develop directional response problems. Limpert, pg 406.
>
> Limpert makes reference to *washboard* type road surfaces but a similar response is acquired by any repeated bumps in the road that cause the suspension to bounce repeatedly. If the frequency and severity of the bumps causes the tires to leave the road surface then steering is eliminated for a period of time each time the tire leaves the road. Striking a series of deep potholes will cause significant vertical and longitudinal loads on the suspension.
>
> [Emphasis added.]

her own statement to the police), usually were able to traverse in safety. Moreover, Katherine's own testimony indicates that she approached the row of potholes while coming from an area further to the right side of the road, and therefore at an angle to their general alignment.

- Even if Katherine had encountered a pothole or series of potholes, it seems very unlikely that her vehicle would have "dipped" significantly or repeatedly in the manner she described, to emphasize the suggested impact of the potholes on her loss of control. In that regard, I bear in mind not only the relatively limited depth of the potholes, (no more than 2 inches, at most, at their centre, and more shallow elsewhere), but also the normal and expected operation of her vehicle's suspension, (designed, as noted and explained by Mr McCarthy, to readily compensate for depressions up to 3 inches[61]), as well as the excessive rate of speed at which Katherine was travelling, all of which seems unlikely to have left much time for noticeable descent into such depressions.

- Finally, if Katherine had indeed traversed the potholes earlier without incident, and other vehicles clearly were able to do the same, (as demonstrated by the well-travelled hard-packed band of dirt and gravel on which the potholes were located, and by Constable Walker safely driving over the potholes during his testing immediately after the accident), this makes me seriously doubt Katherine's assertion that the potholes alone caused her loss of control. Some other factor or factors must have been involved.

[134] Having regard to all of the above, as well as concerns about Katherine's credibility already raised in the context of my speed analysis, I feel unable to attach any significant weight to her subjective testimony, as far as causation is concerned. Her testimony alone certainly is not enough to satisfy me that the plaintiffs have established that the potholes were a cause of the accident, on a balance of probabilities.

[135] Nor am I persuaded that the physical evidence, even when interpreted with expert assistance, and whether considered alone or in conjunction with Katherine's testimony, is sufficient to meet the plaintiffs onus in relation to causation, as far as the potholes are concerned.

[136] In that regard, the plaintiffs' expert Mr Udall opined that the depth and succession of potholes encountered by Katherine would have placed her in a situation of difficulty; i.e., that as her vehicle's wheels were "bouncing" over the potholes, "at the standard speed limit", the car would have "shaked" (sic) more than wanted, the suspension would have "bounced" more than wanted, and this in turn would have caused the car's wheels to temporarily leave the road, in turn decreasing friction with the road surface and making it more difficult for Katherine to steer.

[137] Mr Udall opined that traversing a single pothole would have had only a very limited impact on steering, and been little more than an "annoyance"; i.e., leading to a momentary loss of steering followed by a quick recovery.

[138] While he conceded that going over a series of potholes "doesn't *necessarily* mean a loss of control", (especially if they were approached and crossed in a straight line), he thought it *could* have that result. In that regard, he suggested that traversing a series of potholes would result in a loss of steering during each

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[61] I note in passing that, although neither he nor counsel expressly suggested such a connection, Mr McCarthy's evidence at trial concerning the depth of potholes safely capable of being addressed by most vehicle suspension systems strongly suggested to me that the four inch depth specified by Ontario's *Minimum Maintenance Standards* for pothole repair, (considered below), was far from arbitrary. To the contrary, having regard to the expert testimony of Mr McCarthy, a pothole having a depth of four inches is one that will tend to exceed the design capacity of most vehicles' suspension systems, thereby inherently creating a situation of risk and potential danger for ordinary drivers.

successive pothole event, making steering progressively difficult, decreasing ability to recover as well as the ability to brake, all of which could lead to a total loss of control.

[139] In particular, as noted above, Mr Udall thought the loss of control described by Katherine, upon encountering the potholes, was analogous to the sort of understeering experienced by drivers encountering "washboard" surface conditions on gravel roads.

[140] However:

- Mr Udall's opinion was based, in large measure, on his acceptance of Katherine's assertions relating to causation. During cross-examination, Mr Udall himself emphasized that his analysis relied on such "non-physical" evidence, as well as the physical evidence. The strength of his causation opinion correspondingly is weakened, in any event, by my finding that Katherine's evidence in that regard lacks credibility.

- During cross-examination, Mr Udall mentioned an understanding that the potholes depicted in the available photographs, suggesting maximum pothole depth of two inches), were not representative of the condition of potholes present at the time of the accident. In particular, his understanding was that some potholes present at the time of the accident had been deeper, but were filled in by subsequent grading. If that was his understanding, that too was an error that weakened the strength of Mr Udall's opinion.

- There were potholes in the general area of the road close to where Katherine lost control, but they were neither constant nor contiguous. To the contrary, there were areas of the road before, around and after the row of potholes in question that had no potholes of any significance, and the potholes aligned in the row in question were located at intervals along the band of hard-packed dirt and gravel towards Katherine's side of the road, with spaces in-between. Given the onus on the plaintiffs to prove causation on a balance of probabilities, it cannot simply be assumed, without proper and adequate proof, that Katherine's vehicle necessarily traversed any one or more of the potholes as it made its way from one side of the road to the other.[62] In that regard, I am very mindful of the Supreme Court of Canada's admonition and reminder in *Clements v. Clements, supra*, at paragraph 9, that the "but for" causation test must be applied in a "robust, common sense fashion", and that there is no need for scientific evidence of the precise contribution a defendant's negligence or fault made to an injury. However, in this particular case, where the plaintiffs' central theory of the case fundamentally depends on Katherine having traversed one or more of the specifically located potholes in question, in a number sufficient to make her lose control, and there is a very real possibility that Katherine may not in fact have hit *any* of them, (let alone many of them), the demand for satisfactory proof of such contact cannot be significantly relaxed without inflicting an injustice on the defendant Municipality. That potential unfairness is underscored, I think, having regard to the acknowledgement by Mr Udall, the plaintiffs' own expert, during cross-examination, that this particular accident may have been caused by reasons unrelated to potholes, including excessive speed and/or a sudden turning maneuvre. In the absence of reliable subjective testimony, it seems to me that satisfaction of the plaintiffs' onus regarding causation therefore should require at least some kind of persuasive physical evidence that would allow a reasonable inference that Katherine did indeed traverse potholes, on a balance of probabilities.

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[62] As emphasized in *Mulchandani v. Kooistra Trucking Ltd.*, [2006] A.J. No. 633 (Q.B.), proper and adequate proof causation generally must not be premised on factual assumptions, or on hypothetical and unproven conditions.

- As noted above, when Constable Walker was inspecting the scene of the accident, he found the surface of the road sufficiently hard-packed to permit observation of definite tire marks, clearly attributable to Katherine's vehicle as they led directly towards the position of her vehicle after the accident. He marked these with small traffic cones. He noted that they began with marks attributable to the right side tires of Katherine's vehicle, which then moved in a definite arc towards the northeast. Constable Walker and Mr McCarthy also both explained how and why these marks were caused by Katherine's vehicle being out of control; i.e., because of increased friction between the vehicles tires and the surface of the roadway once the vehicle had gone into a yaw or "side-slip". (Although the vehicle had rotated counterclockwise on a horizontal axis, because of Katherine's steering input to the left, the vehicle's momentum nevertheless was still carrying it in an overall direction to the right. In other words, the vehicle was not going in the direction its front tires were pointing, thus confirming that Katherine had lost control of the car's direction.) In effect, the tire marks therefore provide an indication of where Katherine was out of control.[63] However, the initial marks, created by the vehicle's front right side tires, begin to the north of the potholes relied upon by the plaintiffs, (i.e., to the left of the row of potholes, if viewed in the direction in which Katherine had been travelling), and there is simply no physical evidence to indicate the precise path travelled by the tires of Katherine's vehicle before then.

- In cross-examination, Mr Udall himself conceded that there simply was no physical evidence indicating that Katherine hit any particular pothole or potholes, and that we accordingly "don't know what potholes she hit or how many". He also said it was "*not* clear which potholes were hit, but very unlikely she didn't hit *any*". However, the latter qualification apparently was based in part on Mr Udall's almost simultaneous and oft-repeated assertion that there were "potholes *everywhere* there", in the area where the accident occurred. For the reasons indicated herein, I do not share that view.

- Mr Udall further acknowledged that there was no physical evidence indicating the particular path followed by Katherine's vehicle prior to its leaving the tire marks, (documented by Constable Walker), which were located *closer* to the centre of the road than the identified potholes. There accordingly was no physical evidence as to the vehicle's trajectory, before that point, to permit a reasonable extrapolation as to which potholes Katherine's vehicle probably would have traversed, if any.[64] In Mr Udall's words: "One cannot say reliably how many potholes were driven over *or what occurred to the vehicle prior to the onset of those identifiable marks*."

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[63] Mr McCarthy fairly qualified his evidence by indicating that the vehicle would be out of control at that point for *most* people. In particular, it is not impossible for an experienced driver, with an appropriate skill set, to recover control of a vehicle in such a state of yaw. However, he emphasized that it would be very difficult for most people to regain control at that point, and I think such a conclusion almost certainly applied to Katherine, at the time, given her relatively limited driving experience. For his part, Mr Udall also agreed that Katherine was out of control at that point, and that it would have been "very difficult to recover" during the vehicle's collision course on its way to the ditch.

[64] Constable Walker went to considerable lengths to investigate, document and analyze the available tire and road marks, (in order to determine the path of Katherine's vehicle), and drew no connection whatsoever between the potholes and her loss of control. As noted by Mr McCarthy, commencement of the tire marks relative to the line of potholes indicates that the left or driver's side tires of the Oldsmobile definitely would not have come into contact with those potholes. Similarly, if the Oldsmobile had been travelling in line with the onset of the right or passenger side tire marks documented by the police, then those tires may very well not have traversed the potholes either. Mr McCarthy fairly indicated that there was a *possibility* that the vehicle's right side tires may have traversed, at most, one to three potholes, (but certainly not all of them), depending on the precise path taken leading up to the start of the tire marks; e.g., *if* Katherine's vehicle had been steered to the right just before commencement of the tire marks. However, that precise path was simply uncertain. (Contrary to the suggestion made by Mr Udall and the plaintiffs, I do not agree that Mr McCarthy conceded that Katherine's vehicle had indeed traversed at least some of the potholes.)

- As noted above, even if there had been evidence to establish that Katherine probably had traversed one or more potholes, I do not accept Mr Udall's suggestion that situations like this, involving a row of intermittently spaced potholes, should be readily equated with the sort of conditions and physics involved in true "washboarding" situations. To the contrary, and in accordance with the views and experience of Constable Walker[65], I think it obvious that the surface contact challenges created by tires travelling over a relatively continuous series of closely spaced and well-defined ridges inherently would be much greater than those presented here. In this case, at worst, the Oldsmobile's tires progressively would have made their way, at spaced intervals, through one to three shallow and sloped pothole depressions. As confirmed by the expert evidence of the defendant's expert, Mr McCarthy, such depressions were of the sort the particular vehicle's suspension system was designed to easily accommodate and handle, without causing any steering problems.[66]

[141] In the circumstances, the available evidence does not satisfy me, on a balance of probabilities, that Katherine came into contact with the relevant potholes, or that the potholes were a contributing factor or cause of Katherine losing control of her vehicle.

[142] To the contrary, in my view this accident still would have occurred, regardless of the potholes, because of Katherine's conduct on the evening in question.

[143] She was driving at an excessive rate of speed, having regard to the prevailing conditions. In particular, while she may have been able to maintain control of her vehicle at such speeds, so long as she continued to travel along the bands of hard-packed dirt and gravel, she made insufficient allowance for the probable loss of traction and steering control that were bound to follow if she was forced to move off those hard-packed areas and on to other areas of Thomson Line Road, with loose surface gravel, which were not as sturdy.

[144] Katherine similarly made no allowance for the possibility that such a movement might be necessary, in short order, if she unexpectedly encountered any oncoming vehicles, (such as the Luyks), in areas of the road where hills reasonably could be expected to obstruct direct sightlines down the road ahead.

[145] She also completely failed to notice the oncoming approach of the Luyks beyond the hill, which she reasonably could and should have done, (in a manner similar to the Luyks' sighting and tracking of Katherine's vehicle), had she been paying proper and adequate attention to her surroundings. In all likelihood,

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[65] Constable Walker testified that he had experience studying and driving over true "washboard" conditions, and that such conditions certainly would have an effect on surface friction co-efficients, (and therefore on a driver's corresponding ability to steer or stop). However, he said that was not the situation here, as far as these "slight indentations" and "little potholes" were concerned. More generally, he noted that the total friction co-efficients encountered while travelling over potholes actually can be higher, (permitting greater control), as wheels responding to an initial "bounce" will then return to the road surface in a *harder* way, producing *more* contact with the road surface.

[66] Mr McCarthy, who is also a trained auto mechanic, (and indeed licenced as a "Class A" auto-mechanic in the state of Michigan), explained that the Oldsmobile driven by Katherine had an independent suspension system, the specifications of which were designed and provided for compressions of 3.1 inches in the front and 3.4 inches in the rear. This means the suspension of Katherine's vehicle certainly had the ability to accommodate and/or absorb the effect of the potholes, (no deeper than 2 inches), alleged to have caused the accident here. Mr McCarthy indicated, and I accept, that crossing the relevant potholes therefore probably would not have caused the suspension to "bottom out". Rather, it is far more probable that, if Katherine's vehicle crossed the potholes at all, her suspension system would have absorbed the bumps, maintaining traction on the road, and allowing Katherine to maintain control. That certainly would have been the case if, as Mr McCarthy opined and I accept, Katherine crossed, at most, no more than 1 to 3 of the potholes in question.

that would have prompted her to make such allowances and reduce her speed accordingly, (as Mrs Luyks did), in order to ensure that she could travel off and back onto the hard-packed areas in safety, as required, when passing such an oncoming vehicle.

[146] Having regard to the evidence as a whole, I generally share the views of Constable Walker and Mr McCarthy as to how this accident occurred, and think it more probable that Katherine, a young and relatively inexperienced driver:

- was travelling at an excessive rate of speed, having regard to the nature, configuration and condition of the roadway;

- was shocked by her encounter with the Luyks;

- was obliged to make an unexpected and therefore hard turn towards the right, off the hard-packed surface and onto obvious areas of loose gravel, at a speed far too excessive to enable traction and steering control similar to that which she had been enjoying on the hard-packed surface, which should have been expected; and

- then over-corrected and/or applied the brakes on loose gravel[67], sending her vehicle into a yaw or slide-slip and towards the north side of the roadway, after which all realistic ability to control or stop the vehicle safely had been lost.

[147] All of this is tragic.

[148] However, it was not caused by any default on the part of the defendant Municipality. It was, rather, caused entirely by Katherine's own driver errors and corresponding negligence, which initiated the accident sequence and resulted in the vehicle rollover.

[149] In that regard, I emphasize that I would have found such conduct to be negligent of any driver travelling down Thomson Line Road that evening, regardless of whether or not he or she had any prior familiarity with the road. In particular, I think any ordinary driver, exercising proper prudence, and being reasonably alert to his or her surroundings, easily could, should and would have:

- recognized the nature of this particular road, including its alignment, elevations, surfaces, and probable corresponding limitations;

- seen, albeit intermittently, the Luyks approaching from the opposite direction;

- observed that intervening hills were resulting in the interruption of direct sightlines from time to time; and

- reduced speed accordingly in order to ensure that any necessary passing maneuvres would not result in the sort of unfortunate accident that occurred here.

[150] The fact that Katherine was so familiar with Thomson Line Road nevertheless magnifies, I think, the extent of her own negligence and responsibility for the accident.

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[67] Mr McCarthy opined, and I accept, that applying the brakes at that point was probably the worst thing for Katherine to do, as it makes total loss of control almost inevitable in such a situation.

[151] As suggested repeatedly by witnesses such as Katherine's parents, Mr Prentice, and Katherine herself, an eastbound driver who subjectively was well aware of the relevant potholes, and who had any serious concern about traversing them, would have adjusted his or her driving to ensure that the potholes could and would be avoided.

[152] In particular, knowing the potholes lay on the other side of the hill crest, such a driver, taking reasonable care to address such concerns, would and should not have approached the relevant hill crest at such a high rate of speed, without being able to see if there were any oncoming vehicles that might compel travel over the potholes in question.

[153] Whether one looks at the matter objectively, (focusing on the "ordinary" driver), or subjectively, (having in mind Katherine's additional knowledge and familiarity with that particular area of the road), I think Katherine alone bears responsibility for this unfortunate accident.

Statutory Defences

[154] As the plaintiffs have failed to establish that the Municipality defaulted in complying with its duties under s.44(1) of the *Municipal Act, 2001*, *supra*, (by sufficient proof that Thompson Road was in a condition of non-repair), or the causation required by s.44(2), (by sufficient proof that Katherine sustained her damages because of any such default), there formally is no need to address the Municipality's further reliance on the statutory defences set forth in s.44(3) of the same legislation.

[155] In particular, the provisions of s.44(3) operate to preclude liability "for failing to keep a highway … in a reasonable state of repair". As I have found there was no such failure, there fundamentally is no *prima facie* liability in respect of which the provisions of s.44(3) might operate.

[156] Prudence nevertheless warrants considering hypothetical application of the statutory defences in the alternative; i.e., to account for the possibility that my above analysis and findings may be mistaken, such that Thomson Line Road somehow was *not* in a reasonable state of repair at the time of the accident.

[157] As noted above, the defences extended by s.44(3) are not structured as cumulative requirements, all of which must be satisfied to shield a Municipality from liability. They instead are framed as independently sufficient alternatives. In other words, if applicable, each provision, standing alone, affords a complete defence to any claim pursuant to ss.44(1) and 44(2) of the legislation.

[158] The three possible statutory defences therefore will be considered separately, in succession, bearing in mind that the onus of establishing their application lies on the Municipality.

LACK OF KNOWLEDGE - s.44(3)(a)

[159] As noted above, pursuant to s.44(3)(a), a municipality is not liable for failing to keep a highway in a reasonable state of repair if "it did not know and could not reasonably have been expected to have known about the state of repair of the highway".

[160] In my view, the question is not merely whether the municipality knew or ought to have known of the highway's *general* state of repair.

[161] Rather, viewed within the wider context of the legislative scheme established by s.44, the natural and ordinary meaning of the s.44(3)(a) preamble and sub-paragraph text requires a court, considering possible availability of this particular statutory defence, to determine whether or not the municipality knew or ought to

have known of the *specific* condition which justified a finding there was a failure, under s.44(1) and 44(2), to keep the highway in a reasonable state of repair at the time of an accident.

[162] Again, this is an inherently artificial and hypothetical inquiry in this case, insofar as it effectively requires me to determine whether the municipality knew or ought to have known of a failing or default which in my view did not exist, for the reasons outlined above.

[163] In the circumstances, I nevertheless will focus more generally on whether the Municipality knew or ought to have known of any possible concerns posed by the loose and less sturdy roadside gravel and/or the specific potholes which are alleged to have caused Katherine's accident.

[164] In that regard, I was presented with a good deal of evidence, outlined above, about other accidents on Thomson Line Road (which arguably might have given the defendant indirect notice that there were problems with the road's state of repair), and of complaints being made to various representatives of the Municipality in relation to the road.

[165] However, there was no documentation supporting the largely hearsay evidence of other accidents, (although one would think such corroboration would have been available, had the other accidents taken place and been of any consequence). Moreover, Ms Vowel indicated that she had no memory or knowledge of such accidents having ever been brought to the Municipality's attention.

[166] Evidence of complaints also was largely undocumented, (notwithstanding Ms Vowel's evidence that residents were encouraged to express concerns in writing, and were permitted to attend at Council meetings via delegations to voice concerns). It seems that most complaints were advanced in an informal or casual way, (e.g., by telephone calls or during casual encounters between residents and Municipal representatives in public places, such as coffee shops).[68]

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[68] Evidence of whether and how complaints were received and handled by the Municipality was somewhat contradictory, seemingly because of differing views on what would constitute a proper complaint requiring a formal response or follow up.

As noted above, Ms Vowel recalled receiving complaints about Thomson Line Road in various ways during her tenure as mayor. She emphasized that she, Council and other representatives of the Municipality would pay attention to any proper complaints; e.g., by relaying the complaints to Road Department staff, with an expectation that staff would follow up and investigate. However, Ms Vowel also exhibited some frustration with informal complaints casually made to her in public places, and the apparent reluctance of those concerned to reduce their complaints to some form of writing that could be dealt with by Council.

Mr Hull confirmed that his department always would "go out and look" at the road in response to any relayed complaints, in addition to regularly scheduled patrols. He said that any such complaints should have come to him. However, apart from hearing about Mr Bobier taking a "bag of dirt" or "bag of mud" into the Municipality's office, (which prompted Mr Hull to take a drive out to Thomson Line Road to perform an added inspection), Mr Hull could not recall having received any relayed complaints about the condition of the road. Moreover, as noted by the plaintiffs and confirmed by Mr Hull, there was no documentation or "official log" to corroborate the receipt of such complaints or any associated response, (which was a surprise to Ms Vowel).

Like Ms Vowel, Mr Hull also exhibited a degree of frustration with the suggestion that complaints were being made and ignored. In particular, he discounted repeated informal demands by residents for paving of their respective roads since, according to him, they "*all* wanted" their roads paved. Mr Hull expressly denied that the level of such "complaints" was significantly higher in relation to Thomson Line Road, or that it was viewed as a "problem area".

Mr Englehart indicated that, while there were "always coffee shop complaints" from farmers, on an almost daily basis, expressing a desire to have their respective roads paved, such "complaints" usually were disregarded unless they were advanced more formally. He could not recall having ever received or heard about such a complaint having been made in relation to Thomson Line Road, prior to Katherine's accident, (although he acknowledged that such complaints may have gone to other representatives of the Municipality).

[167] Evidence of such accidents and complaints therefore was correspondingly vague on detail, in terms of timing and content. Coming years after the fact, from those clearly motivated to help Katherine, and/or from disgruntled residents of Thomson Line Road who obviously desire to see their road paved, such evidence must be viewed with caution. On the other hand, I am mindful of authorities noting that a municipality should not readily benefit from its own failure to document or circulate complaints properly, and/or from a policy that insists on written complaints, (which may very well operate, intentionally or unintentionally, to discourage and discount complaints).[69]

[168] However, even if such evidence is accepted at face value, it seems to me that much if not most of it, (e.g., concerning broad allegations of drainage, dirt, dust and the overall rough or poor condition of Thomson Line Road), was either irrelevant or far too generalized, in terms of time, location and nature, to warrant any kind of reasonable inference that the Municipality's attention was being drawn specifically to the specific loose roadside gravel and/or potholes alleged to have caused Katherine's accident.

[169] In that regard, it seems inherently unlikely that people such as the McCleods regularly would have been making complaints specifically targeting the condition of that gravel or those particular potholes on a hill more than a kilometer from their home. Residents seem more likely to have focused any specific complaints on road conditions in their immediate area, or to have made more generalized complaints about the overall condition of the road they were travelling.

[170] Moreover, even if one accepts that there were complaints specifically targeting the loose roadside gravel and/or potholes on that particular hill, (e.g., from someone like Mr McPhail, whose home was located beside the hill, or from someone using the road who expressed a particular concern about the state of potholes on that particular hill), that the Municipality accordingly should have been alert to possible problems in that regard, and that the Municipality completely ignored all such complaints, (although the evidence of Ms Vowel and Mr Mull, at least, was to the contrary), one ultimately still has to ask whether anyone following up on such complaints and/or otherwise looking for a state of disrepair in that particular area reasonably would have seen or noticed anything of concern at the time of the accident.[70] In that regard:

- Mr Englehart said he was familiar with Thomson Line Road, and travelled it several times in the period leading up to Katherine's accident without noticing any concerns.

- Mr Hull testified that he inspected the road and examined its condition just a few days before Katherine's accident, (on September 15, 2004), but observed nothing on the hill near the accident location that prompted any concern. To the contrary, he thought that particular area of the road was "in good shape" as it was fairly "hard and solid", with only a few "minor depressions" and a "little loose

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[69] See *Rutherford v. Niekrawietz*, [1994] O.J. No. 2439 (Gen.Div.), at paragraphs 16, 22 and 35; and *Brown v. Gravenhurst*, [1995] O.J. No. 561 (Gen.Div.), at paragraphs 56-58.

[70] In that regard, I am mindful of authorities, such as *Van Nice v. Calgary*, [1979] A.J. No. 797 (S.C.), and *Jacobs v. McLaughlin*, [1986] A.J. 561 (Q.B.), critical of municipal failure to implement a regular routine for inspections, (which I find was not the case here, for the reasons outlined below), or to maintain proper records of inspection, (which arguably is the case here, at least insofar as no records of inspection *per se* were produced at trial and any such records would seem limited, at best, to the personal logs said to have been maintained by individual members of the Municipality's Road Department staff). However, municipalities are not held liable for failure to carry out inspections and/or maintain records in the abstract. The central question in the present context is whether the Municipality "knew or ought to have known" of the specific defaults in the mandated state of repair, which are found to have caused damage. If the evidence is capable of establishing that a timely and careful inspection or inspections would not reasonably have indicated or revealed such defaults, or any situation of concern, then the absence of an inspection or inspections seems to have much less relevance.

gravel" towards its edge. He said that, had there been any noticeable deficiencies, he would have communicated that by radio to the grader operator, directing his return to the area on an added or unusual basis, prior to the next routine grading. However, Mr Hull saw no need for that.

- Mr Hull and Mr Englehart both attended at the accident location again on September 20, 2004, (two days after the accident), carefully inspecting the road once more, and with Mr Englehart taking photographs that were made exhibits at trial. They found nothing on the hard-packed areas of the road, or the loose gravel areas towards the side of the road, that suggested any concerns or need to requisition special repairs; e.g., by grading the road immediately and thereby disturbing its entire surface. Mr Hull thought the road was "still in very good shape", with mostly hard-packed gravel and only a "few minor potholes", (none of which surpassed the prescribed minimum maintenance standards addressed in more detail below, or caused him any difficulties in travelling over the area). He thought the road's crown may have been diminished, but strongly rejected the suggestion that the crown had vanished or was inadequate. While Mr Englehart also conceded in cross-examination that the crown of the road had become somewhat diminished, flattening the road from side to side, he observed only "minor depressions" near the accident scene, and nothing he would describe as a "pothole".

[171] Of course, at the relevant time, Mr Hull and Mr Englehart were employees of the Municipality, charged with responsibility for detecting road deficiencies to help prevent accidents. Their evidence therefore is inherently self-serving, and also needs to be viewed with appropriate caution. However, I think it significant that their evidence receives strong support from Constable Walker.

[172] Constable Walker was a completely independent and objective witness, very experienced and highly trained in accident reconstruction and analysis. He was focused on examining the particular area and hill in great detail immediately after the accident, looking for anything that might reasonably have caused or contributed to the mishap. Yet he too saw and noted no deficiencies that led him to have any concerns whatsoever about the state of the roadway at that particular location, in relation to the looser roadside gravel, potholes or otherwise. To the contrary, he thought the road at that location was "straight and level", and in "good condition". He saw nothing on the road "that would cause problems", and felt no need to contact the Municipality to suggest or recommend that any remedial action be taken.

[173] Had it been necessary, I accordingly would have found, having regard to all the evidence, that the Municipality had satisfied its onus under s.44(3)(a) of the *Municipal Act, 2001, supra*, so as to negate liability for any such state of disrepair. I am satisfied that the municipality did not know, and could not reasonably have been expected to know, of any relevant default in the road's state of repair at the time of Katherine's accident.

REASONABLE PREVENTION MEASURES – s.44(3)(b)

[174] As noted above, pursuant to s.44(3)(b) of the same legislation, a municipality is not liable for failing to keep a highway in a reasonable state of repair if "it took *reasonable* steps to prevent the default from arising". [Emphasis added.]

[175] In this case, I heard a good deal of competing evidence as to what was and was not done by the Municipality, and what it arguably should have done, to maintain Thomson Line Road. For example:

- In their testimony, Mr Hull and Mr Englehart explained, and confirmed with contemporaneous supporting documentation, that Thomson Line Road was graded at least once a month from February to

November of 2004.[71] This included grading on August 27, 2004, (approximately three weeks before Katherine's accident), and grading on September 29, 2004, (nine days after Katherine's accident)[72]. From April to November of 2004, each such grading consisted of two "rounds" or passes, and the spreading of gravel. The purpose and effect of such grading, (described in great detail by Mr Hull), was resurfacing of the road and dust control; i.e., by establishing a proper grade and crossfall of the road's surface, re-establishing the road's intended 3-5% crown, (depending on the season), and "smoothing" the road's surface by eliminating any deficiencies, depressions and wheel marks.

- Mr Englehart nevertheless also explained and emphasized that grading such a road effectively involves certain trade-offs, from a safety perspective. In particular, while grading will address and eliminate deficiencies and depressions, (including potholes), and help to re-establish the road's crown, (which deteriorates over time), it also inherently makes the entire surface of the road temporarily very loose and unstable again; i.e., until the surface of the more travelled areas of the road once again progressively becomes hard-packed.[73] To enhance overall safety, such roads accordingly are left in their hard-packed state for as long as possible, pending the monthly periodic grading that accomplishes the above goals, and begins the dynamic process all over again. However, if any serious problem in the road's surface was identified through inspections or otherwise, the Municipality could and would make arrangements for extraordinary grading of an area to address the deficiency.[74] In particular, Mr Hull emphasized that the Municipality adhered to the prescribed minimum maintenance standards relating to potholes. If any potholes assumed the dimensions outlined in those standards, (e.g., a depth of at least four inches), the Municipality would make special arrangements to "go out and grade the road" in the relevant area.

- The Municipality also had standing arrangements in place to ensure that each of its roads, including Thomson Line Road, was routinely patrolled on a weekly basis, either by Mr Hull or by Mr Englehart, to look for any deficiencies in the road's state of repair, including problems with drainage or the road's surface, (such as potholes). They would note which roads needed application of further gravel and/or grading to ensure that any potholes did not exceed the dimensions set forth in prescribed minimum maintenance standards, (addressed in more detail below), and directed the taking of appropriate maintenance operations to remedy any deficiencies or areas of concern. There was no way to tell, from available documentation, the precise extent and timing of additional gravel being applied to Thomson Line Road. However, Mr Hull says that "even the worst" road in the Municipality, (not this one), would receive substantial amounts of new gravel over its overall surface at least once every five years, and that gravel regularly would be applied in the meantime as necessary, (e.g., to address any identified "soft spots").

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[71] The gradings were not scheduled for a particular date each month. However, the Municipality grades all of its roads regularly through a continuous progression and rotation that effectively brings the grader back to Thomson Line Road at least once each month.

[72] As noted above, Mr Hull testified that there was no post-accident grading of the accident scene prior to September 29, 2004, despite Mr McPhail's belief to the contrary.

[73] This evidence was supported by the expert testimony of the defendant's expert, Mr McCarthy, who noted that surface conditions of loose gravel have a lower friction co-efficient. This in turn means that traffic using a newly graded road at the same speeds would face enhanced risks, or the inconvenience of having to reduce speed considerably in order to drive safely.

[74] An example of the Municipality's ability to arrange additional grading if and as necessary appears in the summary and report prepared by Mr Englehart, dated November 29, 2004. It refers to additional "custom work" being "performed for a land owner in the area in question", on September 3, 2004. Mr Hull confirmed that the particular grading in question nevertheless was on private property, and accordingly would not have affected the condition of Thomson Line Road on the date of Katherine's accident.

- The routine patrols described in the previous sub-paragraph were supplemented by annual "road tours", organized to assist Council in setting priorities and making decisions about allocation of its limited budget to various possible road maintenance projects throughout the Municipality. In particular, a number of councilors would travel with Mr Hull, Mr Englehart and the Municipality's drainage superintendent to look at possible projects, and receive recommendations from staff concerning matters that should be given priority. (As emphasized by Mr Hull, limited budgets meant that the Municipality simply could not do everything it wanted to do, in terms of road maintenance and improvement. In particular, ongoing taxpayer demands for paving, advanced not only by the residents of Thomson Line Road but also by others who wanted their gravel roads paved as well, regularly had to give way to other priorities such as water and sewer lines.) Mr Hull and Mr Englehart had input as to the roads to be examined on such annual tours, reflecting their assessment of priorities based on their patrols. There is no mention of Thomson Line Road in the notes prepared after the road tour on April 6, 2004, (approximately 5 months before Katherine's accident), suggesting that its condition was not considered a high priority at the time.

- Katherine's father conceded the road was graded a number of times in 2004, and that employees of the Municipality were "trying to do their best" in that regard. However, he thought the Municipality should have applied at least another "six to eight inches" of gravel along the entire road, (so that the grading would have been more effective), and done significant work to the shoulder of the road to enhance drainage, (e.g., by installation of a culvert and removal of grass). According to him, representatives of the Municipality suggested they would take such action, but "really didn't do anything" in that regard.

- Mr Bobier initially testified that he saw "no actions taken to improve the road" or address his many complaints and concerns. However, he later acknowledged that the Municipality would "sometimes send round the grader", to do what he described as "spot grading". In cross-examination and again in re-examination, he also acknowledged and emphasized that he really wants the road on which he lives to be paved with a "tar and chip" surface, and that he will be content with nothing short of that change.

- Mr McPhail observed grading on Thomson Line Road, but suggested that such grading and the perceived application of mixtures with excessive concentrations of sand was ineffective. He thought application of additional or better gravel at the road's shoulders, (as may have been done in or around 2009), was a helpful but impermanent solution. He wanted the road paved, and thought that should have been done because other roads in the township had been paved, including a more distant section of Thomson Line Road towards its west end, near the golf course and dump. (Mr McPhail suggested that had been done to give preferential treatment to a member of Council, who lived on that section of the road. However, I prefer and accept Ms Vowel's understanding that the western section of road was paved sometime after Katherine's accident, and probably in 2009, because objective traffic counts indicated significantly higher traffic volumes in that area. Moreover, as Ms Vowel indicated and Mr McPhail acknowledged, his desire for pavement nevertheless seems driven, at least in part, by a marked desire to avoid dirt on his car, rather than improved safety.)

- Mr Prentice seemed to take no issue with the grading he observed on Thomson Line Road, except to say that it generally was insufficient to have any lasting impact because of the mixture of sand and gravel being used by the City. In his opinion, higher quality mixtures were available. He also acknowledged that he personally was hoping for the road to be paved, as it not only would address potholing but also largely eliminate ongoing issues with dust and small stones that were "hard on cars".

[176] The plaintiffs took issue with the Municipality's acknowledged failure to maintain any written policies concerning the frequency of patrols or grading, any written schedules for maintenance operations, or contemporaneous and detailed logs to document patrols, grading efforts, application of gravel, or the receipt and handling of complaints on a progressive and thorough basis.

[177] I agree that substantially more and further detailed contemporaneous records would have been helpful in this litigation; e.g., to remove any and all doubt about such matters as the frequency and timing of patrols, the timing and precise nature of maintenance operations, and the receipt and handling of complaints.

[178] However, it should be remembered that the Municipality, and its road maintenance staff in particular, prepared and kept documentation primarily with a view to ensuring adequate road maintenance, and not to facilitate resolution of litigation.

[179] There was no suggestion or evidence that record-keeping or record retention by the Municipality fell below any mandated standard.

[180] Apart from arguments that it failed to document or relay alleged complaints in a timely or adequate way, (the possible implications of which have been considered above), I also saw nothing to indicate or even suggest that the Municipality's record-keeping practices affected its maintenance of Thomson Line Road in any deleterious way.

[181] Mr Hull and Mr Englehart were able to provide credible and detailed testimony about the Municipality's regular maintenance activities in relation to Thomson Line Road, and also were able to support that testimony with at least some available contemporaneous documentation.[75]

[182] While documents may be relevant, insofar as they have the potential to confirm or undermine oral testimony, the absence of such documentation does not, by itself, mean that such direct evidence should be rejected. In this case, I saw no reason to doubt the direct and largely unchallenged evidence of the Municipality, as far as its maintenance policies and practices were concerned. As noted above, witnesses called by the plaintiffs testified that they had observed such grading maintenance on numerous occasions.

[183] With the above considerations and evidence in mind, I return to the question of whether or not the Municipality "took reasonable steps to prevent the default from arising", (if, contrary to my finding above, loose gravel at the side of the road and/or the relevant potholes on the hill somehow constituted a "default" or "defaults" in the sense required).

[184] I note that, in contrast to s.44(3)(c) of the *Municipal Act, 2001, supra*, successful application of the statutory defence created by s.44(2) does not require satisfaction of any specified regime or standards of inspection, maintenance or repair.

[185] Nor is application of the defence defeated by suggestions or evidence that the steps taken failed to prevent a default from arising, that other measures might have been undertaken, and/or that such other measures might have been more successful, so long as the steps actually taken were "reasonable".[76]

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[75] I note that the documents and exhibits specifically mentioned herein were not the only contemporaneous records prepared and used by the Municipality and its staff in carrying out their road maintenance responsibilities. For example, Mr Englehart maintained and kept a "daily diary", (portions of which were filed in evidence), and Mr Hull explained that Road Department staff also maintained "home logs", (although these apparently were no longer available at the time of trial).

[186] In my view, there is no evidence before me to indicate that the actions taken by the Municipality were unreasonable, inappropriate or substandard. In particular:

- While the paving of Thomson Line Road is fervently desired by many of its residents, and almost certainly would have ensured a more level and sturdy driving surface, taking such a step was not reasonably required in the circumstances. This was a rural road with relatively low traffic volume, and it did not demand the same sort of treatment usually given to busy streets in densely populated areas. Moreover, for the reasons outlined herein, the possibility of potholes and areas of less sturdy gravel are inherent realities in gravel roads of this nature. It cannot be sensible to hold that a large rural municipality, with limited means, fails to take reasonable steps to prevent such problems unless and until it paves all such roads within its jurisdiction.

- Although the plaintiffs suggested that the Municipality reasonably should have taken more steps to prevent potholes and areas of less sturdy gravel by improving drainage on Thomson Line Road, (e.g., through ditching and berming), or by using different types of gravel, I am not satisfied, for the reasons set out herein, that drainage or quality of gravel issues had anything to do with creation of the specific potholes that allegedly played a role in this accident.

- This is not a situation where there was any testimony from an expert on roadway maintenance to suggest that the Municipality's efforts failed to meet any accepted standard, or comply with any commonly recommended practice, concerning the maintenance of such a gravel road.[77]

- Nor is this is a situation where the Municipality was ignoring its responsibility to be on the lookout for possible pothole or excess gravel concerns in the area of the accident. To the contrary, the evidence before me indicated a very considered, active and ongoing program to prevent, monitor and address such concerns; i.e., by regular inspections, grading and gravel application where necessary. Inspections were reasonably frequent to enable the detection of any concerns, and prompt grading and gravel application if, when and where required. Such grading and gravel applications would, with reasonable frequency, level potholes at the relevant location, (in order to prevent their assuming dimensions posing an unreasonable risk), and draw loose gravel back from the sides of the road towards the middle, (in order to prevent unreasonable accumulations towards the edges of the road). I cannot say that the manner in which the Municipality chose to employ its resources was unreasonable. To the contrary, it seems to me that, given the safety "trade-off" concerns explained by Mr Englehart, more frequent grading would have been ill-advised and therefore unreasonable, as it would have rendered the entire road surface less stable and therefore less safe on a more regular basis. The frequency of grading also seems particular reasonable during the summer months leading up to Katherine's accident, when the roads were more hard-packed and resistant to pothole formation, and the entire road surface generally was more sturdy.

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[76] As noted by Justice Low in *Ondrade v. Toronto (City)*, [2006] O.J. No. 1769 (S.C.J.), at paragraphs 65-67: "That the actions taken by the [municipality] did not achieve [their] goal … is not determinative of whether the steps it took were reasonable. Section 44(3)(b) speaks to action rather than result. … The question is not whether something different or something more intensive could have been done – rather, the issue is whether the steps that the [municipality] did take were reasonable."

[77] In making that observation, I do not suggest in any way that there was any onus on the plaintiffs to lead such evidence. To the contrary, the onus of demonstrating that the statutory defence applies is on the Municipality. However, the absence of such evidence distinguishes this case from others, where such evidence has been offered, and results in less evidence to weigh against that offered by the Municipality in support of its assertion that the measures it took were reasonable.

[187] Having regard to all the circumstances, I am satisfied that the Municipality has discharged its onus of showing that it "took reasonable steps" to prevent the alleged defaults, (of potholes and excessive loose and unsturdy gravel at the edge of Thomson Line Road), in the area where the accident occurred.

MEETING OF REGULATED MINIMUM STANDARDS – s.44(3)(c)

[188] As noted above, pursuant to s.44(3)(c), a municipality is not liable for failing to keep a highway in a reasonable state of repair if "at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway … and to the alleged default and those standards have been met".

[189] It was common ground that the relevant minimum standards, if any, are found in the *Minimum Maintenance Standards for Municipal Highways*, O.Reg. 239/02, ("MMS"). These were enacted pursuant to s.44(4) of the *Municipal Act, 2001, supra*, and were in effect at the time of the accident.

[190] In broad terms, the MMS oblige a municipality to look with minimum prescribed frequency for certain highway conditions, respond to certain detected conditions within specified reaction times, and take measures to address such conditions by effecting repairs that at least meet certain minimum benchmarks. While not an exhaustively comprehensive regulation, (in the sense it does not provide standards for all possible aspects of highway maintenance), the MMS has been recognized as covering "most road maintenance activities".[78]

[191] The prescribed minimum standards are not the same for all types of highway in the province. Rather, they vary with and depend upon a particular highway's classification, as determined by s.1 of the MMS. In particular, with the assistance of a table, s.1 of the MMS deems highways to fall within certain numerical classes, depending on combined consideration of each highway's average annual daily traffic, (i.e., number of motor vehicles using the highway), and each highway's posted or statutory speed limit.

[192] In this case, it was common ground that Thompson Road should be regarded as a "Class 4" highway; i.e., because it has a posted speed limit of 80kph, and has average annual daily traffic of somewhere between 50 and 999 motor vehicles. (As noted above, the actual daily average apparently is no more than approximately 150 vehicles per day.)

[193] For present purposes, the relevant provisions of the MMS, (relating to frequency of routine patrols, potholes on non-paved road surfaces, and potholes on the surface of shoulders either paved or non-paved), are found in ss. 3 and 6 of the MSS, which read in part as follows:

> 3. (1) The minimum standard for the frequency of routine patrolling of highways is set out in the Table to this section.
>
> (2) Routine patrolling shall be carried out by driving on or by electronically monitoring the highway to check for conditions described in this Regulation.
>
> (3) Routine patrolling is not required between sunset and sunrise.
>
> TABLE
> ROUTINE PATROLLING FREQUENCY

Class of Highway	Patrolling Frequency

[78] See *Thornhill v. Shalid*, *supra*, at paragraph 95.

1	3 times every 7 days
2	2 times every 7 days
3	once every 7 days
4	*once every 14 days*
5	once every 30 days

…

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

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

TABLE 1
POTHOLES ON PAVED SURFACE OF ROADWAY

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

TABLE 2
POTHOLES ON NON-PAVED SURFACE OF ROADWAY

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

TABLE 3
POTHOLES ON PAVED OR NON-PAVED SURFACE OF SHOULDER

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

[Emphasis added.]

[194] While I have included the section 3 and section 6 tables in their entirety, (to place the provisions applicable to this case in context), in my view the only provisions with implications for this case are those I have emphasized above.

[195] In particular, the situation involves a Class 4 highway, with no paved roadway surfaces, and in my view the only evidence of potholes at the scene of the accident clearly places them in an area of Thompson Road that should be regarded as a "roadway" rather than a "shoulder".[79]

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[79] I note the distinction between "roadway" and "shoulder" to clarify and confirm the applicable table. It would seem to make no difference to the outcome of the analysis set out below, insofar as the pothole depth specified for Class 4 highways in Table 2 and Table 3 of s.6(3) is the same. However, I find that the former table applies for the following reasons:

- Pursuant to s.1(1) of the MMS, "roadway" is defined for purposes of the regulation as having "the same meaning as s.1(1) of the *Highway Traffic Act,* and "shoulder" is defined as meaning "the portion of a highway that provides lateral support to the roadway and that may accommodate stopped motor vehicles and emergency use".

- Pursuant to s.1(1) of the *Highway Traffic Act*, the term "roadway" is defined as meaning "the part of a highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder, and, where a highway includes two or more separate roadways, the term 'roadway' refers to any one roadway separately and not to all of the roadways collectively".

- Pursuant to the same subsection of the *Highway Traffic Act*, the term "highway" is defined as including "a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof".

- In this case, it is debatable whether the highway had any true "shoulders" at all, pursuant to the above legislated definitions, in the sense that the relevant definition of "roadway" is disjunctive and there appears to have been no intended or clear demarcation or boundary of any kind between portions of Thompson Road that were "improved" or "designed" for vehicular traffic and those that were not. To the contrary, the road was maintained as a single undivided and unlined surface from side to side, with vehicles free to travel regularly on any portion thereof as necessary and desired. There certainly was no defined or obvious "shoulder", in the sense of any area intended not for primary vehicular use but only "lateral support", stopped vehicles and/or emergency use.

[196] As far as "Routine Patrolling Frequency" is concerned:

- As Thompson Road is a Class 4 highway, the provisions of s.3 of the MMS and table contained therein effectively set "once every 14 days" as the applicable minimum standard of routine patrolling.

- Mr Englehart provided uncontradicted testimony, supported by the testimony of Mr Hull, and which I accept, confirming that the Municipality was aware of that applicable minimum standard, but nevertheless voluntarily implemented a routine whereby all roads within its jurisdiction, including Thompson Road, were patrolled at least once a week; i.e., by municipal employees driving on the roads each week, making arrangements for any noticed deficiencies to be addressed and repaired on a timely basis. This was certainly not a case of "wilful blindness".

- For the purposes of s.44(3)(c) of the *Municipal Act, 2001*, I accordingly find that the Municipality not only met but surpassed the applicable minimum standard for routine patrolling for Thompson Road.

[197] As far as potholes are concerned, the Municipality submits, and I agree, that the applicable minimum standards in that regard also had been met at the time of the accident. In that regard:

- The provisions of s.6(2) of the MMS deem a pothole "to be repaired if its surface area *or* depth is less than or equal to that set out in Table 1, 2 or 3". [Emphasis added.]

- Thompson Road is a Class 4 highway, and the potholes underlying the plaintiffs' allegations were located on the non-paved surface of the roadway. Table 2 of s.6(2) therefore applies, and in conjunction with the preamble to s.6(2), effectively provides that "a pothole" shall be deemed to be repaired if, *inter alia*, its depth is less than or equal to 10 cm.

- The depth of each pothole underlying the plaintiffs' allegations was no more than two inches, which converts into an imperial measurement of 5.08 cm. Each pothole underlying the plaintiffs' allegations accordingly had a depth less than or equal to that set out in Table 2, (for potholes on the non-paved surface of such a Class 4 highway).

- As none of the potholes in question exceeded both the surface area *and* depth set out in Table 2, s.6(1) of the MMS imposed no minimum standard of time within which the Municipality was to effect repairs. To the contrary, each such pothole was "deemed to be repaired" by the MMS.

[198] The plaintiffs argue that these provisions of the MMS do not apply, so as to shield the Municipality from liability relating to the potholes pursuant to s.44(3)(c) of the *Municipal Act, 2001, supra*.

[199] In particular, the plaintiffs emphasize that their complaint concerns not simply "a pothole" - which is the wording used by s.6(1) and s.6(2) of the MMS – but, rather, a *series* of potholes. In particular,

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- In any event, I find that the potholes underlying the plaintiffs' allegations were in fact located in that area of Thompson Road ordinarily used for vehicular traffic. In particular, they were located in areas of the road that had become obviously more hard-packed through the tendency of most drivers to travel predominantly along certain paths. (Again, the plaintiffs' expert Mr Udall emphasized repeatedly that the potholes in question had been created at regular intervals, along such regularly travelled portions of the road, through the repeated passage of vehicles and the effect of their standard suspension systems.) For present purposes, the potholes in question accordingly should be regarded as having been located on a non-paved surface of a "roadway".

their contention is that the proximity of these *multiple* potholes to each other created a situation of danger, even if each pothole may not have been dangerous on its own.

[200] Thus, relying on what they say is the "ordinary meaning" of the relevant legislation, and authorities such as *Slough Estates Canada Ltd. v. Ontario Regional Assessment Commissioner, Region No. 15* (2000), 48 O.R. (3d) 84 (C.A.), emphasizing that the ordinary meaning of a legislative provision should prevail absent a good reason to reject it[80], the plaintiffs argue that there are in fact no prescribed minimum maintenance standards applicable to the potholes in respect of which they are advancing a claim, and therefore no expressly prescribed standard which, if satisfied, might in turn give rise to a defence shielding it from liability pursuant to s.44(3)(c) of the *Municipal Act, 2001, supra*, at least insofar as the potholes are concerned.

[201] I disagree.

[202] In that regard, I readily accept the plaintiffs' underlying premise that a combination of independent factors, each one seemingly inconsequential, innocuous or excusable when considered in isolation, collectively may constitute a hazard when viewed from a cumulative and/or wider perspective. An additional straw may break the proverbial camel's back and, (as reflected in an aphorism dating back to the time of Aristotle), the whole may be greater than the sum of its parts.

[203] Similarly, in this case, I accept that one pothole might not cause an ordinary driver any significant concern when traversed in isolation, whereas crossing a series of similar potholes in close proximity arguably might present additional challenges, (although I found that was not the case here, for the reasons set out above). In the abstract, depending on the facts and barring any legislative intervention, such considerations might warrant findings of negligence and/or causation, and corresponding liability, if the focus is extended beyond each individual pothole, considered separately.

[204] However, as far as application of s.44(3)(c) is concerned, the real issue is one of statutory interpretation, and whether the legislation in question was intended to shield a Municipality from any liability that otherwise might exist in a case such as this; i.e., where sufficient care was taken by a Municipality to ensure, in effect, that each and every relevant pothole on its roadway was maintained to the minimum standards prescribed by section 6 of the MMS.

[205] For a number of reasons, I think the plaintiffs' suggested approach and narrow interpretation of s.6 of the MSS must be rejected.

[206] First, in matters of statutory interpretation, distinctions based on use of wording ordinarily suggesting singularity rather than plural, or vice versa, have been addressed by Part VI of the *Legislation Act, 2006*, S.O. 2006, c.21, which reads in part as follows:

> 46. *Every provision of this Part applies to every* Act and *regulation*.
>
> 47. Section 46 applies unless,

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[80] Reiterating comments from the earlier decision of *Macartney v. Islic* (2000), 48 C.C.L.T. (2d) 19 (C.A.), the Court of Appeal described the task of a court in approaching an issue of statutory interpretation:

> A basic principle of statutory interpretation is that the ordinary meaning of a legislative provision should prevail absent a good reason to reject it. The ordinary meaning is presumed to be the intended or most appropriate meaning unless the context or the purpose and scheme of the legislation, or the consequences of adopting the ordinary meaning suggest otherwise.

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context.

…

67. *Words in the singular include the plural* and words in the plural include the singular.

[Emphasis added.]

[207] Applied to this case, (and barring any supervening considerations of the sort outlined in s.47 of the *Legislation Act, 2006, supra*), the "ordinary meaning" attributable to otherwise singular references and pronouns in s.6(1) and 6(2) of the MMS, (to "*a* pothole", "*the* pothole", and "*its* surface area or depth"), must be taken to include corresponding plural meanings as well.

[208] Thus, the ordinary meaning of s.6(2) of the MMS effectively includes a legislative declaration that "*Potholes* shall be deemed to be repaired if *their* surface area or depth is less than or equal to that set out in Table 2", with a corresponding negation of liability pursuant to s.44(3)(c) of the *Municipal Act, 2001, supra*. I find nothing in the regulatory language to suggest a contrary intention, or any concern that the resulting meaning is somehow inconsistent with the surrounding context.

[209] Second, as emphasized by our Court of Appeal, one must have regard to the consequences of adopting a suggested "ordinary meaning" of legislative text. In this case, although the plaintiffs suggest that the ordinary meaning of the text leaves a legislative "gap" in the MMS and s.44(3)(c), relating to situations involving multiple potholes, it seems impossible for any such gap to be confirmed and addressed in the manner suggested by the plaintiffs without generating an outcome inconsistent with the existing legislative text. In particular:

a. This is not a situation where, by accident or design, the legislator has failed entirely to address a specific type of highway condition. To the contrary, the legislator clearly turned his or her mind to the matter of potholes, and "if an activity has been subjected to regulation by the legislature, courts are obligated to make the scheme work".[81]

b. For the reasons outlined above, each and every individual pothole underlying the plaintiffs' claim, considered in isolation, is "deemed to be repaired".

c. The plaintiffs ask the court to adopt a statutory interpretation that would permit the Municipality to be faulted and held liable for not addressing and repairing the "series" of potholes underlying the plaintiffs' claim. However, I find it impossible to imagine how the Municipality might have gone about doing so, in order to avoid such liability, without inherently and unavoidably having to repair one or more of the individual potholes making up the "series".

d. In my view, adoption of the plaintiffs' argument therefore would be tantamount to the court finding that, in order to avoid liability, the Municipality effectively had an obligation to repair something, (one or more individual potholes making up the series of potholes), which the legislator has deemed to be repaired already.

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[81] *Sullivan and Driedger on the Constructions of Statutes*, (4th ed.), at p.136.

[210] As emphasized and explained in *Sullivan and Driedger on the Construction of Statutes*, (4th ed.), at pp.246-247, legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations which produce confusion, or "create an inconsistency or anomaly when considered in the light of some other provision in the statute", therefore are labelled "absurd" and must be rejected.

[211] Such comments apply, I think, to the plaintiffs' suggestion that s.6(2) of the MMS and s.44(3)(c) of the *Municipal Act, 2001* were intended to apply to potholes individually, but not to a series of potholes.

[212] Third, on a related but more general note, I believe the more constrained "ordinary meaning" of those provisions, suggested by the plaintiffs, would substantially undermine what I perceive to be the relevant purpose of the legislation, as far as potholes are concerned, when viewed from the perspective of a pragmatic and functional approach.

[213] The evidence in this case confirmed that potholes are a regular and inevitable occurrence, at least in relation to gravel roads where the condition of the road is far from static. In particular, a gravel road may be graded to a level surface, but potholes inevitably and gradually will return, often at intervals a short distance from each other, owing to such common variables as the passage of vehicles, operation of vehicle suspension systems and weather conditions. In short, multiple potholes are a common phenomenon, and inherently represent a constantly evolving and moving target, as far as maintenance is concerned.

[214] By reference to entirely objective standards, based on measurable surface area and depth of existing conditions, the legislator set guidelines for when a Municipality, (necessarily working to allocate maintenance resources from budgets that are not unlimited), should intervene to repair any given pothole. A Municipality dutifully and successfully working to comply with such standards was then to receive a measure of protection from liability, at least insofar as a pothole not exceeding the minimum standards was concerned.

[215] In my view, that particular legislative scheme would be entirely undermined and frustrated, in practical terms, by the simple expedient of plaintiffs relying on the fact that potholes are rarely found in complete insolation, especially on gravel roads such as the one in this case. In particular:

- a pothole otherwise deemed to have been sufficiently repaired almost inevitably would be transformed into a potential liability by completely undefined but arguable proximity to any other pothole;

- municipalities effectively would be deprived of any objective and practical standard for determining when and how resources should be directed to the repair of potholes; and

- the supposed protection from liability for any pothole, otherwise deemed to have been adequately repaired because of its existing dimensions, would be rendered completely illusory.

[216] Adopting the narrow statutory interpretation suggested by the plaintiffs, and limiting the applicable of s.6 of the MMS and s.44(3)(c) of the *Municipal Act* so that they apply only to an isolated single pothole and not to any series of potholes, accordingly seems inconsistent with the court's legislated obligation to interpret an Act or regulation in a remedial way, and give it such "fair, large and liberal interpretation as best ensures the attainment of its objects". See the *Legislation Act, 2006, supra*, at ss.64(2) and 64(2).

[217] Nor would it seem conducive to "making the scheme work", insofar as the activity of maintaining potholes has been subjected to regulation by the legislature.[82]

[218] Interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.[83]

[219] For the above reasons, I find that s.6 of the MMS accordingly applies not only to lone potholes, but also to situations involving multiple potholes, or those which happen to be in a "series", such as those underlying the plaintiffs' claim.

[220] The applicable minimum maintenance standards were met in this case, and the municipality has satisfied its onus, (or would have satisfied its onus in the event that was formally necessary), of demonstrating why s.44(3)(c) operates to shield the defendant Municipality from liability in any event, at least insofar as possible liability stemming from the potholes is concerned.[84]

Contributory Negligence - Seatbelt Analysis

[221] As noted above, any municipal liability pursuant to s.44(2) of the *Municipal Act, 2001*, *supra*, is made "subject to the *Negligence Act*". This would include possible reduction of liability reflecting a plaintiff's contributory negligence, including failure to wear a seatbelt when doing so might reasonably have prevented or reduced the losses sustained.

[222] My finding that the Municipality bears no liability for this particular accident formally eliminates the need to address and determine whether Katherine was properly restrained at the time of the accident.

[223] However, the parties devoted considerable attention to the seatbelt issue at trial, and I will provide my views in that regard in case I somehow have erred in the analysis set forth above.

[224] In broad terms, the plaintiffs are adamant that Katherine was wearing her seatbelt at the time of the accident.

[225] In support of their position, they rely in part on the testimony of Katherine and her parents at trial, which included the following:

- Katherine said that wearing a seatbelt was her normal practice, (as doing otherwise admittedly would have been illegal, reckless and not good driving behavior), and that she remembers putting her seatbelt on that evening for the drive home. She also said that her first memory after the accident was that of "hanging upside down" in the overturned vehicle because of her unbroken seatbelt, which she still was wearing, and which she somehow was able to unbuckle or slide under before then making her way out of the damaged car by crawling through the front passenger side window.

- Donald McLeod, (Katherine's father), testified that he had trained his daughter to always wear a seatbelt, and that was her practice. He also says that, when he and his wife came upon the scene of the accident approximately ten minutes after it happened and recognized the overturned car as the one

[82] Ibid., at p.136.

[83] Ibid, at p.195.

[84] My attention was not drawn to any applicable or relevant minimum maintenance standards applicable to loose or less sturdy gravel near the side of the road, or to gravel generally.

Katherine had been driving, he immediately descended the ditch, into the tall grass and cornfield, to approach the vehicle and look inside for his daughter while his wife remained upon the road, "hollering for Katherine". He says that, in looking inside the overturned vehicle, he saw that no one was there, but also that the driver's seatbelt was stretched out "the size of a person" so he "knew she'd got out". Mr McLeod also opined that Katherine's injuries, (and her pelvic fracture in particular), were consistent with her wearing of a seatbelt.

- Linda McLeod, (Katherine's mother), admittedly did not descend to the overturned vehicle. However, she testified that Katherine always wore a seatbelt "as far as [she] knew", (for example, when mother and daughter travelled together), and Mrs McLeod accordingly "would not believe for one minute" that Katherine was not wearing a seatbelt at the time of the accident. Like her husband, Mrs McLeod also relied on Katherine's injuries being consistent with the wearing of a seatbelt; an opinion said to have been conveyed to the parents by one of Katherine's doctors.

[226] I nevertheless am mindful of numerous frailties in this inherently subjective evidence, which in my view include the following:

- The police photographs of the vehicle show extensive damage, including severe crushing of the roof, particularly on the driver's side of the car where it is compressed and flattened almost down to the base of the driver's side window. To me, these photos make it clear, even from a lay perspective, that "hanging upside down" in the driver's seat after the accident would have been impossible. When challenged on this during cross-examination, Katherine did not offer an explanation or qualify her original evidence in any way, (e.g., to suggest that her words had been intended to describe a somewhat different situation and position), but simply repeated that she knew she was wearing her seatbelt.

- During cross-examination, Katherine also was confronted with the statement admittedly given by her to the police on January 14, 2005, (just four months after the accident). Back then, Katherine said "I don't actually remember getting into the accident, when I hit the ditch, *the next thing I remember is crawling out of the car* to go get help". (Emphasis added.) Moreover, when later asked "Did you have a seatbelt on?", Katherine responded: "I *thought* I did. I don't actually remember unbuckling myself or how I got out. I *just remember I had put my two hands on the ground and my knees in the car*." (Emphasis added.) In my view, these are strong indications of a much more contemporaneous memory that is far less certain when it comes to the wearing of a seatbelt, and which negates the presence back then of certain memories asserted at trial some 8 years after the accident.

- The circumstances in which Mr McLeod made his observations about the interior of the vehicle on the night of the accident certainly were less than ideal. According to his evidence, (and consistent with police photographs of the accident scene), to reach the overturned vehicle Mr McLeod was obliged to descend a drop off of some fifteen feet from the surface of the roadway, traverse a ditch and then head through tall grass into the edge of the cornfield. There, crushing of the overturned vehicle's roof would have permitted a view into the interior only from the inverted front passenger side windows, lying against the ground. This in itself would have made it difficult, in any event, to see in to the driver's side area of the vehicle's interior, where the relevant seatbelt would have originated. Moreover, all concerned agree that it also was a dark night and that the area had no lighting. Although Mr McLeod says he instructed his wife to shine the lights of their car from its elevated position on the roadway, and on to the area of the overturned vehicle below "so that he could see", he also acknowledged that "helped very little". Moreover, Mr McLeod's understandably urgent priority at the time was the location of his daughter, who was still missing at the time. In such circumstances, it seems doubtful that, after quickly

seeing that Katherine was not still inside the overturned car, Mr McLeod would have lingered to make any detailed examination of the vehicle's interior.

- It was clear to me that the beliefs of both Mr and Mrs McLeod were influenced by their understanding of an unnamed doctor's comment that Katherine's injuries were consistent with the wearing of a seatbelt. However, I was presented at trial with nothing but hearsay evidence of that alleged comment and opinion, which presents obvious difficulties; e.g., inability to test whether the statement was in fact made as alleged, let alone the precise nature of its content, basis and possible qualifications, or the expertise of the doctor in question in relation to such matters. This in turns obviously calls into question the reliability of lay evidence based in part on such hearsay evidence.

- Finally, at the risk of stating the obvious, Katherine and her parents clearly have an interest in the outcome of this litigation, and a desire to see that Katherine obtains some measure of financial compensation for her injuries. In the circumstances, I am alert to the possibility that, almost eight years after the events in question and inevitable intervening discussion of the case and evidence, they may, even if quite unconsciously, have a tendency to colour or shade their testimony in a manner lending support to their cause, including the perhaps unintentional but effective incorporation of positions, assertions and evidence that may not have originated in their direct observations and experience.

[227] For these reasons, I am more inclined to rely on the inherently more objective physical evidence regarding use of a seatbelt on the night in question; something in respect of which I received considerable expert evidence.

[228] Of course, I am not bound to embrace the evidence and findings of any expert, let alone bound to choose the evidence of one expert over another, but the competing expert testimony does inform my independent conclusions.

[229] In that regard, I was impressed by the observations and analysis of Constable Walker, (who from the outset has had no affiliation with either "side" in this litigation), and of Mr McCarthy, (who despite being called as an expert witness by the defendant Municipality, presented his analysis in a manner that struck me as both dispassionate and objective, for example, by readily indicating and confirming necessary and appropriate limitations on his analysis).

[230] I found the testimony of Mr McCarthy particularly informative and persuasive in relation to this issue, insofar as his expertise in accident reconstruction was supplemented by additional specialist training and experience in the areas of biomechanics and seatbelts. (The latter includes many years of experience working for and with entities such as Transport Canada, as well as various automobile and aircraft manufacturers, in testing, evaluation and design of safety mechanisms and various interior occupant restraint systems in particular – using not only three-dimensional simulations but also full scale crash testing.) In this particular case, Mr McCarthy's seatbelt analysis also included work done to locate and work with an exemplar vehicle, similar to that driven by Katherine at the time of the accident, in order to expand upon and confirm his findings.

[231] In contrast, although the plaintiffs' expert Mr Udall was qualified to provide opinion evidence in relation to the seatbelt issue, (by virtue of his repeated involvement in accident reconstruction and associated seatbelt issues, giving him special knowledge and experience going beyond that of the trier of fact in relation to such technical issues), I found his testimony to be far less persuasive and helpful – for reasons that included the following:

- In addition to his acknowledged lack of any specific training relating to seatbelt dynamics, Mr Udall also had no focused expertise in seatbelt design and testing comparable to that of Mr McCarthy.

- Mr Udall's analysis of the seatbelt clearly was flawed from the outset, as it proceeded on an understanding as to the nature of the relevant seatbelt mechanism, (noted below), that was later confirmed and acknowledged to have been completely inaccurate.

- At times, it seemed to me that Mr Udall's testimony seemed to deviate from that of an objective expert and border instead on argument; e.g., to suggest that Katherine's description of "hanging upside down" should be interpreted as a more modest suggestion that she was still restrained by her seatbelt, and/or that the investigating police must have missed finding additional blood evidence inside the vehicle because of its red interior.

- The overall impression left with me, in relation to Mr Udall's testimony concerning the seatbelt issue, was that of an expert trying to sustain a conclusion previously reached through admittedly flawed analysis; i.e., by attempts to make the physical evidence conform to that previously reached conclusion, instead of looking for the proper conclusions to be reached through independent and objective analysis.

[232] As noted by Mr McCarthy and confirmed by police photographs, the particular driver's seatbelt mechanism in Katherine's vehicle had not one but two separate and independent emergency locking retractors, (one at the end of the driver's lap belt and another at the end of the driver's shoulder belt), with the lap and shoulder belts being two separate pieces of webbing, each separately attached to a common latch plate; i.e., the point where a driver would "buckle up" by inserting the latch plate in the common locking mechanism to the right of his or her lap. (Mr Udall incorrectly assumed that the relevant seatbelt mechanism consisted of a single and continuous piece of webbing, with a fixed anchor at one end and just one locking spindle at the other, and a "sliding tongue" latch or buckling plate that notionally divided the continuous belt into lap and shoulder sections while in use. This, he originally and incorrectly opined, would have allowed for the creation of additional slack in the lap belt area once a driver slipped out from the shoulder restraint in a sideways rollover.)

[233] As explained by Mr McCarthy, each locking retractor was "vehicle sensitive", in that each had a sensitive pendulum mechanism that independently would have locked both the shoulder and lap belts once the vehicle underwent a sudden deceleration in any direction, and would have remained locked until such time as the vehicle came to a complete and resting position sufficient to bring each pendulum back into its resting alignment on a sustained basis. (Mr Udall initially assumed, incorrectly, that the nature of the relevant retractor locking mechanism was not "vehicle sensitive" but "webbing sensitive"; i.e., with locking triggered by the belt being pulled from the retractor past a certain speed, rather than by sudden directional decelerations of the vehicle itself. That type of mechanism might have allowed the driver's seatbelt to not lock and continue "unspooling" in response to certain forces – such as those created when the vehicle went into a sideways yaw – provided the rate of pull on the belt did not exceed that of the locking mechanism. However, such a "webbing sensitive" locking mechanism was not present and, when confronted with the "vehicle sensitive" locking mechanisms actually present in this case, Mr Udall suggested that they too would continue to lock and unlock repeatedly, spooling out significantly greater lengths of seatbelt, as the pendulum mechanism temporarily passed a number of times through its resting alignment position during the course of the accident. I reject that suggestion, not only because it is contrary to the evidence of Mr McCarthy, which I regard as superior on this point, but because it seems contrary to common sense. In practical terms, an occupant restraint mechanism that easily permits vast quantities of belt to unspool in response to very momentary and fleeting possible realignments of the trigger mechanisms, despite the car still being involved in rapid decelerations and rollover, would provide no effective restraint at all.)

[234] Mr McCarthy explained, and I accept, that the locking that would have occurred in each of the lap and shoulder retractors would have prevented any further unspooling of the lap and shoulder belt webbing, and correspondingly would have created, in the circumstances of this particular accident, severe loading forces on each if they were holding Katherine in place during the course of the accident. I also accept the evidence of Constable Walker and Mr McCarthy that such loading forces would have produced corresponding "loading marks" on Katherine's seatbelt webbing had her seatbelt been worn during the course of this particular incident, and that there were no such marks or other signs of seatbelt loading and failure found in this case. (Mr Udall did not dispute the absence of such marks and indications, but sought instead to explain that finding by suggesting, through the flawed assumptions and otherwise rejected theories outlined above, the absence of seatbelt loading forces in this particular case. Although Constable Walker conceded during cross-examination that loading marks are not always created by forces placed on seatbelts worn in "side to side rollover" accidents, and acknowledged that such tell-tale signs of seatbelt use might possibly be absent in an accident involving the type of impact that occurred here, he also emphasized that this depends entirely on the particular circumstances of the case, including not only the type of impact but many other variables. In this case, given the particular belt configuration and locking mechanisms in play, I share the view of Constable Walker and Mr McCarthy that loading forces and marks would have resulted and been found had Katherine been wearing her seatbelt at the time of the accident.)

[235] Both Constable Walker and Mr McCarthy also noted and relied upon damage to the outboard side of the "A-pillar" on the passenger side of the vehicle; i.e., the pillar which runs in an angled but generally vertical direction along the leading edge of the retractable front passenger door window, forming part of that relevant window's frame.

[236] That particular damage – quite visible in the police photographs – was described by Constable Walker and Mr McCarthy as a "dent"; i.e., a deformation caused by the pillar being brought into forceful contact with some other object, as opposed to structural damage inflicted by compression forces on the vehicle during the rollover. Nor in my view does it seem likely that the dent was caused by impact of the A-pillar with the ground, having regard to the otherwise relatively undamaged right side of the vehicle. In the circumstances, I find that the rounded dent in question was caused not by general forces associated with the rollover, but by specific impact of the A-Pillar with some object other than the ground.

[237] Constable Walker and Mr McCarthy believed that the A-pillar dent in question was caused by crushing contact with Katherine's head and face. The general theory of dynamics underlying that belief, (which I found to be logical and credible), was explained in more detail by Mr McCarthy as follows:

- An unrestrained occupant of the vehicle initially would have been subjected to forces created when the vehicle started into its sideways yaw; forces which, while not large, already would have initiated a tendency of an unrestrained driver to be pushed to the right of the vehicle's interior, before the automobile became airborne when it reached the north side of the roadway.

- Based on noted mud impact on the vehicle's tires and one of its rear wheels breaking off, the vehicle clearly then initially hit the ground with a high degree of force. That in turn would have caused any unrestrained driver of the vehicle to be propelled forcefully even further across the front seats of the vehicle towards its passenger side; forces which resulted, at that point, in Katherine's head being projected through and out the passenger side window while the rest of her body remained inside.

- Katherine's head and face then were trapped between the A-pillar and ground during the roll-over, with the ground sliding underneath and pushing Katherine's head and face forcefully into the A-pillar,

thereby simultaneously causing both the dent and Katherine's severe head and facial injuries, (permanent consequences of which were readily visible as Katherine testified at trial).

[238] In support of their belief as to the cause of the A-pillar damage, Constable Walker and Mr McCarthy both relied on the presence of fresh blood and human flesh clearly visible in and around the dent, which in the circumstances could have come only from Katherine.

[239] It was suggested by Mr Udall, and again during cross-examination of Constable Walker and Mr McCarthy, that such findings were caused by Katherine crawling out of the passenger window and past the relevant window frame after the accident, while coping with severe injuries including very serious trauma to her head and face. However, I consider and find that explanation improbable, for reasons that include the following:

- The nature and location of the dent, coupled with the presence of not only blood but also embedded human tissue in the immediate location of the A-pillar damage, in my opinion strongly indicates forceful impact and not just incidental and passing contact.

- The same can be said, in my view, of the "crushing" injuries to Katherine's head and face, as well as the evidence indicating that Katherine had quantities of grass and dirt, significant enough to be noted in the medical records, in the wounds to her face and head.[85] To me, this seems far more consistent with Mr McCarthy's opinion that Katherine's head was projected out the window and held forcibly between the vehicle's A-pillar and the ground as it slid along the ground and grass, rather than the suggestion that her face simply made incidental and passing contact with the ground as she made her way out of the vehicle.

- In my view, the blood evidence as a whole also supports the theory of accident and injury dynamics put forward by of Constable Walker and Mr McCarthy, and substantially undermines the plaintiffs' theory that Katherine was wearing her seatbelt prior to undoing it after the accident and making her way out the passenger side window. In particular, Constable Walker's testimony and the police photographs confirm that substantial amounts of blood pooling and transfers were found in the area immediately outside the front passenger window of the overturned vehicle on its passenger side, after the accident. However, there were no findings of blood inside the vehicle itself. Given the nature of Katherine's injuries, I think quantities of blood similar to those found outside, and indeed probably more, would have been deposited inside the vehicle if events had transpired as suggested by Katherine at trial; i.e., if she and her injured head and face had remained inside the vehicle, suspended upside down while still belted and restrained, prior to regaining orientation, somehow undoing the belt mechanism, and slowly making her way outside. Conversely, the absence of blood inside the vehicle provides, I think, a very strong indication that Katherine's injured head and face simply were not inside the vehicle when the injuries were inflicted, or for even a relatively short time thereafter; something which realistically could and would not have been the case had she been wearing her seatbelt at the time. As noted above, Mr Udall suggested that the investigating police must have missed finding additional blood evidence inside the vehicle because of its red interior. However, I found the suggestion not only unsupported by the evidence but argumentative, and reject it. Constable Walker's testimony and the police photographs both indicate and confirm a careful inspection of the accident scene and vehicle, (with the latter being examined not only at the site but also after its removal to an interior location), and very deliberate efforts to locate and document available blood evidence. In that regard, there are numerous photographs of wet and dried blood on nearby vegetation and other objects scattered on the ground near the vehicle, and on

[85] I note that the relevant medical records themselves were not tendered as exhibits at trial, but the plaintiffs also did not object to or dispute Mr McCarthy's indirect evidence as to their content.

the vehicle's A-pillar. However, Constable Walker also expressly noted that he looked for evidence of blood in the interior, and around the driver's seat and belt in particular, (where he would expect to find blood had Katherine been wearing her seatbelt), and found none. In the circumstances, I think it highly unlikely that the police simply failed to notice significant quantities of blood and/or corresponding staining inside the vehicle, despite its red interior.

- Katherine's own statement, given to the police in January of 2005, indicated that the "next thing" she remembered, after heading into the accident, was "crawling out of the car to go get help". In particular, she indicated that her first memory after the accident was that of putting her two hands on the ground while her knees were still inside the car. In my opinion, this is entirely consistent with the initial movements Katherine would be expected to make if, as suggested by Constable Walker and Mr McCarthy, she had been unrestrained and her upper body already had moved to and partially through the passenger side window during the accident.

[240] For these reasons, I find that the damage to the A-pillar in question was indeed caused in the manner outlined in paragraph [34], *supra*.

[241] Relying on the nature and expected operation of the relevant restraint system in Katherine's vehicle, and his examination of the similar exemplar vehicle and its dimensions, (with the extent of the relatively wide body confirmed by the testimony of Constable Walker), Mr McCarthy testified, and I accept, that it would have been impossible for Katherine's head and face to collide with the A-pillar in that manner had she been wearing her seatbelt at the time of the accident.

[242] In particular, as Mr McCarthy explained, even if the forces of the accident had propelled Katherine violently to the passenger side of the vehicle, effectively sliding her upper torso out of the shoulder portion of the belt assembly and onto her side in the front passenger seat area, the lap portion of her belt assembly independently would have locked and prevented her from moving further towards the front passenger window. For a person of her height, and considering the width of the vehicle, this effectively would have prevented Katherine's head and face from reaching the area of the front passenger side A-pillar had she been wearing her seatbelt.

[243] In reaching the above conclusions, I emphasize that I also have considered but am not persuaded by the plaintiffs' reliance on two other particular aspects of the physical evidence:

i. the nature of Katherine's injuries in their entirety, including injuries which the plaintiffs say are indicative of Katherine having worn her seatbelt; and

ii. a photograph, showing that the driver's seatbelt of the damaged vehicle was both unspooled and unretracted after the accident.

[244] As far as Katherine's injuries are concerned, the plaintiffs submitted that Katherine sustained a pelvic fracture and laceration to her left breast during the accident, and that both injuries are consistent with her wearing of a seatbelt. However:

- As noted above, I received almost no direct evidence of injuries sustained by Katherine during the accident, including the particular injuries relied upon by the plaintiffs. Apart from the permanent visible consequences of Katherine's head and facial trauma, evidence as to the nature of her injuries was limited to brief and broad references by Mr McLeod, (e.g., to Katherine having suffered "a cracked pelvis"), and

the testimony of Mr McCarthy, (who reviewed Katherine's medical records in preparation of his opinion as an expert in biomechanics and provided indirect testimony of their content).

- There was no expert opinion evidence supportive of a causal connection between Katherine's injuries and wearing of a seatbelt, apart from a statement alleged to have been made to her parents by one of Katherine's unidentified doctors; evidence which, as noted above, is hearsay which cannot be verified or tested.

- As a properly qualified expert in biomechanics and restraint mechanisms, Mr McCarthy testified that Katherine's failure to wear a seatbelt was supported not only by the evidence outlined above, (including the evidence of her significant facial injuries and the likely manner of their causation), but by the absence, in his opinion, of any seat-belt induced injuries. In particular, during cross-examination, he expressly rejected the suggestion that either her pelvic fracture or left breast abrasion provided any strong indication that Katherine was wearing a seatbelt at the time of the accident. To the contrary, Mr McCarthy emphasized that pelvic fractures actually are not a common injury associated with seatbelt use. While such driver seatbelt injuries can happen in severe collisions, and are quite common in accidents involving severe impact to the driver's side of a vehicle, they are not common in rollover accidents such as the one that happened here. Similarly, Mr McCarthy explained that, while left breast abrasions from seatbelt use are common in frontal collisions, (where a shoulder belt provides significant restraint resulting in significant pressure to the left chest area), the forces involved in a rollover accident such as this are not conducive to such an injury, (as the forces exerted on Katherine primarily would have resulted in her upper body sliding sideways to the passenger side and out of her shoulder belt). In his expert opinion, the injury to her left breast and to her pelvis therefore were not indicative of seatbelt use, but equally consistent with an injury sustained in some other fashion by her unrestrained movements within the vehicle, depending on "how she fell" before she and the vehicle came to a rest.

- In the result, certain evidence of Katherine's injuries therefore supports a conclusion that she failed to wear a seatbelt, (insofar as her head and facial were able to hit the A-pillar and sustain damage in the manner outlined above), while other evidence of her injuries is equivocal in relation to the wearing of a seatbelt, (e.g., insofar as her pelvic and left breast injuries are concerned).

[245] As for the photograph of the driver's side seatbelt being unspooled and unretracted following the accident:

- The photograph in question was not taken by the police. It was instead a photograph included in the expert report of Mr McCarthy dated August 23, 2012. That report was not formally made an exhibit at trial. However, the photograph in question, (described Mr McCarthy's report as "Figure 1: Driver's seat belt in Ms McLeod's vehicle"), was expressly referred to and relied upon by Mr Udall during the course of cross-examination.

- Although included in Mr McCarthy's report, the photograph was not taken by him. Rather, Mr McCarthy's reports indicate it was taken by Doug Johnson of the Walter Fedy Partnership; a private firm of engineers and consultants apparently retained sometime after the accident, and who included the photograph in a report dated May 13, 2005. In the circumstances, I find that the photograph was taken after the accident, and probably sometime after the overturned vehicle had been righted, transported from the accident scene, and inspected by the police.

- The photograph is taken from the vantage point of someone standing just outside the driver's door. It shows the vehicle's driver's seat, on top of which lie the anchor plate and portions of the lap and shoulder belt webbing of the driver's seat belt that are unspooled and unretracted.

[246] Mr Udall and the plaintiffs say that the photograph provides objective physical evidence consistent with Mr McLeod's testimony as to what he saw inside the vehicle shortly after the accident, and supports the plaintiffs' theory that Katherine's seatbelt was worn during the accident and unspooled in the manner alleged by Mr Udall prior to its shoulder belt retractor, at least, being damaged and rendered non-operational during the accident. Mr Udall suggested that, given what was depicted in the photograph, the only alternative scenarios were wearing of the seatbelt during the accident, or malfunction of the seatbelt prior to the accident such that Katherine improbably was sitting on it while driving.

[247] I agree that the photograph is consistent with Mr McLeod's assertion of what he saw inside the vehicle at the scene of the accident. However, for the reasons outlined above, I also have doubts as to whether Mr McLeod's testimony represents an accurate and reliable independent observation of the condition and position of the driver's seatbelt immediately after the accident.

[248] Moreover, for reasons that include the following, I also do not regard the position and condition of the seatbelt webbing depicted in the photograph to be reliable indications that Katherine was wearing her seatbelt during the accident:

- As noted above, the photograph was taken after the overturned vehicle had been righted and transported. Even without any further individual handling or manipulation of the webbing after these movements, the position in which the webbing came to rest before taking of the photograph offers, in my view, no trustworthy indication of where and how the webbing may have been positioned immediately before, during and shortly after the accident.

- There nevertheless are indications in the evidence before me that the relevant seatbelt webbing was indeed handled, and therefore inevitably moved and manipulated in various ways, after the vehicle had been righted from its overturned position. In that regard:

    - The photograph clearly shows substantial quantities of broken glass resting over most of the horizontal portion of the driver's seat; glass which must have been repositioned and fallen onto the previously upside down driver's seat when the vehicle was turned upright. In contrast, however, there is no such glass on top of the seatbelt anchor plate and quantities of webbing also lying over that same horizontal portion of the driver's seat. To me, this indicates that someone moved those portions of the seatbelt, displacing the glass on top of them, sometime after the vehicle was turned upright.

    - Constable Walker testified that part of the police examination of the vehicle after the accident included examination of the driver's seatbelt webbing for "loading marks"; marks which might have indicated that the seatbelt was in use during the accident. To me, this means that the police almost certainly were obliged to move and handle the relevant webbing after the accident. Moreover, I think that may well have necessitated some degree of unspooling of the seatbelt to examine the areas where such loading damage might have been expected – particularly since the photograph shows that the lap belt retractor, at least, was still sufficiently functional to have largely retracted that portion of the restraint mechanism by the time of the photograph.

- Finally, even if portions of the seatbelt were extended and unretracted immediately after the accident, (as described by Mr McLeod in his testimony), that does not mean, in my view, that they necessarily became so during the accident. While that might be one possibility, such evidence would be equally consistent with a scenario whereby the belt was extended but unworn and positioned to the side of the driver's seat. (In that regard, Mr McCarthy noted during cross-examination that failure of a belt to retract on a particular occasion does not necessarily mean that the retractor is broken. Nor, I think, would its failure to retract prior to the accident necessarily have meant it was resting on the seat, with Katherine sitting on it, as suggested by Mr Udall.) In this particular case, the possibility of the shoulder belt being extended by forces exerted during the accident, (when post-accident evidence of the unretracted shoulder belt is considered in isolation), accordingly must give way to the improbability and in some respects impossibility of other post-accident physical evidence, outlined above, had Katherine been wearing her seatbelt.

[249] During the trial, it repeatedly was suggested by the defence that use of seatbelts may have been neglected by members of the McLeod family from time to time; e.g., during short local drives on country roads that were largely devoid of traffic late in the evening, (such as the drive Katherine intended to make that night when travelling home from her aunt and uncle's property). However, Katherine and her parents denied the suggestion, and I find it unnecessary to determine what may or may not have prompted Katherine's conduct, in relation to her seatbelt, on the night in question.

[250] Based on the considerations outlined above, I find that, for whatever reason, Katherine was in fact not wearing her seatbelt at the time of the accident. The defendant has satisfied me, on a balance of probabilities that Katherine was contributory negligent in that regard.

[251] Had the Municipality been responsible for the accident, Katherine's failure to wear a seatbelt would have required a determination pursuant to s.3 of the *Negligence Act*, R.S.O. 1990, c.N.1, of an appropriate apportionment of damages sustained in the accident; i.e., having regard to the corresponding degree of Katherine's contributory negligence.

[252] Plaintiff counsel submitted that the degree of contributory negligence attributable to any failure to wear a seatbelt should be relatively modest, having regard to the severity of the accident and the possibility, put to Mr McCarthy during cross-examination, that Katherine's injuries actually might have been more serious if not fatal had she been fully restrained in the driver's seat during the course of the accident; e.g., when the roof of the vehicle was crushed on its driver side to the level of the seatback.

[253] However, I endorse Mr McCarthy's rejection of that suggestion, given the dynamics of the accident outlined above.

[254] In particular, while both the lap and shoulder belts would have locked when the accident began, and Katherine would have been restrained at the waist, the initial sideways motion and forces exerted on her would have slid her out of her shoulder belt and on to her side, and she would have been held in that position by centrifugal force by the time of the impact that crushed the roof of the vehicle.

[255] In the result, Katherine's injuries would have been significantly reduced had she been wearing her seatbelt. Certainly, her head and facial injuries would not have occurred in the manner they did, had she been properly restrained.

[256] Having regard to all the circumstances, had the Municipality been entirely responsible for the accident itself, I still would have assigned a contributory negligence factor of 25 percent for Katherine's failure to wear a seatbelt.

Conclusions

[257] For the reasons set forth above, I accordingly find as follows:

i. The specific alleged defects in Thomson Line Road at the time of the accident, relied upon by the plaintiffs, were not a "default" or "defaults" within the meaning of s.44(2) of the *Municipal Act, 2001, supra*. In particular, they did not amount to a breach of the Municipality's duty, pursuant to s.44(1), to keep the road in a state of repair that was reasonable in the circumstances, including the character and location of the highway.

ii. In terms of causation:

   a. If the alleged defects relating to the presence of loose or less sturdy gravel near the southern edge of the road constituted a "default" within the meaning of s.44(2) of the *Municipal Act, 2001, supra*, it was a cause of the accident and resulting damages.

   b. However, even if the alleged defects relating to potholes constituted a "default" or "defaults" within the meaning of s.44(2) of the *Municipal Act, 2001, supra*, the plaintiffs' damages were not sustained because of that default or those defaults.

   c. The primary if not only cause of the accident was Katherine's own negligence, with driver errors that included excessive speed, inappropriate attention, and the making of inadequate allowance for the possibility of necessary passing maneuvres, having regard to the prevailing conditions.

iii. In the alternative, (if any of the alleged defects did involve a "default" or "defaults" in the sense required and caused the accident), then having regard to the statutory defences extended by s.44(3) of the *Municipal Act, 2001, supra*:

   a. the Municipality did not know and could not reasonably have been expected to have known about the particular and relevant alleged defects on Thomson Line Road, thereby negating any liability pursuant to s.44(3)(a);

   b. The Municipality took reasonable steps to prevent the alleged defaults from arising, such that liability would be excluded in any event pursuant to s.44(3)(b); and

   c. Section 6 of the MMS applies to the potholes underlying the plaintiffs' claim and, as the applicable minimum maintenance standards were met in this case, (having regard to the depth of the potholes), s.44(3)(c) operates to shield the defendant Municipality from any alleged liability relating to those potholes.

iv. Katherine was not wearing her seatbelt at the time of the accident. Had the Municipality been entirely responsible for the accident itself, I would have reduced Katherine's

resulting damages by 25 percent for that particular aspect of contributory negligence, pursuant s.44(2) of the *Municipal Act, 2001, supra*, and s.3 of the *Negligence Act, supra*.

[258] In the wake of this tragic accident, one can have nothing but sympathy for the plaintiffs, and for Katherine McLeod in particular. At a young age, she has sustained very real and very significant injuries, the impact of which no doubt will be felt by her for the rest of her life.

[259] However, as Mr Justice Lauwers quite rightly pointed out in *Greenhalgh v. Douro-Drummer (Township)*, [2009] O.J. No. 5438 (S.C.J.), at paragraph 2, "In our system of justice, the personal losses arising from unfortunate events lie where they fall unless there is a legal basis for transferring responsibility for them to another".

[260] This litigation must be decided objectively and dispassionately, having regard to the evidence, and I find no proper or principled basis on the record before me to fairly transfer responsibility for the accident and losses, or any portion thereof, to the defendant Municipality.

[261] The plaintiffs' claim accordingly must be dismissed.

Costs

[262] Because my decision was reserved, the parties were unable to make any submissions regarding costs. If the parties are unable to reach an agreement in that regard:

a. The defendant may serve and file written cost submissions, not to exceed five pages in length, (not including any bill of costs or offers), within three weeks of the release of this decision;

b. The plaintiffs then may serve and file responding written cost submissions, also not to exceed five pages in length, (similarly excluding any necessary attachments), within three weeks of service of the defendant's written cost submissions; and

c. The defendant then may serve and file, within two weeks of receiving any responding cost submissions from the plaintiffs, reply cost submissions not exceeding two pages in length.

[263] If no written cost submissions are received within three weeks of the release of this decision, there shall be no costs of the action.

"*Justice I. F. Leach*"
Justice I. F. Leach

Released: January 6, 2014

CITATION: McLeod v. General Motors of Canada Limited et al., 2014 ONSC 134
COURT FILE NO.: 47039 (London)
DATE: 2014/01/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KATHERINE MCLEOD AND LINDA MCLEOD

Plaintiffs

- and -

GENERAL MOTORS OF CANADA LIMITED, THE CORPORATION OF THE MUNICIPALITY OF DUTTON/DUNWICH, and DONALD MCLEOD

Defendants

REASONS FOR JUDGMENT

LEACH J.

Date Released: January 6, 2014