

CANADA / JUDGMENT

Craigie v. Lehigh Hanson Materials Limited

2020 BCSC 12

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 12 Craigie v. Lehigh Hanson Materials Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Craigie v. Lehigh Hanson Materials Limited,

2020 BCSC 12

Date: 20200107

Docket: M125457

Registry: Vancouver

Between:

Nolan James Craigie by his Litigation Guardians, Nancy Craigie

and Alan Craigie

Plaintiff

And

Lehigh Hanson Materials Limited d.b.a. Ocean Concrete, John Doe, Insurance Corporation of
British Columbia

Defendants

And

City of Vancouver

Third Party

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

F. Troen

D. Stewart

Counsel for the Defendants, Lehigh Hanson Materials, John Doe and Insurance Corporation of British Columbia:

C. Morcom

D. Machat

Counsel for the Third Party, City of Vancouver:

No appearance

Place and Date of Trial:

Vancouver, B.C.

October 21 - 25, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 7, 2020

- [1] On August 31, 2011, the plaintiff was in a single vehicle accident in the 1400 block of West 4th Avenue in Vancouver, when he lost control of the scooter that he was riding (the "accident").
- [2] The plaintiff alleges that the cause of his accident was his scooter skidding on an accumulation of wet cement and aggregate on the roadway (the "spill"). He contends that the spill was due to the negligence of Christopher Kolarcik, a driver/employee of the defendant Lehigh Hanson Materials Limited doing business as Ocean Concrete ("Lehigh"). In these reasons, I refer to Lehigh and Ocean Concrete interchangeably.
- [3] In his amended notice of civil claim, the plaintiff removed allegations in his original notice of civil claim that the City of Vancouver ("City"), or its employees, servants or agents, inter alia, failed to set up or enforce an effective inspection or maintenance system, failed to ensure its roads would be safe for use by the public, and failed to warn members of the public of an unsafe road condition.
- [4] In the amended notice of civil claim, the plaintiff pleaded that he had reached a settlement with the City, and waived any right to recover against the City or the remaining defendants for loss attributable to fault, tort, negligence or breach of any equitable, common law or statutory duty.

- [5] The third-party proceedings that Lehigh initiated against the City remain outstanding.
- [6] The sole issue in the hearing before me was the liability for the plaintiff's accident.
- [7] The City did not appear by counsel before me at trial.

Background

- [8] The 1400 block of West 4th Avenue has three eastbound lanes. One of these lanes splits off to connect to Hemlock Street going south. The other two eastbound lanes are through lanes that intersect with Hemlock Street close to the northbound overpass that leads up to the Granville Street Bridge.
- [9] On August 31, 2011, the plaintiff was the licensed operator of a 2009 Honda Ruckus scooter. He had owned his scooter for approximately three years but had never held a motorcycle licence nor taken any courses regarding the operation of a motorcycle prior to August of 2011.
- [10] At the time of the accident, the plaintiff was travelling eastbound on the 1400 block of West 4th Avenue, near the intersection with Hemlock Street, in Vancouver.

The Spill

- [11] Mr. Kolarcik is a ready-mix driver. It is alleged that it was his negligence that caused the spill. He has been driving ready-mix trucks for Ocean Concrete since April 2004. On the day of the accident, in his capacity as an employee of Lehigh, Mr. Kolarcik was driving his regular truck #133. Lehigh agreed it owned truck #133 and that the spill came from that truck.
- [12] Mr. Kolarcik testified that concrete spills in front of the Carter Honda dealership at 1502 West 3rd Avenue, at the entrance to Granville Island, were frequent but admitted that they were usually smaller than the spill he caused on West 4th Avenue. He said spills in front of the Carter Honda dealership occur when a truck reaches a nearby incline in the roadway and a small amount of cement dribbles out the back of the drum.
- [13] Just before 3:40 pm on August 31, 2011, Mr. Kolarcik left the Ocean Concrete plant at Granville Island with a full load of cement. He left Granville Island and proceeded south on Anderson Avenue. At the fork in the road, he proceeded left onto West 4th Avenue. Next, he proceeded east along West 4th Avenue in the right-hand through lane for a short distance. He then became aware of vehicles honking their horns. He looked in his mirror and observed that the drum on his truck was rotating in a counter-clockwise direction, allowing wet cement to spill into the middle of his lane of travel.
- [14] The exact time of the spill is in dispute, but I find that it occurred between 3:40 pm and 4:00 pm on August 31, 2011.

Events following the Spill

- [15] Mr. Kolarcik gave evidence that he stopped his truck and turned the switch on the drum to stop the cement from spilling out. He said he then called Michelle McIvor, a dispatcher for Ocean Concrete, to report the spill. After speaking with Ms. McIvor, Mr. Kolarcik said that he exited his truck to observe the spill. He gave evidence that he recalled seeing a Vancouver Police Department ("VPD") marked car parked at the opposite end of the spill, and a police officer was approaching him.
- [16] Mr. Kolarcik testified that before he left the scene of the spill, he and the VPD officer talked for 10 minutes, and that during their conversation, the officer took his licence and registration. He testified that when he left the scene of the spill, the officer's vehicle was parked at the start of the spill, with its flashing lights on.

Ocean Concrete's Policy for Spills

- [17] Mr. Kolarcik testified that Ocean Concrete's procedure for responding to cement spills is to report the spill to the Ocean Concrete dispatcher. In cross-examination, he said that Ocean Concrete's policy is "to do what I did". When asked about his decision not to take any steps in response to a large unattended spill, he testified that he was "not allowed to pull over and do stuff".
- [18] It is agreed between the plaintiff and Lehigh that after the spill, Ms. McIvor contacted City dispatch regarding the spill.
- [19] Ms. McIvor testified that she regularly reported spills from Ocean Concrete ready-mix trucks to the City, and that the City always cleaned up the reported spills. She gave evidence that the City never advised her that Ocean Concrete needed to change the spill policy in order to stop relying on the City to clean the spills.

The City's Policy with respect to Reported Spills

- [20] In August 2011, Mr. George Ledo was the acting Maintenance Superintendent for the City. He gave evidence that in 2011 a person could call 311 to reach a dispatcher to report a spill on the streets up until 3:30 pm. After 3:30 pm, the calls to 311 went to a dispatcher at the City yard. The dispatcher then passed the report on to the City's cleanup crew.
- [21] Mr. Ledo testified that in August of 2011, the City had only one truck and crew to respond to emergency calls to the dispatcher to deal with any debris or hazards on the streets of the City. At that time of day, anyone calling in to the City to report something on the streets would have been dealt with by the afternoon dispatcher. The dispatcher would then contact the street crew and advise them of the report.

- [22] Mr. Ledo testified that at approximately 3:45 pm on the day of the accident the emergency street crew was on the Cambie Street Bridge cleaning up debris from a motor vehicle accident that had been reported to the City by the VPD.
- [23] Mr. Ledo identified a document he called a "call log" which was made contemporaneously with the calls that came in to the dispatcher. The dispatcher is expected to record exactly what is said by the caller reporting a spill. The "call log" is a City Sanitation Operations call sheet, which recorded the calls received by City Engineering afternoon dispatch on August 31, 2011. The call that matched the spill that caused the accident was called in at 4:00 pm from a "Michelle" and written down as "IFO" (in front of) Carter Honda. Mr. Ledo said a call would have gone out to the City crew minutes after that call.
- [24] There were no prescribed times for a City crew response. Mr. Ledo concluded from the call log that the City crew left the Cambie Street Bridge at 4:30 pm. Before attending the spill site, the crew had to return to the yard, at 701 National Avenue, to dump the debris collected from the Cambie Street Bridge. Mr. Ledo said that the call log indicated that the crew first responded by attending the site near Carter Honda and then attending to a second location on West 4th Avenue, the site of the spill.
- [25] Mr. Ledo testified that the City's clean-up truck arrived at 5:10 pm, which he said was not an unusual response time. He said that if the subject spill was seen to be an emergency, the response time would have been the same since the only crew available was dealing with the accident on the Cambie Street Bridge at the time the call came in.

The Accident

- [26] The parties agree that, at approximately 4:40 pm, the plaintiff's scooter struck a patch of cement that had been spilled on the roadway of the 1400 block of West 4th Avenue, which caused him to lose control of the scooter and hit the ground.
- [27] Mr. Jaromir Kynl witnessed the accident. At the time of the accident, Mr. Kynl was driving approximately 120 feet directly behind the plaintiff in a commercial trailer truck, pulling a trailer transporting beer from the Molson Brewery. He was sitting in an elevated cab positioned about 10 or 11 feet above the ground with a clear view of the street in front of him. Mr. Kynl estimated that he was driving 30 kilometres per hour as he had just left an intersection and was getting back up to speed. He estimated that the plaintiff was going approximately the same speed as his truck immediately before the accident.
- [28] Mr. Kynl said he had worked in the construction industry and on the basis of that experience was able to identify wet cement. As he proceeded eastbound on West 4th Avenue, Mr. Kynl saw something on the road that he initially thought was gravel. As he got closer to the spill, Mr. Kynl realized that it was wet cement.

- [29] Mr. Kynl gave evidence that the plaintiff was driving in the right hand through lane of West 4th Avenue proceeding eastbound on the right side of the lane at the time of the accident. He observed that after riding beside the spill for an unknown distance, the plaintiff turned his scooter to the left in what Mr. Kynl believed to be an attempt to drive over the strip of wet cement in order to change lanes. He estimated the strip of wet cement was approximately 30 metres long, half a metre wide and at least 3-4 cm thick. He said the spill had wet cement in the centre and sand and gravel bordering it. He could not recall whether he recognized it was wet cement before or after he got out of the truck and approached the scene of the accident. Mr. Kynl testified that he remained on the scene until the arrival of the police.
- [30] In cross-examination, Mr. Kynl agreed that the large size of the spill made it clearly there to be seen. He also expressed the view that the plaintiff could have continued in his position safely; but instead, attempted to maneuver his scooter to the left, turning into the wet cement, losing control, fishtailing and falling to the ground.
- [31] Detective Baxter was the investigating officer of the accident. She responded to a 911 call that came into the VPD at 4:41 pm. Det. Baxter testified that the VPD attended at the scene of the accident at 4:45 pm, at which time other emergency services, including an ambulance and members of the Vancouver Fire Department, were already in attendance.
- [32] Det. Baxter arrived on the scene of the accident at 5:01 pm to find a police unit already on scene and a police car parked to block access to the lane leading up to the spill. The plaintiff's scooter had already been moved and the plaintiff was no longer at the scene. She remained there for approximately 20 minutes and took a series of photographs that were introduced into evidence.
- [33] Det. Baxter described the day of the accident as a sunny one; the roads were dry and the trees were casting shadows on the roadway causing it to "appear mottled." She said the shadows were cast throughout the spill and that is reflected in the photographs that she took shortly after the accident.
- [34] Det. Baxter's general occurrence report relating to the plaintiff's accident states that the first police officers to arrive at the scene at 1645 hours were Constables Cooper, Belkin and Mazloun.
- [35] Det. Baxter reported a concrete spill of approximately 30 meters in length, half a meter in width. She confirmed that the spill was about 3 to 4 centimetres deep, located in the middle of the second or right-hand through lane. She said the edges of the spill had rocks or gravel "petering off" to both sides but there was room to operate a scooter on either side of the spill, while still remaining in the second lane.
- [36] Ms. Mclvor believed, based on her records, that she received a call at approximately 5:00 pm from Shane, an Ocean Concrete employee driving truck #128. He advised her of the plaintiff's accident. Ms. Mclvor called the City a third time at 5:15 pm and was advised that the street crew was on scene and that a sweeper would be there in a bit.

[37] Following this telephone conversation, Ms. McIvor called Mr. Kolarcik to advise him of the accident. Ms. McIvor could not recall details of the conversation with Mr. Kolarcik, including what, if anything, he told her about his interactions with a police officer or when he said those interactions occurred. She confirmed her evidence at her examination for discovery that a conversation between Mr. Kolarcik and the police officer took place after the accident and conceded that it was based entirely on her review of her notes in the daily journal, as opposed to any recollection of what Mr. Kolarcik told her.

[38] Ms. McIvor's notes for August 31, 2011 record as follows:

1540 Chris Kolarcik 133 called, drum went wrong way, spilt about 1m called City right away about an hr after trucks were still calling me about spill so called back she said they have been dispatched out. At about 5pm 128 Shane called said accident with scooter going thru spill. Called City again 1715 said on scene but sweeper will be a bit

When Chris stopped @ spill cops stopped asked what we do in this situation, he said dispatch calls City and they clean it up, cop said don't block traffic then just go.

[39] Mr. Kolarcik testified that he drove past the scene of the spill on his way back from delivering his load of cement, about an hour and a half after leaving the scene of the spill. He testified that, at this time, he had already been notified by Ms. McIvor that an accident had taken place at the scene of the spill. He testified that, at that time, he saw that the spill still had not been cleared and further testified that there was no clean-up truck or police in attendance.

[40] Det. Baxter attended at the hospital and spoke briefly with the plaintiff. She said he indicated he was not aware he ran into cement.

Legal Principles

[41] The plaintiff claims the defendants were negligent and that their negligence caused the accident. He claims Lehigh is vicariously liable for the negligence of Mr. Kolarcik.

[42] The defendants deny liability but plead in the alternative that the plaintiff was contributorily negligent. They also make a third party claim against the City.

[43] I address the legal principles relevant to each of these claims in turn.

The Plaintiff's Claim

[44] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3, the Court held that a successful claim in negligence requires the plaintiff to demonstrate:

- a) The defendant owed him a duty of care;
- b) The defendant's behaviour breached the standard of care;
- c) The plaintiff sustained damage; and

- d) The damage was caused, in fact and in law, by the defendant's breach.

Duty of Care

[45] Section 144 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 addresses careless driving and requires, among other things, reasonable consideration for other users of the road:

144(1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[46] While statutory provisions provide guidelines for the assessment of fault in motor vehicle accident claims, they alone do not provide a complete legal framework: *Salaam v. Abramovic*, 2010 BCCA 212. As stated by Mr. Justice Groberman in *Salaam* at para. 21:

In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way.

[47] It is generally accepted that each motorist on the highway owes a duty of care to every other motorist: see, e.g., *Simpson v. Baechler*, 2009 BCCA 13 at para. 29.

[48] In *Dendewicz v. British Columbia Telephone Company*, [1994] B.C.J. No. 221, Mr. Justice Oliver found at para. 9 that "Any person (and a fortiori a public utility company) conducting potentially hazardous work in a public place owes a duty of care to members of the public to protect them from injury."

Standard of Care

[49] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, the Supreme Court of Canada explained standard of care as follows:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[50] There is some basis in statute to conclude a motorist must exercise reasonable care so as to avoid leaving articles or debris on the highway. Subsection 204(1) of the Motor Vehicle Act, for instance, provides as follows:

A person must not throw, deposit, drop or leave on a highway a glass bottle, glass, nail, tack, wire, can or other thing or substance likely to injure a person, animal or vehicle on the highway.

[51] In *Fajardo v. Horianopoulos*, 2006 BCSC 147, Madam Justice Ross discussed the duties of a driver who has exposed others to risk of harm. In that case, the defendant's vehicle struck and killed a moose on the roadway, throwing the moose carcass across both lanes of traffic. The defendant did not move his vehicle from the roadway. He attempted to turn on his hazard lights with no success, and he took no other steps to alert other motorists to the danger posed by the moose carcass. Ross J. held the "driver of a motor car on a highway is under a duty to conduct himself in a manner that does not, by his fault in the management of himself or his car, expose other users of the highway to unnecessary risk of harm" (at para. 37). She found the defendant had an objective "duty to take reasonable care to warn passing motorists" and failed to do so (at paras. 38-39).

[52] In *Zierner v. Wheeler*, 2014 BCSC 2049, Madam Justice Watchuk described the applicable duty of care as follows at para. 119:

In circumstances where a driver's management of his vehicle exposes other users of the highway to unnecessary risk of harm, that driver may be subject to a duty to warn other motorists of a potential hazard. To be effective, a warning must be near the danger it warns of and must perform the function of warning while the condition or danger exists (*Dagneault v. Hatton* (1995), 59 B.C.A.C. 55 at paras. 42-51). The standard for assessing reasonableness when discharging this duty to warn is objective (*Fajardo* at paras. 37-40).

Damage

[53] The requirement that the plaintiff establish that he sustained damage is self-evident.

Causation

[54] The legal principles of causation in negligence are settled. A plaintiff must establish on a balance of probabilities that the defendant's negligence was the "but for" cause of, or materially contributed to, an injury. A defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the de minimis range; as long as a defendant is part of the cause of an injury, the defendant is liable, even though his or her act alone was not enough to create the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.

Contributory Negligence

[55] I accept that all users of the road must exercise reasonable care for their own safety.

[56] The legal framework for determining contributory negligence was summarized by our Court of Appeal in *Wormald v. Chiarot*, 2016 BCCA 415 at para. 14:

The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained.

[57] Mr. Justice Johnston dealt with the issue of whether a road user could assume a road to be in a fit condition for use in *Plakholm v. Victoria (City)*, 2009 BCSC 1039. The case involved a pothole that caused or contributed to a fall by the pedestrian plaintiff. At para. 10, Johnston J. found that, while everyone is obliged to take reasonable care for their own safety, in the absence of any reason to take "particular care", it is not a failure to take reasonable care if one does not look down as one walks.

[58] In *Bye v. Newman*, 2017 BCSC 1718, Madam Justice Choi dismissed an allegation of contributory negligence against the plaintiff dirt bike rider, who turned to avoid an impact with an ATV driven too quickly by the defendant, causing it to cross the centre line into the plaintiff's lane of travel. At paras. 85 - 86, Choi J. wrote:

85 The law does not expect perfection from a person put in danger by another's negligence. Where a person must respond immediately to a dangerous situation, the court will not require them to take the safest possible course in order to avoid liability. Instead, as Freedman C.J.M. wrote in *Williamson Estate v. Landry*, [1974] M.J. No. 68 (C.A.) wrote at para. 4:

4 ... The conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the "agony of the moment" the evasive action she took may not have been as good as some other course of action she might have taken - a doubtful matter at best - we would not characterize her conduct as amounting to contributory negligence. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he has imperilled by his negligence.

As Savage J.A., writing for our Court of Appeal, noted in *Graham v. Carson*, 2015 BCCA 310 at para. 15, this principle is not restricted to vehicles travelling at highway speeds, but can apply when, on the facts, a person had to respond to another's negligence without the time to properly consider their reaction.

86 I find that, to the extent that Mr. Bye's decision to turn contributed to his injuries, he acted in the "agony of the moment"; Mr. Bye had little time to address the risk Mr. Newman's negligence had created, and it is not reasonable to use the considered perfection of hindsight as a measure of his response.

[59] Thus, while a road user must exercise reasonable care for his own safety, he is not expected to act perfectly in light of a danger created by another person's negligence.

The Third Party Claim

- [60] In addressing the third party claim, I am mindful of the following principles.
- [61] First, a determination of proportionate fault against a settling defendant does not require the settling defendant to remain a party either as a defendant or a third party: *Henry v. British Columbia (Attorney General)*, 2016 BCSC 1038 at para. 313.
- [62] Second, a municipality is liable for the negligence of its employees and/or contractors engaged to keep the roadways properly maintained and repaired: *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.
- [63] Third, a municipality owes a duty of reasonable care to the users of its roads and sidewalks. This duty of care ordinarily extends to reasonable maintenance and includes the duty to take reasonable steps to prevent injury to users of the road by reason of hazardous conditions: *Rimmer v. Township of Langley*, 2006 BCSC 703 at para. 192, *aff'd* 2007 BCCA 350; see also *Just v. British Columbia*, [1989] 2 S.C.R. 1228.
- [64] However, a municipal corporation is not an insurer of travellers using its streets. The duty of a municipality is "to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety": *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.) at 718.
- [65] In assessing whether a municipality is liable in negligence, a determination must be made whether the decision at issue was a policy decision or an operational decision. Policy decisions are usually, but not always, made by people of high authority. They involve social or political factors, and deal with the allocation of resources and budgetary considerations. Generally speaking, policy decisions are immune from tort liability: *Just* at pp. 1240, 1242. Operational decisions are usually the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness. These decisions can be reviewed by the court to determine whether the municipality had been negligent or failed to satisfy the appropriate standard of care: *Just* at p. 1246.
- [66] Fourth, liability can be imposed on a party who has voluntarily undertaken to do something they were not otherwise obliged to do.
- [67] In *Goodwin v. Mainroad North Island Contracting Ltd.*, 2007 BCCA 81, the defendant highway maintenance contractor was under contract to provide maintenance for certain highways in the Campbell River area. The RCMP alerted the defendant that there was black ice reported on a road; the defendant dispatcher told the RCMP he would alert a crew. The dispatcher never did dispatch the crew nor alert the District of Campbell River. The plaintiff suffered injuries after her vehicle skidded on black ice and got into an accident. The trial judge dismissed the action on the basis that there was no duty of care owed by the defendant to the plaintiff.
- [68] The Court of Appeal found the trial judge erred in finding no duty of care. The Court held that the defendant assumed a positive duty to act outside of its jurisdiction in the circumstances. The defendant had not simply become aware of the danger to the public;

instead, it had offered to abate the danger, the foreseeable result of which was that the RCMP would make no further efforts to obtain assistance. The Court held that when the defendant volunteered to attend to the ice on the road, it assumed a duty to take reasonable steps to ameliorate the danger created by the presence of black ice.

[69] At para. 26, Madam Justice Newbury reviewed the concept of liability for the voluntary undertaking to do something that one is not otherwise obliged to do:

[26] Setting aside for the moment the question of direct / indirect reliance, there is a long and respectable line of authorities which have imposed liability where an actor, particularly one with public duties, has voluntarily undertaken to provide some kind of assistance to another, but does so negligently and causes foreseeable harm to that other person. The authorities go back as far as *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 92 E.R. 107 (K.B.), where Gould J. stated:

And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. [At 108.]

[70] However, the imposition of a duty will depend on the circumstances. In *Foster v. Perry and VSA Highway Maintenance Ltd.*, 2005 BCSC 1214, the plaintiff sought to impose a positive duty to warn road-users of slippery conditions on an employee of the road maintenance corporation, which had been named as a third party. Mr. Justice Pitfield examined whether the surrounding circumstances were such that the employee should have apprehended the need to warn other road-users. At para. 36, Pitfield J. found:

Simpson, alone in his vehicle, was not in a position to warn drivers both at the top of the hill and at the bottom. It was not his opinion, or that of any other witness, that the conditions at Roseberry Bluffs on the day and at the time in question were anything other than normal winter conditions that required ordinary winter maintenance. Neither Simpson nor any other witness was of the view that the conditions were extraordinary or extreme so that a road closure was justified or required. While there is evidence that vehicles attempting to stop upon approaching the accident scene encountered slippery conditions as did individuals who walked on the highway when approaching the scene, the evidence of other witnesses was that they had driven the Roseberry Bluffs without incident very shortly before the time of the accident. No one using the highway had reported conditions that required immediate attention. Ms. Perry was the only driver to encounter control problems and that for the reasons I have stated.

Municipal Liability for the Actions or Inaction of Police

[71] Subsection 20(1) of the Police Act, R.S.B.C. 1996, c. 367 provides that the City is vicariously liable for the torts committed by the VPD:

20(1) Subject to an agreement under section 18 (1) or 23 (2),

- (a) a municipality is jointly and severally liable for a tort that is committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or employees of its municipal police board, if any, if the tort is committed in the performance of that person's duties, and
- (b) a regional district, government corporation or other prescribed entity is jointly and severally liable for a tort that is committed by any of its designated constables or enforcement officers, if the tort is committed in the performance of that person's duties.

Discussion

The Plaintiff's Claim

[72] In his amended notice of civil claim, the plaintiff alleges that the negligence of Mr. Kolarcik consisted of the following particulars:

- (a) Driving the Cement Truck without due care and attention, or without reasonable consideration for other persons using the highway, contrary to Section 144 of the Motor Vehicle Act, RSBC 1996, c. 318, and any amendments;
 - (b) Depositing, dropping or leaving on a highway a substance likely to injure a person, animal or vehicle on the highway, contrary to Section 204(1) of the Motor Vehicle Act, RSBC 1996, c. 318, and amendments thereto;
 - (c) Failing to ensure that the Cement Truck was mechanically sound;
 - (d) Operating the Cement Truck while knowing or having the means of knowing that it was not mechanically sound;
 - (e) Causing and/or allowing the Cement Truck to spill the Slippery Substance on the Roadway;
 - (f) Transporting the Slippery Substance in a manner that he knew or ought to have known was unsafe;
 - (g) Failing to remove the Slippery Substance from the Roadway;
 - (h) Failing to notify the City of Vancouver and/or the defendant Ocean Concrete and/or the Unknown Owner of the Slippery Substance on the Roadway in a timely manner or at all;
 - (i) Failing to stop, notify, or take any or any adequate steps to protect other motorists using the Roadway, after he knew or ought to have known that the Slippery Substance had been spilled on the Roadway;
 - (j) Such further and other particulars of negligence and/or breach of statutory duty as counsel may advise.
- [73] As no other particulars of negligence or breach of duty on the part of Lehigh were adduced, I need not address sub-para. 72(j).

- [74] Lehigh admits that the plaintiff suffered some injury from the accident.
- [75] The plaintiff alleges that Lehigh is vicariously liable for the alleged negligence of Mr. Kolarcik and is also liable for its own negligence, which consisted of the following particulars:
- (a) Failing to ensure that the Cement Truck was mechanically sound;
 - (b) Consenting to the use of the Cement Truck by the defendant Doe or the Unknown Driver while knowing or having the means of knowing that the Cement Truck was mechanically defective;
 - (c) Knowing or having the means of knowing of the mechanical defects in the Cement Truck and failing to have same repaired or properly repaired;
 - (d) Failing to instruct the defendant Doe or the Unknown Driver in the proper and safe operation of the Cement Truck;
 - (e) Consenting to the use of the Cement Truck by the defendant Doe or the Unknown Driver while knowing or having the means of knowing that the defendant Doe or the Unknown Driver did not have the ability and/or skills to operate the Cement Truck in a proper and safe manner;
 - (f) Failing to remove the Slippery Substance from the Roadway;
 - (g) Failing to notify the City of Vancouver of the Slippery Substance on the Roadway in a timely manner or at all;
 - (h) Such further and other particulars of negligence as counsel may advise.
- [76] As no other particulars of negligence or breach of duty on the part of Lehigh were adduced, I need not address sub-para. 75(h).
- [77] The plaintiff contends that Lehigh had a duty to set policy and provide guidance for its employees to avoid foreseeable accidents. As I explain below, I find Lehigh did have such a policy.
- [78] Mr. Rob Slarks is a customer service manager for Lehigh. At the time of the accident, he was employed as a logistics manager for Ocean Concrete. Mr. Slarks gave evidence as to the standard procedure to be followed by Ocean Concrete ready-mix truck drivers when they become aware of a spill. The driver reports the spill to Lehigh's dispatcher who in turn reports the spill to the City dispatcher.
- [79] I am satisfied by the evidence of Mr. Slarks that Lehigh had a policy to guide its ready-mix drivers on how to avoid foreseeable accidents and what to do if such accidents occurred. I will discuss the reasonableness of that policy below. I find that in light of Mr. Slarks' evidence, the allegations in sub-paras. 75 (d) and (e) must be dismissed.

- [80] Mr. Slarks testified that he would have been surprised if anyone had told Mr. Kolarcik that he was not allowed to put out markers on the roadway, and further testified that he is not aware of any prohibitions on what the driver could do in this regard.
- [81] Mr. Kolarcik gave evidence that the spill of cement from his truck was caused by some type of short circuit in the truck which led the drum to turn in the wrong direction. He explained how it would not have been possible for him to accidentally press the switch, which would change the direction of the drum, as it required him to press the switch for approximately five seconds. Mr. Kolarcik further said the truck was repaired to replace a "switch" after the spill, before it was returned to the road. This finding is inconsistent with Mr. Slarks' evidence that the lack of a repair record indicates the truck was not repaired.
- [82] Mr. Kolarcik denied that it was possible the turning drum on his truck could be caused by driver error or inadvertence. This was again contrary to what Mr. Slarks said. Mr. Slarks confirmed he had some experience driving trucks of this type.
- [83] I reject the evidence of Mr. Kolarcik with respect to the mechanical condition of his truck and in particular the switch that controlled the drum on that truck. Mr. Slarks confirmed that there were no records relating to the repair of the truck involved in the spill. He took that to mean the truck was not repaired after the spill. He further confirmed that the drum of the ready-mix trucks could be caused to turn in reverse by "driver error", where a driver inadvertently pushes the button that causes this motion.
- [84] In the result, I dismiss the allegations set out above at sub-paras. 72 (c), (d), and (f) and sub-paras. 75 (b) and (c).
- [85] Mr. Kolarcik testified that spills in front of the Carter Honda dealership were frequent. He testified that they are usually small, and that they occur when a small amount of concrete drops out of the back of the drum when the truck reaches a nearby incline in the roadway and cement dribbles out. Given the frequency of spills in front of Carter Honda and the relatively short distance between that location and the actual location of the spill, it is more likely than not that Mr. Kolarcik, Ms. McIvor, or both of them, misreported the location of the spill. This is consistent with Mr. Kolarcik's testimony at his examination for discovery that his drum started turning backwards after he had passed the Carter Honda dealership.
- [86] Ms. McIvor testified that Lehigh's spill procedure was to call the City and give them the truck number and the location of the spill. She does not recall her conversation with the City regarding the spill on West 4th Avenue. Specifically, she does not recall whether or not she told the City that the spill was located in front of Carter Honda, but I find that she indeed told this to the City dispatcher. She could not say whether the City dispatcher asked her any questions about the nature of the spill when she called it in to him or her.
- [87] In the result, I find that the allegations of inadequate reporting to the City set out in part in sub-paras. 72 (h) and 75 (g) have been proven.

- [88] In portions of the transcript read in at trial from her examination for discovery, and confirmed by her at trial, Ms. McIvor testified that she had "no idea" how long it would take the City to respond to a spill. She further testified that she had no understanding of where the City's "street sweeper" would be coming from.
- [89] Lehigh contends that the plaintiff has not satisfied the burden of proof that the actions of its employees led to the accident. Lehigh submits it relied on its relationship with the City to clean up the spill once reported, as was the standard procedure at the time, and the directions of a VPD officer, who advised Mr. Kolarcik that he could leave the scene of the spill.
- [90] Lehigh argues that the City never advised Ms. McIvor that a Lehigh driver should put up any types of markers delineating a spill or should block a lane which contained a spill, nor advised her that Lehigh should attempt to clean a spill themselves or should hire a private company to clean any spills.
- [91] I find that the City did not usually respond to such calls immediately. In the result, I find that Lehigh should have expected to have to deal with the consequences of a spill of the magnitude of this spill until a City crew arrived.
- [92] Mr. Kolarcik took no steps beyond reporting the spill to Ms. McIvor, who took no steps beyond reporting it to the City and such report appears to have contained incorrect information and no information that would alert the City that anything out of the ordinary had occurred.
- [93] Thus, the circumstances in this case are comparable to those in Foster. Here, the City's employees had no notice that the spill was extraordinary or so extreme that a partial road closure was justified or required.
- [94] The plaintiff contends that if Mr. Kolarcik interacted with a VPD officer at the scene of the spill, as he stated in his evidence, he breached his duty of care when he subsequently passed the scene of the spill, found it unattended and took no steps to clean it up or warn other motorists of the hazard it posed.
- [95] I find that by the time that Mr. Kolarcik returned to the scene, the accident had already occurred, and the plaintiff's scooter had been removed from the scene of the accident. I reject his evidence on this issue. But, as the accident had already occurred before Mr. Kolarcik returned to the scene, there is no causal link between the accident and his alleged failure to clean up the scene or warn other motorists after he returned to the scene of the spill.
- [96] In summary, I am satisfied that the following matters have been proven on a balance of probabilities:
- a) Mr. Kolarcik owed a duty of care to the plaintiff;

- b) Mr. Kolarcik breached this duty of care in the circumstances by allowing cement and aggregate to spill from his ready-mix truck onto a City street and failing to take reasonable steps to clean up the spill and warn other road users of the hazard that he created;
- c) The spill caused the plaintiff's accident and injuries;
- d) Lehigh is liable for the negligence of its employee, Mr. Kolarcik. There were no allegations directed toward Ms. McIvor, but I am satisfied that both her failure and that of Mr. Kolarcik to adequately report the spill to the City have been proven and find Lehigh vicariously liable for those failures.
- e) I am, however, unable to find that Lehigh was directly liable for the spill or the inadequate report to the City.

Lehigh's Claim of Contributory Negligence

[97] Lehigh's response to civil claim alleges the plaintiff was contributorily negligent, which included the following particulars:

- (a) failing to keep any or, in the alternative, a proper look out;
- (b) driving his motorcycle without any or, in the alternative, with defective brakes or, in the further alternative, in failing to apply the brakes of his motorcycle in a timely and appropriate manner so as to avoid the accident;
- (c) failing to keep his motorcycle under proper or, in the alternative, any control;
- (d) failing to take reasonable or proper or any precautions to avoid the accident;
- (e) failing to turn out reasonably or in time to avoid the accident or failing to direct the course of his motorcycle so as to prevent the accident;
- (f) failing to take any sufficient and/or evasive action to avoid the accident when he knew or ought to have known that an accident was imminent or likely to occur;
- (g) operating his motorcycle without due care and attention or without reasonable consideration for other persons using the highway contrary to Section 183(14) of the Motor Vehicle Act;
- (h) failing to operate his motorcycle in a careful and prudent manner, having regard to all the circumstances;
- (i) operating his motorcycle on a highway when it was not equipped in compliance with the Motor Vehicle Act;
- (j) failing to take the precaution of wearing an adequate safety helmet that could protect his head from injury in the event of an accident; and

- (k) failing to wear protective or proper protective clothing to protect himself from injury should an accident occur.
- [98] The plaintiff sustained a brain injury in a motor vehicle accident in September 1995. Following that accident, and despite his injuries, he was able to live with his wife and children and engage in a business with his wife.
- [99] The parties agree that since the accident in issue before me, the plaintiff has been incapable of providing reliable, if any, evidence with respect to the liability issues in this case.
- [100] On the evidence before me, the licensing requirements for scooters differ from those for motorcycles and the plaintiff was properly licensed to operate the scooter he was riding when injured in the accident. Accepting that the references in Lehigh's response to the civil claim were intended to refer to a "motor scooter" rather than a "motorcycle", they are unsupported by the evidence.
- [101] As I have mentioned above, Lehigh admits that the plaintiff suffered some injury from the accident and I find that it was foreseeable that injury could occur from a scooter rider encountering a spill of the type and magnitude that the plaintiff encountered, but I also find that a spill of the magnitude of the spill that caused the plaintiff's accident was not foreseeable.
- [102] There was no evidence to support the allegations in sub-paras. 97 (b) and (i) above and they are dismissed.
- [103] Lehigh also contends that I should consider that the plaintiff was wearing a beanie style helmet at the time of the accident. There is no evidence before me that the plaintiff's helmet played any role in causing his injuries or that any other helmet would have avoided his injuries.
- [104] Given Lehigh's admission that the plaintiff was injured in the accident, it is unnecessary for me to deal with the allegation in sub-paras. 97 (j) and (k) as they should more properly be addressed when the matter of quantum is addressed.
- [105] Lehigh contends that as the plaintiff was traveling in the right-side portion of the second lane as he approached the spill, he could have travelled to the right of the spill without any incident. It contends that the plaintiff made the decision to steer his scooter to the left, directly into the spill and was thus contributorily negligent.
- [106] Lehigh contends, and I accept that the plaintiff had a duty to operate his scooter in a reasonable manner and to be aware of his surroundings.
- [107] Lehigh argues that the plaintiff merely had to continue to ride his scooter to the right of the spill and says that there is no reasonable explanation as to why he could not observe the spill, either as he was approaching the spill or as he was riding along beside it, other than a failure to take reasonable care and be aware of his surroundings.

- [108] The only evidence of the plaintiff's speed was provided by Mr. Kynl, who estimated that both he and the plaintiff were traveling at approximately 30 km/hr. This speed is not of itself excessive and is below the speed limit of 50 km/hr in the area. The fact the plaintiff does not appear to have observed the spill prior to turning into it, does not suggest that it was a speed excessive relative to the conditions of the road.
- [109] Lehigh says that I should consider its claim of contributory negligence in the context of the plaintiff not having a motorcycle licence and not having undergone any training for the operation of a motorcycle. Lehigh contends that the plaintiff's lack of motorcycle training should have made him more vigilant of his surroundings.
- [110] I do not accept that the plaintiff's failure to undertake motorcycle training can be seen as contributory negligence on his part, nor required him to be more vigilant than other users of the road. No evidence was led to show what benefit the plaintiff might have derived from such training, and in any case, he was not riding a motorcycle and was licensed to operate the scooter that he was riding.
- [111] While Mr. Kynl gave evidence that a scooter is less easy to stabilize than a motorcycle, as there is nothing for the rider to grip with his thighs, the plaintiff was a legitimate user of West 4th Avenue at the time of his accident, and entitled to ride a scooter on that road, despite the absence of something between his thighs that would have been present on a motorcycle. I therefore dismiss as unproven the allegation set out in sub-para. 97 (i) above.
- [112] Lehigh contends that if the plaintiff had kept an adequate lookout and observed the spill prior to turning directly into it, he would have been able to continue to ride his scooter beside the spill and would not have fallen. Lehigh contends that it is readily apparent the plaintiff failed to take reasonable action after the spill, and in fact, took action that directly led to the accident. Lehigh points out that the evidence of Mr. Kynl makes it clear that the plaintiff did not observe the danger of the wet cement spill, despite it being highly visible.
- [113] I am not persuaded that the spill was as readily apparent as Lehigh contends. Even Mr. Kynl, at an elevated cab positioned about 10 or 11 feet above the ground with a clear view of the street in front of him, initially thought that there was only gravel on the road. It was not until he got closer to the spill, and perhaps not until he exited his truck, that Mr. Kynl realized that it was wet cement.
- [114] Lehigh contends that there is no evidence to suggest the plaintiff's decision to turn left into the spill was a decision made in the "agony of the moment" and argues that if the plaintiff had maintained an adequate lookout of his surroundings, he would have observed the spill and not turned his scooter into it.
- [115] I adopt the reasoning of Madam Justice Choi in *Bye*, and find that the plaintiff should not have been expected to exercise perfect judgment when suddenly confronted with the unexpected spill in his lane of travel.

[116] I find that it was reasonable for the plaintiff to expect the roadways to be suitable to drive on. There is no evidence the plaintiff was travelling at an unsafe speed. It appears from the photographs in evidence that the start of the spill was masked by shadows. Det. Baxter confirmed the spill and area was "mottled" with shadows. Both Det. Baxter and Mr. Kynl confirmed the spill extended out as gravel and was not contained to the very centre of the lane.

[117] In summary, I find the plaintiff was not contributorily negligent for the accident that caused his injuries.

Third Party Claim

[118] The defendants' third-party pleadings against the City allege that the City is liable for the accident, based on the following particulars:

- (a) Failing to dispatch a maintenance crew/police to the substance spill in a reasonable time;
- (b) Failing to attend the scene of the substance spill in a reasonable time;
- (c) Failing to erect adequate warning signs at and near the location of the substance spill;
- (d) Failing to ensure the road surface at and near the accident site was properly cleaned;
- (e) Failing to adequately inspect the roadway so as to detect the presence of the substance spill or other hazards which could be a potential to users of the roadway;
- (f) Failing to provide sufficient or proper, or any safeguards for users of the said roadway against the dangers, inherent or otherwise, presented by the roadway;
- (g) Failing to provide or alert the users of the roadway with sufficient, or any, warning of the condition to expect the roadway when there was a substance spill on the road surface;
- (h) Failing to close the roadway to users when its employees/agents knew or ought to have known that the roadway's condition was extremely dangerous; and
- (i) Failing to adequately or reasonably supervise the work in maintaining the roadway.

[119] Pursuant to *Leischner v. West Kootenay Power & Light Co.* (1986), 70 B.C.L.R. 145 (C.A.), the allegations of liability against the City, if proven, affect the attribution of liability if the plaintiff too is found to have been contributorily negligent. As noted by the court, "where the fault of the plaintiff and of two or more tortfeasors contributed to the plaintiff's loss, the tortfeasors are liable only severally, not jointly. This is so whether all tortfeasors are sued as defendants or not": *Leischner* at p. 174. However, as I have not found that the plaintiff was contributorily negligent, the reasoning in this case does not apply.

- [120] I must also consider the distinction that must be made between policy decisions and operational decisions in reviewing the City's potential liability. According to Mr. Ledo, the City policy at the relevant time was to devote but one truck and one crew to clean up reported spills.
- [121] I find that the City's decision to allocate a particular amount of its resources to street maintenance was a policy decision. However, this is not the decision that is being challenged. What is being challenged by the defendant is the implementation of that policy decision.
- [122] The policy decision that the City made was to clean up reported minor spills within a reasonable time, but by no means immediately. The implementation of that policy decision was an operational decision and thus reviewable by the court: Just at p. 1246. Where the City chose as a matter of policy to clean up reported spills, the manner and quality of its system to do so can be assessed in consideration of the standard of care issue. Yet, the standard of care is to be assessed in light of all of the surrounding circumstances, including budgetary restraints and the availability of qualified personnel or equipment: Just at p. 1245.
- [123] I accept that the City had a duty of care to maintain the safety of the roadways, but that duty is not absolute. As explained in *Fafard*, the City is not an insurer of the travellers using its streets, and its duty is to use reasonable care to keep its streets in a reasonably safe condition for their users.
- [124] I reject as unproven the allegations set out in sub-paras. 118 (d) and (i) above.
- [125] Lehigh submits that, similar to the contractor in *Goodwin*, the City assumed a duty to the public, including the plaintiff, to take reasonable steps to clean up the spill after advising Ms. McIvor that they would dispatch a street crew to clean up the spill and when the police officer advised Mr. Kolarcik that he could leave the scene of the accident.
- [126] By 2011, Lehigh, in its various manifestations, had reported concrete spills to the City for some 23 years. It contends that for those 23 years, the City had assumed the responsibility for the clean up of such spills.
- [127] In my view, this grossly overstates what the City had done in those years, and the expectation that Lehigh was entitled to entertain based upon that 23-year history. I find that there was no contract between the City and Lehigh or any other road users, whereby the City was obliged to clean up concrete spills.
- [128] While the City had a practice of cleaning up reported spills, that practice did not anticipate a spill of the volume caused by Mr. Kolarcik. The practice does not excuse Lehigh and its ready-mix truck drivers from the exercise of reasonable care when they cause a spill, nor from the use of the equipment that Mr. Kolarcik had in his truck--namely, the pylons and cones--to warn other users of City streets in just such an eventuality.

- [129] Lehigh contends that the City assumed a further duty of care when their employees or agents, the police officer and the dispatcher, undertook to clean the spill. The defendants say the breach of this duty of care was reasonably foreseeable to lead to the accident.
- [130] The fact that the City took no action to advise Lehigh that it should take any action itself to clean up the spill, despite the fact that the only City street crew on duty at the time was busy with an emergency at the Cambie Street Bridge, does not relieve Lehigh of its responsibility under s. 204(1) of the Motor Vehicle Act, nor create liability on the part of the City to clean up any spill reported to it by Lehigh.
- [131] Ms. McIvor's testimony and documentary record indicate that Mr. Kolarcik did not mention to her the alleged conversation with a VPD officer until after the accident. Further, Ms. McIvor testified that she understood Mr. Kolarcik's conversation with a VPD officer to have occurred after the accident.
- [132] While Lehigh and its employees may have wanted the City to clean up spills, there is no evidence that on this occasion the City dispatcher made any representation to Ms. McIvor that a street crew had been dispatched to clean up any spill.
- [133] In the plaintiff's submission, in light of the totality of the evidence, the fact that the alleged involvement of the VPD officer was not mentioned until well after the accident suggests that Mr. Kolarcik invented it after he learned that his negligence had given rise to an accident.
- [134] In order for Mr. Kolarcik's narrative to be relied upon, the conduct of the VPD officer he allegedly spoke to would have been in direct contravention to the correct procedure and central priorities that Det. Baxter described.
- [135] If a patrol officer was aware of the significance of this spill, Det. Baxter said she would have expected the officer to come over the radio to advise of the spill.
- [136] Det. Baxter said that had she been the first police officer to respond to this spill, she would have considered it a hazard, blocked the roadway with her car to keep the road safe and called for cleanup. This would have generated a "hazard call." She said that she would expect other VPD officers to react in the same way.
- [137] Det. Baxter indicated she was able to "run the calls" for the entire day and did not locate "a hazard call" for the day of the accident. In 2015, when she thought this matter may be going to trial, she checked whether the cement truck driver's information was run in the CPIC system. She said in the event the police officer had run the driver's name, licence or licence plate number on that day, she would find a record of that search. She said the results were negative, and she was never able to find any evidence to corroborate Mr. Kolarcik's claim that there was a police officer on the scene after the spill, but prior to, the plaintiff's accident.

- [138] So, in order for Mr. Kolarcik's narrative to be relied upon, a VPD officer who had walked the length of the spill and seen the full extent of it, would have decided to leave it unattended without even calling the spill in to the City dispatcher. This would have constituted a substantial departure from a VPD officer's normal practice. It is more likely that Mr. Kolarcik, whose usual practice was to do nothing other than call Ocean Concrete's dispatch, simply did so and left.
- [139] Mr. Kolarcik testified that he spoke with the police officer who asked him what the procedure was to clean up a spill. Mr. Kolarcik advised that the standard procedure was for an Ocean Concrete driver to report the spill to the dispatcher for Ocean Concrete, who in turn would report the spill to the dispatcher for the City. The City would then dispatch the necessary cleaning crew to the scene of the spill.
- [140] The evidence of Det. Baxter suggests that this degree of involvement by a VPD officer would have required the officer to call himself in to VPD dispatch, so as to avoid being dispatched out on another call. This would have generated a record. Additionally, the VPD officer's apparent blocking of the roadway would likely have involved a hazard call. The fact that records of such calls could not be located makes Mr. Kolarcik's narrative improbable.
- [141] I find that on the balance of probabilities, Mr. Kolarcik chose, without any involvement with any police officer, to follow his usual practice, as opposed to the practice expected of him by his employer; that is, to leave the scene of the spill without taking any steps to clean it up or to warn other motorists of the hazard that he had created.
- [142] Lehigh contends that the City was negligent by assuming the responsibility for cleaning up spills, such as cement spills, without any real protocols or procedures in place. This defendant says that, if the City had advised Ms. McIvor that Mr. Kolarcik should have stayed at the scene or that Ocean Concrete should have taken other steps to remove any hazard caused by the spill, the accident could have been avoided. I reject this contention as it is clear, as I have stated above, that Mr. Kolarcik understood that he was not permitted to do so.
- [143] In addition, Ms. McIvor did not say that she was advised by the City dispatcher that a City crew would be sent to clean up the spill in other than the usual response time. I have already rejected Mr. Kolarcik's evidence that he was advised by a police officer that he could leave the scene of the spill. I turn then to the assertion by Lehigh that the City assumed the duty to clean up any and all spills on its streets.
- [144] I find that the reasoning in Goodwin does not assist Lehigh. In that case, the defendant was informed about the nature and extent of the hazard on the roadway and was aware that the hazard had already caused one accident.

[145] The history of the prior experience of the parties in Goodwin was that when the defendant received calls from the RCMP, it took steps to ensure that the appropriate service-provider was notified, creating what Newbury J.A. labelled "a de facto 'reliance' on the RCMP's part" (at para. 5).

[146] In addition, the defendant in Goodwin was taken to have known that by virtue of its repeated assurances that a crew had been sent, the RCMP would not call anyone else to respond to the hazard. Indeed, at para. 44, Madam Justice Prowse wrote:

the reasonable foreseeability test is met. That is, Mainroad could reasonably foresee both that the RCMP would rely on its undertaking to take care of the black ice problem on Quinsam Road and refrain from calling for further assistance, and that members of the public using Quinsam Road could be injured if Mainroad did not take steps to deal with the problem.

[147] At para. 53, Prowse J.A. added:

Mainroad did not simply become aware of the danger to the public; it offered to abate the danger, and it did so with the foreseeable result that the RCMP would make no further efforts to obtain assistance. While it may not be entirely accurate to say that Mainroad increased the danger to Ms. Goodwin and other members of the public in so doing, it certainly prevented the danger from being controlled or eliminated.

[148] In the case before me, the City was not advised that the spill was other than the usual magnitude, and Ms. McIvor testified that she had no idea what the City's response time would be.

[149] Mr. Ledo testified that there was no prescribed response time for reported spills on City streets, and that the actual response time of just over an hour was not unusual. There is no evidence to indicate that Lehigh could reasonably have expected the City to attend to the spill any faster than it did.

[150] Lehigh contends, and I agree, that any misunderstanding between Ocean Concrete and the City relating to the size, severity or location of the spill did not contribute in any way to the steps the City took. If the spill was reported to be in the wrong location and no information was provided as to the size or severity of the spill, this does not lead to a finding of liability against the City since the street crew could not have arrived on the scene any earlier than it did.

[151] In my view, the reasonableness of the City's response time must be assessed by considering the City's usual practice and the reasonable expectations of Ocean Concrete. Nothing about Ms. McIvor's report would have indicated to the City that it was dealing with anything other than the usual minor spill in front of Carter Honda. Nothing would have indicated to the City that this spill constituted a hazard or an emergency that needed to be responded to with any urgency.

[152] In summary, I find that the City was not negligent in responding to and cleaning up the spill in the manner that it did. Due to the inadequate report of Mr. Kolarcik and Ms. McIvor, it was unaware of the magnitude of the spill and the fact that it posed a significant danger to the users of the road, and could not be expected in such circumstances to have taken measures beyond those that it took as a matter of routine for minor spills.

The Actions or Inaction of Police

[153] Since the third party claim against the City is still outstanding, I will briefly deal with the allegations with respect to the actions or inactions of the VPD officers.

[154] Lehigh contends that the City is jointly and severally liable for a tort committed by a member of the VPD, pursuant to s. 20 of the Police Act, if the tort was committed in the performance of his or her duties. Lehigh cites *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817 at para. 83 for this proposition. In that case, I determined at paras. 83 - 84 that:

83 DWS seeks relief in the current action based upon the conduct of members of the Abbotsford Police Department. The City contends that it is not the proper party to respond to allegations respecting members of the Abbotsford Police Department. This is only partly correct. The City is liable for the negligence of the members of the Abbotsford Police Department pursuant to ss. 20 and 21 of the Police Act, R.S.B.C. 1996, c. 367.

84 It is correct, however, that the City is not liable for the Abbotsford Police Department members for liability based on other causes of action. Those causes of action must be pursued against the Abbotsford Police Department or the members themselves, subject to s. 21 of the Police Act, which provides that no action lies against individual police officers unless they are guilty of dishonesty, gross negligence, or malicious and wilful misconduct. As with the pleadings with respect to the displacement tactics, it is my view that the pleadings are adequate for present purposes, but will have to be refined by further particulars once the discovery phase of the action is complete. For now, I am satisfied that the City has a reasonable understanding of what is meant by displacement tactics, and the conduct of those for whom it is vicariously liable, that forms the factual foundation for the pleading.

[155] However, it is important to note that, by the time of trial, there were no allegations that members of the VPD were in any way negligent. Lehigh did not name the VPD in its third party pleadings and those pleadings make no mention of the VPD, other than the reference to the unnamed officer that Mr. Kolarcik said he spoke to. I have already determined this conversation did not take place.

[156] As Mr. Justice Voith noted in *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 32 - 33:

32 Historically, it was not necessary to identify by name the cause of action that a plaintiff sought to advance: *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 (S.C.), aff'd [1998] B.C.J. No. 2965 (C.A.). Nor was it necessary for the plaintiff to plead a statute that he or she relied on: *Gold v. Toronto Dominion Bank*, [1998] B.C.J. No. 3074 (S.C.).

33 Neither of these propositions appears to remain valid under the current Rules. Thus, the authors of *McLachlin and Taylor* state at 3-5 and 3-7, respectively:

... under Rule 3-1(2)(c) a notice of civil claim must "set out a concise summary of the legal basis for the relief sought". It would appear that where the cause of action is breach of contract, that must be stated as the basis for the relief sought. Similarly, where the cause of action is a nominate tort, the tort must be named. Where the cause of action is negligence, it may not be necessary to identify that as the cause of action, but in that case there would have to be a statement that the legal basis of the claim made is the existence of a duty of care, breach of the duty of care, and damages resulting from the breach of a duty of care.

...

The requirement under [Rule 3-1(2)(c)] to set out a concise summary of the legal basis for the relief sought means that earlier case law stating that it was not necessary to plead a statute if the material facts giving rise to the right to relief under the statute were pled is no longer applicable in British Columbia.

[157] Lehigh failed to plead a legal basis for their claim against the City for the actions or inactions of the VPD. As a result, the plaintiff had no notice he would have to meet the defence raised at trial concerning such actions or inactions. Therefore, Lehigh should not be permitted to rely upon such allegations.

[158] In any case, as discussed above, I reject the evidence that Mr. Kolarcik had any interaction with the VPD. In the result, there is no factual basis for a finding of negligence on the part of the VPD or any of its officers.

Conclusion

[159] I find that the sole cause of the accident was the negligence of Mr. Kolarcik in allowing cement and aggregate to spill from his ready-mix truck onto a City street and then failing to take reasonable steps to clean up the spill and warn other users of that street of the hazard that he had created.

[160] Lehigh is vicariously liable for the negligence of Mr. Kolarcik and Ms. McIvor.

[161] The third party claim by Lehigh against the City is dismissed.

"The Honourable Chief Justice Hinkson"

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