

CANADA / JUDGMENT

Van Tent v. Abbotsford (City)

2013 BCCA 236

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 236 Van Tent v. Abbotsford (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Van Tent v. Abbotsford (City),

2013 BCCA 236

Date: 20130515

Docket: CA040014

Between:

William Dirk Van Tent

Respondent

And

City of Abbotsford and 456355 dba Jake's Contracting

Appellants

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

On appeal from: Supreme Court of British Columbia, May 25, 2012

(Van Tent v. Abbotsford (City), Vancouver Docket No. M060300)

Counsel for the Appellant:

C.A. Wallace

Counsel for the Respondent:

J.S. Stanley

E.J. McNeney

Place and Date of Hearing:

Vancouver, British Columbia

April 2, 2013

Place and Date of Judgment:

Vancouver, British Columbia

May 15, 2013

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Harris

Reasons for Judgment of the Honourable Madam Justice Garson:

- [1] On a sunny, July 3, 2005, the respondent, Mr. Van Tent, along with two companions, was riding his motorcycle through a construction zone on the Trans Canada Highway. He shoulder checked to his left, and in doing so drifted over the white fog line to his right. He was unaware of a two-inch drop-off associated with construction at the edge of the pavement. He was thrown from his motorcycle as the wheel crossed the drop-off.
- [2] At trial, only the question of liability for the accident was at issue. The trial judge found the appellants, the City of Abbotsford and 456355 dba Jake's Contracting, liable in negligence for failing to adequately mark the uneven pavement. She found as well that Mr. Van Tent's conduct contributed to his own injuries. She apportioned liability 20% against Mr. Van Tent. (The reasons for judgement at trial are not reported.)
- [3] The appellants' position on appeal is that the trial judge erred by concluding that they owed Mr. Van Tent a duty of care. They argued: that Mr. Van Tent failed to use ordinary care while riding his motorcycle; his carelessness caused the accident; and thus the appellants ought to be absolved of any liability for the accident. Alternatively, the appellants argued that the judge erred in apportioning only 20% liability against Mr. Van Tent given his carelessness. The respondent says that the trial judge made no error in finding that the appellants breached the duty of care they owed to him.

[4] For the reasons that follow I would dismiss the appeal.

I Background Facts

[5] The corporate appellant, Jake's Contracting, was constructing an on-ramp on Highway 1 near Abbotsford, British Columbia. The appellant City of Abbotsford shares responsibility for maintenance of the highway in that area with the provincial Ministry of Transportation. The pavement was cut to facilitate the construction, leaving an approximate two-inch drop located less than twelve inches to the right of the white fog line.

[6] Prior to commencing the project, Jake's Contracting prepared and submitted a traffic control plan to the Ministry of Transportation. The plan purported to be in adherence with the prescribed standards from the Ministry's Traffic Control Manual for Work on Roadways.

[7] When construction began, Jake's Contracting implemented the traffic control plan. Hazard signs were posted and other markers were placed on the highway to warn motorists that construction was underway in the area. In addition to large orange barrels, the signage marking the construction zone consisted of the following at the time of the accident:

- at 20 - 60 metres before the beginning of the uneven pavement there were two signs indicating road construction for 2 km (C-18);
- at 30 metres before the beginning of the uneven pavement there was a sign indicating bumps on the roadway (C-25); and
- at 3 metres before the beginning of the uneven pavement there was a sign at road level indicating a drop off on the right shoulder (C-13R).

(The "C" numbers refer to sign numbers designated by the Ministry of Transportation in its Traffic Control Manual for Work on Roadways, described more fully below.)

[8] Mr. Van Tent was riding westbound on Highway 1 when he came upon the construction zone. As was his custom, he was travelling in the right-most lane of the highway.

[9] Travelling at about 50 to 60 kilometers per hour, Mr. Van Tent was followed by two friends, William Foston and Wayne Kirton, on their own motorcycles. Mr. Van Tent looked back to check the location of Mr. Foston. In so doing, he drifted over the fog line to his right, unexpectedly encountered the uneven edge where the pavement had been cut, and was thrown off his motorcycle.

[10] The trial judge found that Mr. Van Tent did not see the uneven pavement or the C-13R warning sign before the accident. Neither did his two companions.

II Legislation and Policy Governing Construction Zone Signage

[11] Sections 138 and 139 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, require traffic control devices be erected on a highway when there is construction. Those sections read:

Work in progress

138 On a highway where new construction, reconstruction, widening, repair, marking or other work is being carried out, traffic control devices must be erected indicating that persons or equipment are working on the highway.

Erection of speed sign

139 On a highway where new construction, reconstruction, widening, repair, marking or other work is being carried out, traffic control devices must be erected to limit the rate of speed of vehicles or to restrict the manner in which the vehicles are to proceed on the highway.

[12] The Ministry of Transportation's Traffic Control Manual for Work on Roadways [the "Manual"] contains prescribed standards for designing and implementing traffic control plans for construction zones on British Columbia highways. Section 1.1 states that the examples provided within the Manual are "generally the minimum required".

[13] Section 1.3.2 indicates what is required of traffic control devices placed in work zones:

To be effective, all traffic control devices must meet five basic requirements. These are to:

- Fulfill a need.
- Command attention.
- Convey a clear, simple meaning.
- Provide adequate time for a proper response.
- Command respect of road users.

Uniformity of meaning is vital to effective traffic control devices.

...

The placement, size and sign messages should be such that attention is drawn to them, that they are legible, their meaning is clear, the regulation is reasonable and there is adequate time for response.

...

Simply stated, uniformity means always treating similar situations in the same way. The use of uniform traffic control devices does not, in itself, constitute uniformity. A standard device used where it is not appropriate is as objectionable as a nonstandard device; in fact, this may be worse, in that such misuse may result in public disregard for the device at other locations where it is needed.

[14] Section 1.4.1 sets out the necessity of advance warnings for motorists:

An advance warning area is necessary for all traffic control zones because drivers need to know what to expect ahead. Before reaching the work area, drivers should have enough time to adjust their driving patterns. The advance warning area may vary from a series of signs, starting 2 km in advance of the work area, to a single sign or flashing lights on a vehicle.

[15] Chapter 2 of the Manual contains the various traffic control devices that may be used during a construction project. Section 2.1.1 gives instructions for the selection of a device, how the devices should be placed and spaced along the highway, and other general directions. Beginning at s. 2.1.5 are the specific instructions for each device, including the devices that were used by Jake's Contracting in this case: C-18 (construction ahead), C-19 (construction ahead ____ km), C-25 (bump or rough roadway ahead), and C-13R (low shoulder on right ahead).

[16] The warrants for the C-13R sign read as follows:

The LOW SHOULDER sign shall be used on unfinished paving projects where the shoulders have not been brought up to the level of the new pavement and the drop off is potentially hazardous.

The C-13R sign is erected on the right-hand side of the roadway in advance of a low shoulder.

III Reasons for Judgment

[17] As noted already, the trial judge found that the failure of Mr. Van Tent to see the uneven pavement sign before the accident was not his fault. She found that the drop off was not readily visible to a reasonably attentive driver. She also found that the appellants inadequately marked the hazard. She noted that the standard against which the appellants should be held was informed by the standards set out in the Manual, and that the appellants had failed to adhere to several of those standards. Further, their conduct breached s. 138 of the Motor Vehicle Act as well as their common law duty of care to implement reasonable warnings of impending hazards. She found that the appellants' breach of the applicable standard of care was the cause of the accident, and she concluded that the appellants were negligent. At para. 90 to 95 she held:

[90] There were several reasons why Mr. Van Tent and his fellow riders did not see the Post-cut Signs before the accident unrelated to any failings on their part. As stated earlier, I find that the uneven road elevation brought about by the cut was not readily visible to a reasonably attentive driver. The potential risk presented by that somewhat hidden danger, particularly to motorcyclists, was compounded by the fact that the signage was sub-standard. The Post-cut Signs were situated among large orange barrels that would have likely dominated the attention of a reasonably prudent driver and I find did so in the case of Mr. Van Tent. Aggravating that problem was the fact that the lone C-13R sign which was positioned between two orange barrels sat too low to the ground to be readily seen, particularly by a motorist driving in heavy weekend highway traffic. To enhance visibility, the Post-cut Signs should have been placed so they would have been more prominent to traffic approaching from the east. The efficacy of the C-13R sign was further undermined by the fact that it was

simply situated too close to the beginning of the dangerous edge to provide a warning sufficiently in advance to approaching motorists including Mr. Van Tent. It practically stood on top of the very danger it was meant to warn about.

- [91] Moreover, the C-25 sign which indicates the presence of bumpy or uneven road surface ahead was plainly the wrong sign to use in the circumstances. It suggested that the roads straight ahead may be bumpy and did not convey to approaching motorists the existence of uneven pavement to the right of the roadway. The choice of that sign stands as a further example of the overall inadequacy of the signage and the deficiency of the traffic control plan.
- [92] Based on the foregoing, I conclude that the Post-cut Signs were significantly inadequate to reasonably warn oncoming motorists of the hazard lurking near the side of Mr. Van Tent's travel lane.
- [93] In my opinion, not only did the defendants fail to observe several of the minimal traffic control standards sanctioned by the Manual in relation to the project, they were also in breach of s. 138 of the MVA. It is settled principle that the mere breach of a statute, standing alone does not constitute negligence per se: *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14, [1983] 1 S.C.R. 205. Nor is the applicable standard of care dictated by the Manual; rather, it is informed by the Manual. More importantly and beyond the defendants' failings that I have described, the defendants failed in their common law duty to implement reasonable measures to warn motorists of the danger presented by the uneven road profile. That conduct fell below the standard expected of a reasonably prudent contractor in the circumstances.
- [94] The cumulative effect of the breaches with particular emphasis on the inadequate type and number of warning signs, combined with the failure to properly position the signs that were used, produced an unreasonable risk of harm to Mr. Van Tent. The likelihood of harm was foreseeable and considerable and the potential gravity of it was significant, especially to motorcycle riders.
- [95] I accept Mr. Van Tent's evidence that had he been alerted to the existence of the perilous uneven edge so close to his lane of travel, he would have moved far away from it. The totality of the evidence establishes that in all probability the accident would not have happened but for the defendants' negligence in failing to adequately warn Mr. Van Tent of the potentially serious hazard that was not visible to the reasonably prudent and attentive motorcycle rider. Stated another way, the accident would not have occurred just the same had the defendants acted in accordance with their standard of care in discharge of the duty they owed to Mr. Van Tent. The negligence of the defendants clearly made a difference and is a cause of Mr. Van Tent's injury. Causation has been established within the meaning of the authorities: *Athey v. Leonati*, [1996] S.C.J. No. 102, [1996] 3 S.C.R. 458; *Resurface Corp. v. Hanke*, 2007 S.C.C. 7.

- [18] However, in apportioning 20% liability against Mr. Van Tent, she found that he was also negligent. She held that his own driving contributed to the cause of the accident when he performed a shoulder check which resulted in his motorcycle drifting over the fog line at a time when he was already travelling very close to the fog line.
- [19] In summary she found that: the signage was inadequate to inform a driver of the hazard presented by the cut pavement; Mr. Van Tent could not be faulted for failing to see the uneven pavement sign; the accident was caused by Mr. Van Tent riding his motorcycle over the uneven cut in the pavement; and that Mr. Van Tent was contributorily negligent in permitting his motorcycle to drift over the fog line.

IV Issues on Appeal

[20] I would state the issues on appeal as follows:

- Did the learned trial judge err in holding that the appellants owed a duty of care to Mr. Van Tent, in circumstances where his own negligence caused him to veer off the road and encounter the hazard?
- Did the learned trial judge err in holding that the appellants' conduct was in breach of the appropriate standard of care?
- Did the learned trial judge err in finding that the negligence of the defendants caused or contributed to the accident?
- In the further alternative, did the learned trial judge err in attributing 80% of the fault to the appellants?

V Discussion

Standard of Review on Appeal

- [21] The standard of appellate review in negligence cases varies depending on which aspect of the analysis is under review. An action for negligence requires proof of: a duty of care; breach of the standard of care; compensable damage; and causation: *Ediger v. Johnston*, 2013 SCC 18 at para. 24; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 96. Thus, a reviewing court must consider the applicable standard for each step that is at issue in the analysis.
- [22] Whether a party owes a duty of care is a question of law: *Simpson v. Baechler*, 2009 BCCA 13 at para. 31, citing *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.
- [23] What the standard of care is in the circumstances, and whether it was adequately met involves the application of a legal standard to the facts at hand. An appellate court must review conclusions regarding the standard of care using the standard applicable to questions of mixed fact and law: *Simpson* at para. 31.

- [24] A trial judge's conclusions on the cause of an accident are factual findings. Once a trial judge identifies the appropriate test for causation, findings of fact should not be interfered with absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 70, [2002] 2 S.C.R. 235.
- [25] The standard of review of a trial judge's apportionment of fault is stringent. Once a trial judge has identified the correct legal standard applicable to the issue of apportionment, the appellate court should not disturb the trial judge's decision as to the division of liability unless there is a "very strong and cogent reason" to do so: *Moses v. Kim*, 2009 BCCA 82 at para. 33, citing *Stermer v. Lawson* (1979), 17 B.C.L.R. 181 (C.A.).

Duty of Care

- [26] The appellants' main argument is that they did not owe a duty of care to Mr. Van Tent. They argue that the trial judge misapprehended their argument, and that they did not concede (as the trial judge says they did) that they owed Mr. Van Tent a duty of care. They say they do not owe any duty of care to drivers on the road who are not using ordinary care. They say that the "ordinary care rule" is an established principle in Canadian jurisprudence, and has most recently been affirmed by the Ontario Court of Appeal in *Morsi v. Fermar Paving Ltd.*, 2011 ONCA 577. They say that the trial judge erred by failing to apply the rule to Mr. Van Tent who, in their view, was not exercising ordinary care when he crossed the fog line and thus fell "squarely within [or outside] the ordinary care rule".
- [27] In other words, the appellants argue that they owe no duty of care to those drivers who are to any degree at fault for the accident. They contend that because Mr. Van Tent was negligent in crossing the fog line in a construction zone, and it was that conduct which was the proximate cause of the accident, the appellants are absolved from any liability.
- [28] As I explain more fully below, it is my view that the appellants' argument confuses the question of duty of care with the question of standard of care.
- [29] The test for determining the existence of a duty of care was authoritatively settled in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and subsequently adopted in Canada. See, for example, the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 46, [2003] 3 S.C.R. 263:

It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which

ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

See also *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261.

[30] The difference between duty of care and standard of care as those concepts are used in a negligence action was explained in *Simpson* at para. 31:

... The standard of care is the content of the duty owed by the defendant. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 Mr. Justice Major for the Court said:

[21] The first step in the negligence analysis is to determine whether the Railways owed a duty of care to the appellant with regard to the configuration of the Store Street tracks. If such a duty is found to exist, it must then be determined whether the Railways exercised the standard of care necessary to avoid breaching that duty. The relationship between the duty and the standard of care was explained by MacDonald J.A. of the Nova Scotia Court of Appeal in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at p. 254:

It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the [trier of fact] to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty.

...

The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This element of reasonable provision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty ...

Thus, a discussion of duty centres around its existence, while the standard of care clarifies what the content of the duty is. Where there is no duty there is no negligence.

[31] The authorities on which the appellant relies, including *Morsi*, do not conflict with the test set out in *Anns* and the Canadian authorities adopting that statement of the law. In my view, the authorities relied on by the appellants, beginning with *Raymond v. Bosanquet* (1919), 59 S.C.R. 452, aff'd (1919), 47 D.L.R. 551 (Ont. C.A.), are not concerned with the existence of a duty of care at all, as was argued by the appellants, but rather with the appropriate standard of care and whether applying that standard of care leads to the conclusion that the defendant breached its duty to the plaintiff in the circumstances of those cases.

[32] In *Raymond*, the court was, as in this case, dealing with allegations made against a municipality for failure to properly maintain a road. Both the Ontario Court of Appeal and the Supreme Court of Canada recognized that a municipality owed a general duty of care to motorists on its highways. Justice Kelly of the Court of Appeal stated at 558:

The duty imposed by the Municipal Act upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel; and, motor-vehicles being now an ordinary means of transportation, this would include travel by such vehicles: *Davis v. Township of Usborne*, (1916) 28 D.L.R. 397, 36 O.L.R. 148.

In *Foley v. Township of East Flamborough* (1898), 29 O.R. 139, a judgment of a Divisional Court, Armour, C.J., in defining what is meant by "repair," said (p. 141): "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied." This judgment of the Divisional Court was reversed by the Court of Appeal (S.C. (1899), 26 A.R. 43), but on altogether different grounds, the Court not dissenting from this opinion of the Divisional Court, which is in harmony with other decisions, and may properly be applied here.

The duty so resting upon municipalities must not be treated lightly or minimised, and municipal councils should not be encouraged into the belief that the requirements of the Act need not be strictly fulfilled; but occurrences such as that involved in this case should be considered and their cause determined according to the circumstances and conditions in which they happen. I am not to be understood as holding that any other bridge and its approaches constructed as these existed at the time of the plaintiff's accident necessarily evidence compliance with the statutory duty of the municipality having jurisdiction over it. ...

[33] It appears that the principle cited by the appellants as the "ordinary care rule" arises from *Raymond* and the cited excerpt from *Foley v. Township of East Flamborough*. As I said, the courts in *Raymond* and *Foley* were concerned with whether the road was sufficiently maintained for the needs of motorists passing over it, an issue that falls under the ambit of standard of care.

[34] (I pause here briefly to note that *Raymond* and other cases of that era were decided in the absence of statutory guidance on the law of negligence. Ontario's first Contributory Negligence Act was not enacted until 1924; British Columbia's came the following year (Contributory Negligence Act, S.B.C. 1925, c. 8.) These statutes were enacted to assist courts grappling with the very issues present in *Raymond*: see *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (S.C.), in which Justice Southin (as she then was) sets out the historical context giving rise to contributory negligence laws in Canada. The framework in which we consider questions of negligence was in its nascent stages, and thus older precedents must be approached with some care.)

[35] The next authority cited to us by the appellants was *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.). *Partridge* turned on whether the municipality was required to clear brush from the side of a highway at an intersection so that motorists

would have a clear view of approaching vehicles. The statutory duty imposed on the municipality was to "keep in repair all public roads..." The court decided that there was no obligation upon the municipality to cut down the brush near the intersection, without regard to the conduct of the plaintiff, a question of the standard of care.

[36] The next authority cited by the plaintiff that I shall mention is *Rowe v. British Columbia* (1989), 56 D.L.R. (4th) 541, 13 M.V.R. (2d) 17 (B.C.S.C.). As noted by Justice Maczko, at 546, the rule stated in *Foley*, and cited in *Raymond*, is an articulation of the standard of care. In applying that rule, Justice Maczko held that the municipality did not breach its standard of care by failing to remove a large boulder from the side of the highway because it was 5.6 metres away from the highway.

[37] Last, I turn to *Morsi*, the 2011 Ontario Court of Appeal decision cited above. In their factum, the appellants argue that:

In *Morsi*, *supra*, the appellate court concluded that the learned trial judge in that case had erred in finding that the defendants owed a duty to the plaintiff, without whose negligence the accident would not have occurred.

The appellants also say that *Morsi* is on all-fours with the circumstances in this case.

[38] Mr. *Morsi* lost control of his car at a transition point on a highway that was under construction. The surface of the pavement transitioned from new asphalt to a temporary foam surface. Mr. *Morsi*'s driving speed of 120 kilometers per hour was double the maximum speed limit for the area. The court of appeal accepted the trial judge's formulation of the issue in the proceeding as correct: "whether at the material time [the roadway] was in a state of repair that was reasonable in the circumstances such that users of the road, exercising ordinary care, could travel upon it safely..." [Emphasis in original.]

[39] Justice MacPherson, for the court, set out the statutory duty of care placed on the defendant municipality by s. 44(1) of Ontario's Municipal Act, 2001, S.O. 2001, c. 25. The court turned next to the trial judge's treatment of the standard of care. MacPherson J.A. commented that the trial judge articulated the appropriate legal test from *Housen* and *Partridge*, and noted that this test was similar to that set out in *Foley* (these are the same authorities upon which the appellants relied in the extant appeal). He then went on to say that the trial judge's error was that he failed to apply the test in the circumstances, beginning at para. 21:

[21] Unfortunately, the trial judge did not address the issue he specifically formulated or the test from *Housen* and *Partridge* he set out. He did review Mr. *Morsi*'s driving but in a way that, inferentially, does not meet the test he articulated. In his most comprehensive discussion of Mr. *Morsi*'s driving, he said:

I find as a fact that the late Mark Morsi operated his vehicle at a speed well in excess of the posted and advisory speed limit. The evidence of Detective Stock and the Varicom tests as well as the evidence of Constable Hebert and the various engineering experts establishes that if Mark Morsi had operated his vehicle at the posted speed or even a speed modestly above it, he would have been able to successfully negotiate the transition area. There is ample evidence in this case which demonstrates that speed was a significant factor in this collision. [Emphasis added.]

- [22] It seems to me that the clear import of this passage, and especially the emphasized portion, is that if Mr. Morsi had driven at or even modestly above the speed limit or, in other words, had used 'ordinary care' while negotiating the reverse curve on the road, there would not have been an accident. In short, the trial judge's own description of Mr. Morsi's driving places it squarely inside the language from Housen, Partridge and Raymond that would absolve York Region of liability.
- [23] In my view, the unfortunate reality is that the most appropriate word to describe Mr. Morsi's driving is 'reckless'. From his entry onto Major Mackenzie Drive to the accident scene, he covered a distance of about 400 metres. He obviously accelerated very rapidly as he drove through the long first curve because he exited it, the experts agree, at about 90 kph. He then accelerated again and over a short straightaway he reached a speed, the experts agree, of 120 kph. He then lost control, flew off the road, and hit a telephone pole. All of this happened in about 30 seconds. During that time, Mr. Morsi would have seen, and ignored, two 60 kph speed signs, a reverse curve warning and a 40 kph advisory sign, and two construction signs. He also would have seen and experienced the long first curve, seen the reverse curve straight ahead of him, and noticed that the road surface straight ahead of him was about to change. In the face of all this information, he chose to accelerate and reach a speed of 120 kph in a legal 60 kph zone with a curve advisory speed of 40 kph. This is not driving with 'ordinary care'. This is not a driver making a mistake. This is reckless driving. As such, it absolves York Region under the test enunciated in the leading decisions of the Supreme Court of Canada set out above.
- [40] While I note that the court was particularly focused on Mr. Morsi's driving, the court's comments must be taken in the whole context of the authorities cited. In both Partridge and Foley, the statement of law focused on more than just the conduct of the users of the road - it also required that the road be kept in "a reasonable state of repair". I infer that the court in Morsi accepted that the defendant municipality had complied not only with its duty of care per s. 44(1) of the Municipal Act, 2001, but had also satisfied the necessary common law standard of care. Because of this, the municipality was absolved of liability.
- [41] In this case, the judge correctly instructed herself on the negligence analysis at para. 69 of her reasons for judgment:

The defendants [appellants in this court] do not challenge Mr. Van Tent's proposition that they owed him a duty of care. It is obvious they did. In order to successfully maintain an action in negligence, however, Mr. Van Tent must show that the defendants breached their duty in that they failed to exercise the standard of care reasonably expected in the circumstances, and that Mr. Van Tent suffered injury as a result of that breach.

[42] Regardless of whether the trial judge was mistaken as to the concession made by the appellants that they owed a duty of care to Mr. Van Tent, she made no error in her conclusion regarding that duty of care. To recall the language used in *Ryan* - "a discussion of duty centres around its existence, while the standard of care clarifies what the content of the duty is. Where there is no duty there is no negligence." In my view, the first question in the negligence analysis applicable to this case must be answered affirmatively. That is, there can be no doubt that both of the appellants are in a sufficiently proximate relationship with persons who use this stretch of highway, including Mr. Van Tent. The appellants did owe a duty of care to Mr. Van Tent.

Standard of Care

[43] The appellants' second ground of appeal is whether the trial judge erred in her conclusion that the appellants' conduct was in breach of the standard of care applicable in the circumstances. As noted above, because this issue engages questions of both law and fact, the standard of review requires that I consider whether the question focuses more on the factual findings or legal conclusions of the trial judge, and modifies the level of deference accordingly.

[44] In this case, the appellants point to a number of errors made by the trial judge. They say she erred in finding that they used the wrong signs, or placed the signs incorrectly.

[45] As already noted, the trial judge held at para. 93 of her reasons that s. 138 of the Motor Vehicle Act and the Manual informed the standard of care expected of a reasonably prudent contractor in the circumstances. (Although not specifically mentioned, s. 139 is of relevance as well.) She found in fact that the appellant contractor fell below this standard in a number of ways, beginning at para. 71:

[71] In this case, the standard of care is greatly informed, although not dictated, by the collection of uniform traffic control standards detailed in the Manual. By virtue of performing construction work on a provincial highway, the defendants were required, at a minimum, to abide by the principles and guidelines it contained. The applicable standards endorsed in the Manual accord with common sense and the conduct expected of a prudent contractor in the circumstances in relation to the task of ensuring the safety of the users of the road and work crews during times of construction and maintenance.

- [72] In my view, the defendants failed to adhere to several of those minimal standards. With respect to many of them, Mr. Stewart variously seemed not to know of them or appreciate their application or the complexities of the planning work that was required of him in creating and implementing an appropriate traffic control plan.
- [46] The errors identified by the appellants are findings of fact made by the trial judge. The appellants have not identified any palpable or overriding errors that would warrant intervention by this Court. Those findings of fact are amply supported by the evidence. I conclude that the trial judge did not err in describing the standard of care, or in concluding that it was breached by the appellants.

Causation

- [47] I turn now to the appellants' third ground of appeal, whether the trial judge erred in her conclusion that the appellants' actions caused the accident.
- [48] In their factum and in oral argument, the appellants seem to suggest that regardless of any general duty of care that may be owed to motorists, and regardless of whether the standard of care was met, the court's focus must be the duty owed to the individual plaintiff in that particular case. The appellants argue that in this case, Mr. Van Tent was aware of the dangers of crossing on to the newly paved asphalt, including the risk that there may be a drop-off in the pavement. Because of this, the appellants say they had no duty to warn Mr. Van Tent of the risk. Further, because they had no duty to warn, their failure to do so could not have caused the accident. All causative blame, they say, must rest with Mr. Van Tent. The appellants cite the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, as support for their argument.
- [49] The appellants' argument on causation overlaps somewhat with their argument on duty of care.
- [50] As already stated, the appellants owed a general duty to all motorists using the highway during a period of construction. The appellants failed to meet the standard of care required to maintain a reasonable level of safety on the highway. They cut the pavement running adjacent to the travelled highway leaving a two-inch drop-off, and failed to adequately warn motorists of the existence of the drop-off. The trial judge found that although Mr. Van Tent knew that drop-offs sometimes occur in construction zones, he was unaware there was a drop-off in this case, because the warning given was inadequate to alert him to the danger. The fact that Mr. Van Tent's actions may have been a contributing cause of the accident does not alter the fact that the drop-off in the pavement and inadequate signage also contributed to the accident.
- [51] In *Resurfice*, the court explained the two commonly accepted approaches to causation when there is more than one contributing cause: the "but for" test, and the "material contribution" test. The "but for" test remains the basic test for determining causation, and should not be displaced other than in exceptional circumstances. The case before this Court is not

exceptional, and causation can be determined using the "but for" test. But for the causes identified in the preceding paragraph, all of which were well supported by the evidence in the court below, the accident would not have occurred.

[52] The appellants argue that the trial judge applied the "but for" test incorrectly because she held that the appellants were a contributing cause of the accident, even though (they say) they had no duty to warn Mr. Van Tent of the drop-off. In my view, the trial judge applied the correct legal test for causation in the circumstances at para. 95 of her reasons (quoted above).

[53] I would not accede to the appellants' ground of appeal on this issue.

Apportionment of Liability

[54] The final issue raised by the appellants is whether the trial judge erred in apportioning 80% liability against them.

[55] The trial judge considered the factors set out in *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993, rev'd on other grounds (sub nom *Aberdeen v. Zanatta*) 2008 BCCA 420. The appellants take no issue with the appropriateness of the factors commented on in *Aberdeen*, but they do take issue with the trial judge's application of *Aberdeen* to the facts of this case. The factors enumerated in *Aberdeen*, and the trial judge's reasons for apportioning liability in the manner she did, were set out beginning at para. 104 of her judgment:

[104] In *Aberdeen v. Langley Township*, 2007 BCSC 993, reversed in part, *Aberdeen v. Zanatta*, 2008 BCCA 420, Mr. Justice Groves endorsed the following enumeration of factors in assessing relative degrees of fault:

1. The nature of the duty owed by the tortfeasor to the injured person . . .
2. The number of acts of fault or negligence committed by a person at fault . . .
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault . . .
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy . . . Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis . . .
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy. . .

(Authorities omitted)

[105] To those foregoing factors, Groves J. added the following at paragraph 67:

6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or the damage;
8. whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

[106] After surveying the authorities Groves J. continued at para. 67 with this summation of the approach to be taken in assessing the relative degree of blameworthiness of the parties:

Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[107] The defendants were entrusted, over a period of several months, with the safety of motorists travelling a major highway while the construction project was being carried out. Responsibility to devise and implement suitable traffic control measures was assigned to an untrained and inexperienced person who proved to be less than adequate. The cut created a very real hazard, particularly for motorcyclists, along a substantial stretch of highway. Jake's received nearly daily warnings, in the form of barrel displacements, from which it should have reasonably inferred that, for whatever reason, some number of the westbound travellers were straying over the fog line and dangerously into the construction area. Yet, Jake's did not close the right westbound lane during non-work hours, or undertake any reasonable steps to improve the sufficiency of the signage or the barrel configurations. The defendants failed to implement reasonably adequate warning measures to alert oncoming motorists of the hazard that they had created near the side of the roadway; a hazard that was not readily visible to reasonably attentive and prudent motorcycle riders on their approach to the area. There was no suggestion that the time or cost that the defendants might have incurred in order to discharge their duty would have been prohibitive, much less disproportionate, to the potential that the hazard would inflict harm.

[108] In my opinion, the defendants' multiple failures and overall disregard for the safety of the reasonably foreseeable users of the road represents conduct that is exceedingly more at fault and carries greater blame, than does Mr. Van Tent's momentary lapse of judgment.

[109] I apportion liability 80 percent against the defendants and 20 percent against Mr. Van Tent.

[56] The appellants have not identified any error in the judge's findings that would lead this Court to question her conclusions regarding apportionment. Her division of liability is not grossly disproportionate to any division this Court might have made in these circumstances: Moses, at para. 33. I would not interfere with the trial judge's decision, and would not accede to this ground of appeal.

VI Disposition

[57] As I conclude that the appellants have not succeeded on any of their grounds of appeal, I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Harris"

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