

CANADA / JUDGMENT

Nichols v. Warner

2007 BCSC 1383

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1383 Nichols v. Warner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nichols v. Warner,

2007 BCSC 1383

Date: 20070918

Docket: M024349

Registry: Vancouver

Between:

Donald Wayne Nichols

Plaintiff

And

Warner, Scarborough, Herman & Harvey,

Karl F. Warner, G.W. Kent Scarborough, and Stephen Herman

Defendants

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff

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T. Jespersen

Date and Place of Trial/Hearing:

March 5-9, 12-15, April 30

and May 1-2, 2007

Vancouver, B.C.

INTRODUCTION

- [1] On October 16, 1994 the plaintiff, Donald Wayne Nichols, was involved in a serious single vehicle accident that resulted in the loss of his leg. The accident occurred as he was riding his motorcycle along Old Yale Road in Chilliwack. Mr. Nichols was negotiating a curve at the intersection with Hopedale Road when he lost control of his motorcycle. His motorcycle left the road and struck a telephone pole. Mr. Nichols leg was severely injured in the crash. The injury was of such severity as to require amputation. This serious injury had particularly unfortunate consequences for Mr. Nichols. Mr. Nichols was a professional truck driver, but after he lost his leg, he could no longer pursue this occupation.
- [2] There were no witnesses to the accident. However, several people attended at the scene after the accident to assist Mr. Nichols. The police attended at the scene and prepared a report of the accident.
- [3] Mr. Nichols retained solicitors, the defendant firm Warner, Scarborough, Herman & Harvey, to commence an action for damages for injuries he suffered in the accident. He met first with the defendant Kent Scarborough. At the initial meeting, Mr. Nichols told Mr. Scarborough that he lost control of his motorcycle because of gravel that had accumulated on the road.
- [4] Mr. Nichols' father, Alex Nichols, was convinced that the corner where the accident occurred was dangerous because of road conditions and because of the presence of the pole. Alex Nichols was very active in the litigation, communicating his concerns about the road to counsel and to the experts who were ultimately retained, conducting his own investigations with respect to the site, and providing counsel with information about potential witnesses who could have evidence that would assist in the litigation.

- [5] The firm commenced an action on Mr. Nichols' behalf naming the District of Chilliwack (the "District") as the only defendant (the "First Action"). Mr. Scarborough considered, but ultimately rejected, joining British Columbia Telephone Co. ("BC Tel") as a defendant. The First Action alleged that the accident was caused by the negligence of the District in the improper design and construction of the roadway, improper signage, and failure to remove the loose gravel that accumulated on the road surface.
- [6] The matter proceeded to Mr. Nichols' Examination for Discovery. At his Discovery, Mr. Nichols provided no evidence with respect to how the accident occurred. Mr. Scarborough had by this time requested his partner, the defendant Stephen Herman, to assist him with the file. Both Mr. Scarborough and Mr. Herman formed the opinion that, in view of Mr. Nichols' evidence on Discovery, if the matter were taken to trial, the case would likely be lost on the issue of causation. Counsel for the District apparently took the same view and was in the process of setting the matter down for summary trial on the issue of causation.
- [7] Mr. Scarborough and Mr Herman met with Mr. Nichols and his father and provided their opinion. They followed this meeting with a letter setting out the opinion in writing. Counsel obtained instructions to settle the First Action on the best terms that could be obtained. The First Action was ultimately settled for \$5,000. The firm wrote off the remaining disbursements and closed its file.
- [8] Alex Nichols remained concerned about the safety of the intersection. This continuing interest in the site resulted in a chance meeting with Michael Weightman who works for the Insurance Corporation of British Columbia ("ICBC"). Mr. Weightman was at the site following another accident that had occurred at that location. Eventually, pursuant to an agreement between Telus and ICBC, the pole was removed in 2000 and improvements to the road were undertaken in 2002.
- [9] That combination of events; another serious accident, the removal of the pole and improvements made to the road, caused Mr. Nichols to reconsider the adequacy of the representation he received in the First Action. He then commenced this litigation alleging that the firm was negligent in its prosecution of the First Action on his behalf.

ISSUES

- [10] An action alleging negligence on the part of solicitors in the prosecution of an action raises two sets of issues. The first matters to be determined relate to whether the firm discharged its duty of care to Mr. Nichols in relation to the First Action. The plaintiff alleges that the settlement of the First Action was improvident. The plaintiff makes a number of allegations of negligence in this regard which can be grouped into two central concerns. First, that the firm did not undertake an adequate investigation with respect to causation and that had an adequate investigation been done, causation could have been established. Second, the firm should have sued BC Tel and advanced allegations with respect to the pole.

- [11] If the plaintiff establishes that the defendant's conduct was negligent, he then needs to establish that the negligence caused him damage. The second set of issues relates to this question. This involves what is commonly described as a trial within a trial. In this trial within a trial, the likely outcome of the First Action had the additional investigations with respect to causation been undertaken and allegations made with respect to the pole will be addressed.

FACTS

The Accident

- [12] The accident that gives rise to this litigation occurred on October 16, 1994 when the motorcycle Mr. Nichols was riding left the road as it was taking a curve. The motorcycle struck a telephone pole that was located to the right of the roadside. This caused him to suffer a serious injury to his leg that required amputation.
- [13] The pole that Mr. Nichols struck was a support pole, the function of which was not to carry the telephone line, but to act as a tension support to the curving telephone line on the north side of Yale Road West. The pole was a lateral distance of 2.5 metres from the edge of the eastbound travel lane.
- [14] The accident took place on Yale Road West near the intersection of Yale Road West and Hopedale Road in Chilliwack. The road is a paved road located in a rural area. There is a gravel shoulder. The corner took the shape of an "s" curve. The curve starts west of the intersection with Hopedale Road, continues easterly, and ends on another tangent.
- [15] The posted speed limit was 60 km/hour. There was a curve warning sign located on the eastbound approach to the intersection. At the time of the accident, Mr. Nichols was travelling eastbound through the left hand curve.
- [16] At the time of the accident Mr. Nichols was 42 years old. He had class 1, 5 and 6 motor vehicle licences. Mr. Nichols was an experienced professional driver and a very experienced motorcycle operator. His motorcycle was in good operating condition. Mr. Nichols lived in Cultus Lake. He had separated from his wife in June 1993.
- [17] He testified that on the morning of the accident he had participated on his motorcycle in a charity toy run in Abbotsford, returning to Chilliwack at about 5:00 p.m. He stopped off at Dukes, a local pub, to have a beer with friends. He testified that he had one beer at the pub. His ex-wife entered the pub with her new boyfriend. Mr. Nichols became upset when he saw her and decided to leave. He agreed that he stayed at Dukes for about an hour.
- [18] There was a note in the RCMP file that Mr. Nichols told the nurse at the emergency room after the accident that he had two jugs of beer at the pub. He testified that he did not recall making that statement and that in any event, it was not true.

- [19] Mr. Nichols agreed that he was familiar with the road on which the accident occurred and generally familiar with the intersection where the accident occurred. He did not recall experiencing gravel at the intersection prior to the accident.
- [20] The weather conditions on the day of the accident were good. The day was clear and warm. The accident occurred at about 6:15 p.m., in pre-dusk daylight. The road surface was described in the police report as in good condition and dry.
- [21] Mr. Nichols testified that he recalled heading east on Yale Road West, taking the sharp corner at Addams Road. He testified that he recalled that as he approached the intersection of Yale Road and Hopedale Road, he was travelling at 60 km/hour, the posted limit. He testified that he throttled down for the curve, slowing his speed somewhat as he entered the curve so that he entered the curve at about 57 km/hour.
- [22] Mr. Nichols testified that he was travelling in the position he normally chose for that section of the roadway, away from the centre of the road, close to the shoulder on the right side and in the paved portion of the road. He agreed that there was a considerable width of the road that had no gravel, in the middle and toward the centre of the road. It was his testimony that he nevertheless avoided those areas because of a concern with approaching drivers crossing the centre line as they executed the curve.
- [23] He testified that as he was about half-way through the curve, he felt a shudder, tried to straighten out, but lost control and went into a skid. It was his testimony that he was on two wheels when he left the roadway and that this occurred past the apex of the curve.
- [24] Mr. Nichols could not recall the actual accident or much of what occurred at the scene or at the hospital. He did not recall making a statement to the police, the ambulance attendant, or to the RCMP. He did recall the RCMP officer stating that there would be no impaired charge. He could not recall, but did not deny, telling the RCMP investigating officer "I was daydreaming and I left the road." His evidence was that it ended up that that wasn't true.
- [25] It was his testimony that at the time he didn't know why he lost control and initially he was taking responsibility for it. He testified that the next day at the hospital he told his father to go to the scene to look for what could have happened. He agreed that he never suggested gravel to his father at the hospital. He stated that he later learned that gravel was the cause because of the physical evidence.
- [26] It was Mr. Nichol's testimony that he never knew the details of how he lost control and has never been able to say how the accident occurred.
- [27] A series of documents were admitted into evidence pursuant to an agreement that the documents constituted prima facie proof of what was said or recorded. The agreement does not extend to any expression of opinion in the documents. In that regard, these documents contain the following information that is of significance in relation to the accident:

- (a) Constable Moskaluk noted that there were no skid marks on the pavement, but noted furrow marks in the gravel and grass;
 - (b) the police accident report makes no reference to gravel on the road or to road configuration factors as related to the cause of the accident;
 - (c) there was no indication at the scene that alcohol was a contributing factor nor were there any physical symptoms of impairment;
 - (d) the traffic accident worksheet sketch shows a skid mark on the gravel shoulder just after the intersection;
 - (e) the officer at the scene noted that Mr. Nichols was eastbound on Yale Road West, approached a single slow left hand bend after approximately 5 kilometers of straight roadway, and that the tire marks indicated that the motorcycle went off the roadway well before the apex of the bend and straight along gravel shoulder;
 - (f) CSO Moskolide spoke to Mr. Nichols who stated "I was daydreaming and I left the road. I wasn't even speeding";
 - (g) photographs taken at the scene on the evening of the accident provide little assistance. They show many marks on the road and on the shoulder area at and near the scene. However, it is not possible to identify which, if any, of these marks were made by Mr. Nichol's motorcycle;
 - (h) Mr. Nichols reported to the emergency room nurse during treatment that he had two jugs of draft at Dukes. Dukes was unable to provide any details due to a large number of motorcyclists at the pub following the yearly ride that Mr. Nichols had taken part in; and
 - (i) Dr. Kousaie saw Mr. Nichols at the hospital following his admission. Dr. Kousaie records that Mr. Nichols told him that "the reason for the accident was an inattention. There was an emotional disturbance for him just prior to the accident and this is why the accident occurred." In his testimony at trial, Mr. Nichols accepted that was what he told the doctor at the time. He said that he believed that it was true at the time.
- [28] Todd Morrison did not witness the accident, but was the first on the scene. He testified that he was driving with his wife, and observed Mr. Nichols crawling in the tall grass. They drove to a farm and called 911 then came back to the scene to assist Mr. Nichols. In the process, they backed their vehicle right over the accident scene and were chastised by the police for disturbing the scene.
- [29] It was Mr. Morrison's testimony that he observed gravel on the road that evening. He stated that he also observed a skid mark or skid marks on the road in the area where he observed the gravel on the roadway. The mark or marks he observed, were heading east to the shoulder, ending at the shoulder. He identified the approximate location on photograph 8 of documents (marked Exhibit 12 in his video deposition and marked at trial tab 12 of Exhibit 2). Mr. Morrison agreed that he was making an assumption that the mark or marks he described in his testimony were caused by Mr. Nichols' motorcycle.

- [30] It was Mr. Morrison's testimony that there was always gravel on the road in that location. He testified that he observed the gravel swept off the road within a couple of days after the accident. It was his testimony that he had driven through the curve hundreds of times prior to October 1994. He agreed that if you entered the curve at an appropriate rate of speed, you could negotiate the curve without any difficulty.
- [31] He agreed that gravel shoulders are not at all unusual features of the roads in the community. He agreed that gravel gets onto the paved portion of the roadways in that area because of vehicles driving onto the gravel shoulder and spitting gravel onto the road.
- [32] Michael Heusken lived on the farm that surrounded the area of the intersection of Yale Road West and Hopedale Road. It was his testimony that over the years he has attended a number of accidents at this location, his estimate being over 20. He described attending at the scene of four previous motorcycle accidents at the site. It was his evidence that gravel was present on the roadway on these occasions.
- [33] Mr. Heusken testified that he attended at the scene of Mr. Nichol's accident to provide assistance. It was his testimony that he observed gravel on the road in the vicinity of the accident.
- [34] Mr. Heusken was an experienced motorcycle driver. It was his testimony that when he drove through the stretch of road where Mr. Nichol's accident occurred, he drove close to the centre because he knew that there was gravel on the road toward the shoulder and wanted to avoid it.
- [35] Mr. Heusken testified that prior to the accident the road was never swept of gravel. He testified that it was only after the accident that the District did start sweeping. It was his testimony that in the 20 or 30 years prior to the accident that he was not aware of the gravel ever having been swept from the road by the District. After the accident, the District swept the area frequently, for a time, and then eventually stopped again.
- [36] Montgomery Bradwell testified that he retrieved Mr. Nichols' motorcycle from the scene of the accident the following day. When he arrived at the scene in the early afternoon, he observed a grader and street broom cleaning the gravel off the area.

The First Litigation

- [37] Mr. Nichols retained the defendant firm in December 1994. At the initial interview he met with Kent Scarborough. Mr. Scarborough was called to the bar in 1986 following a career with the RCMP. He practises almost exclusively in the field of personal injury litigation.
- [38] Mr. Nichols testified that he told Mr. Scarborough in the initial interview that he lost control and that he had had one beer. They discussed gravel. In cross-examination he agreed that he told Mr. Scarborough at the first meeting that he lost control because of gravel. His explanation was that that was what he believed. Mr. Scarborough's recollection of the first meeting, consistent with his notes of the first meeting, was that Mr. Nichols told him that he

hit some gravel and lost control, when the front tire slid out. I find that from the outset of the retainer, Mr. Nichols advised his counsel that the cause of the accident was that he hit gravel and lost control of his motorcycle.

[39] Mr. Nichols advised Mr. Scarborough at the meeting that he estimated his speed was 60 km/hour. They discussed that there had been a history of problems at that corner. Mr. Scarborough advised Mr. Nichols from the outset of his opinion that the case would be difficult with respect to the issue of liability. They did not enter into a contingency agreement. Mr. Nichols was required by the terms of the retainer to fund disbursements. This was a consequence of the perceived difficulty of the case.

[40] By letter dated December 6, 1994, the District was placed on notice of a claim. The letter states in part:

It is Mr. Nichols' position that the accident was caused both due to the improper design and construction of the roadway as well as due to a failure on the part of the District to remove loose gravel which had been allowed to accumulate on the road surface.

[41] The First Action was commenced with the filing of a writ and statement of claim in January 1995. The action named the District as the only defendant. No allegations were made with respect to the pole. Apart from the instructions to commence the action, counsel did not obtain particular instructions from Mr. Nichol with respect to which defendants would be named and the nature of the allegations.

[42] The statement of claim was not provided to Mr. Nichols for review prior to filing, although it was provided to him once it was filed. It contains an error in that it incorrectly identified the leg suffering the injury. Considerable time was devoted at trial to this no doubt embarrassing error. However, nothing turns on this error for purposes of this action since it was neither alleged or established that this error resulted in any damage or loss.

[43] Mr. Scarborough testified that he turned his mind at the outset to the question of whether or not to make allegations with respect to the pole and to add the owner of the pole as a defendant. He concluded that the issue of the pole had to do with the amount of damage and not with how the accident occurred. He was of the opinion that the crux of the case was how the plaintiff left the roadway. In his opinion, the owner of the pole did not have an independent duty to the plaintiff. The pole was on a statutory right-of-way. As to the issue of potential liability under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 (the "Occupiers Liability Act") he did not see a basis for liability because in his opinion, there was no invitation to enter the premises. He decided not to name the owner of the pole or to make allegations about the pole. He did not discuss this with Mr. Nichols. He agreed that he did not conduct any legal research into the matter.

- [44] Alex Nichols, the plaintiff's father, was very much involved in dealing with the litigation. Mr. Scarborough recalled that he questioned counsel why the telephone pole was not being included. The plaintiff recalled his father raising the issue with counsel and recalled that counsel's reply was words to the effect of "first things first". It was his evidence that there was no discussion with counsel about the pros and cons of adding allegations with respect to the telephone pole.
- [45] Alex Nichols had provided information to Mr. Scarborough with respect to the history of the site, the presence of gravel, and names of witnesses.
- [46] In May 1995, Mr. Scarborough had a conversation with the adjuster on the file, Andrew Mitchell. Mr. Mitchell advised him of what he understood to be the circumstances, including that there was some evidence that Mr. Nichols had been drinking, that he left the pub emotionally distraught over the encounter with his wife, and that at least one witness reported that there was no gravel on the road that evening.
- [47] Mr. Scarborough took steps to obtain the accident records relating to previous accidents at the site and to obtain the District's documents. He retained Keith Godfrey, an accident analysis engineer, to provide a preliminary assessment of the claim. Mr. Godfrey did so by letter dated May 8, 1996 in which he identified three possible approaches:
- (a) that the District could have prevented gravel from accumulating by extending the paving on the southeast and southwest corners;
 - (b) that the pole could have been eliminated and the north side pole supported directly;
 - (c) that the corner could have been re-engineered to provide proper banking.
- [48] Upon receiving Mr. Godfrey's views, Mr. Scarborough reconsidered the question of bringing suit in relation to the pole. He consulted with his partner Karl Warner about the question. Mr. Warner shared his views that BC Tel did not have an independent duty to the plaintiff in the circumstances.
- [49] Mr. Scarborough then retained John Lisman, a highway and traffic safety engineer, to provide an opinion with respect to what part the condition and alignment of the roadway and traffic controls or other features may have played in the accident. Mr. Lisman was asked to assume that Mr. Nichols was travelling at an estimated speed of 60 km/hour and that he lost control on the loose gravel covering the road surface, causing the vehicle to fall over on its side. Mr. Lisman's report dated May 7, 1997 concludes:

Conclusions:

- a) The inadequate superelevation of the eastbound lane decreased the safe speed at which the curve could be driven around to significantly less than the posted speed of 60 km/h, and increased the reliance on the surface friction factor to keep the vehicle safely in the curve.

- b) The loose gravel lying on the curve road surface produced a low level of surface friction, causing the motor-cycle to skid, lose control and leave the paved lane.
 - c) The omission of the WA-7, 50 km/h speed tab from the WA-3L Curve Warning sign, would have led the motor-cycle driver to enter the curve at the too high speed of 60 km/h.
 - d) The location of the B.C. Tel. pole aggravated the severity of the crash and the injuries to Mr. Wayne Nichols' leg.
- [50] Having obtained the names of several potential witnesses from the plaintiff and his father, Mr. Scarborough retained an investigator to interview the witnesses both with respect to any information they might have with respect to the plaintiff's accident, but also with respect to any knowledge that they have about other accidents at the site. The investigators contacted Rita Grain who reported that gravel was a problem on that stretch of road, that there had been many accidents at the site, and that there was a lot of gravel on the road on the night of the accident. They tried to interview Delmar Maynard. Mr. Maynard's wife, however, reported that he had recently died. She said that she doubted that gravel was a factor in the accidents, but that she was aware of a number of accidents in that general location.
- [51] Mr. Scarborough secured documents, including transcripts from examinations for discovery, in relation to other accidents at the site. These, however, did not prove to be of assistance in relation to Mr. Nichols' case in that neither the presence of gravel nor the road configuration were noted as causal factors in any of those accidents. He testified that he was waiting until after examinations for discovery to obtain an accident reconstruction report.
- [52] Mr. Scarborough asked his partner, Stephen Herman, to assist with the file prior to the examinations for discovery. Mr. Herman was called to the bar in June 1986. He has carried on a civil litigation practise with about half of his work being in the area of personal injury litigation. Mr. Herman brought an additional aspect of expertise to the file in that he was a proficient and experienced motorcycle rider. He was a senior instructor with the BC Safety Council, and a certified licence examiner.
- [53] Mr. Herman testified that his invariable practice upon first involvement in a file is to review the entire contents of the file. I find that he did so in this case.
- [54] Mr. Herman testified that he contacted potential witnesses, Todd Morrison and Michael Heusken, and made notes of the conversations for the file. He believed that he had these conversations with the witnesses prior to the meeting with Mr. Nichols at which the firm's opinion was discussed.
- [55] It was Mr. Morrison's testimony in examination-in-chief, that he was never interviewed by anyone before being interviewed by counsel prior to giving his deposition in the second trial. He denied, in particular, having been interviewed by any representative of the defendant firm. In cross-examination, he agreed that he might have been interviewed by someone from a law firm acting for Mr. Nichols in the first litigation, but have forgotten about it. Mr. Heusken testified in examination-in-chief, that he had not been interviewed

prior to the second litigation. He did not agree that he could have forgotten such an interview.

- [56] Mr. Herman has identified his handwritten notes of the conversations. I find that he did interview Mr. Morrison and Mr. Heusken, and that the witnesses' evidence to the contrary is mistaken. Mr. Herman's evidence was that, in his opinion, the evidence provided by these two witnesses was not going to resolve the issue with respect to causation of the accident.
- [57] Mr. Herman testified that having reviewed the file, including the comments of Mr. Godfrey and Mr. Lisman's report, he considered the question of the placement of the pole and the potential role of BC Tel in the litigation. He knew from his review of the pleadings that BC Tel had not been named. He was aware that his partner Karl Warner had also considered the issue, and was not impressed with the potential claim against BC Tel. In his view, what Mr. Lisman described was an aggravation of damages resulting from the pole. He concluded that he was satisfied that the plaintiff could blame the District and that the pole was not an issue that needed to be dealt with in the pleadings.
- [58] By this juncture, the police files and hospital records had been received. Mr. Scarborough testified that he was very troubled by the admissions against interest that these documents contained, which were inconsistent with what Mr. Nichols had told them about the accident. He arranged for a meeting with Mr. Nichols prior to the examination for discovery to discuss these concerns.
- [59] Mr. Herman testified that he shared these concerns at the time. He was concerned that there is an inference of negligence when a vehicle leaves the road in a single vehicle accident. Mr. Lisman had been asked to assume, for the purpose of his opinion, that Mr. Nichols had lost control because of gravel.
- [60] Mr. Scarborough testified that there was a meeting with Mr. Nichols prior to the discovery to discuss the concerns arising from the documents. It was his testimony that Mr. Nichols was told at the meeting that his evidence with respect to leaving the road because of gravel was crucial; that they were "dead in the water" without this evidence.
- [61] Mr. Herman testified that he believes, from a review of the file, that he had a meeting with Mr. Nichols in April, shortly after becoming involved in the file, and then a second meeting closer to the examination for discovery in June. He has no present recollection of the first meeting. However, the letter of April 1, 1998 to Mr. Nichols makes reference of concerns arising from the clinical records. He believes that consistent with his usual practice, he would have discussed the claim and the general process, as well as those records, at the meeting with Mr. Nichols.
- [62] Mr. Nichols agreed that his counsel reviewed various important documents with him in relation to the litigation, including the report from Dr. Kousaie and the police and hospital records. He could not recall that there was a meeting with counsel to discuss concerns arising from documents that counsel had received. He denied discussing his evidence prior

to the discovery with Mr. Herman. He recalled no discussion with the lawyers about concerns arising from the documents. It was Mr. Nichol's evidence that never, either before nor after examination for discovery in the first litigation, did counsel ever tell him that it was crucial for him to be able to provide an explanation for how the accident happened.

- [63] I find that Mr. Nichols' recollection in this regard is mistaken. From the outset, Mr. Nichols had told his counsel that the accident occurred because of slipping on gravel. From the outset, his counsel had formed and communicated the view that the case, being a single vehicle accident with no witnesses, would be difficult on the issue of liability. The police files and clinical records contained admissions against interest that were contrary to what Mr. Nichols had told his counsel with respect to causation. They wrote to request a meeting to discuss these central concerns. I find that there was a meeting with counsel to discuss their concerns. I find further that Mr. Scarborough did advise Mr. Nichols of his view that without evidence from Mr. Nichols about the role of gravel, they would be "dead in the water". That was clearly Mr. Scarborough's view throughout, and I have no doubt that he expressed that view to Mr. Nichols.
- [64] Mr. Scarborough testified that at this juncture, prior to examination for discovery, the solicitor for the defendant showed an interest in settlement. Mr. MacMaster, the defendant's solicitor, had written seeking an early disclosure of the plaintiff's expert reports. It was Mr. Scarborough's view that this request was consistent with this interest.
- [65] In response to Mr. MacMaster's letter, Mr. Herman provided the letter prepared by Mr. Godfrey and Mr. Lisman's report. He testified that in his mind this was a difficult case. On the one hand, the damages were catastrophic, but on the other hand, liability would be very difficult. There was in his mind, in the circumstances, a real value to making an attempt to settle at an early stage.
- [66] It was Mr. Nichols' testimony that, apart from being shown a brief instructional video, there was no preparation for his examination for discovery. In particular, it was his testimony that counsel did not review his evidence with him before the discovery.
- [67] Mr. Herman testified that while he has no present recollection of a meeting with Mr. Nichols to prepare for his discovery, it was his invariable practice to meet with the client prior to an examination for discovery to prepare the client. He is certain that he would have followed his practice with Mr. Nichols. His practice was to show the client a video on discovery that had been produced by the Trial Lawyers Association, and then to meet with the client to explain the process and to review areas that were likely to be canvassed where preparation would be helpful. In this case, the particular areas of concern would be the circumstances of the accident and the admissions against interest. Mr. Herman was confident that these areas were canvassed with Mr. Nichols prior to the discovery.

- [68] While Mr. Herman had no present recollection of the meeting with Mr. Nichols, he testified that he does have a specific recollection that the evidence Mr. Nichols gave at his examination for discovery was inconsistent with the evidence that they had discussed before the discovery. Mr. Nichols had said prior to the discovery that he lost control because of the gravel. At the examination for discovery, his testimony was that he did not know why he went off the road.
- [69] I find that Mr. Herman did meet with Mr. Nichols prior to the examination for discovery, consistent with his invariable practice. Given his view that Mr. Nichols' evidence concerning the accident was the lynchpin of the litigation, and his concerns about the admissions against interest contained in the documents, I think it is inconceivable that he would have departed from his practice in this case.
- [70] Mr. Nichols did not recall much about his testimony at the examination for discovery. He agreed that at the examination for discovery in the original litigation, he could not say why he lost control. His explanation for the difference between what he said on discovery and what he told his counsel with respect to the cause of the accident was that he felt free to speculate with his counsel, but in the discovery, he was under oath and not prepared to speculate.
- [71] Mr. Scarborough recalled Mr. Herman discussing Mr. Nichols' evidence at the discovery. He recalled being upset because Mr. Nichols did not give evidence about his speed, the gravel, and the banking. Rather in his evidence at the discovery, Mr. Nichols provided no explanation for the accident, for what caused him to leave the road. It had been Mr. Scarborough's view from the outset that the case was based upon Mr. Nichols' evidence about how he left the road.
- [72] Following the examination for discovery, the attitude of the defendant's solicitor hardened. By letter dated November 19, 1998, Mr. MacMaster wrote to inquire if the plaintiff would abandon the claim. The letter states in part:

In my view, your client will not be able to prove on a balance of probabilities how the accident occurred and, therefore, his claim should be dismissed. Your client has no memory of any events leading up to the accident. He is completely unable to describe what occurred, what speed he was travelling, or anything else that pertains to the accident itself. There are no independent witnesses. There is nothing in your client's evidence or in any of the evidence which is currently known which would support the inference that some negligent act on the part of the District cause your client to go off the roadway.

Although your client wants the Court to infer that the presence of some gravel at the intersection prior to the accident scene caused him to lose control, on the evidence, it is just as reasonable to infer that your client went off the roadway because he was speeding, sleeping, emotionally distracted or because a dog or the proverbial black Chevrolet forced him off the road. Of course, when you combine your client's total absence of any memory in relation to how the accident occurred with the statements in the hospital records and to the police, to the effect that the

accident occurred because your client was not paying attention, it creates a compelling case that your client is completely responsible for his injuries.

- [73] Mr. Herman testified that if he had felt that Mr. MacMaster had misstated Mr. Nichols' evidence, he would have written to correct the misstatement. He concludes from the fact that he did not write such a letter that Mr. MacMaster's summary of the evidence is accurate. I find that the letter contains an accurate summary of the evidence given by Mr. Nichols at his examination for discovery in the First Action.
- [74] Mr. Herman conducted an examination for discovery of the District's representative. He testified that he would have covered the areas of gravel, signage, elevation, banking, and the number of accidents at the corner. In preparation for the examination, he obtained a number of documents from the District including the District's policy with respect to grading, documents with respect to the history of accidents at the site, and documents with respect to the road configuration.
- [75] He recalled that he had not come away from the discovery with anything strong. The District had produced records of the accidents at the intersection. Pursuant to an internal policy, it would have followed up if the accidents reached a certain level. This intersection was, however, below that level. Mr. Herman recalls being disappointed to learn this.
- [76] Mr. Scarborough testified that after the examination for discovery, he concluded that it would be a waste to obtain an accident reconstruction report because they had no assumptions to provide upon which to base such a report. It was now his view that because the evidence he had anticipated Mr. Nichols would give did not materialize, the case had gone from being a difficult case to an impossible case. He stated that in his opinion, adding BC Tel would not have helped in that regard.
- [77] After a further discussion with his partners with respect to concerns about the issue of causation in light of the evidence given at the examination for discovery, Mr. Herman sought an opinion from Albert Roos, an experienced civil litigator, on the issue of causation. The opinion he received did not cause him to change his views with respect to the issue of causation. He believed that he could establish that there was gravel on the road at the time of the accident. However, he did not believe that there was evidence that could establish that Mr. Nichols lost control because of the gravel.
- [78] Mr. Nichols recalled that after the discovery, he met with counsel and was told that they did not think that he should carry on with the suit. He agreed that his father attended the meeting with him and that the meeting became somewhat heated when Mr. Scarborough took offence at Mr. Nichols father's suggestion that he was not fighting for his client. He denied that there was any discussion about pursuing a strategy to attempt to secure a settlement. He absolutely denied that there was any discussion of options. He denied that counsel ever told him that they were prepared to take the matter to trial if that was his wish. He did recall being told that if the case went to trial and he lost, he could face costs. He agreed that at some point counsel advised him that he was free to seek a second opinion.

- [79] Mr. Scarborough testified that following the examination for discovery, he and Mr. Herman met with Mr. Nichols and his father. The purpose of the meeting was to discuss the difficulties with the case in light of the evidence given at the discovery and the defendant's position. He recalled that they advised Mr. Nichols that he had not testified as they had anticipated. Now there was no evidence about how the accident had been caused, and no factual assumptions upon which to base the case with respect to causation. They discussed the recent correspondence from Mr. MacMaster. He recalled that they advised Mr. Nichols that the firm was prepared to take the case to trial, but that it was their opinion that the case could be lost at trial. They suggested a negotiation strategy to try to obtain the best settlement that could be achieved. They advised Mr. Nichols of his potential exposure to costs if the case was lost at trial. They advised Mr. Nichols that he could take his file to another firm for a second opinion. However, he chose not to do so.
- [80] Mr. Herman recalled meeting with his partner, Mr. Nichols, and his father. The purpose of the meeting was to make sure that Mr. Nichols understood what Mr. Herman viewed as the significant impediment to the successful prosecution of the claim. He recalled that they tried to explain the legal issue of causation and where they were left given the defendant's position and the state of the evidence. He recalled that there was a heated exchange between Alex Nichols and Kent Scarborough.
- [81] I find that the firm was prepared to take the case to trial. This is consistent both with the testimony of Mr. Scarborough and with the fact that subsequent to the meeting, the matter was set down for trial. I find that options were discussed with Mr. Nichols; that was the purpose of the meeting and in particular that a settlement strategy was discussed.
- [82] Following this meeting, Mr. Scarborough received a letter from Mr. Nichols' father. The letter states that the firm is dropping the case. Mr. Scarborough testified that this was an error. The firm was always prepared to take the case to trial if they received those instructions. He showed the letter to Mr. Herman who responded with a letter dated April 23, 1999 to Mr. Nichols that reiterated the concern that the case would likely be lost on the issue of causation if it went to trial. The letter recommended that efforts be made to secure a settlement, and sought instructions.
- [83] I find that Mr. Scarborough and Mr. Herman did not tell the plaintiff and his father that the firm was dropping the case. They did communicate their opinion that the case would likely be lost at trial on the issue of causation. They did explain the risk Mr. Nichols faced with respect to costs in the event of a loss at trial. This was upsetting news to both the plaintiff and his father.
- [84] Mr. Nichols recalled getting a letter although somewhat later than April 23, 1999, that he said he did not read. He agreed in cross-examination that he went along with a negotiation strategy.

[85] Mr. Scarborough testified that following the letter of April 23, 1999, he received instructions from Mr. Nichols in a telephone conversation to negotiate with the District to try to obtain an offer of settlement. I find that Mr. Nichols instructed the firm to pursue a strategy of negotiation and that the firm did so.

[86] In furtherance of these instructions, the matter was set down for trial and a without prejudice offer of settlement made to the District. However, the District rejected the offer on the basis that Mr. Nichols' claim would fail for want of any evidence on causation. Moreover, the District instructed its solicitors to set the matter down for summary trial pursuant to Rule 18A.

[87] By letter to Mr. Herman dated September 20, 1999, in anticipation of the 18A application, Mr. MacMaster offered to recommend to the District a waiver of costs if the claim was discontinued. The letter states in part:

It is trite law that unsubstantiated theories of negligence do not ground a case against the defendant. We include the second case, *Lee v. Chan*, as an example of how this proposition operates in relation to similar facts.

In *Lee*, the plaintiff, who was a passenger in the defendant's vehicle during a single-car accident, brought on a summary trial application. The defendant could not explain why he drove off the road. He had no memory of the accident.

Madame Justice Loo noted that when a motor vehicle goes off the road or into the oncoming line of traffic, there arises a *prima facie* case that the driver was negligent which the driver must rebut. The defendant proffered a number of explanations as to what might have caused him to lose control of his vehicle. Madame Justice Loo termed these theories "pure speculation . . . devoid of any evidentiary foundation" (at para. 30), citing Mr. Justice Hutcheon from *Lee v. ICBC* to the effect that "the explanation must be based on evidence, not imagination" (*ibid.*). She found that the defendant had not met the *prima facie* case against him and awarded the plaintiff judgment.

While your client has a theory that the design or maintenance or both of the roadway caused his accident, the evidence supporting a deficiency in either respect is negligible. More importantly, however, there is no evidence that any such deficiency, if it existed, caused or contributed to your client's accident. He cannot recall what portion of the roadway he was traveling on, how fast he was going, what he was doing or even where he was looking at the time of the accident. In such circumstances, it is impossible to say what was the author of his crash. To suggest that the roadway was to blame is nothing more than speculation. Indeed, your client is not able to rebut the presumption that the accident was caused by his own negligence.

As we are now incurring costs further to the preparation of our application materials, we would appreciate hearing how you intend to address this flaw in your client's case. If this matter is dismissed further to our application, we intend to bring this letter to the attention of the presiding justice in relation to the issue of costs.

(emphasis added)

- [88] Mr. Herman identified his handwritten note of a telephone conference with Mr. Scarborough and Mr. Nichols in which Mr. Nichols instructed the firm to discontinue, if that's what had to be done. The note stated that Mr. Nichols said that he had no money and could not afford the risk.
- [89] Following this conversation, Mr. Herman wrote seeking a contribution of \$5,000 from the District toward out of pocket expenses. That offer was accepted by the District as evidenced by the letter of December 6, 1999 from Mr. MacMaster.
- [90] Mr. Nichols testified that some time later, he signed a release that he also did not read. In cross-examination, he could not recall reviewing a series of letters from counsel advising of the progress. He could not recall counsel seeking his instructions with respect to settlement. He could not recall giving any instructions, but did not dispute the accuracy of the notes recording the conversations.
- [91] In the result, the action was settled for \$5,000 which was applied to disbursements. I find that this settlement was pursuant to instructions given by Mr. Nichols in the telephone conversation of October 19, 1999. The firm wrote off \$4,700 in disbursements. The file, except for correspondence and memos, was returned to the plaintiff.
- [92] Some years after the litigation was settled, Mr. Nichols learned of further accidents at the same site and became concerned about the quality of his representation in the litigation. The present action was commenced.

Subsequent Events

- [93] In June 2000, there was a fatal single vehicle collision at the intersection of Yale Road West and Hopedale Road. Michael Weightman, the Regional Coordinator for Road Safety and Loss Prevention with ICBC attended at the scene a few days later to look at the intersection to see if he could determine any of the causal factors of the accident. He met Alex Nichols at the site. Mr. Nichols provided him with information he had collected with respect to the intersection, and with his opinion with respect to defects in the configuration of the road.
- [94] Alex Nichols also provided information that he had collected about accidents at the site to Peter Clough, a journalist with The Province newspaper. Mr. Clough wrote an article about the site that he titled "B.C.'s Most Dangerous Telephone Pole" that was published in the July 12, 2000 edition of The Province.
- [95] ICBC then partnered with Telus to see if the pole was required to be where it was located. In the result, ICBC and Telus shared the costs of the removal of two of the support poles at the intersection of Yale Road West and Hopedale Road, including the pole involved in Mr. Nichols' accident.

- [196] Gino De Bartolo, is a technician employed by Telus. He testified that he was requested by ICBC in the summer of 2000 to relocate a pole to correct a hazardous road condition. He testified that BC Tel would respond to any expression of concern with respect to the placement of its poles. To his knowledge, the request in 2000 was the first time any concern had been expressed to BC Tel or Telus with respect to the placement of the pole.
- [197] He removed the pole that was involved in Mr. Nichols' accident. It was his evidence that the pole had been replaced some time in the mid-1980s. It had been removed and replaced on December 15, 1999, as part of a maintenance renewal.
- [198] It was his evidence that the general policy with respect to the replacement of poles is to replace them where the old pole was located wherever possible.
- [199] It was his evidence that Telus does not keep track of accidents involving poles. He testified that with respect to the initial placement of poles, the policy is to try to set poles away from the road and curve so that trucks turning won't hit them.
- [100] In 2001, in conjunction with the City of Chilliwack, ICBC commissioned Delcan to undertake a traffic operations and safety review of certain identified curves and sections of rural roads on the outskirts of Chilliwack. This was part of an ongoing process of ICBC to attempt to improve highway safety. Mr. Weightman testified that a collision history creates the formula for cautionary benefits. However, not every section of road with a collision history receives any funds for improvements.
- [101] One of the sections included in the study was the Yale Road West curve at Hopedale Road. The report made several recommendations for improvements. These were subsequently implemented, with ICBC sharing in the costs. The improvements were raised pavement markings, an advance sign indicating Hopedale Road is intersecting with Yale Road, chevrons to indicate the curve, improved roadside delineation, and a section of the shoulder of Hopedale Road was paved.
- [102] Mr. Weightman testified that until June of 2000, to his knowledge, no one at ICBC was aware of any history of accidents at the intersection of Yale Road West and Hopedale Road. To his knowledge, no one at the District of Chilliwack was aware of a history of accidents. It was his evidence that Mr. De Bartolo, the Telus representative he dealt with in relation to the pole, was not aware of any history of accidents at the site. It was his evidence that in June 2000, he was aware of no central data bank that would track intersections throughout the province, or pole by pole through the province, by which a history of accidents at a particular location could be traced.

THE FIRST ACTION - Were the Solicitors Negligent?

[103] The approach to be taken by the Court in a solicitor's negligence case was described by Madam Justice Satanove in *Cridge v. de Vooght*, 2004 BCSC 101 [Cridge]. First, the Court is to determine if the solicitors breached their contract or duty of care to the plaintiff. If so, the Court must assess what, if any, damages were caused by the breach. The plaintiff must establish that the breach caused a loss and that the loss has a real value. In that regard, as Satanove J. stated the following at para. 9:

The courts have often referred to lawyers' negligence cases as containing a "trial within a trial". Simply put, in order to assess damages caused by a lawyer's negligence in the context of litigation, a plaintiff must show that if the lawyer had exercised a reasonable degree of skill and care the plaintiff would have had a reasonable prospect of success in the litigation (*Hagblom v. Henderson*, [2003] 7 W.W.R. 590 (Sask. C.A.); *Gorieu v. Simonot*, [1982] 6 W.W.R. 221 (Sask. Q.B.); *Prior v. McNab* (1976), 16 O.R. (2d) 380 (H.C.J.)).

[104] These damages are measured by the value of the lost chance to recover more than the amount actually recovered in the original litigation. The purpose of the second trial is to establish if the plaintiff had a "reasonable probability of realizing an advantage of real monetary value": *Cridge* at para. 12 citing *Pan-Asia Development Corp. v. Smith* (1996), 31 C.C.L.T. (2d) 82 (B.C.S.C.).

[105] The standard of care of a solicitor was described by Justice LeDain, speaking for the Court, in *Central Trust v. Rafuse*, [1986] 2 SCR 147 at para. 58 [Central Trust] as follows:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: see *Hett v. Pun Pong* (1890), 18 S.C.R. 290 at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers -- Negligence -- Standard of Care", 63 Can. Bar Rev. 221 (1985).

[106] The jurisprudence with respect to the application of this standard to the conduct of counsel conducting civil litigation was summarized by Baker J. in *Banay v. Christie & Co.*, 2001 BCSC 1165 at para. 24, [2001] B.C.T.C. 1165 [Banay]:

In *Brenner v. Gregory*, [1973] 1 O.R. 252, 30 D.L.R. (3d) 672, at p. 677 of the latter report, Justice Brenner said:

· In an action against the solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it...

To the same effect, see *Graybriar Industries Ltd. v. Davis & Co.* (1990), 46 B.C.L.R. (2d) 164 (S.C.).

[107] The allegations of negligence contained in the Third Amended Statement of Claim are as follows:

- (a) failure to commence proceedings against the B.C. Tel (now known as Telus);
- (b) failure to make allegations against the District of Chilliwack with respect to the issue of the placement of the pole;
- (c) failure to conduct adequate legal research into the liability of BC Tel;
- (d) failure to conduct a proper search of all relevant documents of the District of Chilliwack;
- (e) failure to interview all witnesses to the accident;
- (f) failure to adequately prepare the plaintiff for examination for discovery; and
- (g) negligently advised the plaintiff to accept an improvident settlement.

Failure to Commence Proceedings against BC Tel and to Make Allegations against Chilliwack with Respect to the Pole

- [108] The plaintiff submitted an expert report with respect to the standard of the ordinarily competent counsel from Gordon Turriff Q.C. Mr. Turriff opined that the ordinarily competent counsel would have provided a written opinion to his client about the prospects of suing the telephone company and sought instructions from his client about whether to commence proceedings.
- [109] It is clear although both Mr. Herman and Mr. Scarborough considered the issue and formed an opinion with respect to the issue of the pole, they did not provide this opinion in writing to Mr. Nichols and they did not seek instructions from him with respect to this specific issue. Rather, they sought instructions from Mr. Nichols to commence an action and proceeded on the basis that the choice of parties fell within the scope of their responsibility within that retainer.
- [110] The defence introduced no expert opinion and the substance of Mr. Turriff's opinion was not addressed in cross-examination. Counsel on behalf of the plaintiff submits that it therefore follows that the failure to seek instructions was negligent.
- [111] Counsel for the defendants submitted that Mr. Turriff's evidence as to the standard of care of a solicitor must be considered in the context of the limitations suggested in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp*, [1978] 3 All E.R. 571 at 582 (Ch. Div.) [Midland Bank]:

The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence of what amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants is of little assistance to the court, whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty in the particular circumstances of the case is, I should have thought, inadmissible,

for that is the very question which is the court's function to decide.

[112] The British Columbia Court of Appeal in *R. & L. Contracting Ltd. v. A and B and others* (1981), 28 B.C.L.R. 342 (C.A.), after citing this passage of *Midland Bank* with approval, concluded that it was not improper for a trial judge to arrive at an opinion with respect to the standard of care, independent of the expert opinion.

[113] In *Startup v. Blake*, 2001 BCSC 8 at para. 68 [Startup] Kirkpatrick J., as she then was, cited with approval the following description of the duties of counsel as summarized by Riley J. in *Tiffin Holdings v. Millican* (1964), 49 D.L.R. (2d) 216 (Alta. S.C.) [Millican] as follows:

It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.

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[114] At para. 67 of *Startup*, Kirkpatrick J. approved of the following obligations of a lawyer enumerated in *Millican*:

The obligations of a lawyer are, I think, the following:

- (1) To be skilful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of his client.
- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

[115] I agree with that formulation of counsel's duty. In the present case, counsel were retained to commence and prosecute the First Action. They did so. As stated earlier, counsel turned their minds to the issue of the pole and concluded that it was not appropriate to add BC Tel as a party or to make allegations concerning the pole. Counsel received instructions to commence an action and did so. Although plaintiff's counsel characterizes the negligence as failing to start an action within the limitation period, the First Action was commenced in a timely fashion.

- [116] The pole was clearly a matter that was on the mind of Mr. Nichols and his father. The experts that the firm consulted had raised it as a possible aspect of liability. In the circumstances, it would have been preferable for counsel to have reviewed their opinion on this issue with Mr. Nichols. Such a review need not have been a formal written opinion, but it would have been better practice for it to have been recorded, at least as a memo to file.
- [117] However, in my view, their failure to do so does not amount to negligence. In my view, the decisions of which parties to name and which allegations to include in the action fell within the scope of the instructions the firm had received to commence an action. This was a matter that fell within the scope of discretion left to counsel. The decision of which parties to name is a matter of professional judgment. If it is the plaintiff's contention that it is counsel's duty to seek specific instructions from the client about which parties to name and then, to name those parties, I reject that contention as it negates the very thing the client seeks from counsel; namely, the application of professional judgment.
- [118] There is an additional difficulty faced by the plaintiff in this respect. Even if it is the case that the failure to provide their opinion in writing concerning the issue of the pole to Mr. Nichols was negligent, that negligence did not result in any loss or harm. The firm provided Mr. Nichols with the statement of claim. He was aware that the issue of the pole was not being pursued. There is no suggestion that receiving an opinion in writing that BC Tel not be named would have made any difference.
- [119] Although Mr. Turriff does not address the substance of the opinion he states should have been provided to Mr. Nichols, the plaintiff must be taken to submit that the opinion reached by the defendants with respect to the issue of the pole was one that a reasonably competent solicitor would not have held.
- [120] Plaintiff's counsel contends that BC Tel owed a duty to the plaintiff pursuant to the Occupiers Liability Act. Counsel contends that this duty was breached because the pole was placed so that it constituted a danger to those, such as the plaintiff, who lost control of their vehicles and left the road on the curve. Counsel submits that the pole need not have been placed in that location to provide support for the telephone line. Thus, counsel submits, BC Tel should have been named. Had BC Tel been named, Mr. Nichols could have recovered for at least some portion of his loss even if the Court concluded that he was responsible for the accident.
- [121] Plaintiff's counsel relies upon the cases of *Leischner v. West Kootenay Power & Light Co Ltd* (1996), 70 B.C.L.R. 145 (C.A.) [Leischner] and *Kennedy v. Waterloo County Board of Education* (1999), 45 O.R. (3d) 1 (Ont. C.A.) [Kennedy] in support of this proposition.
- [122] The facts in *Kennedy* were summarized in the judgment of the Court of Appeal at paras. 1-2 as follows:

Gregory Kennedy, an 18-year-old student, left school on his motorcycle at lunch hour to buy some gum. He drove too fast out of the school parking lot along the driveway out to the road. He lost control of his motorcycle, hit the curb and went flying off. When he landed, his head hit a bollard situated on school property on the grass beside the sidewalk by the driveway. Although he was wearing a helmet, his impact with the bollard caused catastrophic injuries, including complete immobility and inability to communicate or to recall past events.

At trial the judge found that the accident (as opposed to the damage) was caused solely by Mr. Kennedy's negligence. While that finding is not disputed on appeal, what is in issue is whether the Board's action in not removing the bollards was an actionable breach of duty to the appellant, as it contributed significantly to the damage he suffered in the accident. It is undisputed that had Mr. Kennedy hit the ground instead of the bollard, his injuries would have been much less severe because the catastrophic consequences of the accident were caused by his head hitting the bollard.

[123] The bollards had been installed in 1977 together with chains to serve as a boundary to the schoolyard. The Court of Appeal described the installation as follows at para. 5:

In or around 1977 the Board erected a barrier on the grass around the school sports field adjacent to the sidewalk. The barrier bounded the roadway from the front of the school and the student parking lot and out to the public street. The barrier consisted of a row of 22 bollards, 15 feet apart and connected by chains. The bollards were made of steel encased in cement, each over three feet high as well as four feet below ground with a circumference of six to eight inches. Each was capable of stopping a moving vehicle.

[124] In 1986 the chains were removed, leaving the bollards with no function. The Court of Appeal concluded that the trial judge had erred in dismissing the action against the School Board and that the Board should have removed the bollards when it removed the chains to discharge its duty to keep the premises reasonably safe under the Occupiers Liability Act.

[125] The first thing to note about Kennedy is that the Court of Appeal decision was pronounced in June 1999. Accordingly, had the defendants considered the case at the time they were coming to their opinion about the issues surrounding the pole, the reasons would have been those at trial where the court found no liability on the part of the School Board. There are, in addition, important distinctions with respect to the facts; in particular, that after 1986 the bollards served no purpose whatsoever.

[126] There are likewise important distinctions surrounding the facts and basis for liability in *Leischner* notably the conclusion by the Court of Appeal that West Kootenay Power and Light Co. had a very strict duty of care because of the dangerous nature of its undertaking. *Leischner* concerned injuries suffered by the plaintiff when the mast on a sailboat touched a power line that hung 22 feet above a boat launching ramp.

[127] Counsel for the defendants submits that BC Tel did not owe such a duty to the drivers of the errant vehicles that left the road through the negligence of the driver. I have concluded that it is not necessary to resolve this issue in this case.

[128] I accept that the decisions relied upon by the plaintiff do suggest the possibility that BC Tel owed a duty under the Occupiers Liability Act. These authorities suggest that the defendants' opinions with respect to this issue might not have been sound. However, as the authorities summarized by Baker J. in *Banay* demonstrate, a solicitor will be liable for an error in judgment or mistake in view of the law if an ordinarily competent solicitor would not have made or shown it. In my view, on the evidence and submissions in the case at bar, it appears that the questions of whether or not in all the circumstances allegations with respect to the placement of the pole should have been made against the District and whether or not to join BC Tel as a party were matters of judgment about which reasonable counsel could differ. The plaintiff has not established that the opinion formed by the defendants was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care. It follows that this opinion, even if mistaken, was not negligent.

Failure to Conduct Legal Research

[129] Justice LeDain in *Central Trust* at 208-209 provided the following clarification with respect to a solicitor's duty to know the law.

The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. The duty in respect of knowledge is stated in 7 Am Jur 2d, *Attorneys at Law* para. 200, in a passage that was quoted by Jones J.A. in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." See *Charlesworth and Percy on Negligence* (7th ed. 1983), pp. 577-78 to similar effect, where it is said: "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor." The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, *Professional Negligence* (1982), at pp. 145-46 as follows: "Although a solicitor is not 'bound to know all the law,' he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched"

- [130] The plaintiff relied upon Mr. Turriff's opinion that the ordinarily competent counsel would have done such research as required to enable him or her to give an opinion about the liability of the telephone company.
- [131] Mr. Scarborough and Mr. Herman agreed that they did not conduct legal research with respect to the issue of the possible liability of BC Tel or with respect to the District in relation to the issue of pole placement. Both defendants turned their minds to the issue and formed an opinion. In addition, they consulted with their senior partner, the defendant Karl Warner, seeking his opinion with respect to the issue. They were of the opinion that they did not require any additional research to permit them to form an opinion.
- [132] The plaintiff has not established, in my view, that the circumstances were such that the reasonably competent solicitor at the time would have been alerted that further research ought to have been conducted or, in Mr. Turriff's terms, that such research was required. The First Action was an area in which both Mr. Scarborough and Mr. Herman carried out the majority of their practice. They were alive to the issue. They concluded that research was not required. The plaintiff has not established that this was a conclusion that a reasonably competent solicitor would not have reached in those circumstances.

Obtaining Documents

- [133] This allegation was not pursued at trial. In any event, on the evidence I find that the defendants did take appropriate steps to obtain relevant documents from the District of Chilliwack.

Failure to Interview Witnesses

- [134] There are two primary definitions of the noun 'witness'. The first definition is a person who sees an event take place. There were no such witnesses to this accident other than Mr. Nichols. No one else observed the accident. Thus, accepting that a reasonably competent solicitor would ensure that the evidence of all witnesses to an accident was obtained, there were no such witnesses.
- [135] Mr. Turriff opined that ordinarily competent counsel would have "interviewed all persons who arrived at the accident scene." In cross-examination, Mr. Turriff clarified that what he intended to say was that counsel would "take all reasonable steps to locate and interview" such persons. He stated that what he was intending to convey was that reasonable efforts should be taken to determine who might have useful evidence and that those people should be interviewed.

- [136] The defendants obtained the names and contact information of persons who arrived at the scene and who might have useful evidence from the plaintiff and his father. An investigator was retained to conduct interviews. In addition, I have found that Mr. Herman interviewed Mr. Morrison and Mr. Heusken who attended at the scene. In my view, the defendants took reasonable steps, in the circumstances, to determine who might have useful evidence, and to locate and interview such persons.
- [137] Alex Nichols provided Mr. Scarborough with the names of several persons who were not interviewed. However, their evidence was not introduced at trial and there is, therefore, no basis to conclude that these persons would have had any useful evidence or that they were people who should have been interviewed.
- [138] At trial, the plaintiff was critical of the defendants for failing to obtain the evidence of "the best witness", Delmar Maynard. Mr. Maynard was on the list of persons the investigators had been instructed to interview. He died before they were able to obtain his evidence. There is no evidence that the defendants knew or ought to have known that Mr. Maynard was likely to die. Mr. Maynard was not a witness to the accident. His evidence would have been evidence in relation to the history of the site. However, the defendants were aware of that history and were taking steps to collect evidence in relation to that history. In my view, no breach of the standard of care has been established in relation to Mr. Maynard's evidence.
- [139] Finally, and in the alternative, the plaintiff was critical of the solicitors for failing to communicate with Mr. Morrison and Mr. Heusken "in any real sense". With respect to the evidence of Mr. Morrison, the criticism is in relation to an alleged failure to obtain a diagram of the scene and greater specification with respect to a skid mark or marks he saw at the scene. With respect to Mr. Heusken, the criticism is with respect to a failure to explore his evidence and opinions with respect to the history of accidents at the site.
- [140] The consideration of whether reasonable steps were taken by the solicitors to obtain evidence in the case at bar must take place in light of the fact that: there were no witnesses to the accident and the solicitors were aware of this; the solicitors were already aware of the history of accidents at the site and were taking steps to investigate and document that history; and the solicitors were aware through Mr. Godfrey and Mr. Lisman of concerns with respect to the configuration of the road and the placement of the pole. The development of evidence involves many choices and exercises of professional judgment. In my view, the judgements exercised by the defendants in the case at bar in this regard were reasonable and appropriate.
- [141] With respect to the evidence of Mr. Morrison, it must be noted that Mr. Morrison stated at trial that he observed a mark or marks on the road when he arrived at the scene and that he was assuming that this mark or marks had been caused by Mr. Nichols' motorcycle. At trial, it was not established that this was anything more than an assumption. In other words, the plaintiff did not establish that his motorcycle made the mark or marks observed by Mr.

Morrison. There is no evidence that the defendants' opinion or advice would have changed had they obtained such evidence. Accordingly, even if the conduct of the solicitors with respect to Mr. Morrison's evidence fell below the standard of care, and I have concluded that it did not, the failure to obtain his evidence with greater precision did not cause any harm to the plaintiff.

Preparation for Discovery

[142] I have found that Mr. Herman did meet with Mr. Nichols prior to his discovery to review his evidence and prepare him for discovery. This meeting followed an earlier meeting at which counsel discussed concerns related to Mr. Nichols' evidence arising from the hospital records and police files. I find that the defendants did conduct appropriate preparation of Mr. Nichols for his discovery.

[143] Moreover, it is clear that the difficulties with Mr. Nichols' evidence at his examination for discovery had nothing to do with any preparation or lack thereof. The critical issue with respect to liability was causation. Mr. Nichols' evidence with respect to his recollection of how the accident came about was, therefore, the central liability issue to be explored in his discovery. Mr. Nichols testified that from the outset he has never had any recollection of how the accident occurred. It was his evidence that his statements to the defendants with respect to the role gravel played in the accident were his speculation. Under oath on discovery, he could not speculate. His evidence at his discovery was as summarized in Mr. MacMaster's letter; namely, that he had essentially no evidence with respect to that issue. Thus, this is not a situation in which additional or different preparation would have produced a different result in the examination.

Negligent Recommendation with Respect to Settlement

[144] The plaintiff relies upon *Fawell v. Atkins* (1981), 28 B.C.L.R. 32 (S.C.) [Fawell]. Fawell was a solicitor's negligence case arising from an action for damages resulting from a motor vehicle accident. Liability was very much at issue in the original action. Mr. Justice Verchere found at 35 that in the "state of the evidence the views of an independent witness would obviously be of great importance". Counsel were made aware of the existence of an independent witness to the accident who could corroborate the evidence of the plaintiffs, but did not follow up to interview her and obtain her evidence. The solicitors urged the plaintiffs to settle on the eve of trial. Verchere J. concluded that it was negligent of the solicitors to proffer their advice without having first obtained and considered the evidence of the witness.

- [145] In the present case, I have found that Mr. Herman did interview Mr. Morrison and Mr. Heusken. They were, however, not witnesses to the accident. Their evidence was not of a comparative level of "great importance" as that of the witness at issue in Fawell. Moreover, the defendants were aware of the history of the site which is the nub of Mr. Heusken's evidence and they were aware that they had evidence which could establish the presence of gravel on the road that night.
- [146] While the defendants did not obtain a sketch from Mr. Morrison detailing the location of the mark he observed, it is clear that such a diagram would not have changed the solicitors' opinions with respect to the issue. Mr. Herman testified that he did not consider Todd Morrison's evidence was going to resolve what he considered to be the critical lynchpin. Mr. Herman's reservations with respect to the usefulness of this evidence in relation to causation were that it does not necessarily follow that if Mr. Nichols passed through gravel and lost control, that he lost control because of the gravel. He could have lost control on gravel, but not because of gravel. In addition, while Mr. Morrison stated that Mr. Nichols lost control on gravel, he did not observe the accident. He was not in a position to say that the mark he observed was made by Mr. Nichols' motorcycle.
- [147] There is a further distinguishing feature. In Fawell, Verchere J. found at 38:
- Insofar as it is necessary to consider the question of responsibility for the course that the plaintiffs took, I am satisfied from their evidence that they were ready and willing on the morning of the trial to proceed with their action; and further that if they had been fully, i.e., properly, advised of the effect of Miss Davidson's evidence they would not have agreed to settle despite the well-known difficulty in forecasting the outcome of litigation. In short, I am satisfied that if the plaintiffs had been fully and properly advised on the basis of all the evidence that was available to them and to their solicitors, they would not have undertaken the course that they followed.
- [148] In the case at bar, Mr. Nichols has testified about his financial difficulties at the time and his concerns with respect to the financial risk he faced if the case were lost at trial. It was his testimony that he accepted the \$5,000 settlement because he did not want to risk owing any more money. Mr. Herman has testified that the recommendations with respect to settlement were based in part, on what Mr. Nichols had told them about his tolerance to risk. Given Mr. Nichols' level of tolerance to risk, in all of the circumstances, I am not satisfied that he would have instructed counsel to take the matter to trial even if he had been fully advised on all of the evidence that was available to his solicitors.
- [149] I conclude that Mr. Scarborough and Mr. Herman did have an adequate understanding of the evidence in relation to causation at the time they presented their opinion to Mr. Nichols. There was, in my view, no breach of the standard of care in this respect.

Summary with Respect to the Allegations of Negligence

- [150] In the spring of 1999, solicitors for the District were bringing on an application pursuant to Rule 18A to have the claim dismissed on the basis that, given his evidence on examination for discovery, the plaintiff would be unable to discharge his burden of proof with respect to causation. Mr. Scarborough and Mr. Herman were of like mind.
- [151] Causation was clearly a central issue in the case. The solicitors sought a second opinion with respect to the issue. They were prepared to take the case to trial; however, they quite properly informed Mr. Nichols of their opinion with respect to the prospects of success and the risks of proceeding. They had conducted an adequate investigation prior to forming this opinion. They proposed a strategy to attempt to achieve a settlement. They provided Mr. Nichols with the opportunity to take his file to another firm and stated that they would cooperate with the new firm if he did so.
- [152] Mr. Nichols chose not to seek a second opinion. He instructed the firm to adopt the strategy of settlement. He did so on the basis of his assessment of the pros and cons of proceedings. The firm attempted to obtain an offer of settlement, consistent with these instructions. That strategy did not succeed, no doubt because the solicitor for the District took the same view of the evidence with respect to causation as did Mr. Herman and Mr. Scarborough. Counsel did persevere further and were able to obtain a modest contribution to disbursements.
- [153] The defendants took appropriate steps in the prosecution of the litigation. They conducted appropriate investigations. They identified the relevant issues and exercised their professional judgment with respect to those issues. While other counsel may have come to a different conclusion with respect to that exercise, for example, with respect to the question of the significance of the pole, it has not been demonstrated that the view taken by Mr. Scarborough and Mr. Herman was one that a reasonable solicitor would not hold. I have concluded that the defendants satisfied the duty of care owed to Mr. Nichols through the course of their retainer. The claim is therefore dismissed.

THE FIRST ACTION - the Trial within a Trial

- [154] In the event that I am wrong in my finding as to the negligence of the members of the firm, I will address the issues of the original claim.

Causation

- [155] When a motor vehicle goes off the road or into the oncoming line of traffic, there arises a prima facie case that the driver was negligent which the driver must rebut, *Redlack v. Vekved* (1996), 82 B.C.A.C. 313 (C.A.) leave to appeal dismissed, [1996] S.C.C.A. No. 608 (Q.L.). The plaintiff submits that this inference has been rebutted in the case at bar by the process of elimination and by simple logic. The defendants submit that the plaintiff's case on causation amounts to nothing more than speculation and, citing *Lee (Committee of) v. Chan* (1997), 29 B.C.L.R. (3d) 27 (S.C.), submits that such speculation is not sufficient to

discharge the plaintiff's burden of proof.

- [156] The plaintiff submits that there are, in addition to road conditions, five possible causes of the accident. These are impairment, inattention, speeding, mechanical failure and driver inexperience. I agree with the plaintiff that mechanical failure and driver inexperience can be eliminated as possibilities. I will now consider the other possibilities in turn.

Impairment

- [157] The plaintiff submits that alcohol can be eliminated as a factor on the basis of Mr. Nichols' testimony that he consumed one or at most two beer, Constable Moskaluk's note of no noticeable odour of alcohol and no sign of impairment, and the fact that no impaired charge was laid. However, the police report also contains a note that Mr. Nichols told the nurse that he had two jugs of beer at Duke's. The ambulance crew report contains a note of the strong odour of alcohol on Mr. Nichol's breath.
- [158] I agree that it does not appear on the evidence that Mr. Nichols was impaired. I do not agree that, on the state of the evidence, alcohol can be entirely ruled out as a causative factor.

Inattention

- [159] The plaintiff submits that his admissions against interest with respect to the cause of the accident being inattention should be discounted as the product of shock and sedation. He submits that when he made the statements he did not know what caused the accident and was assuming responsibility. However, the police report states that he was coherent at the time he made the statement. Moreover, Mr. Nichols did not say to the police and doctor that he did not know what had happened; he said he was daydreaming.
- [160] It is clear that Mr. Nichols abruptly left Dukes in a state of emotional upset when his ex-wife arrived in the company of her new boyfriend. Thus there is, on the uncontraverted evidence, a basis or reason for lack of attention.
- [161] The plaintiff submits that, according to Mr. Nichols' evidence, he anticipated the curve; therefore, inattention could not have been the cause. In addition, the plaintiff submits that inattention can be ruled out by geometric considerations in that if Mr. Nichols had lost control before he engaged the curve, he would have continued in a straight line following that trajectory and would have missed the pole.
- [162] Mr. Nichols' evidence about the circumstances of the accident must, I think be viewed with some caution given the time that has passed since the accident and the fact that it appears from the summary of his evidence on discovery contained in Mr. MacMaster's letter, that his present evidence contains more detail about the circumstances than he was able to provide in 1998. For example, Mr. MacMaster states that on discovery Mr. Nichols was not, in 1998, able to say where he was on the roadway or how he left the roadway. I have concluded that Mr. MacMaster's summary of the evidence is accurate. The letter was

written at a crucial time in the litigation. Mr. Herman would have taken prompt action to correct any misstatement of the evidence. The fact that no such correction was made, is consistent with the summary being an accurate description of Mr. Nichols' evidence.

- [163] The submission with respect to the "geometric considerations" must be viewed in light of Mr. Lisman's opinion that when vehicles leave the road due to driver inattention, they don't do it at the beginning of the curve because the curve hasn't had any effect on the vehicle, they do it in the latter part.
- [164] In my view, on a review of the evidence, inattention cannot be ruled out as a likely cause of the accident.

Speed

- [165] The plaintiff submits that speed can be ruled out as a factor on the basis of his evidence that he was travelling at 60 km/hr, the speed limit, and that he throttled down as he entered the curve. Again, the reliability of this recollection must be queried in light of the fact that on discovery in 1998 Mr. Nichols' evidence was, according to Mr. MacMaster, that he was completely unable to describe what speed he was going at the time of the accident.

Road Conditions

- [166] The plaintiff, relying upon the report of Mr. Lisman, submits that the only remaining possible cause of the accident is the gravel, which in combination with an inappropriate speed limit and improper banking of the road caused the loss of friction and resulting loss of control. The plaintiff submits that all of the assumptions made by Mr. Lisman have been established on the evidence.
- [167] Mr. Lisman prepared a diagram of the scene which contain a black line with arrows showing the assumed trajectory of Mr. Nichols to the pole. The evidence of Wayne Nichols given at trial is that he was riding adjacent to the shoulder to avoid oncoming traffic, which he testified often straddles the centre line at this location.
- [168] The fact that oncoming traffic often straddles the center line is also confirmed by Michael Heusken, a farmer who has lived at this location for all of his life. However, it should be noted that Mr. Heusken also testified that as an experienced motorcycle driver, when he drove on that section of road, he drove close to the centre to avoid the gravel and debris that collected close to the shoulder.
- [169] The evidence of Michael Heusken and Todd Morrison, is that on the date of the accident there was indeed gravel on the darkened "loose gravel area" marked on the diagram prepared by John Lisman.

[170] Photographs in Exhibit 2, Tab 5 and 11 showing copious amounts of gravel at the accident location, were shown to Todd Morrison and Michael Heusken who confirmed that these photographs are representative of the amount of gravel they saw at the intersection of Yale Road West and Hopedale Road on the night of the accident.

[171] Furthermore, the evidence of Todd Morrison is that there was a skid mark which began in the middle of the loose gravel area and travelled for a distance of 20 or so feet towards the pole.

[172] As a matter of simple logic then, the plaintiff submits, since:

1. the plaintiff was travelling adjacent to the shoulder;
2. that portion of the lane passed through gravel; and
3. there were skid marks through the gravel,

the plaintiff must have lost control on the gravel.

[173] However there are, in my view, substantial difficulties with this submission. The police report contains the observation that the plaintiff lost control "well before the apex and straight along the gravel shoulder". This evidence is inconsistent with the evidence of Mr. Nichols concerning his path of travel. It is inconsistent with the evidence of Mr. Morrison with respect to the location of skid marks he observed.

[174] While Mr. Morrison and Mr. Heusken have testified about the presence of gravel on the road at the time of the accident, the police report makes no reference of gravel being a contributing cause to the accident. In addition, there is no gravel on the road in the photographs taken of the scene on the night of the accident.

[175] Mr. Morrison and Mr. Heusken were shown photographs of the road which showed gravel on the asphalt. They stated that the road was in similar condition at the time of the accident. However, they were not shown the photographs of the road taken on the night of the accident.

[176] The plaintiff refers to the lay witnesses' testimony concerning other accidents at the site and that gravel was present on the road on those occasions. It is clear that there have been other accidents at that location. However, the documents introduced into evidence with respect to those accidents do not support a conclusion that road conditions, including the presence of gravel, were responsible for the accidents.

[177] On a review of all the evidence, I have concluded that it is not possible to conclude that the mark or marks Mr. Morrison described were made by Mr. Nichols' motorcycle. Given the differences between the police report and Mr. Nichols' account of his path and where the loss of control occurred, it is not possible to conclude that the trajectory contained in Mr. Lisman's report is an accurate re-creation of the path taken by Mr. Nichols' motorcycle. Finally, even if Mr. Nichols' motorcycle travelled through gravel, it does not follow and, in

my view, has not been established, that the gravel caused him to lose control.

- [178] On a review of the all the evidence, I have concluded that the plaintiff has not discharged his burden of proof with respect to the issue of causation. In my view, factors other than the road conditions, and in particular inattention, cannot be ruled out. Indeed, in my view inattention is, on the evidence, the most likely cause.

Negligence of the District of Chilliwack

- [179] Chilliwack was clearly under a duty of care to maintain the roadways within its jurisdiction. The duty is to keep the roads in a reasonable state of repair such that those using them may, exercising ordinary care, travel upon them with safety. The standard of care is to be assessed in light of all the surrounding circumstances, including the nature of the road, where it is situated, the amount of traffic, the requirements of the public who use the road, budgetary constraints, and the availability of qualified personnel; see *Housen v. Nikolaisen*, [1998] 5 W.W.R. 523 (Sask. Q.B.) [Housen], *Just v. British Columbia*, [1989] 2 S.C.R. 1228 [Just].
- [180] The plaintiff submits that the evidence with respect to the negligence of the District is "uncontradicted". It is the plaintiff's submission that the road was not kept in reasonable repair because of the accumulation of gravel tracked onto the road from the unpaved shoulders, the absence of a warning sign, the low superelevation around the curve, and the location of the pole towards the end of the curve, which increased the probability of it being struck by a vehicle running off the roadway. The plaintiff submits further that, because the District subsequently took measures to correct many of the deficiencies, it cannot be argued that it was not within the scope of its duty to take these measures.
- [181] The position of the defendants is that the plaintiff lead no or insufficient evidence to establish the standard of care in the circumstances or that the road was not maintained in accordance with the principles set out in *Just*.
- [182] The plaintiff sought to rely upon Mr. Herman's statement in his letter to Mr. Nichols of April 23, 1999, "I believe we can establish that the Municipality was negligent with respect to the maintenance and repair of the section of road where your accident occurred", as an admission against interest. While the plaintiff did not contend that the defendants were precluded from contesting liability with respect to this issue, the plaintiff submitted that this statement by Mr. Herman did constitute evidence going to the issue of the negligence of the District. In my view, that is not the case. The opinion expressed by counsel with respect to the merits is not evidence with respect to that issue.
- [183] With respect to the general condition of the roadway, although the lay witnesses who testified about the condition of the road suggested that the intersection had been a problem for years, no one had ever contacted Chilliwack to express any concerns prior to the accident. There is no evidence that the District was made aware of problems with the intersection prior to Mr. Nichols' accident.

- [184] Mr. Weightman's evidence was that general terrain and road configuration like that of the Yale Road West and Hopedale Road intersection is not unusual in this province. He testified further that to his knowledge there were hundreds, perhaps thousands of telephone and hydro poles adjacent to highways throughout the province. When he attended at the intersection, he found nothing particularly extraordinary about the curve. Based on his knowledge of travelling the roads of the province, this was a curve like hundreds of others on the roads throughout the province.
- [185] With respect to the issue of the build up of gravel, there is some evidence in the form of documents produced by the District that it had in place a policy of sweeping the roadway. It would appear that, consistent with this policy, the road was swept in the month prior to the accident. These documents cast doubt on the reliability of the evidence of the lay witnesses to the effect that the road was never swept until after Mr. Nichols' accident.
- [186] This part of Chilliwack is a farming community. Gravel shoulders are not unusual in the area. Mr. Morrison agreed that there are many intersections in the area at which gravel would likely be found on the side of the road. Mr. Bradwell agreed that, Chilliwack being a rural area, it is not uncommon to find debris on the road from time to time and not unusual for there to be gravel from the shoulders coming up on to the asphalt surfaces.
- [187] The plaintiff has alleged that failure to post a correct speed advisory is a breach of the duty of care on the part of the municipality, citing Housen. In that case, the posted speed limit was 80 km/hr. The trial judge found that the curve could not be safely negotiated at speeds greater than 60 km/hr when conditions are favourable or 50 km/hr when wet. The trial judge also found that the curve in question constituted a hidden hazard. In the circumstances, the trial judge concluded that it was not reasonable to expect the authority to clear away all brush to improve sight distances or to construct such roads to conform to generally accepted design standards. However, where the brush obstructs the ability of a motorist to be forewarned of a hazard, it was reasonable to expect the authority to erect and maintain a warning sign. The authority should have erected such a sign in that case.
- [188] Mr. Lisman's opinion with respect to the speed and design issue was that if the road had been subject to the design process used by engineers in designing a new road, which he doubted it had, the curve in question would be designed for 49.5 km/hr. There was a curve sign on the approach to the curve; however, it was not the particular curve sign that Mr. Lisman would recommend.

[189] Mr. Lisman clarified his opinion in the following exchange:

Q. So the fact that this particular stretch of road in October, 1994 had a radius of this curve of 113 metres and that a safe design speed if you were constructing a new highway at that point now should have 135 meters, that wouldn't be unusual, would it?

A. Sorry. What would not be unusual?

Q. Well, it would not be unusual that a road that had been constructed many, many years ago would have a - radius of 113 metres, for example, whereas the new design criteria called for 135?

A. Quite. Almost anywhere you travel in the province, Mr. Abrioux, when you go out and you see a curve sign, that's virtual admission that the - for the posted speed limited generally that that particular curve doesn't meet the good requirements and you've got to then slow down. So it hasn't been, as it were, if I may, you know, as they say, in brackets, been designed, and God alone knows when that would happen through all of the - you know, to complete the road system of B.C. and in what fashion. But if I may explain just one point here. In essence, what I was not doing here was, as it were, castigating or criticising the authority for not having, you know, redesigned or reconstructed this to meet the scientific requirements. The main purpose of this was to point that - out that given the physical circumstances, the limitations - not quite deficiencies, but the limitations, the physical limitations of the design, the inherent deficiencies or the limitations, that in that case certainly it behoved them, as they say, to make sure that there was no gravel and dirt and stuff tracking onto the road. It needed - it needed a bare pavement to be happily or successfully negotiated, especially by two-wheeled vehicles.

Q. Thank you for that because I didn't want it to be taken from your report that you're advocating, if that's the right word, that the whole system of highways in British Columbia be upgraded to meet current design curve criteria.

A. No. In fact, that would be - that would almost disastrous. No. You would have a programme for prioritizing, as they say these days. And certainly coming to this particular case, the purpose of you know, these technical paragraphs is to indicate the need to keep the place clean, bare - not dry, clean and bare and provide the coefficient to friction presented by the paved surface without contamination.

Q. And if I understand your evidence correctly, the mere presence of a sign warning of a curve, which we see in Exhibit -

A. Yes.

Q. Whatever the exhibit was.

A. 5. Sorry. Pardon me.

Q. Was it 7, I believe?

A. Which we saw earlier certainly, Mr. Abrioux. The curve sign that you made reference to before, that is, in fact, an indication to the public at large - they may not know it, but that's an indication to the public at large that the upcoming curve does not meet current design criteria?

A. Yes. They should adjust maybe path speed. They should be prepared to actually steer around it. If I can just develop that a little bit. That is probably more important than the speed reduction. It's realizing there's a curve there because people - sometimes there are situations where the curve is not really visible, you know. Given a combination of vertical and horizontal curvature, one might approach a curve not realizing that there's a curve there until it's somewhat too late.

[190] While the plaintiff has placed considerable reliance upon the evidence of other accidents at this site, the evidence does not establish that these accidents were the result of any of the road conditions alleged to be the basis of fault in this case.

[191] With respect to the issue of the post accident modification, such evidence is admissible to show what steps could have been taken to reduce risk. However, such evidence does not establish what should have been done at the material time. As Maczko J. noted in *Rowe v. British Columbia* (1989), 56 DLR (4th) 541 (B.C.S.C.) [Rowe], it does not follow that because the road might have been improved that the municipality failed to discharge its duty. This is particularly so in my view where, as in this case, there is no evidence about the budgetary considerations faced by the District at the material time.

[192] This was a rural road. While the road did not correspond to contemporary design specifications, this according to Mr. Lisman, represented more the likely norm. There was a sign indicating a curve. The curve in question was not a hidden hazard such as in *Housen*. The presence of gravel was to be expected on such roads and the District had a policy of sweeping. The plaintiff led no evidence from the District with respect to budgetary constraints. The evidence does not suggest that the District had any notice of particular problems at this intersection.

[193] I find on the whole of the evidence, that the plaintiff has not established that at the material time this road was not kept in a reasonable state of repair such that those using it may, exercising ordinary care, have travelled upon it with safety.

Negligence of BC Tel

[194] The plaintiff submits, relying upon *Kennedy*, that because the pole was "unnecessarily placed", the pole constituted an unnecessary hazard that breached the obligations imposed by the Occupiers Liability Act. However, *Kennedy* is not support for such a broad proposition in my view. In that case the bollards served no purpose whatsoever once the chains had been removed. In the present case, the pole served a support function, although by 2000 at least, that function could be discharged by using the nearby Hydro pole for support. Thus, while the pole at that location may not have been necessary, unlike the bollard, it was serving a function.

- [195] Counsel for the defendants submits the standard of care to be applied with respect to roadside obstructions that has been applied by the courts in this jurisdiction is that such an obstruction is to be placed so that it does not pose a hazard to vehicles approaching with ordinary care; see *Rowe and McDonagh (Guardian ad litem of) v. Gavin*, 2004 BCSC 1756. I find that the plaintiff has not established that the placement of the pole was such that it posed a hazard to vehicles approaching with ordinary care.
- [196] The plaintiff, however, submits that consistent with *Kennedy*, the duty is broader. I have concluded that it is not necessary to resolve this question of the scope of the duty, since on the evidence the plaintiff has not established a breach of the duty alleged.
- [197] In *Leischner*, the Court of Appeal concluded that, absent some higher duty, the tests to be applied under the Occupiers Liability Act were the same as those in ordinary negligence. In *Kennedy*, the Ontario Court of Appeal relied on the reasoning of the Supreme Court of Canada in *Veinot v. Kerr-Addison Mines Ltd.*, [1975] 2 S.C.R. 311. In that case, Dickson J. (as he then was), writing for the court, considered the standard of care owed by occupiers and adopted the following passage from Lord Denning's judgment in *Pannett v. McGuinness & Co. Ltd.*, [1972] 3 W.L.R. 387 (C.A.), which dealt with the standard of care required of occupiers:

The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it. (2) You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3) You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4) You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are, the more precautions may have to be taken.

- [198] Considering s. 3(1) of the Occupiers' Liability Act, R.S.O. 1980, c. 322, which is similar to that of the British Columbia statute, and like the British Columbia statute, includes the words "in all the circumstances", the court in *Kennedy* said at paras. 30 and 89 that budgetary considerations are relevant.

- [199] The duty imposed under the Occupiers Liability Act is:

3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

- [200] With respect to what would constitute reasonable care in the circumstances of this case, I note that there is no evidence with respect to the safety standards concerning pole placement that were in place either at the time of the accident or when the pole was originally placed other than Mr. De Bartolo's observation that in his experience poles are set away from the road and away from curves.
- [201] With respect to the issue of the pole placement, it is important to note Mr. Lisman's evidence with respect to the concept of a clear zone. The concept of a clear zone was derived from the knowledge that for various reasons, sometimes good, sometimes not, drivers leave the highway and become errant. Tests were conducted to work out how far drivers typically went off the highway in such cases. From these studies a set of standards were developed for a strip to parallel the alignment of the highway that should not contain fixed obstacles. This strip is called the clear zone. The size of the clear zone is based upon speed. In British Columbia for speeds of up to 60 km/hr the recommended clear zone is two meters.
- [202] Mr. Lisman testified further that the concept of the clear zone had been introduced in the last two or three decades with respect to design, but that it was now starting to affect the rehabilitation or improvement of highways. However, it was his evidence that these clear zone policies were not meant to be retroactive.
- [203] The telephone pole at issue in the present case was located 2.5 meters from the edge of the roadway; outside the recommended clear zone. The pole was in place in 1965. The evidence does not establish when a pole was first located at that site.
- [204] The plaintiff submits that BC Tel/Telus had actual notice of the pole being the site of numerous accidents on the basis of Mr. Heusken's evidence that the pole has been replaced three or four times because of accidents. The plaintiff submitted that BC Tel/Telus "ignores any notice of hazards posed, no matter how often notice is given".
- [205] That proposition is not consistent with the evidence. It is inconsistent with the documents produced by Telus that show that prior to July 19, 2000, when the pole was removed, the pole was removed and replaced on December 15, 1999 for "maintenance renewal", and on October 1, 1984 because of a "third party request". The initial pole was placed on July 1, 1965. The Telus document also contained the statement that it had no records of accidents at the site.
- [206] There is no evidence of any of the witnesses making a complaint to BC Tel or Telus about the placement of the pole.

[207] Moreover, it appears on the evidence that the first time BC Tel/Telus became aware of concerns with respect to the pole, it responded and the pole was removed. A nearby Hydro pole was used for the support function that it had been the pole's purpose to provide. Mr. DeBartolo's evidence was that likely the Hydro lines had not been in place when the telephone poles were initially placed because if they had been in place at the time, the Hydro pole would likely have been used as an anchor.

[208] I have concluded that this pole did not pose a hazard to vehicles approaching the intersection using ordinary care. Moreover, it has not been established that BC Tel or Telus failed to use reasonable care in the circumstances. No breach of duty has been established with respect to the placement of the pole.

DISPOSITION

[209] I have concluded that the claim is to be dismissed on the basis that the plaintiff has failed to establish:

- (a) any negligence or breach of duty on the part of the defendants;
- (b) any negligence or breach of duty on the part of the District or BC Tel/Telus; and
- (c) that the accident in which he suffered injury occurred as a result of road conditions.

[210] Unless the parties have additional submissions to make on the issue, the defendants are entitled to their costs at Scale B.

"Ross J."

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