

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

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

The Accident

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

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

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

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

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

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

Investigation

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

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

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

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

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

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

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

[57] His ultimate conclusion was:

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

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

Evidence of the Experts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Municipal Employees

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

- To get adequate drainage from the road surface, it was important that water be able to run from the crown or centre of the road to its side and then into the ditch.
- The platform of the road was 8.5 metres and it had been widened between 2001 and the date of the accident.
- He was not aware immediately prior to the accident of residents along the South Talbot Road complaining about the condition of the road.
- Mr. Fuller never told him that Mr. Docherty had complained about the conditions of the road.
- On March 24, 2004, Mr. Fuller gave a statement, which was read into this court's trial record.
- The lip was created by the ploughing of the gravel road taking material to the side of the road and from blow-off from vehicles.

[127] In his oral evidence, Mr. Black stated that he is the retired manager of the Public Works for the Town of Kingsville, having retired in January 2009. In 2004, there were six staff members and one team leader in his department. The team leader was Mr. Fuller. Mr. Black's responsibility included the maintenance of the roads, including repairs and upgrading, signage and winter maintenance.

[128] In 2004 most road surfaces in the municipality were hard surfaces but there were approximately 50 kilometres of gravel roads.

[129] He travelled the South Talbot Road if it was part of his route when he was going somewhere else. His impression was that the road was in decent shape for a gravel road. It was clear from his evidence that maintenance for the South Talbot Road was generally done during the summer months. This included grading, adding supplemental stone, and reshaping the road to get a decent crown or crossfall. As well, salt brine was added for dust control.

[130] He referred to Tab 3 of Exhibit Number Two, being weigh bills for trucks that hauled granular stone to the South Talbot Road on May 9, 2003. He indicated that this was material supplied to that road in that year, and that the length of the road is 2.2 kilometres. The grader operator would reform the crown on the road. His evidence was that the grader operators are experienced and would grade to around 2.5 to 3 percent cross fall.

[131] When grading gravel roads the shoulders are included to try and maintain the slope and remove the surplus of gravel material at the shoulders as this material can build up on the shoulder. During the summer, the gravel material migrates to the edge of the road and stays there. In the winter, gravel and dirt can be ploughed to the side of the road. After the major grading was done, the road would be touched up before winter freeze with a

thin surface layer grading. The major grading would be four to eight inches down. Touch up, by contrast, is one to two inches in depth.

- [132] He reviewed Mr. Fuller's time sheets for February 23, 2004. He noted that on routes two and three there was pot hole patching being performed and Mr. Fuller patrolled all gravel roads between 7:30 a.m. and noon. His evidence was that Mr. Fuller was particularly looking for any abnormal pot holes, wash outs, snow or ice. If Mr. Fuller found something that needed to be done, he would handle it himself or would call one of the other workers. He said that if it was something major, Mr. Fuller would discuss it with him.
- [133] His evidence was that if Mr. Fuller had seen water collecting on the road he would have expected Mr. Fuller to take some steps to remove the water. Specifically, he could have used a shovel to open the area or to bleed it off the road. That action would probably have accomplished the goal of removing the water. As well he could dig a small trench from the edge of the gravel through the grassy area beside the ditch. He agreed that water is something Mr. Fuller is looking for, particularly if it is not going into the ditch. On February 23, 2004, Mr. Fuller did not call for additional maintenance assistance.
- [134] With respect to the weather on the day of the accident it was his evidence that it was freezing in the morning but warmer in the afternoon. He did not recall that it rained during the day. After seeing water on the road in the tape and water in the ditch, he concluded there may have been some precipitation within the preceding 24 to 48 hours. He stated it was not unusual in winter that the gravel would freeze and thaw. That process would produce water coming from the road. During the winter the upper level of the road does tend to get soft and wet.
- [135] He confirmed that on February 20, 2004, all roads were checked. On February 23, 2004, there were four and a half hours on Mr. Fuller's patrol record. That meant he had been on all the loose top gravel roads between 7:30 a.m. and noon.
- [136] He was asked how many kilometres of roads there were. After being referred to the needs study, (Exhibit Five) he indicated there were 235.1 kilometres of road, and of that total 49.1 kilometres were gravel. All gravel roads were treated as Class 4 gravel roads, which required patrol every 14 days.
- [137] He advised that the municipality did not have any maintenance standards at the time. He was aware of the minimum maintenance standards and stated that in February of 2004, patrols occurred more frequently than every 14 days.
- [138] The next witness called by the Municipality of Kingsville was Fred Fuller. Mr. Fuller had been employed by the Town of Kingsville since 1977. He started as a labourer in 1992. He was working as a foreman, but he is now a labourer because the Municipality has eliminated all working foreman.
- [139] His job was to oversee work, perform road patrols, inspect cemeteries, supervise sign installation and general maintenance. He was responsible for roads in the winter, doing patrols, call outs by the O.P.P., watching the weather and doing winter maintenance of

the roads. There are seven employees of the roads department all together. If there was a winter storm, he was to make sure all routes are ploughed and salted and any trouble areas are dealt with.

- [140] During the winter, the Municipality performed regular maintenance and snow ploughing. Beginning in the spring they would conduct fine maintenance grading to a depth of one to two inches, but they could not disturb the frost. As long as the roads were still frozen they could plough the road like a hard top road. He noted they did not use salt on gravel roads.
- [141] His description of the South Talbot Road essentially confirmed the description of all of the witnesses. The only additional information provided in that regard was that there were 12 to 13 homes along the entire length of the road.
- [142] He was uncertain as to the length of gravel roads in the municipality. However he said it took him 4 hours to do the inspection depending on the weather conditions and other factors.
- [143] He was asked during examination-in-chief to review his time sheets for various dates in February. It is clear from those time sheets that he had inspected the South Talbot Road on at least four occasions in February of 2004, before the date of the accident. His evidence was that during the change of season he liked to be on the road as much as possible and that he could tell by looking at the time sheets that the seasons were changing. In the spring, gravel would deteriorate faster than asphalt and that is why he was on the gravel roads more frequently.
- [144] On February 23, 2004 he inspected loose topped gravel roads on all routes, from 7:30 to 12:00 noon. In the afternoon he did patching on routes two and three as a result of what he found on February 20th.
- [145] When inspecting the South Talbot Road, he was looking for wash boarding, pot holes, bridge marker signs, and inspecting the shoulder. When asked what he was checking on the shoulder, he said he was looking for any lip or for any water. Mr. Fuller asked the other witnesses that gave evidence that winter ploughing causes wind rows down the shoulder of gravel roads which create a lip.
- [146] He gave evidence that he was aware of the minimum maintenance standards in 2004. He had gone to a few courses with Mr. Black and he had helped him with the standards. He stated that the purpose of the minimum maintenance standards is to provide guidelines.
- [147] He explained that there were four classes of roads and that South Talbot Road was a Class 4 Road. He stated that it required patrolling every 14 days. He said that he patrolled more frequently than the 14 day requirements because the spring was a bad time of year.
- [148] When referred to Exhibits Number 13 and 14, his evidence was they were not used by Kingsville and that he was not aware of them before the law suit. He said that he believed these standards were for Ministry roads and not municipal roads.

- [149] He examined his Time Sheet for February 23, 2004. It was a Monday and he would have filled the Time Sheet out on Monday evening. He started the shift at 7:30 a.m. and would have been at the shop ready to start work at that time. He generally would follow the same route for inspection and patrols and that route would have put him on the South Talbot Road between 8:00 a.m. and 8:15 a.m. in the morning. He could not recall if it rained, but does recall it being cold in the morning but warmer in the afternoon. This was confirmed by the fact he was doing patching in the afternoon and it has to be above freezing to work with asphalt. That also led him to the conclusion that it was not raining.
- [150] His recollection was that the road on February 23rd was in good condition and that there was nothing that gave him concern. He travelled from west to east on the travelled portion of the road at approximately 60 kilometres an hour. Some of the roads that day had minor defects that had to be addressed by a grader. In fact, he called the grader out to these areas to do fine grading.
- [151] He found out about the accident the next day. He was called in at 5:00 a.m. because the forecast was for two inches of snow. He heard part of a radio report with respect to an accident on South Talbot Road. He believed that he was there at about 6:30 a.m. He went back to the shop and inquired about the accident. He was told to go back to the South Talbot Road, which he did. He confirmed that he received no contact from the O.P.P.
- [152] He reviewed the DVD, which was filed as Exhibit Number 3. When commenting about the presence of water on the road, he stated that he believed that the traffic was pushing moisture out of the road. That is, when traffic goes over the road, frost will come out.
- [153] He reviewed Exhibit Number 6 and explained the bridge is a box culvert with a slight elevation. This is the only place where there is any elevation on South Talbot Road. He believed the road to be eight metres wide and two vehicles could meet and pass on the road and remain on the gravel portion.
- [154] He reviewed the photograph attached to Exhibit Number 6. He said the road looked slushy but hard packed and the top surface appeared wet. He noted the water on the shoulder on the north side of the road. He stated there was no water, or minimal water, on the travelled portion of the road. He described the water as being predominantly on the edge of the road and to a limited extent on the travel portions.
- [155] He was asked to review the statement read in at the Discovery of Mr. Black, purportedly made by him. After reviewing the statement, he agreed that he noted in the statement the road was in good repair with no abnormal washboarding. He further agreed that what he read was everything he told the claims examiner about the condition of the road.
- [156] He acknowledged that there was no comment in the statement about the road being frozen or about water not being on the roadway. He agreed that his testimony in court on those issues is not based on anything in the statement but his recollection of events which occurred five and a half years ago. He was adamant that his recollection was accurate but acknowledged that he had no notes.

- [157] He agreed that he went back to the site on two occasions February 24, 2004. He returned the first time because he heard about the accident on the radio learned that it had occurred at 4:00. He did not know if it was 4:00 a.m. or 4:00 p.m. His reason for going back again early on February 24th was simply that he had been called in early that day because of a prediction of snowfall.
- [158] When asked during cross-examination if he wondered if road conditions might have played a role in the single car accident, his response was that they would not have been a factor.
- [159] In this part of his testimony Mr. Fuller struck me as a fair and reasonable witness. His recollections appeared to be honest, accurate, and given without embellishment.
- [160] On the day of the accident he said that he encountered minimum water during his patrol of the gravel roads. Additionally he did not see any large areas of ice or snow on the roads. However he did acknowledge such areas could develop into problems if they were present.
- [161] Mr. Fuller gave evidence that had there been a problem on the road that day he would have taken steps to deal with it. He was aware of what he was to be looking for, and his truck was equipped to deal with a variety of situations. Obviously he did not hesitate to call out the grader for repairs on other roads.
- [162] From all this, I conclude that Mr. Fuller was at once credible and reliable. Both under direct examination and cross-examination, he impressed me as an honest, diligent person and employee. He readily acknowledged facts or made admissions that might be construed as contrary to the municipality's interest. In addition when called upon to explain his evidence he did so dispassionately, without a hint of interest or bias.

Summary

- [163] Three police officers gave evidence at this trial, two by viva voce evidence (Roberts and Japp) and one by way of report (Armstrong).
- [164] Constable Roberts confirmed that he would defer to the opinions and conclusion of Armstrong and Japp. However, he concluded that he had no reason to contact the Town of Kingsville about the road conditions. Constable Roberts re-attended the scene of the accident after it occurred in an attempt to replicate what occurred. Although he noted some sliding, he travelled through the area without incident. He made no comment about the presence of standing water on February 24th.
- [165] Constable Japp observed the road to be wet and muddy and concluded that was the result of the temperature and the fact that frost was coming out of the ground. He observed a visible crown in the road which was hard packed and that observation was made after the collision and after the re-routing of traffic from Highway 3. Additionally he described the pot holes he observed as small and shallow.

- [166] Constable Armstrong concluded in his report that the accident was caused by Ms. Lauzon travelling at an excessive rate of speed and her inexperience as a driver. He noted in his report that while South Talbot Road was a gravel road it was in good condition at the time of his report. He too travelled the road in the same direction as Ms. Lauzon and found no difficulty.
- [167] The evidence of Constable Japp and Armstrong with respect to the weather in the vicinity of the accident on the date of the accident is not of a great deal of assistance. Constable Roberts was patrolling in the area and made no note of heavy rain. However, all three officers noted the ditch at the side of the South Talbot Road had significant water in it, consistent with rain occurring days prior to the accident.
- [168] Mr. Docherty acknowledged that the temperature could have an effect on road conditions. He agreed that the freeze/thaw conditions could be bad for roads at that time of year. He also gave evidence that he adjusted his speed on the day in question because of the road conditions.
- [169] Mr. Hrycay came to four conclusions. The first conclusion, the speed of the vehicle, is non-controversial. Ms. Lauzon acknowledges that she was travelling the road at or very near the presumed speed limit of 80 kilometres per hour.
- [170] Mr. Hrycay's second and third conclusions are intertwined. He found that the surface was not maintained according to M.T.O. standards, resulting in the surface being substandard and that the substandard condition created a hazard.
- [171] The standards which Mr. Hrycay referred to are not municipal standards. Under cross-examination, he acknowledged that and stated that where municipalities had not adopted these standards they must use their own best practices. The only other relevant standard was the minimum maintenance standards which all witnesses appear to agree the municipality was meeting with respect to frequency of patrol.
- [172] Additionally, he made certain factual conclusions, among them that there was standing water on the roadway. That conclusion appears to have been based on his analysis of photographs taken some distance from the scene where Ms. Lauzon says she went over the hump and water splashed on her windshield. However, the evidence of the investigating officers was that two vehicles could meet and pass without passing through the standing water.
- [173] Mr. Hrycay also found that there was an insufficient cross fall. In considering whether or not that created a condition of non-repair within the meaning of the *Municipal Act, 2001*, one must also consider the evidence of Mr. Black and, to a lesser extent, Mr. Fuller. Specifically, Mr. Black gave evidence that in the spring of the year grading work was done and stone added to the South Talbot Road with a view to restoring the cross fall.
- [174] Mr. Hrycay concluded that there were significant issues with pot holes and wash boarding. These findings are inconsistent with the more reliable conclusions of the officers who attended at the scene and who had the benefit of inspecting South Talbot Road the day of and the day after the accident.

- [175] Mr. Hrycay acknowledged that gravel roads are susceptible to wash boarding. He stated that the condition is a distress manifestation typical of gravel roads and that it was starting to show on the South Talbot Road.
- [176] Like all the witnesses who gave evidence on the point, Mr. Hrycay found that there a wind row or a lip along the edge of the road. On the totality of the evidence, I conclude that this was essentially a seasonal problem. More importantly, it did not cause extensive standing water nor did it prevent water from ultimately leaving the road.
- [177] In summary, because I have doubt about the foundational basis of Mr. Hrycay's conclusions, I have doubt about the conclusions themselves.
- [178] Mr. Hrycay's found that driver experience and selected speed were factors in the conclusion. Again, all witnesses who gave evidence on that point agreed. The area of disagreement is in the significance or importance to be attributed to this factor.
- [179] Mr. McGinnis made 13 findings. I do not intend to review them all in detail. However, I have the same concern with his conclusions as I have for Mr. Hrycay's. That is, I do not feel that he adequately demonstrated to me a sufficiently reliable basis for his findings.
- [180] The main focus of Mr. McGinnis's testimony related to the effect of water on the windshield and to asymmetric drag. He concluded that the presence of water or puddles might take a driver by surprise. I would find that on this occasion not only should the presence of the water not have been a surprise to drivers using the road, but that they should have been alert to its presence. Additionally, I have already found that the water could have been avoided.
- [181] In my view, the most significant conclusion reached by Mr. McGinnis was that the event that caused Ms. Lauzon to leave the road was likely introduced by aggressive steering. In other words, Ms. Lauzon overreacted to a situation and that overreaction created an emergency. Without the overreaction, the accident would not have happened.
- [182] Mr. Black and Mr. Fuller on behalf of the Township testified about their patrol of the South Talbot Road in the weeks leading up to the accident. The point of this evidence is that it demonstrated that the road had been patrolled at least four times within the 10 day period prior to the accident.
- [183] Mr. Fuller patrolled the South Talbot Road the day of February 23rd, at approximately 8:15 a.m. He was clear in his evidence that when he patrolled the road that morning, there was no water standing on the road. During his patrol, he encountered other roads that required maintenance and called for workers to perform that work, but not the South Talbot Road. Mr. Fuller gave evidence that, had there been water on the road during his patrol, would have been taken action to remove it. Either he would have been undertaken to drain the road or placed safety cones along the route to warn users of the road of a potential hazard. Finally, I accept as accurate the testimony of both Mr. Black and Mr. Fuller that there were no prior accidents on the road, or prior complaints regarding water on the road.

Position of the Parties

[184] Mr. Moore submitted that the critical issue was what Fred Fuller actually saw that morning and what he should have done about what he saw. He suggested there were five questions that needed to be answered. They were:

- 1) Did Ms. Lauzon encounter ponded or standing water after she crossed the culvert?
- 2) Did the standing water she encountered cause the roadway not to be in a state of reasonable repair?
- 3) Did Kingsville know or should it have known about the standing water?
- 4) Could Kingsville have remedied the defect in the road before the accident occurred?
- 5) Did the ponded or standing water cause the accident?

[185] Mr. Moore's position was that the standing water on the road surface was unacceptable. Further it created a condition that resulted in the road being in a state of unreasonable repair. He also argued that Kingsville knew or should have known about the existence of the standing water and could have taken steps to remedy the situation.

[186] Simply stated, in Mr. Moore's submission, the accident would not have occurred but for the ponded water, and the ponded water caused the roadway to be in a state of disrepair. The road should be designed and maintained for a normal range of drivers which would include those who make mistakes or are inexperienced.

[187] Obviously Mr. Shillington advanced a contrary position. He urged me to find that the South Talbot Road was experiencing a freeze/thaw condition and that the evidence did not establish the road was in a state of non-repair. Particularly, he emphasized there was no evidence with respect to problems with standing water on the South Talbot Road prior to the accident.

[188] Mr. Shillington also argued that there was no evidence of prior accidents on the road, and no credible evidence of prior complaints with respect to the road particularly in regarding standing water.

[189] Both parties agree that the duties and liabilities of the Municipality with respect to roadways are exclusively statutory in nature. The provisions of the *Municipal Act, 2001*, constitute a complete code of standards.

[190] Mr. Shillington argued that if I find that the road was not maintained in a reasonable state of repair, the defences codified in s. 44(3) of the *Municipal Act, 2001*, are applicable.

[191] Mr. Moore contended that s. 44(2) does not provide any defence to the Municipality in the circumstances of this case.

Discussion

[192] The factums provided by the parties illustrate that the parties are in substantial agreement with respect to the law that governs this matter.

[193] The duty of a municipality for the maintenance of highways within its jurisdiction is contained in sections 44(1) and 44(2) of the *Municipal Act, 2001*, which was proclaimed into force on January 1, 2003. Section 44(3) of the *Municipal Act, 2001*, provides defences in circumstances where a municipality could otherwise be liable for a breach of duty under s. 44(1). I have set out herein s. 44(1), (2) and (3).

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

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

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

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

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

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

[194] The parties agree that the minimum standards referred to in s. 44(3)(c) came into force with Ont. Reg. 139/02 enacted under the *Municipal Act, 2001*. These regulations provide times and repair standards for a number of specific highway conditions.

[195] The defendant Lombard submits, and I agree, that ponding and/or washboard conditions are not enumerated in the Minimum Maintenance Standards. These two conditions were referred to in the evidence and conclusions of both Mr. Hrycay and Mr. McGinnis. There is one standard contained in the Minimum Maintenance Standards that is relevant to this case. That is the frequency of monitoring of the roads. However, Lombard concedes and the evidence is clear that the road was patrolled on February 23rd and three times within the 10 days immediately prior to February 23rd. This certainly meets and in fact exceeds the standards for a Class 4 road such as the South Talbot Road.

[196] Obviously the parties do not agree on whether or not the conditions of the South Talbot Road on February 23, 2004 constitute a condition of non-repair. Throughout these Reasons I have made particular findings with respect to that road. However, for the sake of absolute clarity I would summarize my findings as follows:

- The South Talbot Road is a gravel covered road with no pavement markings.
- There is an evident lane for east and west bound traffic.
- There is a drainage ditch on both sides of the road. The road did not have very many bumps and is described from Ms. Lauzon and Constable Armstrong it was in relatively good condition.
- The road was wet and in parts muddy or soft.
- There were some puddles and potholes but there is no clear evidence as to their size, i.e. surface area or depth.
- In addition to the puddles there were some areas of standing water, predominantly on the right edge of the westbound lane.
- The fact the road was wet is more likely to have been caused by frost coming from the ground than the rain.
- The centre of the road was relatively free of water at the crown and was hard packed.
- There was a lip on the road that slowed run off.
- There was sufficient room for two vehicles to meet and pass safely without the need for either to drive in the soft area along the north edge.
- At the time of the accident there would have been sufficient daylight to give Ms. Lauzon sufficient visibility to observe the road conditions.

[197] Kingsville asserts that the legal test for liability of a Municipality under s. 44(2) is that the condition must pose an unreasonable risk of harm to a driver exercising reasonable and prudent care for his or her safety. In support of that argument Kingsville refers me also to *Johnson v. Milton*, [2008] O.J. 2157 (C.A.) and *Edgeworth v. The King*, [1937] O.J. No. 310 (C.A.).

[198] Lombard articulates the test somewhat differently and refers me to *Housen v. Nikolasiien*, [2002] 2 S.C.R. 235 and refers also to paragraph 35 of *Johnson v. Milton, supra*:

Finally, the trial judge correctly identified the standard of care a Municipality must meet in fulfilling its duty to keep the road in a state of proper repair, namely, "the road must be kept in such a reasonable

state of repair that those requiring to use it may, exercising ordinary care, travel upon it safely.”

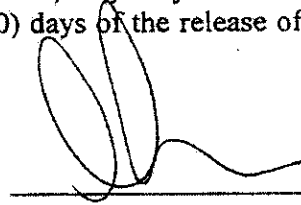
- [199] Justice Moldaver in delivering the Court’s decision in *Johnson v. Milton* referred to *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.) which was cited with approval of *Housen v. Nikolasién, supra*.
- [200] Both parties agree with the proposition that a Municipality in maintaining roads must have regard to all drivers not just model drivers. Further, both parties agree that the onus is on the party asserting the claim (here, the Defendant Lombard) to prove that the condition of non-repair exists. If it is proven on the facts that there is a condition of non-repair, the onus then shifts to Kingsville, the municipality, to establish one of the defences set out in paragraph 44. Whoever bears the onus must establish it on a balance of probabilities.
- [201] Counsel for Kingsville referred me to *Tourand v. Meadow Lake (Rural Municipality No. 588)*, [2000] S.J. No. 100 (Q.B.) and in particular paragraph 71 thereof to support the argument that the concept of non-repair is relative to and depends on a variety of factors. These factors include the location of the highway, its history, its character, its use and the resources in the municipality. Kingsville argues that s. 44(2) does not impose absolute liability on the municipality, and that the municipality cannot be the insurer of all individuals using the road.
- [202] Indeed both Defendants concur that s. 44(2) of the *Municipal Act, 2001*, does not impose absolute liability on the municipality simply because a condition of non-repair exists on a roadway within its jurisdiction. In *MacMaster (Litigation Guardian of) v. York (Regional Municipality)*, [1997] O.J. No. 3928 O.C.J. (Gen.Div.) MacDonald J. stated at paragraph 99:
- I have also proceeded on the basis that the analysis should be premised on the fact the Municipality must provide for ordinary drivers who exercise ordinary care but who may make mistakes. In other words, not all drivers are model drivers. Having made this observation I proceed in the light of the caution set forth in Thomson Rogers a Municipal Liability to the effect this principles should not be taken too far, “on pain of negating the principles the Municipality is not to ensure the safety of the users of the road.”
- [203] The parties therefore agree that the condition of non-repair for rural road such as the South Talbot Road does not impose a high standard on the municipality. *McMaster (Litigation Guardian of) v. York (Regional Municipality, supra*.
- [204] Each case is significantly dependant on its own facts. Therefore, the decisions I have been referred to are of limited benefit in determining what in fact constitutes non-repair. The South Talbot Road was classified as a Class 4 road having regard to the traffic count of 50 vehicles per day. The evidence establishes that it was used predominantly by people

living on the road. I have already set out my findings with respect to the condition of the road at the time of the accident.

- [205] Both parties agree that the familiarity of Ms. Lauzon with the South Talbot Road is a factor in determining the responsibility of Ms. Lauzon and the Municipality. It is clear that in this situation Ms. Lauzon knew the road and had travelled over it as both a passenger and a driver on many occasions. In fact, on the day in question she had travelled the same route, albeit in an eastbound direction.
- [206] I agree with Kingsville that courts have to consider that rural roads, by their nature, are susceptible to the development of adverse conditions. Therefore, drivers have to adjust to those conditions. On the day in question, it is clear that Mr. Doherty did so; it is equally clear that Ms. Lauzon did not. She travelled the road at maximum speed, knowing that the conditions were not optimum.
- [207] As previously stated the concept of non-repair is relative. Therefore a multiplicity of factors need to be considered in the determination of whether or not the road is in a state of non-repair. As indicated these conditions include the location, its use, its character, and its composition. This road is located in a lightly populated part of the Municipality. Historically it has been used as a service road. It is a gravel road which has been maintained on a regular basis. I make the latter finding notwithstanding Mr. Docherty's evidence that he frequently complained about the road, the road that he and his neighbours nonetheless chose to use regularly and that he directed his children to use in preference to the adjacent Provincial Highway No. 3.
- [208] In my view, the evidence taken as a whole, and considered fairly, does not establish that the road was in a condition of non-repair. In all the circumstances, I find that the South Talbot Road was in a condition one might reasonably expect to find a Class 4 gravel road in during a seasonal change from winter to spring. Specifically, the presence of water and puddles should have been expected by drivers, particularly those such as Ms. Lauzon who had travelled the road in the immediately preceding 30 minutes.
- [209] I find that the inspection done by Mr. Fuller on the morning of February 23, 2004, is an accurate indicator of the true state of the road's repair on that date. That inspection did not reveal any unreasonable conditions. Further, I find that it is most likely that during the course of the day the water began to accumulate on the road. However, that water did not create such a condition as to constitute a condition of non-repair within the meaning of s. 44(1) of the *Municipal Act, 2001*.
- [210] The counsel for Lombard asked me to consider as the ultimate question whether or not, but for the water, the accident would have occurred. With respect, I believe that the central question to be determined is: Could a reasonable driver using ordinary care have traversed the roadway safely? In my view, on all the evidence, I am satisfied that the condition of the road was one that a reasonable driver could have travelled without the loss of control.
- [211] I therefore dismiss the claim as against the Defendant Kingsville.

Costs

[212] Having succeeded on the issue of liability, Kingsville is presumptively entitled to its costs. If the parties cannot agree on the issue of costs, they may make brief submissions in writing, in two pages or less, within twenty (20) days of the release of this Judgment, and I will decide the issue.



Scott K. Campbell
Justice

Released: July 21, 2010